

# Internal EDPB Documents



## **Internal EDPB Document 5/2020 on how to proceed with cases under cooperation and consistency procedures in view of the end of the Brexit transition period**

**Adopted on 19 November 2020**

### **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 Article 70 (1) (e) and 56.2 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 3 and Article 22 of its Rules of Procedure as amended on 23 November 2018,

### HAS ADOPTED THE FOLLOWING INTERNAL GUIDANCE

## 1 INTRODUCTION

### 1.1 Background

1. As part of the discussion on Brexit, the EDPB Plenary meeting of 20 October 2020 agreed that the Cooperation expert subgroup ‘will develop a framework of legal and practical criteria that will serve the smooth handling of ongoing cases’ in view of the forthcoming end of the Brexit transition period (31 December 2020).

### 1.2 Scope of the internal working document

2. This internal working document is meant to provide, in the first place, the required assessment of existing cross-border processing cases involving the UK SA as LSA in the EEA from a legal and practical perspective; to that end, the current IMI procedures involving the UK SA as LSA were considered further to analysis provided by the Secretariat.<sup>1</sup>
3. The end of the transition period means that whatever IMI procedure is ongoing as of that date, the UK SA will no longer be able to participate in it thereafter via IMI. This is why this document will also consider the options in cases where the UK SA is currently a CSA in IMI procedures.

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<sup>1</sup> Please note that the attached analysis does not reflect the volume of complaint cases contained within each case register or voluntary mutual assistance module. The number of case registers reflects the number of entries in the IMI case register, which have been set for the purpose of handling cross-border complaints. As these entries can be used, however, for the purpose of bundling complaints, the above numbers do not necessarily reflect the total number of cross-border complaints received by the ICO from any specific SA.

When transferring complaints using an Article 61 request or notification, SAs can bundle multiple cases in a single module. As a result, the number of requests or notifications does not necessarily reflect the total number of cases transferred to the ICO by any specific authority using this method.

## 2 LEGAL ANALYSIS

4. The OSS mechanism relies on the EU main establishment criterion, which is dependent on factual circumstances as per the requirements of Articles 56(1) and 4(16). Accordingly, the qualifications of being LSA and CSA in the OSS may not be modified by an agreement between the involved SAs and the controllers/processors concerned. Thus, the UK SA will cease to be either a LSA or a CSA as from 31 December 2020 by definition.
5. Additionally, and as clearly set out by the WP29 in its WP244 Guidelines, *'The GDPR's cooperation and consistency mechanism only applies to controllers with an establishment, or establishments, within the European Union. [...] This means that controllers without any establishment in the EU must deal with local supervisory authorities in every Member State they are active in, through their local representative.'*
6. This requires breaking down the consequences of the end of the transition period on IMI procedures depending on the individual procedure and the role played by the UK SA.

### 2.1 Practical Consequences

7. Analysis of information provided by the Secretariat shows that there are no ongoing Article 62 and 65 or 66 procedures involving the UK SA as of 13 November 2020. The focus will be therefore on the following IMI procedures:
  - Article 56 – identifying or assuming the ICO as LSA or identifying the ICO as CSA
  - Article 60 - ongoing OSS procedures with ICO as LSA, including Case Registers
  - Article 61 - mutual assistance procedures
  - Article 64 - consistency procedures
8. Having due regard to and without prejudice to all legal rights and obligations of both the ICO and all EEA authorities, all parties are invited to carefully consider the legal and practical deadlines in the cooperation procedure under Chapter VII of the GDPR and the feasibility of progressing matters with such deadlines approaching 31 December 2020, for example with regard to registering new cases in IMI that involve the ICO or expressing objections in ongoing procedures that involve the ICO.
9. Further, all EEA authorities are invited to finalise all data exchanges with the ICO by the 31 December 2020.

#### 2.1.1 IMI Article 56 or 60 Procedures where UK ICO is named as LSA (complaints + investigations)

10. As of 13 November 2020 there are several open Article 56 procedures to confirm the identification of the ICO as LSA, which have advanced to different degrees (some of them are still in the Article 56 stage, others have led to starting Article 60 procedures including the submission of draft decisions). In addition, SAs have transmitted complaints to the ICO identifying them as LSA using Article 61 requests in line with IMI best practice.
11. Further approaches and practices depend on whether the controller or processor has signalled to the UK LSA and to another EEA SA that another EEA establishment could become main establishment as of 1 January 2021 (scenario **(a)**) or whether there is no other establishment in the EEA that could play this role (scenario **(b)**).

12. This information should be sought as quickly as possible. A list of the pending proceedings in IMI could be used for this purpose (based on information prepared by SEC). Information received from this process should be shared with all other CSAs via an Art. 56 procedure, or else via a new Case Register entry and IC/VMN. It would be advisable to also convey the relevant information to the ICO so that the latter can provide guidance to other EEA authorities requesting it.
13. With regard to the preliminary vetting for Article 56 procedures, the CSA, in coordination with the ICO, may ask the controller's or processor's main establishment about intentions to create a new establishment within the EEA prior to the end of the transition period that can be considered the main establishment according to Article 4(16) or, if this is not the case, whether the controller/processor is going to designate a representative according to Article 27. Results of this preliminary vetting should be shared with all other CSAs via an Art. 56 procedure, or else via a new Case Register entry and IC/VMN. This is without prejudice to the controller's/processor's duty to inform the respective authority about their main establishment.

Proposed approach/best practice for (a) In case of another EEA main establishment:

14. When entering a case into IMI via Article 56, the assumed current LSA (UK) should be named as well as the assumed future EEA LSA.
15. The ICO is invited to cooperate closely with the assumed future EEA LSA, especially by means of (voluntary) mutual assistance notification and to at least transfer all relevant information to the new EEA LSA before 31st December if such LSA has been established with certainty prior to that date.<sup>2</sup>

Proposed approach/best practice for (b) In case of no other EEA main establishment:

16. Each EEA CSA will thenceforth be competent for handling the above cases at domestic level under Article 55(1) GDPR, these being no longer cross-border cases pursuant to Article 4(23) GDPR. In this case, the ICO is invited to transfer all relevant data to all EEA CSAs before 31 December 2020.
17. Notwithstanding the duties of the respective controllers, the ICO is invited to provide any information they may have to the EEA CSAs as to the appointment of a representative pursuant to Article 27 GDPR, at or prior to 31 December 2020.
18. In circumstances where the data controller has no new EEA main establishment pursuant to Art. 4(16) GDPR, the data controller is considered to be in a third country as of 1 January 2021. Further, if the data controller does not appoint an Article 27 representative, all EEA authorities as well as complainants may contact the establishment in the UK individually.

**NOTE:** Regarding the Article 60 procedures where UK ICO has accepted to be LSA and where draft decisions have already been inputted by ICO in IMI, they should be finalised as quickly as possible. This would be a matter of priority for the EDPB, so that precedence should be given to concluding these Article 60 procedures by 31 December via adoption of the final decision by ICO. Each EEA CSA will then continue handling the case in pursuance of the GDPR for the relevant follow-up (information to parties, appeal procedures, etc.).

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<sup>2</sup> The IT Users ESG and SEC will discuss a solution to change the LSA for these Case Registers within IMI. From 2021 on, these Case Registers would then be allocated to the new LSA, which means that the new LSA would inherit editing rights from the UK DPA. This procedure should be extended, where possible, to Art. 61 procedures.

Should the ICO be unable to finalise the procedures by 31 December 2020, including on account of the objections raised by CSAs to the draft decisions, the EDPB recommends that the ICO informs the relevant EEA CSAs accordingly.

As a practical approach and in accordance with Article 77(2), the CSA should already inform the complainant that the processing might be delayed because of the shift of competence of the SA that comes with the Brexit.

#### 2.1.2 IMI Article 56 or 60 Procedures where the ICO is a CSA, referred to other countries' SAs (complaints + investigations)

22. These procedures will continue in IMI according to OSS mechanisms, without the ICO's participation as of 31 December 2020. The OSS procedure will indeed continue in cases where several CSAs are involved in addition to the ICO, as the EEA LSA in that case is required to continue handling the subject matter of the complaint pursuant to Article 56(1) GDPR.

**NOTE:** The EDPB considers a matter of priority that the EEA LSA will endeavour to make available to the ICO all the information collected based on the investigations carried out until 31 December 2020, most notably when the cross-border case is based on a complaint from a UK data subject, via IMI.

24. Regarding the complaint lodged with the ICO, the ICO will proceed with handling the case in accordance with its national procedural rules.<sup>3</sup>
25. It should be recalled (see paragraph 3) that the ICO will not be regarded as a CSA from 1 January 2021 (even if it is the complaint-receiving authority) and no information exchange between the EEA LSA and ICO may take place under the umbrella of Article 60 requirements.
26. However, where ICO is the only CSA involved and accordingly the processing no longer meets the criteria as set out in Article 4(23) GDPR, no OSS procedure will exist any longer and the EEA authority that was handling the case as LSA may have discretion to continue handling the subject matter of the complaint ex officio in accordance with its national law.<sup>4</sup>
27. The ESG Cooperation will develop a standardised information letter which all EEA authorities may use to inform complainants residing in UK in a uniform manner.

#### 2.1.3 IMI Cooperation Procedures – Article 61

28. Bilateral procedures, between EEA authorities and the ICO ongoing as of 31 December 2020, will be closed on that date.
29. Multilateral procedures involving the ICO as requesting authority will be closed as of 31 December 2020 as well. Multilateral procedures involving the ICO as (one of the) requested authorities will continue without the ICO's involvement. The ICO's given answers/comments will remain visible.

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<sup>3</sup> In situations where the EEA LSA has undertaken formal steps towards the exercise of corrective powers, such as issuing a notice of intent or a statement of objections, before 31 December 2020, but there is no Article 60 Final Decision yet, it is recommended that the EEA LSA engage closely with the ICO so as to avoid possible infringement of the ne bis in idem principle vis-à-vis the controller.

<sup>4</sup> See footnote 3 regarding the need to engage closely with ICO in respect of these proceedings.

## 2.2 IMI Consistency Procedures – Article 64

30. There are currently a few procedures pending in IMI, concerning draft BCRs where UK SA is the BCR Lead.
31. Reference should be made in this respect to the recently published EDPB ‘Information Note for companies which have ICO as BCR Lead Supervisory Authority’ adopted on 22.07.2020.

For the European Data Protection Board

The Chair  
(Andrea Jelinek)