

Opinion of the Board (Art. 64)



Opinion 8/2019 on the competence of a supervisory authority in case of a change in circumstances relating to the main or single establishment

Adopted on 9 July 2019

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The European Data Protection Board

Having regard to Article 63 and Article 64(2) of the Regulation 2016/679/EU 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 (hereinafter “GDPR”),

Having regard to the EEA Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018,

Having regard to Article 10 and Article 22 of its Rules of Procedure of 25 May 2018,

Whereas:

(1) The main role of the European Data Protection Board (hereafter the “Board”) is to ensure the consistent application of the GDPR throughout the European Economic Area. Article 64(2) of the GDPR provides that any supervisory authority, the Chair of the Board or the Commission may request that any matter of general application or producing effects in more than one EEA Member State be examined by the Board with a view to obtaining an opinion. The aim of this opinion is to examine a matter of general application or which produces effects in more than one EEA Member State.

(2) On April 30, 2019, the French and the Swedish Data Protection Authorities requested the Board to examine and issue an opinion on continuance of the competence of a national authority in case of a change in circumstances relating to the main or single establishment.

(3) The opinion of the Board shall be adopted pursuant to Article 64(3) of the GDPR in conjunction with Article 10(2) of the Rules of Procedure within eight weeks from the first working day after the Chair and the competent supervisory authorities have decided that the file is complete. Upon decision of the Chair, this period may be extended by a further six weeks taking into account the complexity of the subject matter.

HAS ADOPTED THE FOLLOWING OPINION:

1 SUMMARY OF THE FACTS

1. The French and the Swedish data protection authorities requested the Board to examine and issue an opinion on continuance of the competence of a national authority in case of a change in circumstances relating to the main or single establishment.
2. These changes may occur when:
 - a single or main establishment is relocated from one EEA country to another EEA country;
 - a single or main establishment ceases to exist on the EEA territory;

— a main establishment is set up on an EEA country's territory or moves from a third country to an EEA country.

3. The French and the Swedish data protection authorities specifically submitted the following questions :
 - As of when should an authority's competence be considered as definitely fixed, rendering any change relating to the main or single establishment's circumstances without effect on the procedure?
 - Should this be the initial moment when a complaint is received by an authority or, if not based on a complaint, when the authority starts looking at a processing at its own discretion?
 - Should this be the moment when an authority decides to initiate an investigation and contacts the controller/processor?
 - Should it be the moment when a decision-making procedure is launched?
 - Should this be the moment when the authority renders a decision thereby putting an end to the case in question?
4. The decision on the completeness of the file was taken on 17 May 2019. The period until which the opinion has to be adopted has been set until 12 July.

2 ON THE COMPETENCE OF THE BOARD TO ADOPT AN OPINION UNDER ARTICLE 64.2 ON THIS TOPIC

5. The Board considers that the question of competence of a national authority in case of a change in circumstances relating to the main or single establishment concerns a "*matter of general application*" of the GDPR, as there is a clear need for a consistent interpretation among data protection authorities on the boundaries of their competences. Clarification is particularly needed to ensure, amongst others, a consistent practice of cooperation in accordance with Article 60, mutual assistance in accordance with Article 61 of the GDPR and joint operations in accordance with Article 62 of the GDPR.
6. Indeed, the GDPR does not contain any specific provision relating to the case in which the main or single establishment of the controller or processor is set up on the territory of one EEA Member State and relocated mid-procedure to another Member State's territory or outside the European Economic Area, nor to the case in which an establishment is created inside the European Economic Area mid-procedure or ceases to exist.
7. Likewise, to date, EDPB guidelines, and particularly those relating to the lead supervisory authority, do not provide any more information than the GDPR does as regards these situations.
8. Yet, to enable consistent implementation across the European Economic Area, an objective criterion must be found to fix the moment from which any change in circumstances would have no effect on the competence acquired by an authority. This issue is of significant importance as the matter of the potential concurrent competences between supervisory authorities need to be addressed. It is thus necessary, not only from the perspective of legal certainty, but also from an operational perspective (case handling by data protection authorities), to clarify the questions raised.

9. For these reasons the Board considers that the questions raised by the French and the Swedish data protection authorities can be subject to an opinion under Article 64.2.

3 RELEVANT PROVISIONS

10. Article 4.3 of the Treaty on European Union provides: *“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”*
11. Article 41(1) of the EU Charter of Fundamental Rights provides that: *“Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union”*.
12. Article 51(1) of the GDPR sets forth the legal mandate of data protection authorities, which is to monitor the application of the GDPR in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the European Economic Area.
13. Articles 55, 57 and 58 specify the competence, tasks and powers of each data protection authority¹.
14. Article 56 provides for the *“one-stop shop”* mechanism, a procedural rule according to which a specific role is granted to a lead supervisory authority, defined as the authority on the territory of which the controller or processor has its main or single establishment².
15. Chapter VII of the GDPR, entitled *“Cooperation and Consistency”*, defines the different ways in which data protection authorities shall cooperate in order to contribute to a consistent application of the GDPR. The relevant provisions are set out in particular in Article 60 of the GDPR, which provides for the cooperation between the lead supervisory authority and the other supervisory authorities

¹ It should be recalled in this respect that Recital 11 of the GDPR stipulates as follows: *“Effective protection of personal data throughout the Union requires the strengthening and setting out in detail of the rights of data subjects and the obligations of those who process and determine the processing of personal data, as well as equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data and equivalent sanctions for infringements in the Member States”*. Recital 13 of the GDPR states that one of the objectives of the Regulation is *“to provide legal certainty and transparency for economic operators [...] as well as effective cooperation between the supervisory authorities of different Member States”*. Lastly, pursuant to Recital 122, *“Each supervisory authority should be competent on the territory of its own Member State to exercise the powers and to perform the tasks conferred on it in accordance with this Regulation”*.

² Recital 124 provides that: *“Where the processing of personal data takes place in the context of the activities of an establishment of a controller or a processor in the Union and the controller or processor is established in more than one Member State, or where processing taking place in the context of the activities of a single establishment of a controller or processor in the Union substantially affects or is likely to substantially affect data subjects in more than one Member State, the supervisory authority for the main establishment of the controller or processor or for the single establishment of the controller or processor should act as lead authority”*.

concerned³. Likewise, under Articles 61 and 62 of the GDPR, supervisory authorities shall provide each other with mutual assistance and, where appropriate, conduct joint operations, including joint investigations and joint enforcement measures.

4 OPINION OF THE EDPB

4.1 Scope of the opinion

16. In the context of the present opinion, the Board is of the view that the questions mainly relate to infringements of a continuing or continuous nature due to the fact that, for a change in circumstances relating to the main or single establishment to intervene, the infringements need to have been committed over a certain period of time. A “continuing” infringement is an act (or omission) which lasts over a certain period of time and a “continuous” infringement is an offence consisting of several acts all of which contain the elements of the same (or similar) offence committed over a certain period of time (*European Court of human rights, grand chamber, case of Rohlena v. the Czech Republic, application no 59552/08*).

4.2 The rationale for the opinion

17. The EDPB underlines that the rules of the GDPR on distribution of competences among the different concerned Member State authorities and the concept of lead authority are based on intense and fluent co-operation among the SAs. This new level of cooperation is deriving from the fact that the GDPR is now the common legal framework for data protection, so there should be no doubt or obstacle for SAs on the consistent and swift application of the GDPR. Therefore when considering the right answer to the question raised the efficient cooperation of SAs based on mutual trust is taken as a starting point and a must.
18. To enable consistent implementation across the European Economic Area, an objective criterion must be found to solidify the moment from which any change in circumstances would have no effect on the competence acquired by an authority. Such criterion should meet three objectives:
 - to ensure both data controller and data subjects a sufficient degree of legal certainty and foreseeability, an objective stated in the GDPR and particularly in Recital 13;
 - to take into account considerations relating to good administration, by ensuring the efficiency and effectiveness of action taken by authorities (see in particular Article 41 of the CFR EU and Recitals 11 and 13 of the GDPR) and by avoiding any misuse of the one-stop shop mechanism in the form of forum shopping or forum “hopping”;
 - to limit the risk of concurrent competences between authorities.
19. Article 55(1) and Recital 122 of the GDPR set out the general principles regarding competence of SAs, whereby each supervisory authority is competent on the territory of its own Member State “*for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with*

³ This is supported by Recitals 123 to 126 and 130. More specifically, according to recital 125, “(...) *In its capacity as lead authority, the supervisory authority should closely involve and coordinate the supervisory authorities concerned in the decision-making process*”. Recital 126 states that “*The decision should be agreed jointly by the lead supervisory authority and the supervisory authorities concerned and should be directed towards the main or single establishment of the controller or processor (...)*”.

this Regulation". However, Article 56(1) and Recital 124 contain an overriding rule and provide that the supervisory authority of the main establishment or of the single establishment of the controller or processor is competent to act as LSA for the cross-border processing carried out by that controller or processor.

20. Article 56(1) is *lex specialis*, and as such it takes priority whenever any processing situation arises that fulfils the conditions specified therein – such as the one where there is a main or single establishment in the EU that is responsible for cross-border processing activities involved in a complaint/alleged detected or reported infringement. Accordingly, a LSA's competence for handling a case arises from the existence of the controller's/processor's main or single establishment on the territory of its MS in the context of a cross-border processing activity. If the main or single establishment moves once a proceeding has been initiated before or by the LSA, and if the new main or single establishment fulfils the conditions for being considered as such, then the controller/processor will be entitled to rely on a new sole interlocutor under Article 56.1 and 56.6, *i.e.*, the new LSA in the Member State of the new main or single establishment.
21. The switch of the role as LSA does not mean that the initial SA was not competent to act at the time it did, and therefore it does not retroactively deprive the operations already carried out by the initial authority of a legal basis. The previously competent SA had full jurisdiction when the main or single establishment was located on its territory. Therefore, the acts performed retain their value and the evidence and information gathered by former LSA can be used by the newly competent one.
22. This solution increases the chances for the deciding authority to have the power to enforce its decision. Indeed, the new LSA is in a position to enforce the decision it renders as there is an establishment of the controller or processor on its territory, which is in line with the principle of effective enforcement set out in Recital 11 of the GDPR.
23. Furthermore, this solution also offers the advantage of reducing the risk of two authorities (or more) considering themselves to be the lead for the same infringement or, on the contrary, no authority considering itself to be the lead. Indeed, the criterion of a final decision being reached is relatively straightforward and its satisfaction quite easy to determine.
24. In any event, it is worth underlying that in case of change of LSA, the cooperation procedure set forth under Article 60 will be applicable and the new LSA will be under an obligation to cooperate with the former LSA and with other CSAs in an endeavour to reach consensus, at least if the former LSA remains a CSA. In practice, this means that the new LSA will have to submit a draft decision to the former LSA (and all the other concerned SAs), which as any other CSA will be in a position to express a relevant and reasoned objection. Moreover, the former LSA will be in a position to participate in the carrying out of the investigations in the context of joint operations pursuant to Article 62 if it meets the criteria set out in Article 4(22).
25. The fact that a final decision has been reached in a cooperation procedure initiated under Article 60 GDPR must be taken into due account in particular by ensuring that the initial (L)SA is involved in any subsequent steps by the newly established LSA so as to avoid depriving the administrative process of its effectiveness and/or introducing further delays in making available the relevant remedies (also in accordance with Article 41 of the CFR EU).

26. Lastly, it shall be noted that to prevent forum shopping and ensure an effective protection of data subjects, the relocation of the main establishment needs to be effective and proven by the data controller (see the WP244 entitled “*Guidelines for identifying a controller or processor’s lead supervisory authority*” adopted on 13 December 2016 by the Article 29 Data Protection Working Party, p.8). The concept of the main establishment itself indicates that it is not just a momentary or only a bureaucratic step to define it by the undertaking, but a real one, made with a lasting purpose. Therefore, SAs should exercise effective control over the notion of main establishment in order to reduce the risk that controllers or processors artificially change their main establishment for the purpose of changing the competent authority to handle the case.

4.3 The adopted opinion

4.3.1 Relocation of the main or single establishment within the EEA

27. Subject to the above considerations, the relocation of the main establishment to the territory of another EEA Member State mid-procedure is considered to deprive the first authority of its original competence at the moment such a change becomes effective, but not to retrospectively deprive the operations already carried out by the initial authority of a legal basis.
28. Every pending proceeding will be transferred to the SA of the state in which the main establishment is located. This SA will become LSA, and the proceeding will continue in accordance with the rules laid down in Article 60, in cooperation with the CSA referred to in Article 4(22).
29. The relocation of the main or single establishment within the EEA is considered to deprive the first authority of its original role as LSA at the moment such a change becomes effective and demonstrated. As previously, the cooperation procedure set forth under Article 60 will be applicable and the new LSA will be under an obligation to cooperate with the former LSA and with other CSAs in order to reach consensus.

4.3.2 Creation of the main or single establishment or relocation from a third country to the EEA

30. The EDPB considers that the lead competence can switch to another SA until a final decision is made by the LSA. As a result, the creation of a main or single establishment or its relocation from a third country to the EEA (in a procedure which was initially started without cooperation) mid-procedure will allow the controller to benefit from the one-stop-shop.
31. Every pending proceeding (necessarily non-cooperation proceeding because of the initial lack of main establishment in the EEA) will be transferred to the SA of the state in which the main establishment is located. This SA will become LSA, and the proceeding will continue in accordance with the rules laid down in Article 60, in cooperation with the CSA referred to in Article 4(22).
32. The creation of a main or single establishment or its relocation from a third country is considered to deprive the first authority of its original role as a competent authority due to the fact that the complaint has been first lodged with the SA, at the moment such a change becomes effective and demonstrated. As previously, the cooperation procedure set forth under Article 60 will be applicable

and the new LSA will be under an obligation to cooperate with the former LSA and with other CSAs in an endeavour to reach consensus.

4.3.3 Disappearance of the main or single establishment

33. The EDPB considers that the lead competence can switch to another SA until a final decision is made by the LSA. As a result, the disappearance of the main or single establishment mid-procedure (either because the main establishment has been moved out of the EEA territory or because it has been disbanded) will divest the controller to benefit from the one-stop-shop.
34. In the case in which the establishment ceases to exist in the territory of its Member State, the former lead supervisory authority remains competent like any other CSA under Article 4(22) of the GDPR. Since the processing cannot be considered as cross border any more, the principle of cooperation vanishes and each concerned authority regains full jurisdiction.

5 CONCLUSION

35. In conclusion, the Board considers that competence to act as lead supervisory authority can switch to another supervisory authority in case of a documented change in the circumstances relating to the main or single establishment of a controller or processor until a final decision has been reached by that supervisory authority.

For the European Data Protection Board

The Chair

(Andrea Jelinek)