Quis custodiet ipsos custodes? Data protection in the judiciary in EU and EEA Member States

Bart Custers *, Linda Louis**, Maria Spinelli*** and Kalliopi Terzidou****

Key Points

- Compliance with data protection legislation shall be subject to control by an independent authority, also for the judiciary. However, in order to safeguard the independence of the judiciary, both the General Data Protection Regulation and the Law Enforcement Directive explicitly state that national Data Protection Authorities are not competent to supervise courts 'when acting in their judicial capacity'.
- In this article, the notion of 'courts acting in their judicial capacities' is analysed to determine whether any common understanding of this notion exists. Apart from legal analysis, empirical research (survey and interviews) was carried out in 30 countries (27 EU and 3 EFTA EEA Member States).
- The concept of 'courts acting in their judicial capacity' can be contrasted with 'courts not acting in their judicial capacity' (the functional interpretation) or with 'other organizations' (the institutional interpretation).
- The functional interpretation is followed by most countries and in fairly similar ways. The institutional interpretation is followed by some countries, but in very different ways and some practices raise concerns, such as limited or no supervision for the judiciary (interfering with Article 8 of the Charter) and supervision of the judiciary by the ministry of justice (potentially interfering with the separation of powers according to the *trias politica*).
- Altogether, there is to a large extent a common understanding of the notion of 'courts acting in their judicial capacity' and this is the functional interpretation. The institutional interpretation, however, may lead to a gap in data protection supervision of the judiciary.

Introduction

In the European Union (EU), all people have a fundamental right to privacy, described in Article 7 of the Charter of Fundamental Rights of the European Union[1] (Charter), ratified in December 2000. Apart from this right to privacy, the same Charter also explicitly lists a fundamental right to data protection in Article 8, stating that everyone has the right to the protection of personal data concerning him or her.[2] Compliance with these rules shall be subject to control by an independent authority, which all EU Member States have addressed by establishing national Data Protection Authorities (DPAs), in charge of independent supervision.

Compliance with data protection law and independent supervision also applies to the judiciary. However, in order to safeguard the independence of the judiciary, both the General Data Protection Regulation (GDPR,

* Bart Custers, Faculty of Law, eLaw—Center for Law and Digital Technologies, Leiden University, Leiden, The Netherlands
** Linda Louis, Faculty of Law, eLaw—Center for Law and Digital Technologies, Leiden University, Leiden, The Netherlands
*** Maria Spinelli, Faculty of Law, eLaw—Center for Law and Digital Technologies, Leiden University, Leiden, The Netherlands
**** Kalliopi Terzidou, Faculty of Law, Economics, and Finance/Department of Law, University of Luxembourg, Luxembourg.
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1 Charter of Fundamental Rights of the European Union, OJ 2010 C 83/389..

2 Gloria G Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer, Heidelberg 2014) 220. .

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EU Regulation 2018/679)[3] and the Law Enforcement Directive (LED, EU Directive 2018/680)[4] explicitly state that national DPAs are not competent to supervise courts 'when acting in their judicial capacity'.[5] In this article, the notion of 'courts acting in their judicial capacities' is analysed to determine whether any common understanding of this notion exists and, if not, to investigate how this could be harmonized.

Both the GDPR and the LED refer to certain limitations when data are processed by courts or judicial authorities acting in their judicial capacities. Therefore, the notion of 'courts acting in their judicial capacity' is of essence to better define the scope of the powers of the supervisory authorities, but also to better define and frame the exceptions to certain provisions of the GDPR and the LED. The notion of 'other independent authorities acting in their judicial capacity' as referred to in Articles 32 and 45 of the LED is also fundamental to better understand the extent to which EU Member States can limit the powers of the DPAs.[6]

In this article, we analyse the notion of 'courts and other independent judicial authorities acting in their judicial capacities' from a legal perspective and its implementation in practice. The goal is to see to what extent there exists a common understanding and harmonized interpretation of the notion of 'courts and other independent judicial authorities acting in their judicial capacities'. If such a common understanding exists, as second goal is to investigate what these notions cover and how different approaches and regimes can potentially be conciliated to reach a harmonized approach.

Some may disagree that furthering a harmonized understanding and approach towards data protection supervision over the judiciary is something to strive for. However, from a legal perspective, it is clear that data protection legislation unabatedly applies to the judiciary and compliance needs to be supervised by independent authorities. Obviously, the main driver for compliance is to protect data subjects, and the main reason for independent supervision is to protect the judiciary from influences of the executive branch. However, as we will show in this article, some countries leave a gap in the supervision of data protection in the judiciary.

The (geographical) scope of this research concerns all EU Member States as well as European Free Trade Association (EFTA) and European Economic Association (EEA) states (Iceland, Liechtenstein, and Norway).[7] Since the UK left the EU in January 2020, this research includes 27 EU Member States. In total, 30 countries (27 EU Member States and 3 EFTA EEA states) were included in this research.

The legal scope of this research is restricted to data protection law, more particularly to the GDPR and the LED, national implementations of the GDPR and the LED, and relevant case law and policy documents. Privacy law (as opposed to data protection law) was considered to be beyond the scope of this research. Hence, for instance, constitutional human rights' provisions (such as privacy violations regarding bodily integrity) or privacy provisions in national criminal procedural law (such as the observation of suspects in criminal investigations), were considered to be beyond the scope of this research, unless there is processing of personal data involved.

The research presented in this article was carried out between January 2020 and August 2020. Developments that took place after 1 July 2020 were not taken into account in this research. This is particularly important for findings relating to the implementation of the LED in national legal frameworks: the deadline for this was May 2018, but some countries did not meet this deadline.[8]

This article is structured as follows. 'Methodology' section describes the methodology used in this research. 'EU legal frameworks for data protection' section examines the EU legal frameworks for data protection, ie the GDPR and the LED and analyses how this applies to the judiciary. 'Courts and other judicial authorities' and 'Acting in a judicial capacity' sections provide a

3 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 2016 L 119/1. .

4 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 2016 L 119/89.

5 For more details on the LED, see Juraj Sajfert and Teresa Quintel, 'Data Protection Directive (EU) 2016/680 For Police And Criminal Justice Authorities' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285873> accessed 31 March 2021; Paul De Hert and Vagelis Papakonstantinou, 'The New Police and Criminal Justice Data Protection Directive: A First Analysis' (2016) New Journal of European Criminal Law 7 (1) ; Paul De Hert and Vagelis Papakonstantinou, 'Data Protection Policies in EU Justice and Home Affairs. A Multi-layered and Yet Unexplored Territory for Legal Research' in Ariadna R Servent and Florian Trauner (eds), *Routledge Handbook of Justice and Home Affairs Research* (Routledge London, 2018); Mark Leiser and Bart Custers, 'The Law Enforcement Directive: Conceptual Challenges of EU Directive 2016/680' (2019) 5 European Data Protection Law Review 367–78.

6 Note that the text of the GDPR and the LED use the term SA (Supervisory Authority) rather than the term DPA. Since supervisory authorities exist in many sectors of society, in this article, the term DPA is used to specifically refer to supervisory authorities in the data protection domain.

7 Switzerland is an EFTA member, but not an EEA member and was therefore left out of scope.

8 For an overview, see Leiser and Custers (n 5).

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comparative analysis of the legal interpretation and national implementation of the notion of 'courts and other judicial authorities acting in their judicial capacity'. 'Courts and other judicial authorities' section investigates which institutions are included in the concept of courts and other judicial authorities. 'Acting in a judicial capacity' section examines what 'acting in a judicial capacity' entails. 'Conclusion' section provides conclusions by answering the research questions. This section also provides recommendations to further develop the concepts of courts and judicial authorities in EU data protection law.

Methodology

Data collection

A mixed method approach consisting of desk research, a survey and interviews was chosen. The desk research consisted of literature research and online research. During the desk research, available literature and online information was collected on, for instance, the organization of the judiciary in each of the countries investigated, the ways data protection is supervised in the judiciary and the national implementation of the GDPR and the LED, particularly focusing on provisions addressing the judiciary.

The literature research included, among other things, legislations, policy documents, case law, parliamentary proceedings, annual reports of DPAs and bodies within the judiciary, and relevant academic publications. The online research mostly focused on the websites of the DPAs and the judicial authorities in each of the countries investigated.

To better select and organize the information gathered, a questionnaire was used. The questionnaire was completed for each of the countries investigated. It consisted of three substantive parts and one part with general questions. In total, the questionnaire contained 18 questions. The first part (nine questions) focused on the judiciary, with questions on how the judiciary is organized, what kind of judicial authorities exist beyond the regular judiciary, what 'acting in judicial capacity' means, and how data protection supervision is organized for judicial authorities. The second part (six questions) focused on legislation, policies, and case law, with questions on how the GDPR and LED are implemented in national legal frameworks, and which legal provisions, policy documents, and case law are relevant for the judiciary. The third part (one question) focused on the delineation of the concepts of courts and judicial authorities, with a question on which aspects could be considered helpful to constitute a common understanding or shared interpretation of what courts and judicial authorities are. The fourth (general) part of the survey (two questions) asked for further literature and experts in each country.

The questionnaire was the basis for this research to collect and select relevant information to the understanding of the notions 'courts' and 'other judicial authorities' in all EU Member and EFTA EEA States' national legislation relating to the GDPR as well as the national legislation implementing the LED and provide a legal analysis of it. The first step was to try to complete the questionnaire by desk research as much as possible. The second step was to further complete the questionnaire by distributing a shorter version of it as a survey to all national DPAs. This second step ensured that all relevant factual information (legislation and other published documents) was retrieved and included in this research. The views and conclusions expressed in this research are only the authors' views and do not in any way reflect the official opinion of the DPAs.

With the first step, it was possible to complete approximately two-thirds of the questions (across all countries). With the second step, out of a total of 30 countries (27 EU Member States and 3 EEA states) 19 (mostly) completed surveys were received from the respective DPAs and one DPA answered the main questions via e-mail. Altogether, the response rate is 67 per cent.[9] With the first and second steps, most of the questionnaire was more or less completed. For the remaining gaps, the third step was to locate and interview experts in specific countries. Interviews took place online and the experts were only asked information about the parts that were still missing at that point.

Data analysis

Two analyses are carried out in this research: a legal analysis and a compare and contrast analysis of the survey results. For the legal analysis, the first step was to distil all legal provisions in the GDPR and the LED relevant for the judiciary. Next, all legal documents (legislation, policy documents, case law, etc) collected on a national level were analysed on relevance for the judiciary. This was done mainly by searching for the terms 'courts', 'judiciary', and judicial authorities' in the legal documents. Finally, all selected provisions were put together in order to find out how this could contribute to a common understanding of the notion of 'courts and

9 Completed surveys were received from the DPAs of: Austria, Germany, Slovakia, Finland, Liechtenstein, Luxemburg, Croatia, Romania, Latvia, Poland, Czech Republic, Lithuania, Sweden, Estonia, Cyprus, Portugal, Greece, the Netherlands, and Denmark.

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other judicial authorities acting in their judicial capacities' and, subsequently, to the scope of the GDPR and LED to this end. From this, options were considered for a common understanding and possible shared interpretation of these notions.

The survey results per country were combined per survey question. In other words, for each survey question, the country results were compared and contrasted.[10] During this qualitative analysis, the main goal was to investigate whether and how countries could be grouped in separate clusters for each question or aspect. Typically, countries may have chosen that DPAs do or do not supervise other judicial authorities, or, some countries may have considerable specific legislations, whereas other countries have not. This compare and contrast analysis is helpful in determining the scope of the GDPR and the LED with regard to the judiciary and other judicial authorities and to find out to what extent there is a common understanding.

EU legal frameworks for data protection

The GDPR and the judiciary

Independent supervision of compliance with the GDPR is organized in two ways, internal and external supervision. Internal supervision is organized via the designation of a Data Protection Officer (DPO). According to Article 37 of the GDPR, entities that control and process personal data shall designate a DPO when the processing is carried out by a public authority or body, except for courts acting in their judicial capacity, or when the data processing takes place on a large scale, or when special categories of (sensitive) data are being processed, including personal data relating to criminal convictions and offences.

It should be noted here that the judiciary is explicitly exempted from the obligation to designate a DPO when *acting in their judicial capacity*. What this means is discussed in 'Acting in a judicial capacity' section. The fact that courts may have, under certain conditions, no obligation to designate a DPO, does not mean they are not allowed to do so. In fact, in two EU Member States courts actually appointed DPOs throughout the judiciary.[11] In the Netherlands and Germany, almost all courts, at all different levels ranging from lower courts to supreme courts, have designated internal DPOs. However, the fact that DPOs have been appointed by courts does not necessarily mean they can monitor data processing carried out under judicial capacity. In Germany, the internal DPOs are mostly responsible for data protection regarding administrative matters, ie data processing of the court when not acting in its judicial capacity.[12] Also, the Court of Justice of the EU has appointed an internal DPO.[13]

The external supervision is organized via the establishment of national supervisory authorities, usually referred to as DPAs. According to Article 51 GDPR, each EU Member State shall provide for one or more independent public authorities to be responsible for monitoring application of the GDPR. Given the requirements of specific expertise in Article 53 GDPR, Member States opted to establish a separate supervisory authority for data protection law (often already existing before the introduction of the GDPR), rather than assigning GDPR supervision to other supervisory bodies like a National Ombudsman. For instance, Romania initially decided to assign supervision of data protection law to the National Ombudsman (*Avocatul Poporuliu*). But already in 2004, the National Ombudsman indicated it had no specialized employees and therefore it was decided to establish a separate DPA in 2005, taking over supervision of data protection law in 2006.

For the external supervision, it should be noted that the DPAs are not competent to supervise processing of operations of courts *acting in their judicial capacity* (Article 55(3) GDPR). The phrasing here is slightly different from the phrasing used for the DPO exemption: This provision states that DPAs cannot supervise courts acting in their judicial capacity. So, even if the courts would agree with DPA supervision, DPAs are not allowed to do this. At least, they are not allowed to supervise courts when courts are acting in their judicial capacity. As will be explained in 'Acting in a judicial capacity' section, there are possible interpretations of this phrasing that allow DPAs to supervise courts to the extent where they are not acting in their judicial capacity. However, in order to be able to analyse this, it is necessary to first examine which institutions qualify as courts, which will be discussed in 'Courts and other judicial authorities' section.

10 Cf Bart Custers and others, *EU Personal Data Protection in Policy and Practice*. Information Technology & Law Series Nr 29 (Asser/Springer, Heidelberg 2019).

11 In other EU Member States, no appointing of internal DPOs was reported or found during desk research.

12 An example is s 7 (1) sentence 2 of the Federal Data Protection Act (Bundesdatenschutzgesetz, , vom 30. Juni 2017 (BGBI. I S. 2097, in short: BDSG)): '*In the case of a data protection officer ordered by a court, these tasks shall not refer to the action of the court acting in its judicial capacity.*' Another example is s 7 (1) sentence 2 of the Hessian Data Protection and Freedom of Information Act (Hessisches Datenschutz- und Informationsfreiheitsgesetz, HDSIG, 3 May 2018).

13 <https://curia.europa.eu/jcms/jcms/p1_641404/en/>.

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Bulgaria, Spain, Finland, Ireland, Lithuania, and Poland have explicitly exempted courts and other judicial authorities from their national DPA's supervision in their national data protection acts or else assigned this competence to authorities other than the DPA. For instance, Article 17(1) of Chapter III of the Bulgarian Data Protection Act indicates that the Inspectorate to the Supreme Judicial Council is in charge of supervising the processing of personal data by courts and prosecuting and investigating authorities acting in their judicial capacity. In Denmark, Section 37 of the Data Protection Act regulates the supervision of courts. When the processing of personal data covers administrative matters, the Court Administration is the competent authority to carry out the supervision. When the processing is within the limits of judicial matters, the president of the court in question is charged with ensuring compliance with national data protection law. The decisions of the president can be appealed to a superior court.[14] In Spain, Article 49(3) of the Organic Law 3/2018 states that 'where judicial bodies or judicial offices are involved, the inspection powers shall be exercised via and through the mediation of the General Council of the Judiciary.' In Finland, the Data Protection Act (1050/2018) states in Article 14(2) that the Ombudsman, acting as the DPA, does not have the competence to supervise the Chancellor of Justice during the processing of personal data, although reference to other judicial bodies exempted from supervision is not mentioned.[15] In Ireland, under Section 157 of the Data Protection Act 2018, a judge assigned by the Chief Justice is competent for the supervision of data processing of courts when acting in their judicial capacity. In Lithuania, the Data Protection Inspectorate is the competent authority trusted with the task of ensuring compliance with national data protection law, namely with Law of the Republic of Lithuania on Legal Protection of Person Data. Article 12 of the Law lays down certain investigatory powers of the Inspectorate over natural persons following a court order and the power to initiate court proceedings based on the findings of the investigation for infringements of the processing of personal data. There is not, however, a mention of powers to investigate courts within or beyond their judicial activities.[16] In Poland, the supervision of data protection is by the national council of the judiciary or the president of the respective courts.

Apart from the provisions on DPOs and DPAs, there is one other instance where the GDPR mentions courts 'acting in their judicial capacity', and that is Article 9(2)(f). Article 9 of the GDPR deals with special categories of personal data, such as data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, often referred to as 'sensitive data'. Processing of such sensitive data is prohibited, unless one of the exemptions in Article 9(2) applies. The exemption mentioned in Article 9(2)(f) is processing of sensitive data necessary for the establishment, exercise, or defence of legal claims or whenever courts are acting in their judicial capacity. In other words, courts acting in their judicial capacity are allowed to process sensitive data.

The question whether the GDPR applies to courts is clearly answered in Recital 20 of the GDPR: 'this Regulation applies, inter alia, to the activities of courts and other judicial authorities.' This recital also explains why the courts are exempted in some provisions: 'in order to safeguard the independence of the judiciary in the performance of its judicial tasks, including decision-making.' While the protection of an independent judiciary is understandable, it is not immediately clear how the general rule of GDPR applicability to the judiciary and the exemptions listed for the judiciary relate to each other, particularly when it comes to supervision. Recital 20 states that 'the competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity', but provides only very limited guidance as to how to arrange supervision for the courts: 'Union or Member State law could specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities.' However, no such EU law exists to date and also national law is very limited in this respect. Recital 20 states that it is possible to entrust the supervision of data processing to 'specific bodies within the judicial system

14 Ch III, pt 11, Supervision of the courts s 37. (1) The Court Administration shall carry out supervision in accordance with Chs VI and VII of the General Data Protection Regulation of the processing of data carried out for the courts when they do not act in their capacity of courts. (2) With respect to other processing of data, the decision must be made by the relevant court. An interlocutory appeal against the decision may be lodged with a higher court. For special courts or tribunals whose decisions cannot be brought before a higher court, an interlocutory appeal against the decision referred to in the first sentence of this subsection may be lodged with the high court in whose district the court is located. The time allowed to lodge an appeal is 4 weeks from the day when the decision was notified to the individual concerned.

15 Finnish Data Protection Act (1050/2018) (*Tietosuojalaki*, 1 March 2000). pp. 18. <https://www.finlex.fi/en/laki/kaannokset/2018/en20181050.pdf>.

16 Art 12. Powers and Rights of the State Data Protection Inspectorate (2) . . . Access to the residential premises (including those rented or used on any other grounds) of a natural person where documents and/or equipment related to personal data processing are kept shall be permitted only upon producing a court order authorizing access to the natural person's residential premises; (7) [The DPA shall have the power] to take part in court proceedings concerning infringements of the provisions of international, EU and national law on the issues personal data protection.

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of the Member State'. As will be explained in 'Courts and other judicial authorities' section, Member States have arranged this in different ways.

A final remark on the GDPR text in relation to the judiciary can be made on the confusing phrasing in Recitals 20 and 97. Recital 20 mentions 'courts and other judicial authorities' and Recital 97 mentions 'courts or independent judicial authorities'.[17] The articles of the GDPR do not use this phrasing. 'Other judicial authorities' section will discuss, based on country analyses, how 'other courts' or 'independent judicial authorities' relate to the regular judiciary.

Case law on this topic is scarce, but potentially interesting case law may follow from a Dutch case, in which the Dutch DPA refused an enforcement request from a citizen towards a judicial authority. The Dutch DPA considered itself not competent to act on the basis of the GDPR. Since this case dealt with the concept of 'acting in its judicial capacity', the Dutch court forwarded this question to the Court of Justice of the EU for a preliminary ruling.[18]

In Spain, before the passing of Organic Law 3/2018, the Supreme Court decided, in the case of Juan Carlos Trillo Alonso,[19] that the Spanish Data Protection Agency does not have the competence to ensure that the courts comply with Spanish Data Protection Law (Organic Law 15/1999). Such competences lie with the General Council of the Judiciary (*Consejo General del Poder Judicial-CGPJ*), which is the constitutional body that governs the entire judiciary of Spain. The president of the CGJP is also president of the Supreme Court.

The LED and the judiciary

The provisions in the LED that relate to (supervision of) the judiciary are similar to those in the GDPR. Supervision concerns internal supervision by the DPO and external supervision by the DPA. Internal supervision by a DPO is mentioned in Recital 63 and regulated in Article 32(1) of the LED. Data controllers should designate a DPO, but Member States are allowed to exempt courts and other independent judicial authorities when acting in their judicial capacity. This means there are two options. Either a country does not use this exemption, in which case the LED prescribes designation of a DPO, or a country decides (via the implementation of the LED in national law) that the judiciary is exempted. In the latter case, the LED does not prescribe what should be done—it may be argued that no DPO or internal supervision is required in that case.

For external supervision, Article 45(2) of the LED prescribes that each Member State shall provide for the DPA not to be competent for the supervision of data processing of courts when acting in their judicial capacity.[20] Similar to the analogous provision in the GDPR, this leaves less leeway than the DPO provision: countries are not allowed to let DPAs supervise courts when acting in their judicial capacity. What 'acting in their judicial capacity' means, is not entirely clear and will be discussed in 'Acting in a judicial capacity' section. Most, but not all, countries investigated understand this as courts can act either in their judicial capacity (ie adjudication) or in other capacities (ie advisory tasks, day-to-day operations, etc). The courts are then within the scope of national DPAs when not acting in their judicial capacity. The LED, like the GDPR, does not indicate who should be supervising the courts when acting in their judicial capacity. In practice, the most common solution is supervision of courts by a designated department, committee, or council within the judiciary. 'Courts and other judicial authorities' and 'Acting in a judicial capacity' sections will discuss this in more detail.

Article 45(2) of the LED contains another sentence, stating that countries may provide for their DPA not to be competent to supervise data processing of other independent judicial authorities when acting in their judicial capacity. Hence, for other independent judicial authorities, there is leeway to decide whether they are within the scope of DPAs. Since the LED focuses on criminal law, it can be argued that 'other independent judicial authorities' in this context only refer to authorities in criminal law (most obviously public prosecution services, but also probation and parole boards and other agencies making decisions in criminal matters). Since criminal law, contrary to other legal areas like civil law or administrative law, is highly regulated by governments, few arbitration courts exist outside the regular judiciary. In some cases, courts dealing with issues on national security and intelligence, courts dealing with military law or courts dealing with disciplinary law in a criminal law context (for instance, forensic psychiatry or psychology), may be positioned outside the regular judiciary.[21] See 'Other judicial authorities' section for more on this.

The text of Recital 80 of the LED is mostly the same as in Article 45(2), stating that the LED applies to the judiciary

17 This can be understood as Recital 20 referring to the general application and Recital 97 referring to a derogation.

18 Case UTR 19/1627 and UTR 19/1761, [2019] Rechtbank Midden-Nederland (The Netherlands) ECLI:NL:RBMNE:2020:2028 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2020:2028>.

19 https://supremo.vlex.es/vid/-342728530.

20 Paul de Hert and Juraj Sajfert, 'The Role of the Data Protection Authorities in Supervising Police and Criminal Justice Authorities Processing Personal Data' in C Brière and A Weyembergh (eds), *The Needed Balances in EU Criminal Law: Past Present and Future* (Hart Publishing 2018).

21 cf Wouter Teeuw and others, '*Security Applications for Converging Technologies: Impact on the constitutional state and the legal order*' (WODC, The Hague 2008) O&B 269.

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that data protection in courts when acting in their judicial capacity is not to be supervised by DPAs, but that for other independent judicial authorities, DPAs can be made the supervising authority. Recital 80 does not provide guidance on who should supervise data protection in courts when acting in their judicial capacity, but does state that courts and other judicial authorities are always to be subjected to independent supervision, in accordance with Article 8(3) of the Charter of Fundamental Rights of the EU. How this should be arranged is not explained.

Apart from the instances mentioned above, the LED mentions courts and other judicial authorities in Recital 20, which is also relevant in this respect. This recital states that countries are allowed to specify processing operations and procedures in national rules on criminal procedures relating to personal data processing by courts and other judicial authorities. At first sight, this recital seems to be addressed to giving countries sufficient leeway to address criminal law and procedures in national legislation, acknowledging that criminal law in the EU is still mostly national law and only harmonized at EU level to a limited extent. However, looking more closely at Recital 20, it can be seen that this recital explicitly mentions personal data contained in judicial decisions or records in relation to criminal proceedings. As will be explained in 'Acting in a judicial capacity' section, this provides an important clue as to which personal data may relate to data processing by courts *when acting in their judicial capacity*.

Courts and other judicial authorities

In order to assess the scope of the notion 'courts acting in their judicial capacities', it is necessary to first focus on the concept of courts, which will be done in this section and then focus on the concept of judicial capacities, which is the subject of the next section. This section provides a brief overview of our comparative analysis on how the judiciary and other judicial authorities are organized in the countries investigated. 'The regular judiciary' section focuses on the organization of the 'regular' judiciary. 'Other judicial authorities' section focuses on 'other judicial authorities', including the role of public prosecution services. 'European courts' section briefly discusses European courts.

'The regular judiciary'

EU and EEA Member States have organized their judiciary system in different ways. Some aspects, like the existence of district courts, courts of appeal and supreme courts are similar across all jurisdictions, but there also exist variations across countries, for instance, when it comes to specialized courts.

Within national constitutions, courts are typically described as having the power to administer justice. Constitutions usually simply mention 'courts of first instance' and 'courts of appeal', or even just 'ordinary courts'[22] (such as in Bulgaria,[23] Finland,[24] Ireland,[25] Latvia,[26] Liechtenstein,[27] Lithuania,[28], Portugal,[29] Poland,[30] and Romania[31]). Some constitutions directly refer to secondary legislation for the organization of the judiciary (such as Austria,[32] Croatia,[33] Cyprus,[34] France,[35] Germany,[36] Malta,[37] The Netherlands,[38] and Spain[39]). Specialized courts are rarely mentioned in constitutions, with the exception of martial (military) courts.[40] Some constitutions acknowledge the possibility for the creation of new categories of courts and/or specialized courts

22 For instance, the Constitution of Liechtenstein uses the term 'ordinary courts', see ch VIII, s B of the Liechtensteinian Constitution (*Verfassung des Fürstentums Liechtenstein*, 5 October 1921) <http://hrlibrary.umn.edu/research/liechtenstein-constitution.pdf>. The same applies to the Austrian Constitution, in Art 138(1)(b) (*Bundes-Verfassungsgesetz Österreich*, 25 July 2021) <https://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf>.

23 Art 119(1) of the Bulgarian Constitution (Конституция на Република България, 12 July 1991) <https://www.wipo.int/edocs/lexdocs/laws/en/bg/bg033en.pdf>.

24 Art 98 of the Finnish Constitution (*Tietosuojalaki*, 1 March 2000) <https://finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>.

25 Art 34(2) of the Irish Constitution, Constitution of Ireland/Bunreacht na hÉireann, 29 December 1937, http://www.irishstatutebook.ie/eli/cons/en/html#part11.

26 Art 82 of the Latvian Constitution (*Satversme*, 7 November 1922) <https://likumi.lv/ta/en/en/id/57980>.

27 Arts 95–105 of the Constitution of Liechtenstein (*Verfassung des Fürstentums Liechtenstein*, 5 October 1921) <http://hrlibrary.umn.edu/research/liechtenstein-constitution.pdf>..

28 Arts 84(11) and 111 of the Lithuanian Constitution (*Lietuvos Respublikos Konstitucija*, 25 October 1992) <https://www.wipo.int/edocs/lexdocs/laws/en/lt/lt045en.pdf>.

29 Art 209 of the Portuguese Constitution (*Constituição da República Portuguesa*, 25 April 1974) <https://dre.pt/part-iii>.

30 Art 175 of the Polish Constitution (*Konstytucja Rzeczypospolitej Polskiej*, 17 October 1997) <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

31 Art 126(1) of the Romanian Constitution (*Constituţia României*, 29 October 2003) <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

32 Art 83(1) of the Austrian Constitution, *Bundes-Verfassungsgesetz Österreich*, 25 July 2021, https://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf.

33 Art 118 of the Croatian Constitution (*Ustav Republike Hrvatske*, 1 January 2014) <https://www.wipo.int/edocs/lexdocs/laws/en/hr/hr049en.pdf>.

34 Art 152 of the Constitution of Cyprus (16 August 1960) <https://www.constituteproject.org/constitution/Cyprus_2013.pdf?lang=en>.

35 Art 64 of the French Constitution (*La Constitution française du*, 4 October 1958) <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf>.

36 Art 92 of the German Constitution (*Grundgesetz für die Bundesrepublik Deutschland*, 23 May 1949) <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

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(for instance, in Bulgaria,[41] Finland,[42] France,[43] Germany,[44] Hungary,[45] Ireland,[46] Lithuania,[47] and Romania[48]).

Constitutions usually state that the jurisdiction of courts must be conferred by law, and courts are typically described as carrying out judgments in the name of the nation or the figurehead of the nation (for instance, in Liechtenstein,[49] Lithuania,[50] Poland,[51] and Spain[52]). Courts are usually described as being administered in public, except in circumstances which call for the protection of private or family life, or professional or commercial secrets. Courts and judges are almost always described as needing to embody one or multiple of the following characteristics: independence, impartiality, competence, and objectivity. Recent case law confirms that when judges are appointed and promoted by the Minister of Justice, this does not mean that these judges are not independent.[53] A German administrative court doubted its own independence, but a preliminary ruling of the CJEU showed that as long as functional independence exists, this is sufficient. There may not be doubts in the minds of the subjects of the law as to the imperviousness of that court to external factors, in particular any influence of the legislature and the executive and its neutrality.[54] Independence of the courts is of fundamental importance for the EU legal order and the rule of law.[55] Independence is also of crucial importance as a guarantee of the protection of rights that individuals derive from EU law.[56] The main criteria set for courts or tribunals include, inter alia, whether these are established by law, whether they are permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[57] The tasks of courts are usually described in terms of adjudication, administering justice, or enforcement of laws. Usually, judges are not permitted to hold any other office positions, and may not work in private establishments. A typical example of this is within the Lithuanian Constitution, which states that 'A judge may not hold any other elected or appointed office, may not work in any business, commercial, or other private establishments or enterprises.'[58] Constitutions sometimes explicitly state that the establishment of extraordinary courts of law is prohibited (for instance, in Bulgaria,[59] Denmark,[60] Finland,[61] Germany,[62] Latvia,[63] Lithuania,[64] and Romania[65]).

37 Art 99 of the Maltese Constitution (*Constitution of Malta / Konstituzzjoni ta' Malta*, 21 September 1964) <https://www.wipo.int/edocs/lexdocs/laws/en/mt/mt010en.pdf>.

38 Art 116(1) of the Dutch Constitution (*Nederlandse Grondwet*, 19 January 1983) <https://www.denederlandsegrondwet.nl/id/vjjdado5jqmb/grondwet_volledige_tekst>.

39 Art 122(1) of the Spanish Constitution (*Constitución Española*, 29 December 1978) <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>.

40 See for instance Art 119 of the Bulgarian Constitution (Конституция на Република България, 12 July 1991) https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm or Art 82 (n 26).

41 Art 119(2) of the Bulgarian Constitution (Конституция на Република България, 12 July 1991) <https://www.wipo.int/edocs/lexdocs/laws/en/bg/bg033en.pdf>.

42 Art 98 (n 24).

43 Art 34 of the French Constitution <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf>.

44 Art 101 of the German Constitution (*Grundgesetz für die Bundesrepublik Deutschland*, 23 May 1949) <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

45 Art 25(4) of the Hungarian Constitution (*Magyarország Alaptörvénye*, 1 January 2012) <https://www.constituteproject.org/constitution/Hungary_2013.pdf?lang=en>.

46 Art 34(3)(4) of the Irish Constitution (Constitution of Ireland/Bunreacht na hÉireann, 29 December 1937), <http://www.irishstatutebook.ie/eli/cons/en/html#part11>.

47 Art 111 of the Lithuanian Constitution (*Lietuvos Respublikos Konstitucija*, 25 October 1992) <https://www.wipo.int/edocs/lexdocs/laws/en/lt/lt045en.pdf>.

48 Art 126(6) of the Romanian Constitution (*Constituția României*, 29 October 2003) <https://www.presidency.ro/en/the-constitution-of-romania>.

49 Art 95(1) of the Constitution of Liechtenstein (*Verfassung des Fürstentums Liechtenstein*, 5 October 1921), <http://hrlibrary.umn.edu/research/liechtenstein-constitution.pdf>.

50 Art 109 of the Lithuanian Constitution (*Lietuvos Respublikos Konstitucija*, 25 October 1992), <https://www.wipo.int/edocs/lexdocs/laws/en/lt/lt045en.pdf.

51 Art 174 of the Polish Constitution (Konstytucja Rzeczypospolitej Polskiej, 17 October 1997) <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

52 Art 117(1) of the Spanish Constitution (*Constitución Española*, 29 December 1978) <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>.

53 Case C-272/19, *VQ v Land Hessen* [2020] ECJ, ECLI:EU:C:2020:535. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=228367&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2754888>.

54 Joint Cases C-585/18, C-624/18 and C-625/18, *AK and O* [2018] CJEU, EU:C:2019:982.

55 Case C-46/16, *Associação Sindical dos Juízes Portugueses* [2018] ECJ, EU:C:2018:117; Case C-274/14, *Banco de Santander* [2020] ECJ, EU:C:2020:17.

56 Cases C542/18 RXII and C543/18 RX II, *Review Simpson v Council and HG v Commission* [2020] ECJ, ECLI:EU:C:2020:232.

57 Case C-46/16 (n 55); Case C-503/15, *Margarit Panicello*, [2017] ECJ, ECLI:EU:C:2017:126.

58 Art 113 of the Constitution of the Republic of Lithuania (*Lietuvos Respublikos Konstitucija*, 25 October 1992), <https://www.wipo.int/edocs/lexdocs/laws/en/lt/lt045en.pdf>.

59 Art 119(3) of the Bulgarian Constitution <https://www.wipo.int/edocs/lexdocs/laws/en/bg/bg033en.pdf>.

60 Art 61 of the Constitution of Denmark <https://www.thedanishparliament.dk/-/media/pdf/publikationer/english/the_constitutional_act_of_denmark_2013,-d-,pdf.ashx>.

61 Art 98 (n 24.

62 Art 101 of the German Constitution (n 44).

63 Art 86 of the Latvian Constitution (Satversme, 7 November 1922) <https://likumi.lv/ta/en/en/id/57980>..

64 Art 111 of the Lithuanian Constitution (n 28).

65 Art 126(5) of the Romanian Constitution (*Constituția României*, 29 October 2003) <https://www.presidency.ro/en/the-constitution-of-romania>.

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Other judicial authorities

Apart from the 'regular' judiciary, all countries examined have legislation that allows for establishing 'other judicial authorities'. Such authorities outside the regular judiciary can be specialized courts or tribunals, sometimes of a temporary nature or with limited competences and authority.

In some countries, constitutional courts are considered as separate from the judiciary by the constitution (this is the case, for instance, in Bulgaria,[66] Finland,[67] and Germany[68]) and/or by established jurisprudence; a typical example of this is the constitutional court (*Tribunal Constitutional*) in Portugal.[69] In some countries, quasi-judicial authorities are subject to a separate set of specific laws applicable to only quasi-judicial authorities, either through the consent of those institutions (such as in Croatia)[70] or by default due to the nature of their activities (such as in Denmark).[71] Institutions that are generally considered to be quasi-judicial by the legislator include: authorities that conduct public administrative functions (such as in Denmark), courts of arbitration and arbitration boards (such as in Croatia, Germany, Liechtenstein, and the Netherlands), disciplinary bodies or first instance bodies examining objections to taxation or asylum decisions (such as in Cyprus), military courts, courts dealing with issues on national security and intelligence, and private sector institutions (such as in Denmark). In addition, some 'regular' courts are considered to have certain quasi or non-judicial functions; an example of this would be the Auditors Court of Portugal, which has 'pure' court functions, such as the supervision of the legality of the public expenses and the judging of public accounting, but also advising functions, namely to give opinions on state accounts to be reviewed by parliament, which could be considered as a non-judicial function.[72] Also, some courts and tribunals may have a temporary nature, which sets them apart from the judiciary.

Although the term 'other independent judicial authorities' at first sight seems very broad and its scope unclear, when looking into national legal systems, it is quite straightforward to determine on the basis of ECJ case law, which authorities fall into this category: the main criteria set for courts or tribunals include, inter alia, whether these are established by law, whether they are permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent.[73] Authorities established via self-regulation, for instance for mediation or alternative dispute resolution, are not in scope of this notion.

A special category that needs to be discussed within the scope of 'other judicial authorities' are the public prosecution services. The distance between the judiciary and the prosecution services varies from country to country. In some countries, the prosecution services work closely with the judiciary, sometimes located in the same buildings, whereas in other countries, a clear separation exists between these organizations. For instance, in France, prosecutors are members of the judiciary, ie the body of the judicial authority includes judges and prosecutors. During criminal investigations, in some countries examining magistrates (who are judges) oversee the pre-trial investigations and the use of police competences (which means they play an important role in the criminal investigation and prosecution). Examining magistrates have an important role in France (*juge d'instruction*) and also exist in Spain (*juez de instrucción*), the Netherlands (*rechter-commissaris*), Belgium (*onderzoeksrechter/juge d'instruction*), and Greece. However, Portugal and Italy have abolished the position of examining magistrates. In Italy, the constitutional court also ruled that the various functions of the national member of Eurojust were not judicial in nature.[74]

Also important in this respect is that in some countries, public prosecution services are allowed to settle or sanction cases when dealing with minor offences. For instance, in the Netherlands, the public prosecution service is competent to sanction criminal offences which have a maximum sentence of up to 6 years imprisonment in the Dutch Criminal

66 Art 119 of the Bulgarian Constitution distinguishes a Supreme Court of Cassation and a Supreme Administrative Court (Конституция на Република България, 12 July 1991) <https://www.wipo.int/edocs/lexdocs/laws/en/bg/bg033en.pdf>..

67 Art 98 of the Finnish Constitution distinguishes a Supreme Court and a Supreme Administrative court (n 24).

68 Art 95(1) of the German Constitution distinguishes five supreme courts, Grundgesetz für die Bundesrepublik Deutschland, 23 May 1949 <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

69 Acórdão do Tribunal Constitucional 171/92 BMJ 427.

70 The Croatian Law on Arbitration (Courts Act, Official Gazette 88/01), Zakon o sudovima, November 2010, and the Law on Conciliation (Mediation Act, Official Gazette 18/11), Zakon o mirenju, 2 February 2011, regulate quasi-judicial bodies, but these laws only apply to parties who have consented to them and have completed a specific legal procedure.

71 Administrative bodies are by default considered quasi-judicial via the Danish Public Administration Act (*Forvaltningsloven*, 1 January 1970) and the Danish Access to Public Administration Files Act (*Offentlighedsloven*, 1 January 2014).

72 <https://www.tcontas.pt/pt-pt/Pages/homepage.aspx>; see also https://en.wikipedia.org/wiki/Judiciary_of_Portugal#Auditors_Court.

73 See n 57.

74 <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2011136_DeSiervo_Gallo_en.pdf>.

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Code.[75] This includes shoplifting, threats, and driving under influence. The prosecution service cannot impose prison sentences, but can impose fines, community service, or compensation to victims. Usually, these (criminal) sanctions also result in (additions to) a criminal record of the offender.

EU case law has previously judged under which circumstances a public prosecutor's office (or equivalently named) cannot be considered a judicial authority for the purposes of issuing arrest warrants.[76] While not directly related to the question under scrutiny, the analysis employed by the CJEU is instructive. The CJEU confirmed its earlier jurisprudence that the concept of 'judicial authority' is not limited to only judges or courts, but applies more broadly to the authorities 'participating in the administration of criminal justice'. However, a judicial authority is identified in the CJEU jurisprudence with respect to its capability to exercise its responsibilities objectively and its independence must be guaranteed by statutory rules and an institutional framework. Thus, despite the sometimes blurred relationship that public prosecutors have with Ministries of Justice, the mere fact that the executive branch of the government may issue an instruction to a prosecutor, whether that power is exercised or not, has been adjudged as disqualifying the prosecutor from being a 'judicial authority' for the purposes of issuing European arrest warrants. However, the CJEU stated it is possible that public prosecutor's offices can be deemed as judicial authorities if they are sufficiently independent.[77]

Case law supports that a public prosecutor's office and similar entities cannot, as a rule, be considered as qualifying for exemption from DPA supervision, and that it would depend on the kind of functions being carried out. This originates from case law of the Italian constitutional court,[78] which had to decide on the nature of Eurojust's functions when a reference was made to it questioning the fitness of the Minister of Justice to appoint a national member to Eurojust.[79] The court noted that 'the decision to establish Eurojust does not grant that body any adjudicatory function or provide that it carries out activity conducive to the exercise of judicial functions by other supranational bodies. By contrast, it provides that Eurojust shall adopt as reference bodies the investigative or adjudicatory bodies from the individual states.' In contrast to the judicial bodies currently provided for under EU or international law, 'Eurojust thus operates in a manner ancillary to the operations of the judicial authorities of the Member States.'[80] Moreover, 'the activities of assistance, cooperation, support or coordination carried out by Eurojust for the national authorities in relation to investigations and prosecutions, the generic nature of these terms as well as the fact that such operations are not characteristic of judicial action mean that they are to be classified as administrative activities.'[81] The European decision does 'not grant any typically judicial power to the supra-national body, nor does it require individual Member States to grant their national members judicial powers to be exercised in their respective territories.'[82]

European courts

European and international courts do not fall within the scope of national legislation. Regulation 2018/1725 (on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices, and agencies) provides guidance on the scope of the EDPS.[83] Recital 74 states that the EDPS is not competent to supervise data processing activities of the CJEU. Article 10(2)(f) of this Regulation provides an exemption to the prohibition on processing special categories of personal data (sensitive data) if processed by the CJEU when acting in its judicial capacity.[84] Article 57(1)(a) states that the EDPS shall monitor and enforce data protection law by EU institutions and bodies, with the exception of the CJEU acting in its judicial

75 <https://www.om.nl/onderwerpen/strafbeschikking>.

76 Case C-509/18, *Minister for Justice and Equality v PF* [2019] ECtHR, ECLI:EU:C:2019:457. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0509>.

77 Case C-518/18, *RD v SC* [2019] CJEU, ECLI:EU:C:2019:546, lit 74. See also Cases C-566/19 PPU and C-626/19 PPU [2019] ECLI:EU:C:2019:1077 and ECLI:EU:C:2019:1012.

78 Case 136/2011 [2011] La Corte Costituzionale (Italy), ECLI:IT:COST:2011:136 <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2011136_DeSiervo_Gallo_en.pdf>.

79 The case involved a reference from the Lazio Regional Administrative Court concerning the appointment of the national member of Eurojust, which was assailed by the referring court on the grounds that the decision to appoint, which was made by the Minister of Justice, essentially amounted to a decision relating to the exercise of judicial functions which impinged upon the status of a magistrate, and should as such be reserved to the Supreme Council of the Judiciary. The Court considered the nature and scope of the various functions of the member of Eurojust and, found that these were not judicial in nature.

80 <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2011136_DeSiervo_Gallo_en.pdf> p 7.

81 <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2011136_DeSiervo_Gallo_en.pdf> p 8.

82 <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2011136_DeSiervo_Gallo_en.pdf> p 10.

83 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, OJ 2018 L 295 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725>.

84 Cf Case T-452/17 [2018] ECJ, ECLI:EU:T:2018:418.

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capacity. Given that the CJEU is an EU institution, this means that the EDPS is the supervisor for personal data processing by the CJEU when not acting in its judicial capacity. When the CJEU is acting in its judicial capacity, the court established via two decisions in October 2019 an internal supervision mechanism.[85] This mechanism concerns the handling of complaints by an internal committee. Furthermore, the CJEU has appointed a Data Protection Officer in relation to the processing of personal data in connection with the institution's non-judicial activities.[86]

Acting in a judicial capacity

This section analyses the notion of courts and other independent judicial authorities 'acting in their judicial capacities' as used in the GDPR and the LED. The analysis is based on a legal–textual analysis and empirical research results from the survey that was performed for this research. 'List of relevant aspects' section describes relevant aspects of this notion and 'Common understanding/shared interpretation' section examines to what extent there is a common understanding or shared interpretation of these understandings.

List of relevant aspects

When looking more closely at the notion 'courts and other independent judicial authorities acting in their judicial capacities', it consists of three elements, ie 'courts', 'other independent judicial authorities', and 'acting in their judicial capacity. The first and second elements were discussed in the previous section. Regarding the third element, there is an important linguistic issue and that is whether this third element ('acting in their judicial capacities') should be read as an *explanation/clarification* (courts and other independent judicial authorities always act in their judicial capacities) or as a *further specification* (courts and other independent judicial authorities can act in their judicial capacities, but could also act in other ways or capacities). Since the addition 'acting in their judicial capacity' is often accompanied by the word 'when' in the text of the GDPR and LED, it seems likely that it intends to be a further specification. However, this understanding is not followed by everyone, as will be explained below.

In general, it could be hypothesized that there are two possible interpretations for the notion of courts acting in their judicial capacity, namely a functional versus an institutional interpretation.

Functional interpretation

In this section, the notion of 'courts acting in their judicial capacity' can be contrasted with the notion of 'courts *not* acting in their judicial capacity'. In this interpretation, the addition 'acting in their judicial capacity' is a further specification. This means that a distinctive line can be drawn inside courts, as some of their operations and personal data processing concerns their judicial capacity, such as verdicts, case records, etc, and some of their operations and personal data processing do not concern their judicial capacity, such as their internal organization and processes, personnel, etc.

The difficulty with this interpretation is obviously where to draw the distinct line. It could be argued that this can be interpreted in a broad or narrow way. When interpreting judicial capacity in a narrow sense, only the processing of personal data that can be found in files of specific (civil law, criminal law, etc) cases processed by the courts are included. Personal data processing beyond this, for instance, by the personnel department of courts, is then beyond the scope of judicial capacity.[87]

When interpreting judicial capacity in a broad sense, every form of processing personal data related to the judicial tasks and processing of cases by the judiciary could be included. For instance, personal data processing by the personnel department of courts could be included in the scope of judicial capacity, because of the independent position of courts and their judges. In the broadest sense, this comes very close to the institutional interpretation.

Institutional interpretation

In the institutional interpretation, the notion of 'courts acting in their judicial capacity' can be contrasted with the notion of 'other organizations'. In this interpretation, the addition 'acting in their judicial capacity' is a further explanation or clarification: courts and other independent judicial authorities always act in their judicial capacities, but other organizations do not. This means that a distinct line can be drawn around the concept of

85 Decision of the Court of Justice of the EU of 1 October 2019 establishing an internal supervision mechanism regarding the processing of personal data by the Court of Justice when acting in its judicial capacity <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:C2019/383/02&from=EN> OJ C-383/02 [2019] and Decision of the Court of Justice of the EU of 16 October 2019 establishing an internal supervision mechanism regarding the processing of personal data by the General Court when acting in its judicial capacity, OJ C383/03 [2019] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:C2019/383/03&from=EN.

86 <https://curia.europa.eu/jcms/jcms/p1_2699101>.

87 Cf Bart Custers and Helena Ursic, 'Worker Privacy in a Digitalized World under European Law' (2018) 39(2) *Comparative Labor Law & Policy Journal* 323–44.

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courts and other independent judicial authorities. The difficulty with this interpretation is obviously where to draw the distinct line between courts and non-courts. As was discussed in 'Courts and other judicial authorities' section, the regular judiciary is usually clearly distinguishable, via constitutional anchoring or regulated by formal legislation, but when dealing with other independent judicial authorities, the scope is much less clear.

Both interpretations are now discussed to see how they can be supported or refuted. Arguments 'for' and 'against' each interpretation are provided based on the legal texts and actual practices.

Arguments 'for' the functional interpretation

Starting with the functional interpretation, the text of the LED provides some important clues in support of this interpretation. The first clue is Recital 20 of the LED, which mentions 'personal data contained in judicial decisions or records in relation to criminal proceedings'. This could be understood as 'acting in judicial capacity' referring to data in judicial decisions and court case records. Other personal data (such as personnel, finance, daily operations, etc) are not processed in a judicial capacity.

Another clue in support of the functional interpretation can be found in Recital 80 of the LED, stating that the exemption 'should be limited to judicial activities in court cases and not apply to other activities where judges might be involved in accordance with Member State law.' This could be read as: Courts are subject to DPA supervision when not processing court cases, but not for the data in court cases.

Arguments 'against' the functional interpretation

These two arguments above may be regarded significant, but it is important to note that these arguments are based on recitals of the LED (ie Recitals 20 and 80 of the LED), not on any articles. Furthermore, similar phrasing cannot be found in the GDPR at all, making these arguments arguably somewhat less strong.

Based on the legal text, also another argument refuting the functional interpretation can be constructed. It is clear that there should be independent data protection supervision for the judiciary (Article 8 of the Charter), but in order to ensure independence of the judiciary, it is exempted from DPA supervision. If this only applies to personal data in court cases, the question is where to draw the distinct line regarding which personal data and data processing activities are in scope or out of scope. This is not very clear, which raises the question if this is so important for the independence of the judiciary, why did the legislator not provide more guidance? Obviously, this question can also be raised for the institutional interpretation (see below), but with regard to the functional interpretation, it can be argued, from a formalistic point of view, that the independence of courts is interfered with (at least to some extent) if DPAs supervise them, or at least their personal data processing activities not related to court cases. The main argument would then be that the DPAs have a say in how the data is processed. Even if this would apply to some types of data processing seemingly not related to 'acting in its judicial capacity', such as personal data on judges or planning, it could be argued from this perspective that this should be covered by the independence requirement, since the ways in which such personal data are processed may influence the way courts can do their work.

When looking at actual practices, a total of 18 of the 30 countries investigated seem to adhere to the functional interpretation. Support for this can be found in cases in which DPAs supervise the judiciary for data processing activities not related to court cases. Typically, Austria, Croatia, Cyprus, the Czech Republic, Estonia, France, Germany, Greece, Ireland, Liechtenstein, Lithuania, Luxemburg, the Netherlands, Poland, Portugal, Slovenia, Spain, and Sweden seem to take this approach.

In Austria, if the courts act within the framework of the monocratic administration of justice, they are subject to the supervision of the DPA. There also exists case law to support this, as the CJEU rejected the references for preliminary rulings from two Austrian provincial courts in their capacity as commercial register courts on the grounds that these courts did not have to decide on any legal disputes, but acted as authorities keeping the commercial register.[88]

In Cyprus, when courts do not act in their judicial capacity, they are subject to DPA supervision. Typically, the publication of documents is not considered part of the adjudication process and as such is considered beyond 'acting in their judicial capacity'.[89]

In Estonia, the explanatory memorandum of the Estonian personal data protection act lists some situations where courts are considered to be acting in their judicial capacity and some situations where they are not considered to be acting in their judicial capacity.[90] For instance, it is explicitly mentioned that courts have been

88 See Case C-447/00 *Hollo Ltd.* [2002] ECLI:EU:C:2002:38 <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=46675&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2757915; and see Case C-182/00> Lutz GmbH and others [2002] ECJ, ECLI:EU:C:2002:19.

89 <https://www.whitecase.com/publications/article/gdpr-guide-national-implementation-cyprus>.

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entrusted with non-judicial tasks. The district courts have land registration departments that maintain land registers and marital property registers. Other registers include the commercial register, the register of non-profit associations and foundations, the commercial pledge register, and the ship register. All these registers are not considered to be conducting adjudication activities and therefore the DPA is competent to supervise them.

In France, as a general rule, all judicial authorities fall beyond the scope of the national DPA's (the CNIL's) supervisory competence when they are acting in their judicial capacity. Hence, they follow the functional interpretation. The French data protection act also states that the CNIL does not have the power to control such processing.[91]

In Germany, officials with certain judicial powers ('*Rechtspfleger*') and bailiffs can be supervised by the national DPAs. Some *Länder* (such as Bavaria)[92] differentiate according to the activity they are performing. For instance, officials with certain judicial powers ('*Rechtspfleger*') are, inter alia, responsible for individual inheritance proceedings. In these proceedings, they are independent, subject only to the law and supervision by national DPAs.[93] In addition, bailiffs may execute judicial instructions like the delivery of judicial orders and decisions. In these cases, the bailiffs cannot be supervised by the national DPAs.[94]

In Greece, all judicial authorities are supervised by the DPA, except when acting in their judicial capacities. So, when courts are processing personal data of their employees, this is within the scope of DPA supervision. Supervision for the processing activities in the scope of their judicial authority is not regulated, although the judiciary has proposed to establish a committee composed of judges for GDPR and LED compliance.

In Ireland, the Courts Service, the administrative service covering all courts, is supervised by the DPA (the Data Protection Commission) and complaints about the way the courts handle personal information should be reported to the Data Protection Commission, while the Service has its own data protection officer.[95] Court records are under the control of the courts and not the Courts Service.

In Liechtenstein, the DPA is competent to supervise personal data processing not related to adjudication, such as administrative matters of the courts.[96] Typical examples are the processing of personal data of court employees, data processing regarding budgetary issues, and the administration of court proceedings.

In Lithuania, all courts are supervised by the State Data Protection Inspectorate (the national DPA) when it comes to personal data processing, except in cases where personal data are processed while administering justice.[97] However, when it comes to the supervision of data protection of personal data in court cases, there is no institution supervising GDPR and LED compliance of the courts. Only the internal disciplinary boards (Judicial Court of Honour) or the ethics commission of the judiciary can look into this. The Council of Courts and the National Courts Administration do not have specific data protection supervision competences.

In Luxemburg, according to the *travaux parlementaires* of the data protection act, courts 'acting in their judicial capacity' refers to legal decision making by courts and not to decisions of a purely administrative nature.[98] Typical examples mentioned of the processing of personal data carried out by a court in its judicial capacity include its registry in order to correctly designate the parties to the dispute in the judgment, or to manage the list of pending cases and/or the personal data of the parties to the dispute and their representatives. However, the processing of personal data carried out in order to manage, for example, applications for recruitment, or the court's archives or access badges to the building and the car park will fall within the competence of the national DPA, the National Data Protection Commission, as in

90 See pp 38 and 39 (about § 40) of the legal text: Seletuskiri isikuandmete kaitse seaduse eelnõu juurde (25 May 2018) <https://www.riigikogu.ee/download/b7c9371a-7768-46b5-9d33-9eb4e3b98125>.

91 Art 19-V, loi 78-17 du 6 janvier 1978 relative à l'informatique, aux fichier et aux libertés (1 January 2020) <https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=CC47F0B78B17641C5438CE1524F30A74.tplgfr32s_3?idArticle=LEGIARTI000037822747&cidTexte=LEGITEXT0000060686624&dateTexte=20190723>.

92 Bayerisches Datenschutzgesetz (15 May 2018) <https://www.gesetze-bayern.de/Content/Document/BayDSG-34?AspxAutoDetectCookieSupport=1>.

93 Rechtspflegergesetz (5 November 1969) <https://www.gesetze-im-internet.de/rpflg_1969/__9.html>

94 The DPA of North Rhine-Westphalia just recently published a table with examples for processing operations where courts are acting in their judicial capacity and examples, which are not regarded as judicial activities. The guiding question for activities of judges in their judicial capacity thereby was, whether the processing operation in question is aimed at promoting a concrete judicial decision. The table is currently available only in German and can be accessed under: https://www.ldi.nrw.de/mainmenu_Ueberuns/submenu_UnsereAufgaben/Inhalt2/Datenschutz/LDI-NRW--Uebersicht-Abgrenzung-Verwaltungsaufgaben-und-rechtsprechende-Taetigkeit--2020-07.pdf.

95 <https://www.courts.ie/courts-data-protection-notice>

96 <https://www.gerichte.li/Datenschutz>.

97 Art 39.3 of the Law of the Law of the Republic of Lithuania on Legal Protection of Personal Data, Processed for the Purposes of Prevention, Investigation, Detection or Prosecution of Criminal Offences, or the Execution of Criminal Penalties, or National Security, or Defence, 21 April 2011, No XI-1336.

98 <https://chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=F8D841F69617CFB0F3C4EABA07B0A486CAEF532AD43FC10A14DB9C10A8E2684130EDC83D340C47DE511D7E4EBFA66904$57C39B068267DD4420035077693B356B> see p 46ff.

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this case the processing is purely administrative and not judicial in nature.

In the Netherlands, the work of the judiciary is beyond the scope of supervision of the DPA. However, the publication of court decisions and verdicts are within the scope of DPA supervision, according to the website of the Dutch DPA.[99]

In Portugal, the DPA supervises GPDR and LED compliance of the judiciary to the extent their data processing takes place beyond their judicial capacity. The national law implementing the LED, Law 59/2019 limits the DPA competence to data processing activities beyond adjudication in Article 43(2). Article 43(4) of the same act regulates that access to data and data processing logs by the DPA can only be carried out by the two DPA Commissioners who are magistrates (one judge and one public prosecutor, designated by the '*Conselho Superior de Magistratura*' and '*Conselho Superior do Ministério Público*', respectively). GPDR and LED compliance of any personal data processing by courts related to court cases is supervised by the judiciary itself.

In Slovenia, the DPA does not supervise courts (and other judicial authorities) in their judicial capacity.[100] The judiciary has organized its own data protection supervision for this. However, the DPA does consider within its scope the processing of personal data in criminal law cases and the processing of personal data by courts when not acting in their judicial capacities.[101]

In Spain, the law does acknowledge that courts may process data for 'non-jurisdictional purposes'.[102] Article 236 ter of the *Ley Orgánica 6/1985 del Poder Judicial* (last amended in 2019) on the structure of the Spanish judiciary, states that 'courts may process personal data for jurisdictional or non-jurisdictional purposes. In the first case, the treatment will be limited to the data as long as they are incorporated into the processes they know and their purpose is directly related to the exercise of jurisdictional power.' In the cases in which data are processed for non-jurisdictional purposes, the Spanish DPA may supervise courts. Article 235 nonies of the same law states that the DPA is the supervisory authority with respect to data processing for non-jurisdictional purposes and their corresponding files.

Arguments 'for' the institutional interpretation

Looking at the institutional interpretation, the question can be raised why the legislator added the phrasing 'acting in their judicial capacity', as it seems redundant. The addition 'acting in their judicial capacity' may be intended to clarify why it is important to exempt the judiciary from supervision of the DPAs, namely to guarantee its independence. Support in the legal texts for the institutional interpretation can therefore be constructed on the basis of the argument that data protection supervision needs to be independent. So, for instance, Article 55(3) of the GPDR ('supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity') should then be read as: 'supervisory authorities shall not be competent to supervise processing operations of courts *because they are* acting in their judicial capacity.' This argument is perhaps not very strong, since at most points in the legal texts, the phrase 'acting in their judicial capacity' is used in combination with the word 'when' (ie 'when acting in their judicial capacity').

Despite the lack of direct support for the institutional interpretation, 7 of the 30 countries investigated seem to adhere to this interpretation. According to our survey results, completed by the DPAs in these countries, in Belgium,[103] Bulgaria,[104] Denmark,[105] Hungary,[106] Latvia, Malta,[107] and Romania[108] the DPA is completely excluded from any form of supervision of personal data processing

99 <https://autoriteitpersoonsgegevens.nl/nl/onderwerpen/politie-justitie/justitie>.

100 The second draft of the PDPA-2 (<https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=10208>) does not provide for a definition of the notion 'acting in their judicial capacity'. Nevertheless, looking at its provisions (in particular arts 38, 39, and 46), it is clear that the exemption will not apply only to ordinary courts but also to other authorities/bodies that act in semi-judicial capacity such as public prosecutors, execution officers and (bankruptcy) liquidators, Constitutional Court, Ombudsman, etc. For these bodies, supervision of the national DPA will only apply if such bodies will act outside of their judicial capacity. As this is just a draft law which could be still changed (either based on the inter-governmental negotiations or through the parliament procedure), the relevant articles have not been studied in-depth.

101 Also see: 'Commentary to the Draft GDPR Implementation Law' p 111 <https://www.gov.si/assets/ministrstva/MP/ZVOP-2-14.8.19.pdf>.

102 See: Article 236ter Ley Orgánica 6/1985 (last amended on 25/07/2019), del Poder Judicial <https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666&tn=1&p=20190725>.

103 <https://www.gegevensbeschermingsautoriteit.be/burger/faq/wat-wordt-bedoeld-met-het-begrip-overheidsinstantie-en-overheidsorgaan-in-artikel-37-van-de-avg>.

104 Survey answer:

> All of the above judicial authorities are supervised by the Inspectorate of the Supreme Judicial Council. This independent body is established under Article 132a of the Constitution of the Republic of Bulgaria, with a mandate to inspect the activity of the judiciary bodies without affecting their independence and making recommendations and reports. It is composed by an Inspector General and ten inspectors, elected by the National Assembly by a majority of two thirds of the Parliament Members. The Commission for Personal Data Protection, acting as DPA, is not entrusted in the supervision of courts, prosecuting and investigating authorities.

105 Art 67(1) of the Danish Data Protection Act <https://rm.coe.int/16806af0e6>.

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operations, even if the personal data does not relate to court cases and adjudication. In some of these countries, such as Bulgaria and Hungary, data protection compliance is supervised by the judiciary itself, internally via DPOs, an ombudsman, special departments or committees or the courts higher in the hierarchy. Some countries have chosen not to exempt courts from DPA supervision, so that the DPA is responsible for supervising data protection compliance. Some countries even have a gap in the supervision (leaving the question *Quis custodiet ipsos custodes?* unanswered). For instance, in Belgium, the DPA is not competent to supervise data protection in courts or tribunals, meaning they are not competent to do this, not even when the courts do not act in their judicial capacity. No specific authority has been designated to be competent to supervise courts and tribunals.[109] Similarly, in Malta, the DPA is not competent to supervise any type of personal data processing by the courts. Both in Belgium and Malta, websites of the judiciary indicate to contact them or the DPA in case of complaints.[110]

In Bulgaria, data protection activities within the judiciary are supervised by the Inspectorate of the Supreme Judicial Council.[111]

In Denmark, data protection activities are supervised by the Court Administration. This is laid down in Article 67(1) of the Danish Data Protection Act. Section 38 of the *Retshåndhævelsesloven*, the act that implements the LED, explicitly mentions that the Court Administration shall carry out supervision in relation to the processing of personal data carried out for the courts when they do not act in their capacity of courts.

In Hungary, general supervision of the judiciary, including data protection law compliance, is conducted by the Hungarian National Authority of the Judiciary (in Hungarian: *Országos Bírósági Hivatal, OBH*).[112] After a controversy in 2011, in which president Orban terminated the term of the data protection commissioner,[113] most of the data protection supervision was moved from the DPA to the Commissioner for Fundamental Rights.[114]

In Latvia, all courts are beyond the scope of supervision of the national DPA. The main supervisory authority is the Ministry of Justice, which is responsible for the institutional governance of district and city courts, regional courts and land registry offices, and may issue internal regulations as well as investigations on these courts. The Supreme Court is largely supervised by itself, specifically by the Chief Justice of the Supreme Court, which organizes the work of the Supreme Court.[115]

In Romania, all courts fall within the scope of 'judicial authorities acting in their judicial capacities'. The Romanian DPA is not competent to supervise any data processing in the judiciary. The Romanian DPA has referred any issues related to data protection supervision to the Superior Council of Magistracy and the Ministry of Justice of Romania. So far, the Romanian Superior Council of Magistracy did not establish a specific body within the judiciary that is entrusted with data protection supervisory competence.

In Slovakia, the supervision of data protection over courts is approached in a different way. In Slovakia, supervision is distinguished in proceedings and inspections. The national DPA is fully competent when it comes to proceedings (regardless of whether personal data are processed in judicial or non-judicial tasks). When personal data in courts are processed in the scope of judicial tasks, the Ministry of Justice is authorized for inspections (whereas the DPA is authorized for proceedings).[116] So, according to Section 81.7 of the Slovak Data Protection Act, if courts are acting in their judicial capacity, the inspection is carried out by the Ministry of Justice, but the data protection proceedings are conducted by the DPA.[117] For other judicial or quasi-judicial authorities (apart from courts), the DPA is fully competent to carry out inspections and exercise supervision.

106 Note that the website of the Hungarian DPA suggests that courts when not acting in their judicial capacity are subject to supervision of the DPA. However, in the survey the DPA indicates that the DPA is completely excluded from data protection supervision in the judiciary.

107 Survey answer: 'All courts, including the ones mentioned in question 1.4 are in scope of art. 55(3) GDPR and art. 45 LED, which means they are beyond the scope of supervision of the national DPA.'.

108 Survey answer: 'In this respect, the Romanian supervisory authority has referred these issues to the Superior Council of Magistracy and the Ministry of Justice of Romania. So far, the Romanian Superior Council of Magistracy did not indicate the specific body within the judiciary system that would be entrusted with the supervisory competence, so that the DPA institution is unaware of it.'.

109 <https://www.gegevensbeschermingsautoriteit.be/burger/faq/wat-wordt-bedoeld-met-het-begrip-overheidsinstantie-en-overheidsorgaan-in-artikel-37-van-de-avg>.

110 <https://judiciary.mt/en/Pages/footer/Privacy-Policy.aspx>.

111 <https://www.inspectoratvss.bg/en/page/175>.

112 <https://birosag.hu/en/node/30846>.

113 <https://www.reuters.com/article/us-eu-hungary-idUSBREA370TX20140408>.

114 <https://www.ajbh.hu/en/web/ajbh-en/main_page>.

115 <http://www.at.gov.lv/en/par-augstako-tiesu/priekssedetajs/priekssedetaja-kompetence>.

116 <https://dataprotection.gov.sk/uoou/en/content/activities-office-0> 'Where personal data are processed by the courts when acting in their judicial capacity, personal data protection supervision is exercised by the Ministry of Justice of the Slovak Republic pursuant to sections 90 to 98.'.

117 <https://dataprotection.gov.sk/uoou/en/content/national-legislation>.

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Table 1. Overview of support for both interpretations of 'acting in their judicial capacity'

	Functional interpretation	Institutional interpretation
Support in the legal documents	Recital 20 LED Recital 80 LED	None
Support in the survey	Austria, Croatia, Cyprus, the Czech Republic, Estonia, France, Germany, Greece, Ireland, Liechtenstein, Lithuania, Luxemburg, the Netherlands, Poland, Portugal, Slovenia, Spain, and Sweden	Belgium, Bulgaria, Denmark, Hungary, Latvia, Malta, Romania, Slovakia

Arguments 'against' the institutional interpretation

The arguments against the institutional interpretation are to be found in both the legal analysis and the survey revealing actual practices. The legal analysis shows some clues against the institutional interpretation. First, the use of the word 'when' in the phrase 'when acting in their judicial capacity', suggesting some actions are beyond judicial capacity. Secondly, Recitals 20 and 80 of the LED are contra-indications for the institutional interpretation. Thirdly, the addition 'when acting in their judicial capacity' seems redundant if the institutional interpretation is followed.

In practice, however, the majority of the countries investigated do not follow the institutional interpretation, providing little support on the ground for this view. That is not to say the majority is always right, it only shows limited use in practice. However, looking at the countries that do support the institutional interpretation, it can be argued that there is a scattered landscape with a variety of interpretations, as described above. This lack of uniformity on the institutional interpretation can be considered as a weak point, as obviously it is not clear and shared understanding on how the institutional interpretation should work in practice.

Common understanding/shared interpretation

Table 1 summarizes the findings in this section, by showing support for both the functional and the institutional interpretation of 'courts acting in their judicial capacity'. The legal documents mostly support the functional interpretation, although this support is somewhat weak and not conclusive. The research findings show a clear majority of countries adhering to the functional interpretation and a minority of countries following the institutional interpretation.

The functional interpretation is quite homogeneous and explicit, splitting supervision into two parts, executed by the DPA for non-judicial tasks and by internal judiciary bodies for judicial tasks. The institutional interpretation shows rather heterogeneous solutions for data compliance supervision, with almost[118] full DPA supervision (including parts of the judicial capacity of courts) in Slovakia, no DPA supervision (including for the non-judicial tasks of courts) in Bulgaria, Denmark, and Hungary, to no clear and specific data protection supervision for courts at all (in Belgium, and Malta).

Some countries charge the Ministry of Justice with the role of data protection supervision over courts when acting in their judicial capacity. This is the case in Latvia, Romania, and (for inspections) Slovakia. It can be questioned how this relates to the protection of the independent position of the judiciary. For these countries, there may be concerns regarding the separation of powers according to the *trias politica*.[119] In Hungary, the Venice Commission confirmed that the democratic separation of powers is no ideal in this situation.[120]

In summary, the legal documents point somewhat in the direction of the functional interpretation and the survey results point strongly in the direction of the functional interpretation. Eighteen countries adhere to the functional interpretation and eight countries follow the institutional interpretation.[121] The functional interpretation is followed in quite similar ways in the first group of countries, whereas the institutional

118 In Slovakia, supervision is distinguished in proceedings and inspections. The national DPA is fully competent when it comes to proceedings (regardless of whether personal data is processed in judicial or non-judicial tasks). When personal data in courts are processed in the scope of judicial tasks, the Ministry of Justice is authorized for inspections (whereas the DPA is authorized for proceedings).

119 Cf case C-272/19 (n 53): 'The mere risk of political influence being applied to the courts or tribunals, by means of, inter alia, the facilities or staff allocated by the Ministry of Justice, is sufficient to create a risk of interference in their decisions and to affect the independence of the court or tribunals in the performance of their tasks.'.

120 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e>.

121 Our study did not yield conclusive results on Finland, Iceland, Italy, and Norway.

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Table 2. Distinguishing 'acting in their judicial capacity' from 'not acting in their judicial capacity'

	Acting in judicial capacity	Not acting in judicial capacity
Examples of court activities	Primary court processes: Preparing court cases, hearing opposing parties, making decisions in court cases, archiving court records	Secondary court processes: HR/Personnel, finance/accounting, quality management, change management, planning, security, organizational strategy, PR/communications, IT
Examples of personal data	Data on suspects, witnesses and victims (criminal law), data on litigating parties (civil law and administrative law), statements of experts or witnesses, data in verdicts, data on lawyers representing litigating parties	Data on employees, data on wages, data on projects within courts, CCTV images from security cameras, data in press releases, data on lawyers if not connected to specific court cases

interpretation is followed in very different ways in the second group of countries. Some of the practices in the second group may raise concerns, such as limited or no data compliance supervision for the judiciary (interfering with Article 8 of the Charter) and supervision of the judiciary by the ministry of justice (the executive branch, potentially interfering with the separation of powers according to the *trias politica*).

The functional interpretation and the way it is implemented in countries following this interpretation raises two issues. The first issue is how to distinguish acting in a judicial capacity from not acting in a judicial capacity. This can be distinguished by looking more closely into the court activities and the personal data that is processed in the scope of these activities. Acting in judicial capacity refers to the primary court processes, such as preparing court cases, hearing the positions of and evidence brought in by litigating parties, making decisions in court cases, and archiving court records. Typically, the personal data processed in the scope of these activities include data on suspects, witnesses and victims (criminal law), data on litigating parties (civil law and administrative law), statements of experts or witnesses, and data in verdicts. Basically, the main criteria that are unique for courts or tribunals include, inter alia, whether these are established by law, whether they are permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent.[122]

Not acting in judicial capacity refers to secondary court processes, which any organization typically has. Such processes include HR/Personnel, finance/accounting, quality management, change management, planning, security, organizational strategy, PR/communications, IT. Typically, the personal data processed in the scope of these activities include data on employees, data on wages, data on projects within courts, CCTV images from security cameras, and data in press releases. In some countries, the judiciary is also consulted for advice, for instance, when the government is preparing new legislation. In some countries, courts also perform registration activities, such as land registers and marital property registers in Estonia. Such advisory activities and registration activities are not within the scope of 'acting in judicial capacity'. Although this may seem straightforward for many activities and types of personal data, there may exist grey areas. For instance, personal data on lawyers may be in scope of 'acting in judicial capacity' if the data are related to a specific court case in which a lawyer is representing a client. However, if the data are not related to a specific court case, for instance, when the contact details of lawyers in a specific district are on a communication list (say a list of e-mail addresses to for a newsletter), such data are not related to acting in judicial capacity. Table 2 provides an overview of examples of court activities and personal data processed within these activities.

In summary, personal data in (criminal, civil, administrative, etc) law court cases, ie in the documents processed in such cases, are in the scope of the judicial capacity. This concerns (personal data in) documents such as verdicts, case records, etc. Personal data processed by courts not related to the contents of court

122 See n 57.

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cases, such as data related to their internal organization and processes, personnel, etc., are beyond the scope of the judicial capacity. Support for this distinction can also be found in Recital 20 and Recital 80 of the LED. Recital 20 explicitly mentions personal data contained in judicial decisions or records in relation to criminal proceedings as data falling within the scope of a judicial authority's judicial capacity. Recital 80 states that '[the prohibition of DPA supervision] should be limited to judicial activities in court cases and not apply to other activities where judges might be involved in accordance with Member State law.' This could be read as: Courts are subject to DPA supervision when not processing court cases, but not for the data in court cases.

The second issue is, in cases in which DPAs are not in charge of supervising courts, then who is? According to Article 8 of the Charter of Fundamental Rights of the EU, there must be supervision. This is confirmed in Recital 20 of the GDPR that explicitly states that the GDPR also applies to the judiciary.[123] However, the legal framework provides very little guidance on how data protection supervision for the judiciary should look for the situations the DPAs are not allowed to supervise. Countries can provide guidance on this via additional policies and legislation, but this is currently not used according to our survey results. In at least 18 of the 30 countries examined (those following the functional interpretation, see Table 1) the solution for supervising data protection in courts when acting in their judicial capacity is supervision by the judiciary internally. For this purpose, the judiciaries in these countries have arranged supervision internally via data protection officers, an ombudsman, special departments or committees, or the courts higher in the hierarchy. Even when data protection officers or other internal supervisors are established, they may only be competent for courts when not acting in their judicial capacity: for instance, in Germany, the data protection officer is generally not competent when courts are acting in their judicial capacity.[124] Other countries (eg Lithuania, Belgium, Malta) designated no institution at all to supervise the judiciary on data protection. Yet, some other countries (eg Latvia, Romania) have charged the ministry of justice with this.

Conclusions

Common understanding

The concept of 'other independent judicial authorities' can be contrasted with the 'regular' judiciary. The regular judiciary usually consists of three layers, ie, district courts or courts of first instance, courts of appeal, and supreme courts. Countries have organized this in their constitution, in specific acts on the judiciary system, or both. As a result, legislation in all countries examined allows for the establishment of other, sometimes quasi-judicial, authorities. A major category is the constitutional courts, which are considered as separate from the judiciary in Bulgaria, Finland, and Germany. Another major category is judicial authorities with a very specific scope, such as administrative courts, arbitration boards, and disciplinary bodies. Other, less often used examples of 'other independent judicial authorities' include bodies of a temporary nature and regular courts that exercise non-judicial functions, such as public accounting or advisory function on legislative proposals. Although the term 'other independent judicial authorities' at first sight seems very broad and unclear, when looking into national legal systems, it is quite straightforward to determine (based on ECJ case law) which authorities fall into this category: the main criteria set for courts or tribunals include, inter alia, whether these are established by law, whether they are permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent.[125] Authorities established via self-regulation, for instance for mediation or alternative dispute resolution, are not within the scope of this notion. Public prosecution services are a category apart, since in some countries they have limited adjudication competences and can issue criminal sanctions (eg when dealing with minor offences). If this is the case, public prosecution services can be regarded as 'other judicial authorities' for those specific tasks. Similarly, to the extent to which they take on such adjudication tasks, this also matches the notion 'acting in their judicial capacity.' The concept of 'courts acting in their judicial capacity' can be contrasted with 'courts not acting in their judicial capacity' or with 'other organizations'. The former we have called the functional interpretation, in which 'acting in their judicial capacity' is a further specification, and the latter we have called the institutional interpretation, in which 'acting in their judicial capacity' is a further clarification. Although our legal analysis shows a clear inclination of the legislator towards the functional approach, not all countries investigated adhere to this. Of the 27 EU Member States and the 3 EEA countries investigated

123 Cf also EDPS (2014) Opinion of the EDPS on the package of legislative measures reforming Eurojust and setting up the European Public Prosecutor's Office (EPPO) (*EDPS*, 5 March 2014) <https://edps.europa.eu/sites/edp/files/publication/14-03-05_opinion_eurojust_en.pdf>.

124 See, for instance (n 12).

125 See n 57.

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in this research, we were able to determine 18 countries adhering to the functional approach and 8 countries adhering to the institutional approach. The functional interpretation is followed fairly similarly in the first group of countries, whereas the institutional interpretation is followed in very different ways in the second group of countries. Some of the practices in the second group actually raise concerns, such as limited or no data compliance supervision for the judiciary (interfering with Article 8 of the Charter) and supervision of the judiciary by the ministry of justice (the executive branch, potentially interfering with the separation of powers according to the *trias politica*).[126] Altogether, it can be concluded from our legal analyses and the survey analyses that there is much more support for the functional interpretation. In other words, there is to a large extent a common understanding and this is the functional interpretation.

From this conclusion, it can be derived that the national DPAs are not allowed to supervise personal data protection issues in the courts when acting in their judicial capacity, but are allowed (and, given their expertise, most appropriate) to do so when the courts are not acting in their judicial capacity.

However, this raises two issues. The first issue is how to distinguish acting in a judicial capacity from not acting in a judicial capacity. The clearest way to distinguish this is to consider the personal data that is processed. Personal data in (criminal, civil, administrative, etc) law court cases, ie in the documents processed in such cases, are in the scope of the judicial capacity. This concerns (personal data in) documents such as verdicts, case records, etc. Personal data processed by courts not related to the contents of court cases, such as data related to their internal organization and processes, personnel, etc., are beyond the scope of the judicial capacity. Support for this distinction can also be found in Recitals 20 and 80 of the LED. Recital 20 explicitly mentions personal data contained in judicial decisions or records in relation to criminal proceedings as data falling within the scope of a judicial authority's judicial capacity. Recital 80 states that '[the prohibition of DPA supervision] should be limited to judicial activities in court cases and not apply to other activities where judges might be involved in accordance with Member State law.' This could be read as: Courts are subject to DPA supervision when not processing court cases, but not for the data in court cases.

The second issue is, in cases in which DPAs are not in charge of supervising courts, then who is? According to Article 8 of the Charter of fundamental rights of the EU, there must be supervision. This is confirmed in Recital 20 of the GDPR that explicitly states that the GDPR also applies to the judiciary.[127] However, the legal framework provides very little guidance on how data protection supervision for the judiciary should look for the situations the DPAs are not allowed to supervise. Countries can provide guidance on this via additional policies and legislation, but this is currently not used according to our research findings. In at least 18 of the 30 countries examined (those following the functional interpretation, see Table 1), the solution for supervising data protection in courts when acting in their judicial capacity is supervision by the judiciary internally. For this purpose, the judiciaries in these countries have arranged supervision internally via data protection officers, an ombudsman, special departments or committees, or the courts higher in the hierarchy. Even when data protection officers or other internal supervisors are established, they may only be competent for courts when not acting in their judicial capacity: for instance, in Germany, the court's data protection officer is generally not competent when courts are acting in their judicial capacity.[128]

Recommendations

Given that our research results show strong support (both from the legal analysis and the survey analysis) for the functional interpretation, this seems to be the most generally accepted approach (75 per cent of the countries on which information could be obtained), complemented with internal supervision for the judiciary when acting in their judicial capacity. It could be argued that the countries that opted for the institutional interpretation rather than the functional interpretation could reconsider this. However, countries that opted for full internal supervision of the judiciary, for all data processing regardless of whether it takes place in their judicial authority or not (eg Bulgaria, Denmark, Hungary), are allowed to do so, presuming that the internal supervision is independent as well. This model is compliant with all the legal provisions.

The legislator provided little guidance on data protection supervision over the judiciary in the legislation. By ruling that DPAs are not allowed to supervise parts

126 See also the broader discussion regarding the independence of the judiciary in Poland, case C-791/19, *European Commission v Republic of Poland*, ECJ, ECLI:EU:C:2021:597.

127 Cf also EDPS (2014) Opinion of the EDPS on the package of legislative measures reforming Eurojust and setting up the European Public Prosecutor's Office (EPPO) (*EDPS*, 5 March 2014) <https://edps.europa.eu/sites/edp/files/publication/14-03-05_opinion_eurojust_en.pdf>.

128 See n 12.

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of the work of the judiciary (for reasons of independence that are completely understandable), but not stating what the alternative is, the legislator has created confusion. The lack of guidance causes (or even forces) countries to create solutions themselves. Obviously, when each country has to develop its own solutions, this will result (and has resulted) in various solutions and a lack of harmonization. The clearest way forward would be appropriate guidance on this. This can be done by the legislator, for instance, by adding to the GDPR and LED a provision that the judiciary should arrange internal data protection supervision itself to the extent it is acting in its judicial capacity. The result would be further harmonization, providing clear and binding guidance.

Some may disagree that furthering a harmonized understanding and approach towards data protection supervision over the judiciary is something to strive for. However, from a legal perspective, it is clear that data protection legislation unabatedly applies to the judiciary and compliance needs to be supervised by independent authorities. Obviously, the main driver for compliance is to protect data subjects and the main reason for independent supervision is to protect the judiciary from influences of the executive branch. For these reasons, countries that did not (yet) implement data protection in the judiciary or independent supervision over the judiciary regarding data protection compliance should do so. The majority of countries have properly arranged this, so there are plenty of best practices to learn from.

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