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

Version 2

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Version history

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version 1.0	08 October 2019	Adoption of Internal EDPB Document 3/2019 on internal guidance on Article 64(2) GDPR
version 2.0	02 December 2025	Inclusion of an Appendix; minor modifications to Internal EDPB Document 3/2019 on internal guidance on Article 64(2) GDPR

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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 the last sentence of Article 64(3) 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 the last sentence of Article 64(3) 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.**
3. During its meeting on 28 October 2024, the Plenary of the EDPB gave a further mandate to the Cooperation Expert Subgroup to provide Best Practices relating to Article 64(2) GDPR opinions. These have been duly appended to this document as an appendix.

1.2 General context and ratio of Article 64(2) GDPR

4. 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.[1] 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 (Recitals 13, 135) and the main task of the EDPB (Article 70(1)(1)). By determining clear competencies (Articles 55, 56) and procedures (Articles 60 et seq.) the GDPR enables SAs to achieve a consistent

[1] See in this regard also Article 63.

and high level of protection of personal data across the European Union (EU) and the European Economic Area (EEA).

5. In this regard, the GDPR foresees different tools which are available for the SAs to obtain a consistent application and interpretation of the GDPR. The one-stop shop mechanism laid down in Article 60 can be cited as an example, as can 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.
6. 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.

7. 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.*"

8. In contrast to Article 64(1), Article 64(2)does not provide an obligation for the SA, the Chair or the Commission to ask for an opinion. Consequently, it remains at the discretion of the possible applicants to request such an opinion. However, this possibility 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.

2.1.1 Conditions of Article 64(2) GDPR

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

2.1.2 What is a "matter of general application"?

10. 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 refer to the interpretation of provisions of the GDPR.

11. 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.

12. 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.

13. 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 to avoid setting a precedent on their own on a sensitive subject.

14. 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 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 What is a "matter producing effects in more than one Member State"?

15. 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 (23) GDPR), where the likelihood of effects is sufficient.

16. 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.

17. 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 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.

2.2.1 Relationship between both conditions

18. 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.

2.2.2 Relationship to cooperation procedures (Articles 60 et seq. GDPR)

19. As both conditions may arise from an ongoing individual case, the relationship to cooperation mechanisms according to Articles 60 et seq. GDPR has to be clear. First, it has to be noted though, that the primary objective with regard to cross-border cases is to reach consensus within the cooperation procedures (Articles 60 et seq. GDPR) without involving the EDPB

(Recital 138, second sentence). Therefore, Article 64(2) GDPR cannot be used to circumvent the cooperation mechanisms.

20. 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".

21. 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.

22. The following examples and counterexamples intend to clarify especially the relation between Articles 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 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, considering 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.

Considering 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 Articles 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)

23. The following admissibility requirements have to be met:

2.3.1 Possible applicants

24. 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. Any SA, the Chair of the Board or the Commission may request such an opinion. Other bodies and data subjects are excluded from the possibility to submit such a request.

2.3.2 Substantive requirements

25. Furthermore, at least one of the two substantive requirements of Article 64(2) GPDR 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 on admissibility. In this regard, it should be kept in mind that, in the end, it is the EDPB who decides whether 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

26. 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

27. 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.

28. 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.

2.4 Consequences

29. 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.

30. 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 to obtain, as a second step, a binding decision pursuant to Article 65(1) GDPR.

2.5 Outlook

31. This guidance and its appendix will be evaluated as deemed necessary with regards to practical experiences with Article 64(2) considering especially the number and subjects of requests.

For the European Data Protection Board

The Chair

Anu Talus

Appendix

3 Introduction

(1) These Best Practices provide guidance on the various stages of an Article 64(2) opinion, setting out a series of recommendations which promote an effective and efficient procedure for the making of a request under Article 64(2) GDPR and the writing of the opinion in response to that request. These Best Practices cannot limit the ability to request an opinion under Article 64(2) GDPR. Nevertheless, they represent a common understanding between EDPB Members on how to streamline the process of requesting and preparing an Article 64(2) opinion.

4 Making a Request

4.1 Informal discussion phase within the EDPB

(2) When a supervisory authority, the Chair of the Board or the Commission (the "requesting party") considers requesting an Article 64(2) opinion, they are recommended to informally discuss the request within the EDPB before formally launching their request. The requesting party should informally discuss the request with the EDPB in a timely manner, typically in the form of discussions at ESG or TF level. Where relevant, the requesting party should agree on a timeframe with the EDPB in which feedback would need to be provided.

(3) In addition to any discussions at ESG/TF level, the requesting party should, where possible, inform the EDPB Plenary if they are considering making a request. This would allow for prior discussion on the matter and, where relevant, on EDPB priorities. Where appropriate, the requesting party should also provide an update to the EDPB Plenary after its discussions within the ESG/TF.

(4) The informal discussion phase should be held so that the requesting party and the EDPB, as applicable, can:

- ensure that the EDPB is informed as early as possible of the matter of general application or producing effects in more than one Member State on which it considers requesting an opinion under Article 64(2) GDPR;
- assess whether the subject matter is appropriate for an Article 64(2) opinion. This means considering the elements set out in section 4.2 below. Based on the discussions within the EDPB, the requesting party should consider whether the matter is best addressed through, e.g., a discussion in the relevant EDPB ESG or Plenary; cooperation via an Article 61 or 62 request; the development of guidelines, recommendations or best practices; or an Article 64(2) opinion;
- identify any relevant legal provisions and, where feasible and appropriate, any existing positions among EDPB Members on the subject matter of the request. This should

particularly be done to anticipate potential views and allow the relevant ESGs to start any necessary preparatory work ahead of the formal launch of the request;

- allow for support in the framing of the request and the formulation of the questions. It can also be used to reach a common reading of the scope of the request and questions;
- discuss the appropriateness of a public consultation. Importantly, this discussion should be held to avoid delays in the procedure and ensure that a public consultation, if one is to be held, takes place as early as possible as set out in section 4.4. If the requesting party has already held a public consultation on the matter, this should also be presented at this stage;
- identify and arrange any resources necessary to draft the opinion, and plan the work with the subgroups and the Secretariat. The informal discussions should also be used by a requesting party when deciding whether to formally submit their request, and to consider the use of resources required in light of the EDPB's existing workstreams and resource allocations, as well as its commitments under the EDPB Strategy and work programme; and
- discuss the timing for the launch of the request in light of the points discussed. The timing should aim to, as much as possible, avoid having multiple Article 64(2) requests at the same time, avoid having an Article 64(2) request at the same time as an Article 65 or Article 66 GDPR procedure, and avoid having a shortened period for the EDPB to work on the request due to a holiday period.

4.2 What kind of questions are appropriate for the Article 64(2) GDPR procedure and how these questions should be formulated?

(5) Requests for Article 64(2) opinions should include one or more core questions which can be directly addressed by the opinion. Questions should be framed and scoped to require a concrete answer which can be provided in a limited number of pages and within the available timeline. Further, the number of questions should be limited according to their scope. In particular, when deciding how many questions might be appropriate to include in a single request, it is best practice for the requesting party to consider how much time and space might be required for each question, and how the available space and resources will be divided between each question.

4.2.1 Appropriate topics for a Request

(6) When evaluating whether a topic is appropriate for a request under Article 64(2) GDPR, it is worth noting that an opinion of the Board is addressed to its Members and should have a general character. This does not exclude that topics may also produce considerations on the consistent application of the GDPR that could be relevant for controllers or processors. In this regard, the requesting party should consider whether an opinion addressed to EDPB members would provide sufficient added value. Further, the requesting party should not make requests where the main value would be providing information, advice or guidance to other stakeholders, in which case the requesting party should instead consider proposing, e.g., EDPB Guidelines or a Statement.

(7) When considering if the added value of the opinion stems from a lack of alignment between EDPB Members, the requesting party should consider if this matter requires swift alignment (e.g. because of new, high-impact and widely-applicable societal and/or technological developments; because of a need to inform ongoing/pending enforcement actions; or because it concerns a strategic or sensitive subject where it is important to align views before setting a precedent) or whether it may be more appropriate to consider this matter through other EDPB workstreams. Further, the requesting party should consider whether the matter can be scoped in a way which fits within the relevant time period for an opinion, or whether it should rather be considered over a longer time frame.

(8) In principle, requests which overlap with existing EDPB work items should be avoided. In particular, requests should not be used to pre-empt, or compensate for delays on, guidelines. Where a request overlaps with an existing work item, the requesting party should make sure to explain the overlap, how the requested opinion might affect the existing work item and provide sufficient justification as to why the opinion is needed (e.g. by demonstrating that the topic of the request is not covered in the existing work item).

(9) To help ensure that the requested opinion falls within the scope of the EDPB's legal competence, it is best practice for the requesting party to consider the following elements:

a) Does the question provoke an answer which is addressed to SAs?

b) Does the question address a matter within the scope of 64(2), as elaborated on by the internal document? Among other things, does the request identify whether it relates to a matter of general application or to a matter producing effects in more than one member state – and, where necessary, does the request explain how it relates to either of these elements?

c) Is the question of sufficient focus that it can be properly answered within eight weeks and within a single opinion? If not, is the question so complex that it could be answered within the extended deadline of eight plus six weeks? This calculation should consider the workload of the EDPB.

4.2.2 Appropriate framing and scope for requests

(10) As noted in para. (35) below, an Article 64(2) opinion should generally be between 2 and 15 pages and the requesting party should make sure to consider whether their questions are scoped to fit within this page range. Questions should therefore be clear and concise, with a frame and scope which allows the EDPB to provide a high quality, efficient and useful opinion within the legal deadline and the recommended page count. In this regard, the requesting party should recall that the EDPB is bound by the questions asked and that quality of the opinion will often depend on the quality of the request and its questions. It is also important to recall that the opinion will be addressed to all SAs and should be framed as such.

(11) As a best practice, targeted questions are preferred. This can include presenting the question as a choice between several alternative options, which allows the opinion to take the form of a reasoned support for one particular choice. For example, these questions could be formulated so that, after the necessary analysis has been performed, it can ultimately be answered with yes or no. Alternatively, the request could include a series of alternative statements or assertions, one of which can be used as the basis for the EDPB's answer. Where this style of question is not possible, the questions should at least be targeted in the sense of providing a sufficient level of detail so that it is clear which issues need to be covered by the response, and in the sense of being sufficiently restricted to be answerable within a limited number of pages and within the relevant legal deadline. The terminology used in the questions should be applied consistently, as any variation in wording may create ambiguity about the intended scope of the question. To avoid any confusion, questions should not be framed in a double negative.

(12) To help ensure this targeted scope, it can be appropriate to limit questions to a small part of a larger topic, or to specific provisions of the GDPR. Where this is done, it is best practice for the question to make any necessary assumptions or caveats appropriately clear. This can be done in the actual wording of the question or by reference to other parts of the Request. Where the substantive elements of these assumptions or caveats may be considered controversial, this should be addressed during the informal discussion phase within the EDPB. If it appears that a request cannot be condensed or focused to a particular issue, it is likely that an opinion is not the correct means to resolve the issue and that another approach, such as guidelines, may be more appropriate.

(13) Questions should be framed to allow for clear answers which provide concrete and usable guidance to SAs. As a best practice, questions should be avoided or reframed if they can only be answered by reference to a case-by-case approach without any clarifying insight on how that analysis can be performed. As a best practice, requests should also avoid references to specific controllers, unless this is absolutely essential to address the question at stake. In this regard, please see para. 21 of the Internal Document and the examples provided.

4.2.3 Template questions

(14) The following non-exhaustive list can be used as templates when formulating questions for an Article 64(2) request. These templates should be used for testing a limited number of specified GDPR provisions and not for GDPR compliance as a whole. Where a template includes a description of factual circumstances, this should be carefully scoped to the

elements that are specifically being tested in the Article 64(2) opinion, with unnecessary details being set aside through caveats and assumptions (e.g. regarding compliance of other elements or ancillary matters), bearing in mind the best practices above. This description can either be incorporated into the question itself or by reference to another part of the request. Where the question includes a definition, it should, as far as possible, be drawn from existing regulations, standards, or other official sources. It should also be made clear whether the request for an opinion requires the EDPB to clarify any terms as part of its opinion. The templates are:

a) Should [provision XYZ] be applied as meaning [interpretation A] within the context of [situation ABC]?

   This template expects a "Yes" or "No" answer supported by appropriate reasoning. The inclusion of the contextual situation may be omitted where appropriate and provided that this does not widen the scope beyond the best practices set out in paras. (11) – (13) above. Given the potential overlap with template B, this template should only be used if a specific "yes" or "no" answer will provide particular value.

   Alternatively, this template may be modified into a multiple-choice question, presenting two or more possible interpretations from which the EDPB can select. These options could, in particular, be derived from, or narrowed down by, discussions held during the informal consultation with the EDPB.

b) [Description of situation ABC, listing the key elements.] Could this situation be compatible with [provision XYZ]?

   This template expects a "Yes" or "No" answer supported by appropriate reasoning. Importantly, this template asks "could" the situation be compatible, not "is the situation always compatible" and does not expect the opinion to provide a comprehensive list of factors that might affect compatibility beyond those explicitly listed in the question. This template should, therefore, only be used to test the specific elements described in the question itself and this should be made clear in both the request and the introduction for the opinion.

c) How should [provision XYZ] be applied within the context of [situation ABC]?

   This template expects a specific commentary on the particular GDPR provision, supported by appropriate reasoning. The requesting party should ensure that the factual context limits the scope of the opinion according to the best practices set out in paras. (12) and (13). Where appropriate, the requesting party should also provide a list of possible solutions, based on the existing work.

d) What are the minimum factors which should normally be considered by an SA when evaluating compliance with [provision XYZ] within the context of [situation ABC]?

   This template expects an answer in the form of a list of factors which should be evaluated during an enforcement proceeding, along with supported reasoning. The template may be expanded to include optional factors – or, alternatively, the inclusion of a contextual situation may be omitted – if doing so would not widen the scope beyond the best practices set out in in paras. (11) – (13) above. Where appropriate, the requesting party should also provide a list of possible solutions, based on the

existing work. This template should only be used in circumstances where a non-exhaustive list provides useful results.

4.3 How many substantive elements or issues are appropriate to include in a single request?

(15) Each request should be very focused and address very specific matters. Therefore, substantive elements should be limited to those absolutely necessary and should generally only cover one issue or specific problem.

(16) In case of multiple issues, it should be considered whether those issues have sufficient overlap/dependency to justify being included in a single request and, if not, which issues have the highest priority for the requesting party. Issues of a lower priority could then be excluded from the scope of the request and handled in a subsequent request or in different types of EDPB documents where still necessary. This is primarily due to the fact that very short timelines have to be adhered to in an Article 64(2) procedure.

4.4 When and how might it be "appropriate" under Article 70(4) GDPR to perform a public consultation on the issues at hand?

(17) A public consultation is a tool to gather stakeholder views and positions which can help to, for instance, gather practical insights on specific, technical questions. Where a public consultation is considered to be appropriate, it should take place as early as possible and, as a rule, prior to the formal launching of the Article 64(2) GDPR process (and the start of the legal deadline).

(18) The EDPB can hold a public consultation under Article 70(4) GDPR where found "appropriate" by the EDPB Plenary. The requesting party may, additionally or alternatively, hold a public consultation on its own initiative if permitted by, and in accordance with, its national frameworks.

(19) If a public consultation is carried out by the requesting party, the requesting party should provide the EDPB with the results, as well as with any available information on the results' representativeness across other EDPB Members.

(20) If a consultation is to be performed by the EDPB, the requesting party should engage with the EDPB Secretariat, the relevant ESG(s) and the Plenary to assess its appropriateness during the informal discussion phase within the EDPB, as set out in section 4.1. This early engagement should be done in a way which allows for the necessary EDPB resources to be dedicated to the organisation of the public consultation, for the modalities and organisational aspects of the public consultation to be determined (e.g. a decision by the EDPB on what questions will be posed and whether this will be done via a written consultation or a stakeholder event), and for an appropriate timing taking into account the legal deadline to adopt the opinion.

(21) The non-exhaustive lists of elements below may help to assess the appropriateness of a public consultation in relation to Article 64(2) opinions, which can be included when requesting the Plenary to organise such public consultation:

- Do the questions have a strategic and/or societal dimension?
- Do the relevant topics have an innovative or novel nature?
- Do the questions refer to a technical subject matter and/or do they have a specialist dimension?
- Would the EDPB benefit from the views of controllers/processors/the relevant data subjects when reflecting on the answers to the questions? Would the input collected from the stakeholders allow the EDPB to produce answers to the questions that are better aligned with the situation in practice?
- Are the questions related also to other fields of law? Would consultation of authorities competent for the supervision and enforcement of such fields of law inform the opinion?
- Has the question(s) already been publicly discussed?

(22) With respect to unsolicited contributions received during the legal deadline – often in the form of letters shared with the Secretariat – tight deadlines may require additional resources in order to fully review and process all inputs. To address this, a group of volunteers from among EDPB members may be established to analyse the contributions and provide concise summaries or key insights to support the drafting process.

(23) A public consultation should not be conducted on the actual question contained in the request once the opinion has been adopted.

4.5 What should be included in the submission and which parts of the constitute the actual request?

4.5.1 The "request" to the Board and its written reasoning

(24) When submitting a request for an opinion, the requesting party should present one document containing the actual "request" that the Board will examine with a view to providing the opinion envisaged by Article 64(2) GDPR and the "written reasoning" referred to in Article 10 (3) RoP (see Internal EDPB Document 3/2019, para. 25).

(25) Considering that the EDPB will be bound by the scope of the request, this scope should be clearly set out by presenting the specific question (and sub-questions where needed) in an autonomous section of the document devoted to the "question submitted to the EDPB" so as to allow the EDPB to clearly identify it.

(26) A different section of the same document should be devoted to the "written reasoning". It should clarify on which conditions referred to in Article 64(2) GDPR the request is based, i.e.

if it is a matter “of general application” or a matter “producing effects in more than one Member State” (see Internal EDPB Document 3/2019, paras. 7 et seq.).

(27) The written reasoning should include a detailed description of the background of the request and explain, as applicable, why the issue is considered “a matter of general application” and/or, where the request concerns a matter producing effects in more than one Member State, the types of effects and the Member States that would be involved.

(28) The written reasoning should also highlight the novelty of the request or, where it refers to a legal issue relating to the interpretation of the GDPR that is not new, the reasons why the existing case law and/or previous opinions, decisions and other work of the EDPB do not appear to give the necessary guidance to deal with it.

(29) If the request concerns a matter of general application related to the practical implementation of the GDPR, indications should be provided on the absence of previous experience in relation to the practical issue at stake or on a (possible) inconsistent application of the GDPR.

4.5.2 Additional documents/information

(30) Where applicable, the submission should also include evidence that the requesting party has attempted to “solve” the issue through other means, provide any already-envisaged solutions or possible options, and explain why the opinion is necessary.

(31) Any known lack of common understanding within the EDPB and any diverging views of SAs on the relevant issue should also be highlighted and substantiated in the submission. To this end, where relevant, a summary of the documents exchanged on this topic and of the views of the other SAs (e.g., gathered by means of previous Article 61 requests and/or discussions held within the relevant EDPB subgroups on the issue, including during the informal cooperation) may be provided. In cases where there is no apparent disagreement about a substantive legal question, it should be clarified why an opinion of the Board is needed. For example, one such reason could be to facilitate a future consistent interpretation/application of a GDPR provision that has not been already addressed by the EDPB or the existing case law on a strategic or sensitive subject.

(32) Where a public consultation is held before submitting the request, whether by the EDPB or by the requesting party itself, the outcome should be considered in the request, which should clarify if and how the public consultation has shaped the questions being asked and the possible answers (see section 4.4 above).

(33) As best practice, the requesting party should have considered the elements raised in the request beforehand and should therefore have, for example, already gathered certain materials or developed possible solutions, options or scenarios. The requesting party could therefore provide such materials (articles, opinions from academics, etc.) as part of the request if available. Any such material should be presented in a fair and non-biased way, e.g. by providing copies of any contributions received as part of a public consultation. Where such material is not (yet) available or has not been sourced, the requesting party should consider the completeness and maturity of their request.

(34) The request could also suggest the competent ESG(s) for consideration by the Chair when deciding on the mandating of the request to an ESG.

5 Drafting the opinions

5.1 How should an Article 64(2) GDPR opinion be constructed and presented?

(35) Article 64(2) opinions should be constructed to answer the question(s) posed in the request as clearly and efficiently as possible. The opinion should limit itself to the scope of the question(s) and should not be longer than necessary to answer the question actually asked. Opinions should generally be between 2 and 15 pages.

(36) As a best practice, all participants should contribute where possible and make their SA's views known as early as possible. Further, participants should be aware of, and help to curtail, all forms of scope creep.

(37) The specific structure for the opinion will depend on the nature of the request itself. At a minimum, however, it is a best practice to include a copy of the question(s) asked, an evaluation by the EDPB of the admissibility and need for the opinion in light of the request and of the requirements in Article 64(2) GDPR, a short text which clearly sets out the scope of the opinion and/or providing any necessary context for the answer, the details of any assumptions or qualifications which have been incorporated into the answer, an appropriate level of reasoning, and a clearly-marked section which explicitly sets out the answer(s) to the question(s).

(38) Opinions are an instrument addressed from the EDPB to its Members and should be written with this target audience in mind. Therefore, opinions should refer to elements that SAs should consider when assessing compliance with the GDPR, which may, where appropriate, include general considerations on the consistent application of the provisions in question and which can be generally relevant for ensuring compliance with the GDPR. As a best practice, opinions should generally be written in soft-law style (e.g. "should" rather than "must") unless describing explicit GDPR obligations, using direct language that gives a clear answer. It is a best practice to review the language and style at every stage of the writing process.

(39) Further, opinions should be written in a style which allows SAs to determine how to take the opinion into consideration and allows the EDPB to evaluate whether and how this has been done in specific cases. In this regard, the EDPB should ensure that the views and interpretations reflected in the opinion are appropriately accessible and understandable for the reader.

(40) When determining what should be included in the content of the opinion, both in terms of substantive content and in terms of the level of detail required, it is a best practice to consider whether a particular element is strictly necessary for answering the question(s) posed in the request. In this regard, it is recalled that "extra" considerations can be reserved for later EDPB work items. Equally, "textbook" or background information should not be included unless it is actually incorporated into, and necessary for, the concrete answer being provided.

5.2 How the work should be organised at the drafting and subgroup level

(41) After confirmation of the completeness of the file, the request is officially launched and the formal work can start. As a best practice, the work should be organised with a small and agile drafting team, with either the Secretariat as the sole rapporteur or with a limited number of SAs represented in the drafting team.

(42) The lead rapporteur should, together with the drafting team and Coordinators of the competent ESG(s), provide a schedule for the drafting and adoption of the opinion in order to allow the members of the drafting team and competent ESG(s) to anticipate the necessary human resources. The schedule should include:

- different drafting team and ESG meetings and the related rounds of comments (including, if necessary, joint meetings where more than one ESG is competent),
- If necessary, a SAESG meeting, and
- the Plenary for the adoption,

Ad hoc ESG or Plenary meetings should be exceptional in principle and should be announced as soon as possible.

(43) The requesting party (or any other SA) may be requested to help the drafting team or the subgroup members better understand the questions posed. The drafting team may reach out to the requesting party (or any other SA) where necessary for further information or explanations.

(44) Where issues cannot be solved within the relevant ESG, or where issues require a decision at the Commissioner level, it would be appropriate to use a meeting of the SAESG or Plenary, ensuring that SAs have the time to discuss and decide on the different options. Alternatively, different options may be proposed for decision by the Plenary during the discussion on adoption of the opinion.

(45) The drafting should be organised by the drafting team, considering the workload of ESGs and its existing schedule of meetings, in order to fit the timeline. It should be borne in mind that, during the whole drafting process, the relevant ESGs should be consulted and comment on the draft as often as appropriate through rounds of comments. Late comments should be avoided unless a strategic issue becomes important to tackle, as it may be impossible for the drafting team to consider comments submitted after the deadlines. Comments should include drafting suggestions whenever possible.

(46) Ad hoc ESG meetings should only be scheduled if some points are blocked and there is a need for further discussion, for finalizing the draft opinion, or if the workload of the ESG is such that the opinion cannot fit into its existing schedule of meetings. Orientation polls should be used to unblock situations where possible.

(47) As a best practice and considering the tight timelines, the work should be organised to minimise the number of SAESG meetings related to the opinion. If a SAESG meeting is

required, there should ideally be no more than one per procedure. This may happen if, for example, polls taken during the drafting do not provide a clear direction for the drafting, in which case a SAESG with a clearly defined agenda should then be organized. The use of the SAESG should, however, be carefully considered and not overburden the EDPB staff and Members. As a best practice, the drafting team should ensure that the questions/options presented to the SAESG are as clear as possible given the restricted timeline of the Article 64(2) procedure and to help ensure that the SAESG is able to provide a final orientation as a result of the discussions.

5.3 How the work can best be organised to preserve quality of drafting despite the short time limit?

(48) As a best practice, the timeline for work should include a window for proofreading and other editorial checking to be performed after the final agreement has been made on substance. The timing for this revision may differ depending on the specific circumstances, including the length and complexity of the opinion's text.

(49) To help protect this period for revision, the core direction of the work should be established as early as possible, taking full advantage of the informal discussion phase within the EDPB in accordance with section 2, and the other best practices set out in this document.