

# EDPB Documents



## PROCESS GUIDE FOR THE SELECTION AND THE HANDLING OF STRATEGIC CASES

Version 2

### INTRODUCTION

At a two-day high-level meeting in Vienna in April 2022, EDPB members agreed to further enhance cooperation on cases of strategic importance (hereafter “strategic cases”), and to diversify the range of cooperation methods used to handle them. In particular, it was decided that EDPB members will collectively identify cross-border cases of strategic importance in different Member States on a regular basis, for which cooperation will be prioritised and supported by EDPB.

In line with the Statement on enforcement cooperation adopted at the Vienna meeting by EDPB members<sup>1</sup>, this process guide aims at (i) specifying the criteria and the selection process allowing the identification of “strategic cases” and (ii) to detail how EDPB members can handle these strategic cases through the enhanced cooperation mechanism.

It should be noted that cases of strategic importance should, in principle and by priority, be one-stop-shop cases and that they should be handled following a flexible and pragmatic approach, in the spirit of good cooperation between supervisory authorities (hereafter “SA’s”). In the same spirit, SA’s will exchange information and cooperate in informal ways at the different stages specified bellow when handling strategic cases.

Lastly, it should be noted that the handling of cases of strategic importance will eventually take place in accordance with - and by making full use of - the procedures and instruments for achieving cooperation and consistency between SA’s, as laid down in Chapter VII of the GDPR.

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<sup>1</sup> Statement on enforcement cooperation, EDPB, on 28<sup>th</sup> April 2022, [here](#).

## I. SELECTION OF CASES OF STRATEGIC IMPORTANCE BY THE EDPB

The aim of this section is to specify the criteria that define a case of strategic importance, as well as to detail the procedures that should be followed, from the identification of a case of strategic importance by an SA until its qualification as strategic case by the EDPB.

### 1. Criteria to prioritise case of strategic importance

The paragraphs below lay down criteria to assess whether or not a case qualifies as a strategic case in accordance with the Statement on enforcement cooperation made by the EDPB at the Vienna meeting in 2022.

First of all, a strategic case should be a case where it is likely that a high risk to the rights and freedoms of natural persons in several Member States exists. Therefore, this subsection aims at listing criteria that contribute, individually and/or cumulatively, to discerning whether a case represents a high risk to the rights and freedoms of the data subjects.

To identify potential strategic case, an SA can base its proposal on the following list of criteria:

- A **structural or recurring problem** in several Member States in particular where the case concerns a general legal issue with regards to the interpretation, application or enforcement of the GDPR;
- A case related to the **intersection of data protection with other legal fields**;
- A case which affects a **large number of data subjects** in several Member States;
- A **large number of complaints** in several Member States;
- A **fundamental issue falling within the scope of the EDPB strategy**;
- A case **where the GDPR implies that a high risk can be assumed**, such as:
  - The processing of special categories of data as referred to in Articles 9 and 10 of the GDPR;
  - A processing regarding vulnerable people such as minors;
  - Situations mentioned in Article 35 (3) of the GDPR where a data protection impact assessment (DPIA) is required, or situations where a DPIA is required based on the criteria<sup>2</sup> for processing operations that are likely to result in a high risk as laid down in the Guidelines on Data Protection Impact Assessment<sup>3</sup>.

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<sup>2</sup> These criteria are: 1) Evaluation or scoring, including profiling and predicting 2) Automated-decision making with legal or similar significant effect 3) Systematic monitoring 4) Sensitive data or data of a highly personal nature 5) Data processed on a large scale 6) Matching or combining datasets 7) Data concerning vulnerable data subjects 8) Innovative use or applying new technological or organisational solutions 9) When the processing in itself "prevents data subjects from exercising a right or using a service or a contract".

<sup>3</sup> Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679, wp248rev.01, as endorsed by the EDPB on 25 May 2018.

Any case that meets at least one of the criteria listed above could be submitted as a potential strategic case to the other EDPB members. While it is sufficient for a strategic case to meet only one of criteria listed above, the EDPB members could also take into consideration the total number of criteria that are met in the proposal when selecting strategic cases to be submitted to the PLEN. It should be noted that the list of criteria is not exhaustive and that SAs may include additional reasoning in their proposals.

Finally, it should be noted that the degree of public debate and media attention are not included as relevant criteria. These audience factors should nevertheless be considered by the EDPB members when selecting a case.

## 2. Process and timeline for the selection of cases by the EDPB

This subsection lays out the essential steps from the identification of a case that could potentially become a strategic case to its submission to the Plenary for adoption.

### 2.1. Identification of a case by SA and submission to the ENF subgroup

On a voluntary basis, any SAs convinced that one of the criteria listed above is fulfilled for a case is allowed to submit a proposal of strategic case to the ENF subgroup.

More specifically, proposals of case of strategic importance can be submitted:

- Either by the lead supervisory authority (hereafter “LSA”), for instance where it needs technical support or investigations to be carried out;
- Or by a concerned supervisory authority (hereafter “CSA”) to prioritize the work on a specific case where it is not the LSA.

The EDPB will not decide that a case should be designated as a “strategic case” without the agreement of the LSA. Where a CSA wants to submit a strategic case for discussion before the EDPB, they should ideally seek the approval of the LSA first, both in line with the spirit of good cooperation and considering that the submission of a case as a possible strategic case could potentially create procedural difficulties for the LSA in a case that they are handling. However, although the LSA’s approval is required for the selection of a case as strategic, and while the LSA’s approval is preferable before a case is submitted for selection as a strategic case, the LSA’s approval is not required before the EDPB discuss a case for selection.

To submit a proposal to the ENF subgroup, the SA should complete the standard form at the end of this process guide and detail the criteria met by the case, the reasons of its proposal, and a proposed timetable/estimated deadline for the handling of the case.

### 2.2. Preselection of potential strategic cases by the ENF subgroup

Before its submission to the Plenary, the proposal supported by a supervisory authority should be submitted for discussion to the ENF subgroup. The proposal remains a “potential” strategic case until its adoption by the Plenary.

The supervisory authority submitting a case of strategic importance should transmit its proposal sufficiently in advance of the ENF subgroup meeting to leave time for every SA to analyze the potential strategic cases on the agenda before the meeting, to ensure informed discussions.

During this ad hoc ENF ESG meeting, the EDPB members discuss the submitted case(s) based on their analysis, with the aim to identify among the potential strategic cases, those that could be submitted to the PLEN for adoption, along with proposals for members to be part of the working teams on each case. Again, the selection of cases of strategic importance for which cooperation will be prioritized will be done by the ENF subgroup on the basis of the criteria defined in the previous section.

In order to divide the work and to be able to actually achieve the desired results within the agreed timeframe, the ENF member should remember that the selected cases should be divided over different LSAs and CSAs.

Finally, in order to ensure efficient engagement in the progress of strategic cases, the ENF subgroup should not deal with more than 5 on-going cases at a time (including cases that are not finalized), and therefore should limit the number of cases they select.

### 2.3. Submission and selection of strategic cases to the EDPB

After submission of the potential strategic case by the ENF subgroup to the Plenary for their adoption, the PLEN should decide on the following items:

- whether or not the submitted potential strategic cases should be included in the set of strategic cases cooperation mechanism;
- which authorities will compose the working team on each case and which SA will be in charge to coordinate the group (it should preferably be a small team of 3/4 authorities and should in OSS cases, include the LSA but does not have to include every CSA in order to remain agile);
- regular consultations with the CSAs not in the working team will be held to report on the progress of the work and to submit key points for arbitration, if necessary through the PLEN;
- take note of the work plan on which each case should be processed under the direction of the LSA (delays for investigations, for deliverables...) within a fixed timeline, which in principle should not go beyond 2 years.

After the PLEN meeting, the potential strategic case that has been adopted by the PLEN is qualified as a case of strategic importance at European level. The work team will have to follow the principles and the *modus operandi* detailed in section 2 of this process guide.

## II. WORKING ON A STRATEGIC CASE

This section lays out guidance for the practical implementation of investigations<sup>4</sup> for the SAs involved once a case has been designated as strategic. The handling of strategic case should be guided by the over-arching objectives of the Vienna Process: enhanced cooperation, efficiency and acceleration of investigations.

### 1. General Principles

The pursuit of the objectives of enhanced cooperation and timely investigation should be flanked by the following principles: self-commitment, prioritisation, foresight, transparency, collegiality and pragmatism:

#### 1.1. Self-commitment

Considering the independence of SAs during an OSS procedure and the voluntary nature of the strategic cases process, the adherence to the goals, principles and working methods in this guide shall be understood as an expression of *self-commitment* of the SAs involved to investigate a strategic case in an efficient and timely manner in a spirit of sincere cooperation<sup>5</sup> and the self-set goals expressed in the Vienna Statement. This guide does not prescribe strict or granular procedural rules. Rather, it encourages the SAs involved to set themselves specific goals and methods and to commit to those in each individual case.

#### 1.2. Prioritisation

The notion of “strategic” already implies that such a case should be treated differently from a “normal” case. The high significance of a strategic case (as laid out by the selection criteria in section I.2.) results in the need of SAs to “*prioritise*” strategic cases, as explicitly mentioned in the Vienna Statement. *Prioritisation* may manifest itself in different forms. First, it can mean that *more* human or financial resources are dedicated towards the case, e.g. in the form of FTE working days. However, acknowledging that resources can be limited by budgetary or other constraints<sup>6</sup>, *prioritisation* need not necessarily result in “extra” resources. SAs could also prioritise by shifting or allocating *existing* resources, e.g. by deciding that a strategic case should be handled by the responsible staff *before* other cases. Third, *prioritisation* may manifest itself through structural and organisational manners within an SA, e.g. by creating expert task forces or by involving senior officials early on in the process. In line with the principle of *self-commitment*, SAs should *prioritise* the handling of strategic cases but they should decide themselves *how* such prioritisation shall take place.

#### 1.3. Foresight

The effective handing of cases of strategic importance further requires *foresight*. SAs should be mindful that an efficient handling of a strategic case can set a precedent and thus lead to more legal certainty and facilitate or avoid the handling of similar cases, thus saving resources,

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<sup>4</sup> “Investigations” should be understood in a broad sense and should cover both complaint-based as well as ex officio cases within the meaning of Art. 57(1)(f),(h) GDPR.

<sup>5</sup> Art. 4(3) Treaty on European Union.

<sup>6</sup> Possibly reference to contribution to Art. 97 evaluation where lack of resources is mentioned.

especially when the case deals with a structural or recurring problem in several member states. SAs should be aware of what other authorities (e.g. consumer and competition authorities) are doing in parallel. Furthermore, the SAs should anticipate new technical or political developments. The SAs involved should be aware of existing and upcoming guidelines, opinions and other work of the EDPB in such strategic matters.

#### 1.4. Collegiality

SAs should be committed to good cooperation in a spirit of *collegiality*. The EDPB recalls that the key concepts of the cooperation procedure consist of “*an endeavour to reach consensus*” and the obligation to “*exchange all relevant information*”.<sup>7</sup> It is therefore of utmost importance that the SAs cooperate in a collegial manner and all pursue the same objectives within a case, i.e. to swiftly and strongly protecting citizens’ fundamental rights in a consistent manner throughout the entire EEA.

During the whole cooperation procedure all SAs should keep a mindset that all SAs “gain” in the end because the important OSS-case was completed successfully within a reasonable timeframe and setting precedents in landmark decisions will facilitate the handling of future cases. Further, the likelihood of an Article 65 procedure could be decreased.

#### 1.5. Transparency

To succeed in the “*endeavour to reach consensus*” SAs are obliged to “*exchange all relevant information*”<sup>8</sup>. *Transparency* is particularly important in strategic cases, since those are usually quite complex, so early and continuous access to all relevant information is the key to a good collegial cooperation. “Relevant information” should be understood in a broad manner. The LSA when it considers it useful for the SAs involved could share details of the investigation beyond the basic information, for example minutes of meetings with the controller or information relating to the technical aspects of the investigation.

*Transparency* does not only pertain to the content of the investigation itself but also to the organisational methods and means of cooperation specific to the strategic nature of the case. Each SA involved shall communicate very clearly, *how* they prioritise the work on the case of strategic importance. Self-set goals, milestones and timetables, and possibly other unique working methods of handling the case should be clearly communicated to the other SAs involved. At the beginning of the investigation, the SAs should engage in discussions in a transparent manner in order to enable the LSA to prioritize certain aspect of the investigation and to draft a timetable of the steps it intends to take within the investigation. Transparency within the cooperation procedure enables the SAs to identify controversial or divergent assessments of facts or legal views as early as possible. This helps to prevent discussions at a later of the procedure and avoids Article 65 procedure. Finally, SAs should be transparent with the public in accordance with applicable national and EU laws<sup>9</sup>.

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<sup>7</sup> Paragraph 37 of the Guidelines 02/2022 on the application of Article 60 GDPR.

<sup>8</sup> Paragraph 37 of the Guidelines 02/2022 on the application of Article 60 GDPR.

<sup>9</sup> This aspect is more concretely dealt with in Section 5.

## 1.6. Pragmatism and informal communication

In order to improve the cooperation in cases of strategic importance the case handling should be *pragmatic* and tailored towards the specific case. The SAs should focus on the objective of strong and swift enforcement and avoid unnecessary formalism in the cooperation between SAs. That is especially true with regard to means of communication. Here, SAs should not be limited to the use IMI but may resort to more informal and flexible tools. Self-set milestones may be adapted with regard to the overall objectives but shall be communicated with the other SAs involved and the ENF ESG. The discretionary power that SAs enjoy pursuant to domestic law should be exercised in a pragmatic way in order to facilitate and promote the cooperation in the case of strategic importance. In their discussions, the SAs should focus on the essential aspects that are decisive to the outcome of the case in order to ensure a strong and swift enforcement.

## 2. Making a Plan / MoU

In the Vienna statement, the EDPB stated that under the direction of the LSA, an action plan will be established to ensure that the work will be conducted in the most efficient manner and within a fixed timeline. The following sections should be understood as a best practice. However, with respect to the principle of pragmatism, SAs are free to deviate from the suggested approach if necessary.

### 2.1. Kick-off Meeting with LSA + dedicated CSAs (“working team”)

That requires an *early* exchange between the LSA and the dedicated CSAs (“working team”). They should conduct a short kick-off meeting in which the LSA informs the CSAs about the very basic facts of the case and what it has done so far. It may be helpful to provide a summary of the most important facts of the case that are available<sup>10</sup> to facilitate a first exchange of thoughts by the working team. Ideally, the kick-off meeting shall take place very shortly after the plenary meeting in which the case was designated, or, if appropriate, even before that plenary meeting.

### 2.2. Making an action plan / Second Meeting / MoU

As a next step, the Action Plan should be established, ideally within four weeks after the plenary has designated the case as strategic. The Action Plan should at least include the following elements:

- The LSA and the dedicated CSAs should explain their self-set means of the prioritisation of the case.
- The LSA and the dedicated CSAs should define the tasks and roles within the working team, in particular of the CSAs. From the outset, the CSAs’ role is rather reactive, i.e. they receive information by the LSA and provide constructive feedback. Depending on the case, CSAs could also take a more active role, e.g. proactively sharing own existing information about similar cases, carrying out legal research on specific questions, or collect factual information within their own territory. The EDPB notes that, where it is envisaged that the CSAs shall take investigatory measures within the meaning of Article 58(1) GDPR, the cooperation is elevated to a “joint investigation” and the legal

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<sup>10</sup> The “summary of key issues” as contained in the procedural regulation could serve as an orientation.



requirements of Article 62 become fully applicable. In such case, a more detailed Action Plan may be required.

- The working team shall jointly agree on a timeline in order to “ensure that the work will be conducted in the most efficient manner”<sup>11</sup>. The working team should be free to decide on the format of the Action Plan and may include, where appropriate, other elements, such as:
  - means of communication (e.g. not exclusively IMI but also informal formats such as e-mail, phone or video calls, in-person meetings, etc.);
  - frequency of internal communication;
  - external communication (i.e. how to possibly inform the public about the ongoing investigation);
  - “early adoption” by the SAs on a voluntary basis of elements for reaching consensus under the procedural regulation such as “summary of key issues” or “preliminary findings”;
  - implementation of the right to be heard.

### 2.3. Facing challenges

If the working team cannot agree on an action plan or for whatever reason the action plan cannot be followed, the working team should try to resolve those issues swiftly in the spirit of the principles laid out in this guide. The SAs should follow a layered approach. First and foremost, the dialogue between the LSA and the CSAs shall be intensified in order to avoid unnecessary escalations. If necessary, the LSAs and the CSAs should seek the advice of another SA that acts as a mediator. The SAs should report the results of their dialogue to the ENF ESG.

## 3. Reaching Consensus and internal communication

The Guidelines 02/2022 on the application of Article 60 GDPR clarify<sup>12</sup> that the SAs should use all possible tools, including mutual exchanges of relevant information, providing each other with an opportunity to express their views on exchanged information and take into account the point of view of other CSAs in order to reach consensus. This is particularly important in cases of strategic importance.

For the exchange of such information, not only the IMI system should be used. In addition, the LSA should offer to explain important results of the investigation by email or in videoconferences. The exchange in such videoconferences might be also helpful in order to ensure that the SAs work together, not against each other in the cooperation procedure. The LSA should make use of the possibilities of Article 60(2) GDPR in a collegial manner if it deems necessary or appropriate for the case at hand.

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<sup>11</sup> See Vienna statement, page 1, point b).

<sup>12</sup> See Paragraph 42 of the Guidelines.



In line with the principles of transparency and collegiality, the LSA and the CSAs should report regularly report a state of play of the investigation to the ENF ESG. In particular, the members of the ENF ESG should be informed especially if adjustments of the timeline are necessary. The reporting should be kept simple and informal. The members of the ENF ESG should get the opportunity to briefly discuss the report. The working team may seek the views of the members of the ENF ESG on specific points in more detail, where it deems this helpful. In addition, important results and milestones should be reported to the Plenary. The extent of the information, which is presented to the Plenary must be decided on a case-by-case basis. In case of disagreements on important legal questions that are decisive for the outcome of the case, the working team may consult the ENF ESG, and if need be, the EDPB plenary for non-binding orientation. The working team should seek to anticipate potential RROs and to avoid them by finding early consensus. However, if it is clear that disagreements persist, the working team may also, in a spirit of collegiality, “agree to disagree” and communicate this in a transparent manner to the ENF ESG.

#### 4. [External Communication](#)

The working team may agree upon a communication strategy in the action plan, taking due account of the applicable law and potential risks for the integrity of the investigation identified by the LSA. In the first place, it is up to the LSA to decide whether to communicate the results of the investigation, for instance via press release or the publication of the final decision. Therefore, external communications, up until the date on which the final decision has been published by the LSA, may take place only with the agreement of the LSA. In addition, the final decision should in principle be published on the EDPB’s website if that is permitted by the national law of the LSA. In principle, the communication should indicate that the final decision was based on procedure that had been designated as a strategic case by the EDPB, unless the plenary decides otherwise. The withdrawal of a case should be communicated if the designation as a strategic case had already been announced in public.

### III. CLOSING OF A STRATEGIC CASE

This last section aims to list some situations in which a strategic case could be considered as closed.

#### 1. [Submission of the Draft Decision in IMI by the LSA](#)

In principle, the enhanced cooperation on a strategic case is completed as soon as the LSA has submitted the draft decision.

If, despite the enhanced cooperation, a CSA expresses a relevant and reasoned objection to the draft decision, the working team shall support the LSA’s assessment whether the relevant and reasoned objection should be followed.

After the final decision has been issued the LSA should inform the Plenary. The EDPB should publish the results of the case in a press release.

## 2. Withdraw of the strategic case by the EDPB Plenary

In certain circumstances, the strategic case could close naturally because it no longer meets the relevant strategic criteria. The selection of a case as a strategic case can take place at a very early stage, in particular before the end of the investigations carried out by the LSA. Depending on the elements revealed during the investigation, the case, although considered by the Plenary a strategic case, may turn out to be of lesser importance, or even lose its character as a cross-border case.

When the working team realizes that the strategic case no longer meets one of the selection criteria or that the reasons given at the time of its selection no longer exist, the LSA in consultation with the authorities of the working team proposes to downgrade this case by following the same procedure as that for selecting a case as a strategic case, namely a discussion within the ENF subgroup, then submission to the Plenary of the downgrading of the case from the list of strategic cases.

## TEMPLATE

### Proposal for cooperation on strategic cases

Applicant SA (insert the name of your SA)

#### A. Background information

1. **Data controller/processor's name:**
2. **LSA:**
3. **CSAs:**
4. **IMI number (if any):**

#### B. Summary of the case

1. **Facts and current status** (i.e. investigations already led by the applicant, key dates, number of complaints, of data subjects, etc.):
2. **Legal References** (e.g. Transparency (Article 12), Right of access (Article 15), etc.):
3. **Subject Matter** (e.g. Biometric data, Health care, etc.):
4. **Key Findings** (max 150 words):

#### C. Why does this case qualify as a strategic case?

- It concerns a structural or recurring problem in several Member States  
Which one?

- Case related to the intersection of data protection with other legal fields  
Explain briefly:
- A large number of data subjects in several Member States are affected by the processing operation  
How many?
- A large number of complaints have been received by your DPA  
How many?
- A fundamental issue falling within the scope of the EDPB strategy
- Case where the GDPR implies that a high risk can be assumed (processing of special categories of data as referred to in Articles 9 and 10 of the GDPR; processing regarding vulnerable people such as minors; or situations mentioned in Article 35 (3) of the GDPR where a data protection impact assessment (DPIA) is required, or situations where a DPIA is required based on the criteria for processing operations that are likely to result in a high risk as laid down in the Guidelines on Data Protection Impact Assessment.  
Explain briefly:

D. What is the added value of this cooperation and what kind of help do you expect/offer?

For instance: what kind of expertise is required, is there a proposed timeframe, how much support / capacity do you expect is needed, will you ask assistance from the pool of experts)

## TEMPLATE Action Plan

- **Background, objective, and scope of the investigation**
  
- **Participating SAs in the working team**

**LSA:**

**CSAs:**

- **Tasks of the members of the working teams**

Who	What	When

- **Dates (or milestone) of the investigation**

**Kick off Meeting of the working team:**

**Status meetings:**

**Granting of the right to be heard:**

**Presentation of the preliminary draft decision:**

**Upload of the draft decision in IMI:**

- **Means of internal Communication and reporting**
- **External Communication**
- **Contact details of the members of the working team**