

Article 65 FAQ

How does cross-border cooperation work under the GDPR?

The GDPR requires the EEA Supervisory Authorities (SAs) to cooperate closely to ensure consistent application of the GDPR and protection of individuals' data protection rights across the EEA. One of their tasks is to coordinate decision-making in cross-border data processing cases.

Under the so-called one-stop-shop mechanism (Art. 60 GDPR), which applies to cross-border processing situations, the Lead Supervisory Authority (LSA) acts as the main point of contact for the controller or processor for a given processing, while the Concerned Supervisory Authorities (CSAs) act as the main point of contact for data subjects in the territory of its Member State. The LSA is the authority in charge of leading the cooperation process. It will share relevant information with the CSAs, carry out the investigations and prepare the draft decision relating to the case, and has to cooperate with the other CSAs in an endeavour to reach consensus on this draft decision.

When a draft decision is issued, the CSAs are consulted by the LSA and can express their relevant and reasoned objections to the draft decision within a period of four weeks (Art. 60 (4) GDPR).

When none of the CSAs object, the LSA may proceed to adopt the decision.

In case at least one of the CSAs disagrees with the draft decision, it can express its relevant and reasoned objections as mentioned above. If the LSA intends to follow the objection(s), it shall submit a revised draft decision to all the CSAs. The CSAs then have a period of two weeks (Art. 60 (5) GDPR) to express their relevant and reasoned objections to the revised draft decision.

If the LSA does not intend to follow the objection(s) and therefore a dispute arises about a draft decision or a revised draft decision and no consensus can be reached, the consistency mechanism is triggered. This means that the LSA is obliged to refer the case to the European Data Protection Board (EDPB).

The EDPB will then act as a dispute resolution body and within one month from the referral of the subject matter it will issue a decision by a two-thirds majority, that is binding on the LSA and the CSAs (Art. 65 GDPR). This period can be extended by another month if the case is complex. When the EDPB is not able to reach a decision within the abovementioned period by a two-thirds majority, the decision should be adopted by a simple majority. Should the members of the EDPB be split, the decision will be adopted by the vote of the EDPB Chair.

The LSA, and in some situations the CSA with which the complaint was lodged and where the decision will be addressed to the complainant, must adopt its final decision on the basis of the EDPB decision, which will be addressed to the controller or processor and, where relevant, to the complainant.

Who can trigger the dispute resolution mechanism?

When a dispute between SAs arises in the course of a one-stop-shop procedure, the dispute resolution mechanism must be triggered. It is mandatory for the LSA to trigger this process when it does not plan to follow the relevant and reasoned objections of the CSAs or believes that an objection is not reasoned or relevant.

Apart from the one-stop-shop mechanism, in case an SA does not request an opinion for a draft decision under Art. 64 GDPR or does not follow the opinion of the EDPB, any SA, as well as the European Commission, can trigger an Art. 65 procedure.

A case has been submitted to the EDPB under Art. 65 GDPR - what happens next?

Upon referral of the case, the EDPB will have one month to adopt a decision. This period may be extended for one more month, depending on the complexity of the subject matter. Within this timeframe, a binding decision has to be adopted by a two-thirds majority.

If the EDPB has been unable to adopt a decision within this timeframe, it shall adopt its decision within two weeks following the expiration of the second month. In the latter case, the decision shall be adopted by a simple majority.

Should the members of the EDPB be split, the decision will be adopted by the vote of the EDPB Chair.

During this time, the one-stop-shop procedure is pending and the SAs concerned cannot adopt a decision on the case referred to the EDPB.

Whom are the decisions addressed to?

All decisions taken under the dispute resolution mechanism shall be addressed to the national SAs. The decision by the EDPB is binding on them.

What happens next?

Once the EDPB has adopted a decision, the EDPB Chair shall notify the decision to the relevant national SAs without undue delay.

As regards one-stop-shop procedures, the LSA or the CSAs with which the complaint was lodged must adopt its final decision on the basis of the EDPB decision, which will be addressed to the controller or processor and, where relevant, to the complainant. This shall take place without undue delay and at the latest one month after the EDPB has notified its decision. The LSA and CSAs shall notify the EDPB of the date their final decision was notified to the controller or processor and the complainant. Following this notification, the EDPB shall publish its decision on its website.

The LSA and CSAs final decisions shall be taken under Art. 60 (7), (8) and (9) GDPR. The final decision must refer to the decision by the EDPB and has to specify that this will be

published on the EDPB website. The LSA and CSAs final decisions shall attach the decision of the EDPB.

When will the EDPB's decision be published?

Once the LSA or in some cases the CSA with which the complaint was lodged has notified the EDPB of the date its final decision was communicated to the controller or processor and, where relevant, to the complainant, the EDPB will publish its own decision on its website.

Can an SA challenge an Art. 65 GDPR decision by the EDPB?

As addressees of the EDPB decisions, the relevant SAs that wish to challenge them, can bring an action before the European Court of Justice (CJEU) within two months of being notified.

Can a controller, processor or the complainant challenge an Article 65 Decision by the Board?

Decisions adopted by the EDPB on the basis of Article 65 GDPR are “binding” on national SAs, since they shall adopt their final decision on the basis of the EDPB decision. EDPB binding decisions are mainly addressing the national SAs and is binding on them.

Where decisions of the EDPB are of direct and individual concern to the controller, processor or complainant, they may bring an action for annulment against those decisions within two months of their publication on the EDPB website before the CJEU, in accordance with Art. 263 TFEU.

Without prejudice to this right under Art. 263 TFEU, each natural or legal person also has an effective judicial remedy before the competent national court against those final decisions taken by the SA, which produces legal effects concerning that person. This right has to be exercised in accordance to the applicable national legislation.

Where a decision of an SA - implementing an Art. 65 GDPR decision of the EDPB - is challenged before a national court by the data subject or the controller/ processor and the validity of the implemented Art. 65 GDPR decision of the EDPB is at issue, the national court does not have the power to declare the EDPB's Art. 65 GDPR decision invalid, but must refer the question of the validity to the CJEU in accordance with Art. 267 TFEU.

However, a national court may decide to not refer a question on the validity of a decision of the EDPB when a natural or legal person was under the legal conditions to bring an action for annulment of that decision before the CJEU, but had not done so within the period laid down in Art. 263 TFEU.

Are there other situations that can trigger the dispute resolution mechanism?

The dispute resolution mechanism is not only triggered in case an LSA ‘does not follow a relevant and reasoned objection of the CSAs or rejects an objection as being not relevant or reasoned’ (Art. 60 GDPR). It can also be activated in specific different cases envisaged by Art. 65 (1), such as when there are conflicting views on which of the SAs should act as LSA.

In addition, in some circumstances, listed under Art. 64 (1) GDPR, every competent SA has the duty to request an opinion from the EDPB before adopting its national draft decision (such as before approving a new set of standard contracts). Under Art. 64 (2) GDPR, any supervisory authority may also request an EDPB consistency opinion on any matter of general application or producing effects in more than one Member State. If an SA does not request the opinion of the EDPB for the cases listed under Art. 64 (1) GDPR or does not follow the EDPB opinion issued under Art. 64 GDPR, any SA and the European Commission can launch a dispute resolution procedure under Article 65 about the matter.

As the CJEU clarified in its judgement in the C-311/18 (Schrems II) (paragraph 147):

“As regards the fact, underlined by the Commissioner, that transfers of personal data to such a third country may result in the supervisory authorities in the various Member States adopting divergent decisions, it should be added that, as is clear from Article 55(1) and Article 57(1)(a) of the GDPR, the task of enforcing that regulation is conferred, in principle, on each supervisory authority on the territory of its own Member State. Furthermore, in order to avoid divergent decisions, Article 64(2) of the GDPR provides for the possibility for a supervisory authority which considers that transfers of data to a third country must, in general, be prohibited, to refer the matter to the European Data Protection Board (EDPB) for an opinion, which may, under Article 65(1)(c) of the GDPR, adopt a binding decision, in particular where a supervisory authority does not follow the opinion issued.”