EUROPEAN COMMISSION

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To the President and Members of the EFTA Court

Observations

lodged by the **European Commission**, represented by Antonios BOUCHAGIAR and Herke KRANENBORG, members of its Legal Service, acting as Agents, with an address for service at the Legal Service, *Greffe contentieux*, BERL 1/93, 1049 Brussels, and consenting to service by e-EFTACourt, in:

Case E-5/25

Rainer Silbernagl* v *Universität Liechtenstein

concerning a request by the Liechtenstein Princely Supreme Court (Fürstlicher Oberster Gerichtshof) to the EFTA Court for an advisory opinion, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, on the interpretation of Article 38(3) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, OJ L 119, 4.5.2016), as incorporated into the EEA Agreement by Joint Committee Decision No 154/2018 of 6 July 2018.

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The European Commission (the "Commission") has the honour of submitting the following observations to the EFTA Court.

1 INTRODUCTION

1. The defendant, Liechtenstein University, is an independent public law foundation.

2. The applicant was employed by Liechtenstein University as data protection officer (DPO) for an indefinite duration with a work volume of 50%. According to the employment contract, the employment relationship could be terminated by either party to the contract on giving a period of four months' notice.

3. One day after the conclusion of the abovementioned employment contract, the applicant signed a further employment contract with Liechtenstein University as postdoctoral researcher at the professorial chair for banking and financial markets law. It involved a work volume of 30% and had a fixed term until 30 June 2021.

4. Both contracts were subject to more detailed rules in the Rules on Employment and Remuneration of Liechtenstein University. A few months after the conclusion of the two contracts, the Rules on Employment and Remuneration were amended to include a rule according to which employment as a postdoctoral researcher or as a research assistant could not be combined with any other university employment. According to the order for reference, that rule on incompatibility was "*not established because of the applicant but for other reasons, namely, to encourage early-career researchers and on account of ongoing organisational changes*".[1]

5. Following the introduction of the rule on incompatibility, the applicant received from Liechtenstein University a letter informing him that the university would terminate his employment relationship as DPO in accordance with the four-month agreed notice period. In further exchanges with the applicant, the university made clear that the sole reason for the termination was the abovementioned rule on incompatibility.[2]

6. According to the referring court, the applicant did nothing wrong before the termination, neither as data protection officer nor as a research assistant. The people who had dealings with the applicant in his employment with the defendant had no complaints concerning the

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1 See page 5 (point 1.1) of the order for reference.

2 See page 6 (point 1.1) of the order for reference.

applicant. His conduct during the period in which the employment relationship was in force was faultless and did not constitute a reason for the termination.[3]

7. The applicant brought court proceedings against Liechtenstein University arguing that his employment contract should not have been terminated. In particular, he argued that Article 38(3) of Regulation (EU) 2016/679 (hereinafter "GDPR"),[4] in conjunction with Article 7(4) of the Liechtenstein Data Protection Act, allow for the dismissal of a DPO only with just cause, which was not asserted in the present case by Liechtenstein University.

8. In May 2024, the Princely Supreme Court accepted the applicant's argument that he could have been dismissed only with just cause. However, in September 2024, the Constitutional Court set aside that judgment on the basis that Article 7(4) of the Data Protection Act concerned only the dismissal of a DPO, but not the termination of the employment relationship not connected with the exercise of the function of a DPO. Such a termination was covered by the usual requirements of the law on employment contracts, and therefore it could be performed also without just cause.[5]

9. The case was thus referred back to the Princely Supreme Court, which sent to the EFTA Court the present request for advisory opinion on the interpretation of Article 38(3) GDPR.

2 LEGAL FRAMEWORK

10. The GDPR was incorporated into the EEA Agreement by Joint Committee Decision No 154/2018 of 6 July 2018 amending Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement [2018/1022]. The Joint Committee Decision did not introduce any adaptations as regards Article 38(3) GDPR, whose interpretation is at issue in the present case.

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3 See pages 6-7 (point 1.1) of the order for reference.

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016.

5 See pages 11-14 (point 1.7) of the order for reference.

11. Article 38(3) GDPR provides the following:

> "*The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data protection officer shall directly report to the highest management level of the controller or the processor.*"

12. According to referring court, as regards Liechtenstein law, the Data Protection Act states the following:

> *"Article 6*
> *(1) Public bodies shall designate a data protection officer.*
> *[…]*
> *(4) The data protection officer may be a staff member of the public body, or fulfil the tasks on the basis of a service contract.*
>
> *Article 7*
> *[…]*
> *(3) The public body shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. The data protection officer shall directly report to the management of the public body. The data protection officer shall not be dismissed or penalised by the public body for performing the data protection officer's tasks.*
> *(4) The dismissal of the data protection officer shall be permitted only by applying Article 24 of the State Employee Act mutatis mutandis."*

13. In turn, the State Employee Act provides the following:

> *"Article 24*
> *(1) The employment relationship may at any time be terminated by either party to the contract with just cause; such termination shall be effected in writing, stating the reasons for the termination. Termination by the Government shall be effected by way of an order.*
> *(2) Just cause shall be defined, in particular, as any circumstance in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected.*
> *(3) If the termination without notice proves to be wrongful or without justification, then the person concerned shall be entitled to compensation for what they would have earned if the employment relationship had been terminated with due notice. If reinstatement is not effected, then compensation in accordance with Article 23(1) shall be paid."*

3 QUESTIONS FOR ADVISORY OPINION

14. By its request for advisory opinion, the Princely Supreme Court asks the following three questions:

> "*First question:*
> *Must the second sentence of Article 38(3) of the GDPR be interpreted as meaning that it precludes a national provision such as, in the present case, Article 7(4) of the Data Protection Act, according to which a data protection officer employed by a public body may only be dismissed by the public body with just cause, in particular, where circumstances exist in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected, even if the data protection officer precisely does not perform his function or does not perform it correctly?*
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> *Second question:*
> *Must the second sentence of Article 38(3) of the GDPR as worded in German be interpreted as meaning that the term "dismissed" [in German "abberufen"] includes also an (ordinary) termination of the employment contract by the employer of the data protection officer if, as a result, the employment contract basis and thus the factual possibility of exercising the activity of data protection officer ceases to exist?*
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> *Third question:*
> *Does the protective purpose of the second sentence of Article 38(3) of the GDPR, that is to say, safeguarding the functional independence of the data protection officer, require an interpretation of this provision and corresponding national rules serving the same protective purpose, such as Article 7(3) and (4) of the Data Protection Act, to mean that a dismissal which is effected contrary to these rules entails that the dismissal is void and that the employment relationship between the employer and data protection officer as such remains intact?*"

4 LEGAL ANALYSIS

4.1 First and second question

15. The Commission proposes to reply to the first and second question together.

16. By its first question, the referring court asks whether the second sentence of Article 38(3) GDPR precludes a national provision, such as Article 7(4) of the Data Protection Act, which provides that a DPO employed by a public body may only be dismissed with just cause.

17. By its second question, the referring court asks whether the second sentence of Article 38(3) GDPR applies not only to a "dismissal" of a DPO by the employer but also to a "termination" of the DPO's employment contract.

18. As a preliminary remark, the Commission notes that the assumption on which the first question is based might not be valid. In particular, the first question is based on the assumption that Article 7(4) of the Data Protection Act allows for the removal[6] of a DPO only with just cause in a case such as the present. However, according to the facts of the case,[7] the Constitutional Court does not share this interpretation of Liechtenstein law, since it ruled that in the present case the DPO may also be removed without just cause, in accordance with the usual requirements of the law on employment contracts.

19. It is for the courts of Liechtenstein to interpret their national law. However, if the correct interpretation of Article 7(4) of the Data Protection Act is the interpretation put forward by the Constitutional Court, this would mean that in the present case the DPO may be removed without just cause, which would render the first question hypothetical, and therefore inadmissible.[8]

20. In any event, for the sake of completeness, the Commission proposes the following reply on substance.

21. The second sentence of Article 38(3) GDPR provides that the DPO "*shall not be dismissed or penalised by the controller or the processor for performing his tasks*".

22. According to the case-law, the prohibition of the dismissal of a DPO means that the DPO must be protected against any decision terminating his or her duties, by which he or she would be placed at a disadvantage or which would constitute a penalty.[9] The dismissal of a DPO by the controller is capable of constituting such a decision.[10]

23. Article 38(3) GDPR imposes a limit which consists in prohibiting the dismissal of a DPO on a ground relating to the performance of his or her tasks, which include monitoring compliance with data protection law and with the controller's policies on the protection of

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6 Be it via "dismissal" of the DPO or via "termination" of the DPO's employment contract.

7 See paragraph 8 above.

8 See, for example, the judgment of the EFTA Court of 20 November 2024 in Case E-3/24 *Margrét Rósa Kristjánsdóttir v Icelandic Health Insurance (Sjúkratryggingar Íslands)*, para. 32.

9 Case C-453/21 *X-FAB Dresden* EU:C:2023:79, para. 21; Case C-534/20 *Leistritz* EU:C:2022:495, paras 20-21.

10 Case C-453/21 *X-FAB Dresden* EU:C:2023:79, para. 22.

personal data.[11] The objective of that provision is to ensure the functional independence of the DPO, and thus the effectiveness of the GDPR, by protecting the DPO against any decision which terminates his or her duties, places him or her at a disadvantage or constitutes a penalty, where such a decision relates to the performance of his or her tasks.[12]

24. Therefore, each Member State is free, in the exercise of its retained competence, to lay down more protective specific provisions on the dismissal of the DPO, in so far as those provisions are compatible with EU law, in particular with the second sentence of Article 38(3) GDPR.[13] Such increased protection cannot undermine the achievement of the objectives of the GDPR, which would be the case if it prevented any dismissal of a DPO who no longer possesses the professional qualities required to perform his or her tasks or who does not fulfil those tasks in accordance with the GDPR.[14]

25. Therefore, increased protection which would prevent the dismissal of the DPO in the event that he or she is not in a position to carry out his or her tasks in an independent manner on account of there being a conflict of interests would undermine the achievement of that objective.[15]

26. In view of the above considerations, the Court of Justice (CJEU) concluded in the *Leistritz* case in relation to a "termination" of the employment contract of a DPO that: "*the second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which provides that a controller or a processor may terminate the employment contract of a data protection officer, who is a member of his or her staff, only with just cause, even if the contractual termination is not related to the performance of that*

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11 Case C-453/21 *X-FAB Dresden* EU:C:2023:79, para. 24; Case C-534/20 *Leistritz* EU:C:2022:495, para. 25.

12 Case C-453/21 *X-FAB Dresden* EU:C:2023:79, paras 26-27; Case C-534/20 *Leistritz* EU:C:2022:495, paras 27-28.

13 Case C-453/21 *X-FAB Dresden* EU:C:2023:79, para. 31; Case C-534/20 *Leistritz* EU:C:2022:495, para. 34.

14 Case C-453/21 *X-FAB Dresden* EU:C:2023:79, para. 32; Case C-534/20 *Leistritz* EU:C:2022:495, para. 35.

15 Case C-453/21 *X-FAB Dresden* EU:C:2023:79, para. 34.

officer's tasks, in so far as such legislation does not undermine the achievement of the objectives of the GDPR".[16]

27. The CJEU reached the same conclusion in the *X-FAB Dresden* case with respect to the "dismissal" of a DPO by the employer, namely that "*the second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which provides that a controller or a processor may dismiss a DPO who is a member of staff of that controller or processor solely where there is just cause, even if the dismissal is not related to the performance of that DPO's tasks, in so far as such legislation does not undermine the achievement of the objectives of the GDPR*".[17] The CJEU also reached that conclusion in the *KISA* judgment issued on the same day.[18]

28. It is clear from the use of the terms "termination" and "dismissal" in the extracts of the *Leistritz* and *X-FAB Dresden* judgments quoted in paragraphs 26 and 27 above that the protection afforded to the DPO by the second sentence of Article 38(3) of the GDPR does not concern only a "dismissal" of the DPO by the employer but also a "termination" of the DPO's employment contract. Therefore, the reply to the referring court's second question should be that the second sentence of Article 38(3) GDPR applies not only to a "dismissal" of a DPO by the employer but also to a "termination" of the DPO's employment contract.

29. Furthermore, according to the case-law in paragraph 24 above, national law may offer to the DPO more protection than Article 38(3) GDPR, which requires as a minimum that the DPO must not be removed for performing his tasks. However, the increased protection afforded by national law must not go as far as to preclude the removal of an incompetent DPO or of a DPO whose interests are conflicted, because such an excessively high level of protection would actually undermine the achievement of the objectives of the GDPR.

30. National law providing for the DPO's "termination" or "dismissal" only with just cause respects that balance, and is therefore compatible with Article 38(3) GDPR, as confirmed explicitly in the *Leistritz*, *X-FAB Dresden* and *KISA* judgments. Nevertheless, that balance is also respected by national law which does not require just cause for the DPO's removal

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16 Case C-534/20 *Leistritz* EU:C:2022:495, para. 36 (emphasis added).

17 Case C-453/21 *X-FAB Dresden* EU:C:2023:79, para. 36 (emphasis added).

18 Case C-560/21 *KISA* EU:C:2023:81, para. 31.

but is limited to the minimum protection of Article 38(3) GDPR, i.e. that the DPO must not be removed for performing his tasks. Therefore, both interpretations of Article 7(4) of the Data Protection Act, by the Princely Supreme Court or by the Constitutional Court, are compatible with Article 38(3) GDPR.

31. In view of the above, the Commission would propose to the EFTA Court to reply as follows to the second and first questions of the referring court:

The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that the term "dismissed" includes also an (ordinary) termination of the employment contract by the employer of the data protection officer.

The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that it precludes neither a national provision according to which a public body may terminate without just cause the employment contract of its data protection officer, provided that the termination is not due to the data protection officer performing his tasks, nor a national provision according to which a public body may terminate said employment contract only with just cause, provided that such legislation does not undermine the achievement of the objectives of that regulation.

4.2 Third question

32. By its third question, the referring court asks whether a dismissal in violation of Article 38(3) GDPR entails that the dismissal is void and that the employment relationship between the employer and the DPO remains intact.

33. Although the third question uses the term "dismissal", the Commission understands that it is intended to cover also a "termination" of the DPO's employment contract, since such a termination is at issue in the case before the referring court. Therefore, the third question rather asks whether a termination of the DPO's employment contract in violation of Article 38(3) GDPR entails that the termination is void and that the employment relationship between the employer and the DPO remains intact.

34. As a preliminary remark, the Commission notes that, if the EFTA Court were to follow the proposed reply to the first question, then there would be no need to reply to the third question, given that the termination of the DPO's employment contract would not infringe Article 38(3) GDPR. If such termination does not breach Article 38(3) GDPR, no question

arises about the possible legal consequences of that breach, such as the possible voidness of the termination.

35. In any event, for the sake of completeness, the Commission proposes the following reply on substance.

36. The second sentence of Article 38(3) GDPR provides for the substantive rule that the DPO's employment contract must not be terminated for performing his or her tasks. However, the GDPR does not set out the legal consequences of the controller breaching that provision.

37. According to settled case-law of the CJEU, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for the enforcement of the rights and obligations set out in the GDPR in accordance with the principle of procedural autonomy, on condition that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).[19]

38. These principles are also reflected in the case-law of the EFTA Court. In the absence of EEA rules governing the matter, in accordance with the principle of national procedural autonomy, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law. Such rules must respect the principles of equivalence and effectiveness.[20]

39. In the hypothetical situation that a controller would terminate the employment contract of its DPO in violation of the second sentence of Article 38(3) GDPR, it would be for the domestic system of Liechtenstein to lay down the precise legal consequences stemming from such a violation, subject to the principles of effectiveness and equivalence. If Liechtenstein law provided for the voidness of such a termination, the Commission sees no reason to doubt that such a legal consequence would be in line with the principles of effectiveness and equivalence.

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19 See, for example, Case C-507/23 *Patērētāju tiesību aizsardzības centrs* EU:C:2024:854, para. 31.

20 See, for example, the judgment of the EFTA Court of 9 August 2024 in Case E-11/23 *Låssenteret AS v Assa Abloy Opening Solutions Norway AS*, para. 44.

40. Nevertheless, other effective legal consequences could also be in line with those two principles.[21] The GDPR, and EU/EEA law more generally, do not prescribe the voidness of the termination of the DPO's contract or another specific measure as the necessary legal consequence of a violation of the second sentence of Article 38(3) GDPR.

41. In view of the above, the Commission would propose to the EFTA Court to reply as follows to the third question of the referring court:

The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that it is for the domestic legal system of each Member State to determine the legal consequences of a termination of the employment contract of a data protection officer by the controller in breach of that provision, provided that the principles of equivalence and effectiveness are observed.

5 CONCLUSION

42. The Commission has the honour to propose to the EFTA Court to reply to the second question as follows:

The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that the term "dismissed" includes also an (ordinary) termination of the employment contract by the employer of the data protection officer.

43. The Commission has the honour to propose to the EFTA Court to reply to the first question as follows:

The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that it precludes neither a national provision according to which a public body may terminate without just cause the employment contract of its data protection officer, provided that the termination is not due to the data protection officer performing his tasks, nor a national provision according to which a public body may terminate said employment contract only with just cause, provided that such legislation does not undermine the achievement of the objectives of that regulation.

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[21] See, by analogy, Case C-760/18 *M.V. and Others (Contrats de travail à durée déterminée successifs dans le secteur public)* EU:C:2021:113, paras 63 and 70.

44. The Commission has the honour to propose to the EFTA Court to reply to the third question as follows:

The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that it is for the domestic legal system of each Member State to determine the legal consequences of a termination of the employment contract of a data protection officer by the controller in breach of that provision, provided that the principles of equivalence and effectiveness are observed.

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