

# Internal EDPB Documents



**Internal EDPB Document 5/2021 on handling complaints against public authorities or private bodies acting on the basis of Article 6(1), point (c) or (e), GDPR in another EEA Member State**

**Adopted on 07 July 2021**

**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.**

Table of contents

- 1. Scope ..... 3
- 2. Background ..... 3
- 3. Practical Guidance ..... 4
  - 3.1 SA RECEIVING A PUBLIC SECTOR COMPLAINT FOR WHICH IT IS NOT COMPETENT UNDER 55.2 GDPR..... 4
  - 3.2 SA HANDLING A PUBLIC SECTOR COMPLAINT FOR WHICH IT IS COMPETENT UNDER 55.2 GDPR ..... 5
- ATTACHMENT ..... 7

# The European Data Protection Board

## HAS ADOPTED THE FOLLOWING INTERNAL DOCUMENT

### 1. Scope

1. This internal guidance document is meant to address the handling of those cases where a complaint is received by an EEA SA (the 'complaint-receiving SA') concerning processing activities by a public authority (or a private body acting under 6(1)c or 6(1)e) GDPR in a different EEA MS, in order to outline shared cooperation approaches that can be relied upon by SAs.

### 2. Background

2. In these cases the SA of the MS where the public authority operates is exclusively competent under Article 55(2) GDPR (the 'competent SA'). However, all EEA SAs are required to cooperate under 57(1)g GDPR to ensure consistency of application and enforcement of the GDPR - therefore, including cases regarding public bodies or authorities.
3. Article 61(1) GDPR provides for mutual assistance obligations between EEA SAs 'in order to implement and apply this Regulation in a consistent manner'; this wording implies that mutual assistance is an overarching obligation, i.e. regardless of whether assistance is sought as part of OSS procedures or not. Accordingly, SAs 'shall put in place measures for effective cooperation with one another'.
4. Moreover, Article 77(1) GDPR allows data subjects to lodge complaints with 'a' supervisory authority – which may be 'in particular' the one in the MS 'of his or her habitual residence, place of work or place of the alleged infringement'. Accordingly, it can be argued that a data subject is entitled to lodge complaints with the SA that is closest to their centre of interests even though that SA is not competent for handling the complaint under Article 55(2) GDPR. Data subjects are not required to address themselves to the SA that is competent under the GDPR as it will rather be up to the SAs to sort out this competence between them in accordance with the GDPR.
5. It should also be recalled in this respect that Article 77(2) GDPR requires the complaint-receiving SA to inform the complainant on progress and outcome of the complaint. This may have relevance as regards the need for all EEA SAs as administrative bodies to ensure effectiveness and efficiency of their administrative action pursuant to general principles of EU law (Article 41 CFR, in particular, as applied jointly with Article 51 CFR) and national law – in that the most efficient way should be determined to inform the complainant pursuant to Article 77(2) including when such complainant is habitually resident in a different EEA MS.

6. Taking account of the above considerations, it appears to be necessary to clarify how EEA SAs may cooperate in practice to handle complaints addressed against public bodies or authorities in a different MS so as to ensure a consistent application of the GDPR also in such cases and fully uphold data subjects' rights whilst avoiding procedural pitfalls.
7. On the one hand, there is indeed a risk that a data subject may experience difficulties in staying abreast of the complaint-handling proceeding in the competent SA's MS on account of possible language and legal barriers, so that it is imperative that his or her right to be informed on the progress (and outcome) of the complaint pursuant to Article 77(2) GDPR is upheld to the maximum possible extent. This is a difficulty that does not arise in the context of an OSS proceeding, where the CSA remains a party to the proceeding throughout its development and acts as the one-stop-shop for the complainant (the key interlocutor for the complainant).
8. On the other hand, there is the risk that the proceeding before the competent SA may be marred by the activities of the complaint-receiving SA insofar as such activities may conflict with the exclusive competence recognised in such cases to only one SA under Article 55(2) GDPR. It should be avoided that the complaint-receiving SA undertakes activities or takes initiatives that are not based on specific requests by the competent SA and thus becomes ultimately liable for those activities and initiatives especially in the complainant's eyes.

### 3. Practical Guidance

9. For the purposes of this document, a distinction can be drawn by considering the role of the complaint-receiving SA and that of the competent SA separately.

#### 3.1 SA RECEIVING A PUBLIC SECTOR COMPLAINT FOR WHICH IT IS NOT COMPETENT UNDER 55.2 GDPR

##### PROPOSED BEST PRACTICES

10. The complaint-receiving SA will inform the complainant that it is not competent to carry on the proceeding under Article 55(2) GDPR and that he/she will have to interact directly with the competent SA regarding the complaint, but that it will forward the complaint (as is) to the competent SA if the complainant agrees to it, where applicable under national law. It will provide the complainant with the contact details of the competent SA, if possible including the relevant department/unit.
11. The complaint-receiving SA will immediately inform the competent SA that it received the complaint using IMI Art 61 VMA<sup>1</sup>. By the same means, with the complainant's agreement where this is applicable under national law, it will forward the complaint (as is) along with

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<sup>1</sup> It should be recalled that it has already been agreed (see Article 56.2 internal guidance) that a SA that is not competent to handle the given case/complaint may use the Art. 61 Voluntary Mutual Assistance procedure to pass on the case/complaint to the competent SA.

(at least) a summary of the complaint in English for the sake of cooperation under Art. 57(1)g GDPR.

12. The complaint-receiving SA will remain available for further interactions with the competent SA, upon the latter's request, and with the complainant, in pursuance of Article 77(2). Further procedural steps concerning the complaint-receiving SA (e.g.: closing the procedure) will be regulated in accordance with the complaint-receiving SA's national law.
13. A **template information sheet/letter** is provided as an attachment to this document; it may be used on a voluntary basis by the complaint-receiving SA to convey the necessary information to the complainant.

### 3.2 SA HANDLING A PUBLIC SECTOR COMPLAINT FOR WHICH IT IS COMPETENT UNDER 55.2 GDPR

#### PROPOSED BEST PRACTICES

14. The competent SA under Article 55(2) will confirm reception of the submission as forwarded by the complaint-receiving SA via IMI Article 61 VMA along with a short English summary.
15. The competent SA will perform a preliminary vetting of the submission based on the English summary, in order to assess at least admissibility under the national law. It will inform the complainant (either directly or via the complaint-receiving SA using an Article 61 VMA request) about the subsequent steps also regarding admissibility of the complaint.
16. In particular, the complainant will be informed as soon as possible whether he/she will have to lodge the complaint directly with the competent SA, in a language that is admissible under the competent SA's national law, to meet national law requirements.
17. Due to the lack of competence of the complaint-receiving SA, the latter is barred in principle from handling the complaint directly. However, the two SAs may determine further cooperation activities, on a voluntary basis, as appropriate to the case at hand. It will be for the competent SA to determine such activities in accordance with the competent SA's national law and in the light of Article 61 GDPR. The complaint-receiving SA may act as a facilitator or intermediary mainly with respect to the competent SA's contacts with the complainant.
18. For the purpose of informing the complainant about the progress of the complaint pursuant to Article 77(2) GDPR, the competent SA may also rely on the complaint-receiving SA's assistance using an Article 61 VMA request.
19. There may be cases where the objective of Article 77(2) GDPR and the rationale of Recital 129 GDPR may be better fulfilled by involving the complaint-receiving SA in the exchanges with the complainant (e.g. in terms of language barriers and the exercise of the complainant's right to be heard) - although it may be argued that the legal framework in the competent SA's MS already takes care of such situations and enables hearing the complainant without 'superfluous costs and excessive inconveniences' as mentioned in Recital 129 GDPR. As pointed out above, this may only take place on the basis of a request

made by the competent SA to the complaint-receiving SA and by taking account of the constraints of the competent SA's national law.

20. Based on the experience gathered in this area, it will be considered whether further best practices need to be defined in order to streamline the information flow between the complaint-receiving SA and the competent SA, in any case based on the impulse and input provided by the latter.

For the European Data Protection Board

The Chair

(Andrea Jelinek)

## ATTACHMENT

### TEMPLATE INFORMATION LETTER FOR COMPLAINANT

(suggested for use by the complaint-receiving SA, if appropriate)

Dear Madam/Sir,

We are writing further to your complaint as lodged with our SA on ... regarding [brief description of complaint] [national reference No ...].

We would like to inform you that our SA is not competent to handle your complaint, as it is addressed against [select appropriate option] a public body/a public authority/a private body acting in compliance with a legal obligation under the law of/ for the performance of a task carried out in the public interest of/ [name of MS]. Under Article 55(2) of the GDPR, in such cases the SA of the MS concerned is competent; accordingly, you should contact: [name of competent SA and contact details].

[Select appropriate wording] Please consider that our SA can forward your complaint to the [competent SA] if you agree to it; in that case, please let us know at your earliest convenience as we will also provide the [competent SA] with a short English summary of your complaint. If we do not hear from you by [deadline], we will consider that you do not intend us to proceed in this manner. // We would also like to inform you that we will forward your complaint to the competent SA jointly with a short English summary.

Please consider that you may be contacted by the [competent SA] requesting you to lodge your complaint with it in accordance with its national law requirements. In any case, all future contacts regarding your complaint will be handled by the [competent SA].

For your information, our SA may provide the [competent SA] with assistance in handling your complaint if requested to do so, including in order to inform you about the progress of the complaint.

Yours Sincerely,