

EUROPEAN DATA PROTECTION SUPERVISOR

Summary of the Opinion of the European Data Protection Supervisor on the proposal for a recast of the Brussels IIa Regulation

(The full text of this Opinion can be found in English, French and German on the EDPS website www.edps.europa.eu)

(2018/C 120/07)

SUMMARY

The Brussels IIa Regulation is the cornerstone of judicial cooperation in family matters in the European Union. It establishes uniform jurisdiction rules for divorce, separation and annulment of marriage as well as for disputes about parental responsibility in cross-border situations. The overall objective of the recast of the Brussels IIa Regulation is to remove the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition and to better protect the best interest of the child by simplifying the procedures and enhancing their efficiency.

The new proposed rules aim to promote better cooperation between central authorities, which exchange information within and across Member States, without involving the creation of any IT system. The EDPS had not been consulted on the proposal by the Commission. Given that concerns regarding the relationship between the proposed recast and the Union law on protection of personal data were raised during the discussions within the Council Working Party on Civil Law Matters, the Council formally requested an opinion of the EDPS. The EDPS welcomes this request for consultation from the Council.

The Opinion focuses on specific recommendations to strengthen the lawfulness of the processing provided for under Articles 63 and 64 of the Proposal. Additionally, the EDPS provides recommendations for suitable and specific safeguards to protect the fundamental rights and interests of the data subjects.

In the light of Articles 6(3) and 9(2)(g) of the GDPR and in consideration of the context, the aim of the Proposal and the fact that children are among the data subjects affected by the Proposal, the EDPS recommends including in the Regulation specific clauses in relation to the purpose of processing and the types of data subject to the processing. In particular, the EDPS recommends clarifying whether the cooperation framework set up under Chapter V of the Proposal covers parental responsibility matters only or includes international child abduction as well. Thus, considering that Chapter V appears to include both areas of cooperation, and in order to provide more legal certainty and to satisfy the requirements of the purpose limitation principle, the EDPS considers that Article 63(3) could be modified to narrow the purposes to '*cooperation in specific cases relating to parental responsibility and international child abduction*'. In addition, the EDPS would welcome an explicit reference to the principles of data quality and minimisation in the Regulation.

In the context of the current Proposal, the EDPS is satisfied that Article 63(4) provides for the obligation, as a principle, to notify the data subject about the transmission of information. This obligation may be postponed, as an exception, until the request has been carried out. This limitation, which aims to ensure a fair balance between the rights of the data subjects to be informed about the transmission and the interests of the Member States to exchange information, in itself does not appear to raise fundamental questions from the point of view of the general principles of lawfulness, fairness and transparency. However, the EDPS considers that the reference to the '*national law of the requested Member State*' may be subject to confusion in that it seems to allow the introduction of national restrictions to the duty to inform. The EDPS recommends specifying that the reference to the national law of the requested Member State under Article 63(4) does not allow further limitations on the right to information to be introduced at national level, so that the specific measure envisaged to ensure fairness of the processing enshrined in this provision be consistently applied across the Union.

In addition, the EDPS recommends establishing in the Regulation, as a principle, the right of access of data subjects to the information transmitted to the requesting authority of a Member State. The EDPS further recommends, to the extent restrictions to the rights of access and rectification are considered necessary in the particular context of the Proposal, supplementing the Proposal with a clear and specific provision laying down '*the scope of the restrictions*', in accordance with Article 23(2)(c) of the GDPR.

1. INTRODUCTION AND BACKGROUND

1. On 30 June 2016, the Commission submitted to the Council a Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). The Proposal is a recast of Council Regulation (EC) No 2201/2003 of 27 November 2003, repealing Regulation (EC) No 1347/2000 (the so-called Brussels IIa Regulation, hereinafter the 'Proposal').
2. The Brussels IIa Regulation is the cornerstone of judicial cooperation in family matters in the European Union. It establishes uniform jurisdiction rules for divorce, separation and annulment of marriage as well as for disputes about parental responsibility in cross-border situations. It facilitates the free circulation of judgements, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in other Member States. It applies since 1 March 2005 to all Member States ⁽¹⁾ except Denmark ⁽²⁾.
3. The Commission has assessed the operation of the Regulation in practice and considered necessary to amend the instrument in its application report adopted in April 2014 ⁽³⁾. The evaluation showed that between the two major areas covered by the Regulation, matrimonial and parental responsibility matters, the latter was identified to have caused acute problems. In addition, the European Court of Justice (CJEU) has so far rendered 24 judgments concerning the interpretation of the Regulation, which were taken into account.
4. The overall objective of the Proposal is to further develop the European area of Justice and Fundamental Rights based on mutual trust by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition and to better protect the best interest of the child by simplifying the procedures and enhancing their efficiency.
5. In particular, the Proposal abolishes the procedure of *exequatur* ⁽⁴⁾ for all decisions covered by the Regulation's scope, introducing, instead, automatic recognition of all judgments from other EU Member States. The Proposal also clarifies a number of issues concerning cross-border child abduction, with the aim of improving the efficiency of the return of an abducted child.
6. The new rules aim to promote better cooperation between central authorities, which exchange information within and across Member States, without involving the creation of any IT system. The Council Working Party on Civil Law Matters has nevertheless raised concerns during the discussions about the relationship between the proposed recast and the Union law on protection of personal data.
7. On 11 January 2018, the Council submitted to the EDPS a formal request for an opinion, in particular on Articles 63(3) and 63(4) of the Proposal, concerning rules on how information collected by central authorities dealing with cross-border cases may further be used and how notification to data subjects should be done.
8. The EDPS welcomes that he has been consulted by the Council. The focus of this Opinion, is to provide specific recommendations to strengthen the lawfulness of the processing provided for under Articles 63 and 64 of the Proposal (Section 2). Additionally, the EDPS provides recommendations for suitable and specific safeguards to protect the fundamental rights and interests of the data subjects (Section 3).

4. CONCLUSION

Lawfulness of the processing

38. As a main recommendation and in order to strengthen the lawfulness of the processing envisaged (under Articles 6(3) and 9(2)(g) of the GDPR) and considering the context and aim of the Proposal, the EDPS recommends clarifying the scope and purpose(s) of the cooperation established under Chapter V of the Proposal:
 - The EDPS recommends clarifying whether the cooperation framework set up under Chapter V of the Proposal covers parental responsibility matters only or includes international child abduction as well. Considering that Chapter V includes both areas of cooperation, and in order to provide more legal certainty and to satisfy the requirements of the purpose limitation principle, the EDPS considers that Article 63(3) should be modified to narrow the purposes to '*cooperation in specific cases relating to parental responsibility and international child abduction*', thus excluding '*matrimonial matters*', which is the other major area covered by the Regulation. The definitions of '*competent authority*' etc. should be adapted accordingly.

⁽¹⁾ To those Member States which joined the Union after that date, the Regulation applies from the beginning of their membership.

⁽²⁾ Denmark does not participate in the Regulation and is therefore neither bound by it nor subject to its application.

⁽³⁾ COM(2014) 225 final.

⁽⁴⁾ A procedure whereby a foreign judgment needs to be formally recognised by the Member State of enforcement.

39. As an additional recommendation to strengthen the lawfulness of the processing:

- The EDPS would welcome an explicit reference to the principles of data quality and data minimisation under Article 64(1) of the Proposal.

Suitable and specific measures to safeguard the fundamental rights and interests of the data subject

40. As a main recommendation:

- The EDPS recommends specifying that the reference to the national law of the requested Member State under Article 63(4) does not allow further limitations on the right to information to be introduced at national level, so that the specific measure envisaged to ensure fairness of the processing enshrined in this provision be consistently applied across the Union.

41. As an additional recommendation, the EDPS suggests supplementing the Proposal with specific measures to safeguard the rights access and rectification of data subjects:

- The EDPS recommends establishing in the Regulation, as a principle, the right of access of data subjects to the information transmitted to the requesting authority of a Member State. The EDPS further recommends, to the extent restrictions to the rights of access and rectification are considered necessary in the particular context of the Proposal, supplementing the Proposal with a clear and specific provision laying down '*the scope of the restrictions*', in accordance with Article 23(2)(c) of the GDPR.

Brussels, 15 February 2018.

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