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Delegations will find in the Annex the opinion of the European Data Protection Supervisor (EDPS) on the above-mentioned proposals.

The opinion is also available on the website of the EDPS.


EDPS
EUROPEAN
DATA
PROTECTION
SUPERVISOR
The EU's independent data protection authority
6 September 2024
Opinion 20/2024
on two Proposals for Council Decisions on the signing and conclusion of an Agreement between the EU and Bosnia and Herzegovina on the cooperation between Eurojust and the authorities of Bosnia and Herzegovina competent for judicial cooperation in criminal matters
edps.europa.eu

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 'With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies', and under Article 52(3)'... for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data'.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years.

*Under **Article 42(1)** of Regulation 2018/1725, the Commission shall 'following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data'.*

This Opinion relates to the Proposal for a Council Decision on the signing, on behalf of the Union, of an Agreement between the European Union and Bosnia and Herzegovina on the cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the authorities of Bosnia and Herzegovina competent for judicial cooperation in criminal matters[1], and the Proposal for a Council Decision on the conclusion, on behalf of the European Union, of an Agreement between the European Union and Bosnia and Herzegovina on the cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the authorities of Bosnia and Herzegovina competent for judicial cooperation in criminal matters[2].

This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the Proposals and the future Agreement that are relevant from a data protection perspective.

[1] COM(2024) 298 final.
[2] COM(2024) 299 final.

Executive Summary

On 16 July 2024, the European Commission issued two Proposals for Council Decisions, under Article 16(2) and Article 85 in conjunction with Article 218(5), Article 218(6), second subparagraph, point (a)(v), and Article 218(7) of the Treaty on the Functioning of the European Union, one on the signing and other on the conclusion, on behalf of the Union, of an Agreement between the European Union, of the one part, and Bosnia and Herzegovina, of the other part, on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the authorities of Bosnia and Herzegovina competent for judicial cooperation in criminal matters. The proposals are accompanied by an Annex containing the agreed text of the Agreement.

The objective of the future Agreement is to enhance judicial cooperation between Eurojust and the competent authorities of Bosnia and Herzegovina by allowing the transfer of personal data between Eurojust and the competent authorities of Bosnia and Herzegovina, in order to support and strengthen their cooperation in investigating and prosecuting serious crime, in particular organised crime and terrorism, while ensuring appropriate safeguards with respect to fundamental rights and freedoms of individuals, including privacy and the protection of personal data.

The EDPS has already had the opportunity to comment on the exchange of personal data between Eurojust and the competent authorities of Bosnia and Herzegovina in his Opinion 10/2020, where the EDPS provided several recommendations in order to clarify and, where necessary, further develop the safeguards and controls with respect to protection of personal data. The EDPS notes with satisfaction that his recommendations have been taken into account and that the provisions of the future Agreement are consistent with the provisions of Chapter IX of EUDPR on the processing of operational personal data by union bodies, offices and agencies. As a result, it could be concluded that the presented Agreement between the EU and Bosnia and Herzegovina adduces adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals.

At the same time, in this Opinion, the EDPS provides some recommendations, in particular with regards to onward transfers of personal data, the right to erasure of personal data, the possibility to postpone transfer of personal data and on the review and evaluation of the Agreement, aimed at facilitating the practical implementation of the future Agreement by Eurojust and the competent authorities of Bosnia and Herzegovina.

Contents

1. Introduction 4

2. General remarks 5

3. Onward transfers of personal data received 7

4. Right of access, rectification, erasure or restriction 7

5. Postponement of the transfer of personal data 8

6. Review and evaluation of the Agreement 9

7. Conclusions 9

3

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('EUDPR')[3], and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. Regulation (EU) 2018/1727 ('Eurojust Regulation')[4] lays down specific rules regarding transfers of personal data by Eurojust to third countries and international organisations. Article 56(2) thereof lists a number of legal grounds, based on which Eurojust could lawfully transfer data to authorities of third countries, such as an adequacy decision of the Commission in accordance with Article 36 of Directive (EU) 2016/680[5] finding that the third country ensures an adequate level of protection[6]; a cooperation agreement allowing for the exchange of operational personal data concluded before 12 December 2019 between Eurojust and the given third country or international organisation; or an international agreement between the Union and the third country or international organisation pursuant to Article 218 TFEU that provides for adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals.

2. On 19 November 2020, the Commission adopted a Recommendation for a Council Decision authorising the opening of negotiations for Agreements between the European Union (EU) and Algeria, Armenia, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities for judicial cooperation in criminal matters of those third States[7].

3. The European Data Protection Supervisor issued an Opinion regarding the Recommendation on 17 December 2020.[8] The Council granted the authorisation for the

[3] OJ L 295, 21.11.2018, p. 39.
[4] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, 21.11.2018, p. 138).
[5] Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).
[6] At the moment, the only existing adequacy decision under the LED is on the United Kingdom, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D1773.
[7] COM(2020) 743 final.
[8] EDPS Opinion 10/2020 on the negotiating mandate to conclude ten agreements allowing the exchange of data between Eurojust and the competent authorities for judicial cooperation in criminal matters in certain third countries.

opening of the negotiations on 1 March 2021, adding also Argentina, Brazil and Colombia to the list, and adopted a set of negotiating directives[9].

4. The negotiations with Bosnia and Herzegovina began in October 2023 and a preliminary agreement was reached in January 2024[10]. Consequently, on 16 July 2024, the Commission issued a Proposal for a Council Decision on the signing, on behalf of the Union, of an Agreement between the European Union and Bosnia and Herzegovina on the cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the authorities of Bosnia and Herzegovina competent for judicial cooperation in criminal matters[11], and the Proposal for a Council Decision on the conclusion, on behalf of the European Union, of an Agreement between the European Union and Bosnia and Herzegovina on the cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the authorities of Bosnia and Herzegovina competent for judicial cooperation in criminal matters[12] ('the Proposals'), both accompanied by their respective Annexes containing the final negotiated text of the Agreement.

5. The objective of the future Agreement is to enhance judicial cooperation between Eurojust and the competent authorities of Bosnia and Herzegovina in combating serious crime, by allowing for the transfer of personal data between Eurojust and the competent authorities of Bosnia and Herzegovina, in order to support and strengthen the action by the competent authorities of the Member States of the Union and those of Bosnia and Herzegovina, as well as their cooperation in investigating and prosecuting serious crime, in particular organised crime and terrorism, while ensuring appropriate safeguards with respect to fundamental rights and freedoms of individuals, including privacy and the protection of personal data[13].

6. The present Opinion of the EDPS is issued in response to a consultation by the European Commission of 16 July 2024, pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 9 of the Proposals.

2. General remarks

7. The EDPS recognises the need for cooperation between Eurojust and judicial authorities of third countries involved in the investigation and prosecution of serious crimes, which do not stop at Union borders. In this regard, Eurojust should be able to cooperate and exchange personal data with them to the extent necessary for the accomplishment of its tasks within the framework of the requirements set out in the Eurojust Regulation[14].

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[9] Council Decision authorising the opening of negotiations for Agreements between the European Union and Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities for judicial cooperation in criminal matters of those third States, see 6153/21 + ADD 1, Council Decision adopted by written procedure on 1 March 2021 (CM 1990/21).
[10] See Explanatory Report, COM(2024) 298 and 299 final, p. 2.
[11] COM(2024) 298 final.
[12] COM(2024) 299 final.
[13] See Article 1 of the Annexes to the Proposals.
[14] See Explanatory Report, COM(2024) 298 and 299 final, p. 1.

8. At the same time, transfers of personal data gathered in the context of criminal investigations envisaged under the future Agreement are liable to have a significant impact on the lives of the individuals concerned, as they will be used in prosecution cases in the receiving country under its national law. Consequently, the necessity and proportionality of the envisaged processing need to be assessed in accordance with Article 52(1) of the Charter[15].

9. In particular, transfers of personal data between Eurojust and the authorities competent for judicial cooperation in criminal matters of Bosnia and Herzegovina constitute an interference with individuals' rights to privacy and data protection guaranteed by Articles 7 and 8 of the Charter. Therefore, the future Agreement must ensure that the derogations and limitations to rights to privacy and data protection, including in relation to fighting crime, apply only in so far as is strictly necessary[16]. In that regard, the EDPS welcomes Article 10(5) of the future Agreement, obliging the Parties to comply with the safeguards provided for in the Agreement regardless of the nationality of the data subject concerned and without discrimination.

10. As mentioned above, the EDPS has already had the opportunity to comment on the exchange of personal data between Eurojust and the competent authorities of Bosnia and Herzegovina in his Opinion 10/2020, where the EDPS provided several recommendations in order to clarify and, where necessary, further develop the safeguards and controls with respect to protection of personal data. The EDPS notes with satisfaction that his recommendations have been taken into account and that the future Agreement provides for similar data protection safeguards as provided for in Chapter IX of EUDPR with regard to processing of operational personal data by Union bodies, offices and agencies when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part three TFEU[17].

11. In addition, the EDPS welcomes that, before the future Agreement enters into force, Bosnia and Herzegovina, as an EU candidate country, is required to adopt a new law on personal data protection, in line with the EU acquis, and to ensure the necessary operational capacity and independence of the Personal Data Protection Agency[18].

12. As a result, it could be concluded that the presented Agreement between the European Union and Bosnia and Herzegovina adduces adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals.

13. At the same time, the EDPS considers that certain safeguards with respect to the protection of personal data, while already provided for in the future Agreement, may still benefit from additional precision and clarity. In this regard, the subsequent comments by the EDPS aim at facilitating the practical implementation of the Agreement by Eurojust and the competent authorities of Bosnia and Herzegovina as well as to provide guidance for future

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[15] For further details see the EDPS Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data, issued on 19 December 2019, https://edps.europa.eu/sites/edp/files/publication/19-12-19_edps_proportionality_guidelines_en.pdf.

[16] See Judgments of the Court of Justice of 6 October 2020, La Quadrature du Net and others, joined cases C-511/18, C-512/18 and 520/18, ECLI:EU:C:2020:791, paragraph 130, of 8 April 2014 in Joined Cases C-293/12 and C-594/12, Digital Rights, EU:C:2014:238, paragraph 52; and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 140.

[17] In accordance with Article 26 of the Eurojust Regulation, Article 3 and Chapter IX of EUDPR apply to the processing of operational personal data by Eurojust.

[18] See Explanatory Report, COM(2024) 298 and 299 final, p. 2 and 3.

agreements with other third countries that are still under negotiations or negotiations are still to begin.

3. Onward transfers of personal data received

14. The EDPS recalls that, in accordance with Article 56(6) and recital 45 of the Eurojust Regulation, when personal data are transferred from Eurojust to a third country, the level of protection of natural persons ensured by the Eurojust Regulation and by Union law must not be undermined. This requirement is fully valid also in case of a potential onward transfer of personal data received from Eurojust by the competent authorities of Bosnia and Herzegovina to other authorities in Bosnia and Herzegovina or to the authorities of a third country or to an international organisation[19].

15. The EDPS therefore welcomes Article 13 of the future Agreement, which prohibits further transferring the personal data received from Eurojust to other authorities of Bosnia and Herzegovina or to the authorities of a third country or to an international organisation, unless such onward transfer is carried out under strictly limited conditions.

16. The EDPS additionally welcomes paragraph 1(c) of Article 13, which lays down that the possible onward transfer to other authorities of Bosnia and Herzegovina is subject to the same conditions and safeguards as those applying to the original transfer.

17. In that regard, although this is not explicitly mentioned in paragraph 2 of the same Article, regulating onward transfers to the authorities of a third country or to an international organisation, the EDPS expects that, when giving its explicit prior authorisation pursuant to paragraph 2(b), Eurojust will assess and clearly indicate the modalities applying to the onward transfer in question. These modalities could be the same conditions and safeguards as those applying to the original transfer, similarly to the explicit obligation in paragraph 1(c) of Article 13, or other conditions and safeguards deemed necessary and appropriate in the specific case.

4. Right of access, rectification, erasure or restriction

18. The EDPS recalls that the right of access and the right to rectification are essential elements of the right to data protection under Article 8(2) of the Charter. Furthermore, as regards Article 7 of the Charter, the European Court of Justice has held that "the fundamental right to respect for private life, enshrined in that article, means that the person concerned may be certain that his personal data are processed in a correct and lawful manner. In order to carry out the necessary checks, that person must have a right of access to the data relating to him which is being processed"[20]. The EDPS therefore welcomes the inclusion, under

[19] See to that effect Article 56 and recital 45 of the Eurojust Regulation.
[20] Opinion 1/15, EU-Canada PNR Agreement, ECLI:EU:C:2017:592, par. 219.

Articles 14 and 15 of the future Agreement, of a right to access as well as rectification, erasure or restriction.

19. As regards specifically the right to erasure, the EDPS positively notes that paragraph 2 of Article 15 prescribes that the Parties must provide for any data subject to have the right to obtain from the authorities processing personal data transferred under the Agreement the erasure of personal data concerning the data subject where the processing of the personal data infringes data protection principles (Article 10(1) of the Agreement) or rules on the transfer of special categories of personal data (Article 11(2) thereof), or where the personal data must be erased in order to comply with a legal obligation to which the authorities are subject.

20. The EDPS considers that even though the provision of Article 15(2) mentions explicitly only infringements of Articles 10(1) or Article 11(2) of the Agreement as grounds enabling the data subject to obtain erasure of personal data, this should not be viewed as an exhaustive list. In particular, it is the understanding of the EDPS that the infringement of Article 10(1)(a) - lawfulness of processing of personal data - should be interpreted broadly, thus covering possible infringements of other legal obligations under the future Agreement, such as those laid down in Article 10(6) and Article 11(1).

5. Postponement of the transfer of personal data

21. The EDPS welcomes the obligation included in Article 29(4) of the future Agreement, according to which a Party may "*postpone the transfer of personal data in the event that, and for as long as, the other Party ceases to provide for, and implement, the safeguards and obligations contained in Chapter II (Information exchange and data protection) of this Agreement*".

22. The EDPS considers that it may provide a useful and effective safeguard, especially in cases of third countries that face practical issues to meet the obligations stemming from the Agreement, e.g. amendments of the relevant domestic legislation, legal or organisational changes affecting the supervisory authority, etc.

23. At the same time, the EDPS believes that the provision of Article 29(4) may benefit from additional clarity, in particular as regards the specific context and the modalities of its possible application, as well as its distinction from other provision of the Agreement with similar effect, such as the legal possibility to suspend in whole or in part the application of the Agreement in the event of non-fulfilment of obligations (Article 32(2)). To this end, in view of ensuring legal clarity and certainty, the EDPS invites the Commission to clarify, e.g. in the Explanatory Memorandum to the Proposal for Council Decision, what are the envisioned cases of application of the provision of Article 29(4) of the future Agreement.

24. Furthermore, the EDPS considers that it is important to clarify who on the EU side would carry out the assessment whether the safeguards and the obligations required by the Agreement are provided for in the law of the third country and implemented in practice - Eurojust, the Commission, or another competent Union body.

8

6. Review and evaluation of the Agreement

25. The EDPS welcomes Article 31 of the future Agreement that provides for the regular review and evaluation of the Agreement and specifically envisages the participation of "relevant experts on data protection" in the respective review teams. In this context, the EDPS recommends the involvement in the review and the evaluation of the Agreement also representatives of the independent data protection authorities.

7. Conclusions

26. In light of the above, the EDPS makes the following recommendations:

(1) in case of onward transfers to the authorities of a third country or an international organisation, when giving its prior explicit authorisation, Eurojust to assess and clearly indicate whether the same conditions and safeguards as those applying to the original transfer should also apply to the onward transfer, or whether some other conditions and safeguards are deemed necessary and appropriate in the specific case;

(2) regarding the right to erasure pursuant to Article 15(2), to interpret broadly the infringement of Article 10(1)(a) - lawfulness of processing of personal data - thus providing the data subjects with the right to obtain from the authorities processing personal data transferred under the Agreement the erasure of their personal data also in case of infringements of other legal obligations under the future Agreement, such as Article 10(6) and Article 11(1);

(3) to clarify the practical application of the safeguard provided for in Article 29(4) of the future Agreement, as well as to clarify who on the EU side would carry out the assessment whether the safeguards and the obligations required by the Agreement are provided for in the law of the third country and implemented in practice;

(4) to involve the independent data protection authorities in the future reviews and evaluations of the Agreement.

Brussels,

Wojciech Wiewiórowski

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9