

# Internal EDPB Documents



## **Internal EDPB Document 3/2019 on Internal guidance on Article 64 (2) GDPR**

**Adopted on 8 October 2019**

### **Important note:**

**This document was originally written for internal use among EDPB members. At its Plenary meeting of 14 June 2022, the EDPB has decided, in the interests of transparency, to make this document available to the public by publishing it on its website.**

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## The European Data Protection Board

Having regard to 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 22 of its Rules of Procedure,

### HAS ADOPTED THE FOLLOWING INTERNAL GUIDANCE

## 1 INTRODUCTION

### 1.1 SCOPE

1. During its meeting on 5 July 2018, the Plenary of the European Data Protection Board (EDPB) gave mandate to the Cooperation Expert Subgroup to analyze the scope of Article 64 (2) and to provide guidance on the practical application of Article 64 (3) last sentence of the General Data Protection Regulation (GDPR), including possible implications for the Rules of procedure (RoP) of the EDPB.
2. ***While the second part of the mandate, i.e. the guidance on the practical application of Article 64 (3) last sentence GDPR, including possible implications for the RoP of the EDPB will be realized in a separate document, this document intends only to analyze the scope of Article 64 (2) GDPR.***

### 1.2 GENERAL CONTEXT AND RATIO OF ARTICLE 64 (2) GDPR

3. The provision at stake, namely Article 64 (2), must be read in a broader context. Placed in the middle of Chapter VII entitled “Cooperation and Consistency”, the purpose of Article 64 in its entirety is to ensure a coherent and common interpretation and application of GDPR.<sup>1</sup> Ensuring consistent monitoring of the processing of personal data by Supervisory Authorities (SAs) in all Member States is one of the most important aims of the GDPR (Recital 13, 135) and the main task of the EDPB (Article 70 (1) s. 1). By determining clear competencies (Articles 55, 56) and procedures (Articles 60 et seq.) the GDPR enables SAs to achieve a consistent and high level of protection of personal data across the European Union (EU) and the European Economic Area (EEA).
4. In this regard, the GDPR foresees different tools which are available for the SAs to obtain a consistent application and interpretation of the GDPR. As an example can be cited the One-stop-shop mechanism laid down in Article 60, but also the possibility to ask other SAs for mutual assistance (Article 61 GDPR) or to conduct joint operations (Article 62 GDPR). In case of disagreement concerning an individual case, Article 65 provides for the possibility to adopt a binding decision within the EDPB.

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<sup>1</sup> See in this regard also Article 63.

5. Article 64 for its part provides the possibility to request an opinion from the EDPB. While requesting an opinion from the EDPB is obligatory in the specific circumstances mentioned in Article 64 (1), Article 64 (2) provides SAs, the Chair of the EDPB and the European Commission with the possibility to request an opinion from the EDPB regarding matters of general application or producing effects in more than one Member State. As such, Article 64 provides SAs with a valuable tool to ensure the consistent application and a high level of protection of personal data in the EU.
6. Consequently, it results from the above - and should be kept in mind while interpreting Article 64 (2) - that this provision aims, among all the others mentioned above, at ensuring harmonious interpretations of the GDPR.

## 2 REQUESTS UNDER ARTICLE 64 (2) GDPR

### 2.1 ARTICLE 64 (2) GDPR

#### **Article 64 (2) GDPR:**

*“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 Member State** be examined by the Board with a view to obtaining an opinion, in particular where a competent supervisory authority does not comply with the obligations for mutual assistance in accordance with Article 61 or for joint operations in accordance with Article 62.”*

7. In contrast to Article 64 (1) the GDPR does not provide an obligation for the SA, the Chair or the Commission to ask for an opinion in the context of Article 64 (2). Consequently, it remains at the discretion of the possible applicants to request such an opinion. However, this possibility to request for an Opinion of the EDPB only exists if one of the two conditions is met, namely if the request concerns a matter of general application or a matter producing effects in more than one Member State.

### 2.2 CONDITIONS OF ARTICLE 64 (2) GDPR

8. The legislator laid down two different conditions. The distinction and relation between those conditions is explained further below.

#### 2.2.1 What is a “matter of general application”?

9. A matter of general application concerns abstract questions regarding data processing that has the potential to infringe the fundamental right to data protection. Consequently, a matter of general application can first of all refer to the interpretation of provisions of the GDPR.
10. Such abstract legal questions may arise without a specific triggering event but also from an ongoing case, for instance where it is necessary to constitute a precedent. When a question of interpretation, which is new, and/or of general interest for the uniform application of the GDPR is raised, or where the existing case law and previous opinions and decisions by the EDPB do not appear to give the necessary guidance to deal with a legal situation, it is useful for SAs to have a tool which permits to

obtain a general solution for the question at hand. This also contributes to consistency as all SAs are involved in the Article 64-procedure.

11. A matter of general application can also refer to questions related to the practical implementation of the GDPR. This includes abstract procedural questions regarding the cooperation and consistency mechanisms, especially where the GDPR leaves regulatory gaps.
12. The origin of a matter related to the interpretation of the GDPR could be a cross-border case as well as a national case, when the issue could also present itself in different Member States. The involved SAs may then decide to bring the matter before the EDPB in order to avoid setting a case law on their own on a sensitive subject.
13. In this context, it has to be underlined that such an opinion cannot be requested on the subject matter of a case but only on the underlying legal issues, which need to be solved in order to process the case on a factual level.

**Example:**

The Board could be requested to provide an opinion when a cross-border operating controller moves its main or single establishment to the territory of another Member State, resulting in questions regarding the competence of the former LSA and competence of the new LSA.

### 2.2.2 What is a “matter producing effects in more than one Member State”?

14. The second condition mentioned in Article 64 (2) GDPR refers to matters “producing effects in more than one Member State”. Firstly, this means that there must be effects in at least two Member States. These effects need to be factual in contrast to the definition of cross-border processing (Article 4 No. 23 GDPR), where the likelihood of effects is sufficient.
15. Secondly, given the fact that the wording of Article 64 (2) GDPR is not restricted to a special kind of effect, these effects must be understood as not being limited to legal effects. In contrast to the first condition which concerns abstract questions of a predominantly legal nature, this condition addresses effects of all kinds, for instance to the rights and freedoms of data subjects.
16. Article 64 (2) GDPR also serves as a tool to ensure consistency where no other instrument is applicable. This refers especially to questions arising from international cases where the One-stop-shop mechanism does not apply, but where a consistent approach is preferable.

**Example 1:** The processing activities of an US-based controller, without an EU establishment, produce effects in several EU Member States. When a question arises regarding one of the activities of this US-based controller, Article 64 (2) can be applied in order to ensure a consistent approach regarding this question.

**Example 2:** Another example of a practical application can be the situation where a LSA does not involve a SA in an Article 60 procedure although this SA is concerned according to Article 4 (22) and despite the SA informing the LSA about its status as a concerned SA.

### 2.2.3 Relationship between both conditions

17. It is likely that not all practical cases can be clearly allocated to one of these two conditions. A “matter of general application” can also be defined as a situation which produces legal effects with regard to categories of persons regarded generally and in the abstract. However, this first condition is formally unrelated to the second condition “producing effects in more than one Member State”, i.e. it is focused on the “generality” of the matter at issue. Nevertheless, there certainly are borderline cases where it is not feasible to draw a clear line between these two conditions.

### 2.2.4 Relationship to cooperation procedures (Article 60 et seq. GDPR)

18. As both conditions may arise from an ongoing individual case the relationship to cooperation mechanisms according to Article 60 et seq. GDPR has to be clear. First of all, it has to be noted though, that the primary objective with regard to cross-border cases is to reach consensus within the cooperation procedures (Article 60 et seq. GDPR) without involving the EDPB (Rec. 138 s. 2). Therefore, Article 64 (2) GDPR cannot be used to circumvent the cooperation mechanisms.
19. However, Article 64 (2) GDPR foresees the possibility to ask for an opinion of the EDPB “where a competent supervisory authority does not comply with the obligations for mutual assistance in accordance with Article 61 or for joint operations in accordance with Article 62”.
20. Articles 61 and 62 GDPR are tools which intend to achieve consistent and effective application of the GDPR. In cases where SAs refuse to comply with their duties to cooperate with other SAs via joint operations and mutual assistance Article 64 (2) GDPR serves as possibility to reach consistency by other means.
21. The following examples and counterexamples intend to clarify especially the relation between Article 60 et seq. and 64 GDPR, as requesting an opinion based on Article 64 (2) GDPR while a cooperation procedure is ongoing is the most complicated case of application. In this regard it should be noted that Article 60 (1) obliges the LSA and CSAs to cooperate with each other “in an endeavour to reach consensus”, which means that finding consensus without involving the Board is the preferable solution. This means that, as a best practice, informal cooperation procedures should be triggered before initiating formal procedures. Article 64(2) is the necessary tool if such consensus cannot be reached.

**Example 1:** A complex cross-border case is handled by the LSA, in good cooperation with two CSAs and in accordance with Article 60 GDPR. The case concerns, amongst others, a fundamental (new) legal question regarding the interpretation and application of Article 5 GDPR – purpose limitation. Taking into account the fundamental nature of the subject matter and the limited amount of SAs involved in the cross-border case the LSA and CSAs, in good cooperation and without there being any dispute on the question whether or not to request an opinion by the EDPB, may decide to request an Opinion of the EDPB, in order to achieve a consistent interpretation of the legal question at hand. This request

only covers the preliminary fundamental, underlying legal question regarding the interpretation and application of purpose limitation and not the ongoing cross-border case itself. The answer on the request is necessary for the involved SAs in order to be able to continue the drafting of a draft decision within the cooperation procedure.

**Counterexample 1:** A complex cross-border case is handled by the LSA. While cooperating with the two CSAs as set out in Article 60 GDPR, it becomes clear that one CSA does not agree with the approach of the LSA regarding the outcome of the case. The CSA does not want to wait for the draft decision of the LSA and considers invoking Article 64 (2) GDPR. In this case, Article 64 (2) GDPR should not be triggered, taking into account that both the LSA and CSAs need to follow the procedure as laid down in Article 60 GDPR. In practice this means that the LSA will submit a draft decision to the CSAs, while the CSAs have the opportunity to provide a relevant and reasoned objection should they disagree with this draft decision.

**Example 2:** The processing activities of a controller that concern personal data of a large number of data subjects in several EU Member States are – based on several complaints – subject to justified and substantial concerns of one or more CSAs. The LSA, however, after receiving the complaints does not inform the CSAs about the subsequent steps to handle the complaints or initiate an Article 60-procedure.

Taking into account that the CSAs that have received the complaints are obliged to inform the complainant about the state of play and the outcome of the complaint according to Article 77 (2) GDPR, requests for mutual assistance may be filed.

If the LSA does not comply with the obligations for mutual assistance in accordance with Article 61, the CSA may then request an opinion according to Article 64 (2).

**Counterexample 2:** On the other hand, there can be many valid causes for the extended duration of an investigation, particularly one with high stakes, with many of those reasons relating to fair procedures and the challenges in engaging with data controllers. In this case, Article 64 (2) GDPR cannot be triggered to request a LSA to accelerate the production of a draft decision when the investigation of a cross-border case is still ongoing, provided all requirements of Article 60 (1) or 61 are satisfied, in particular the exchange of all relevant information.

**Example 3:** Given that Article 60 GDPR is applicable, the situation might arise that the LSA does not provide a draft decision or any other outcome. In this situation, where informal requests for clarification and formal mutual assistance requests from the CSA according to Article 61 GDPR remained unsuccessful, the CSA may ultimately request an opinion on the LSA's non-compliance with the procedure of Article 61 GDPR.

**Counterexample 3:** However, Article 64 (2) GDPR cannot be triggered to request another SA to carry out a specific type of action or enforcement measure (according to Article 58 GDPR) regarding an ongoing cross-border case. The exercise of a corrective power must be subject to appropriate procedural safeguards and objective assessment. More importantly, there is no legal basis for the Board to compel specific measures based on Article 64 (2).

**Example 4:** The CSA sends a local case request to the LSA according to Article 56 (3) GDPR. The LSA does not reply within three weeks and the CSA's attempts to contact the LSA by other means such as

mutual assistance requests fail. The CSA may then, as a last resort, request the EDPB to obtain an opinion on the consequences of the absence of answer from the LSA.

**Counterexample 4:** Article 64 (2) GDPR may not be used to request another SA to prioritise specific cases provided that they respect the cooperation mechanism. Each SA is the only party with a full view of its own case load, the relative seriousness of those cases and the priorities that need to be applied.

## 2.3 ADMISSIBILITY REQUIREMENTS (ARTICLE 64 (2) GDPR)

22. The following admissibility requirements have to be met:

### 2.3.1 Possible applicants

23. The wording of the law is very clear on the question of who has the right to submit a request for an opinion under Article 64 (2) GDPR, namely any SA, the Chair of the Board or the Commission may request such an opinion. Other bodies, like e.g. data subjects are excluded from the possibility to submit such a request.

### 2.3.2 Substantive requirements

24. Furthermore, at least one of the two substantive requirements of Article 64 (2) GDPR has to be fulfilled. In practice, it may not be entirely clear which of the two conditions mentioned in Article 64 (2) GDPR is the most appropriate condition to base a request for an Opinion on. In these situations it is up to the requesting SA to decide whether it will base its request on one specific condition, or whether it will provide separate reasoning for both conditions. The SA can base its request either on one condition or on both conditions, which are laid down in Article 64 (2) GDPR. The decision on which condition to base the request, is at the discretion of the SA, whereas the Board makes the final decision. In this regard, it should be kept in mind that, in the end, it is the EDPB who decides whether or not a request will be rejected or not. If the conditions are not met the EDPB may reject the request on admissibility grounds.

### 2.3.3 Written reasoning

25. The applicant has to provide written reasoning (Article 10 (3) RoP) for the request. Doing otherwise would contradict Article 64 (4) GDPR, where reference is made to the need for the SA to provide the Board with any relevant information and documents. If the request is not reasoned, the EDPB can reject the request. In case the request is not sufficiently reasoned, the EDPB should - as best practice - ask for clarification if possible.

### 2.3.4 Exception from the right to obtain an opinion

26. Lastly, it is necessary that the EDPB has not already issued an opinion or decision in the sense of Article 65 (1) GDPR on the same matter before (Article 64 (3) s. 1 GDPR). If there are already similar opinions concerning similar matters the requesting SA, the Chair or the Commission has to provide reasoning why the request is not exactly on the same matter. This requires a prior assessment of the EDPB

opinions on similar matters. The EDPB may reject a request if there already is an opinion on that exact matter.

27. In all cases where the EDPB rejects a request for an opinion it is expected to indicate the reasons for rejecting the request on admissibility grounds (requirements a, b and c).

## 2.4 CONSEQUENCES

28. Article 65 (1) (c) GDPR states in its second alternative that in cases where a competent supervisory authority does not follow the opinion of the Board issued under Article 64, the Board shall, upon communication of the matter by any supervisory authority or the Commission, adopt a binding decision. As this alternative is not explicitly limited to either paragraph 1 or 2 of Article 64 GDPR, this must be applied to both situations where an opinion of the Board can be issued.
29. It follows from the above that in cases where, as a first step, the Board issues an opinion under paragraph 2 which is not followed by a supervisory authority, any supervisory authority or the Commission may communicate the matter to the Board again in order to obtain, as a second step, a binding decision pursuant to Article 65 (1) GDPR.

## 2.5 OUTLOOK

30. This guidance will be evaluated as deemed necessary with regards to practical experiences with Article 64 (2) taking into account especially the number and subjects of requests.

For the European Data Protection Board

The Chair

(Andrea Jelinek)