



Final

88th Plenary meeting 12-13 December 2023, Brussels

Some points have been redacted from these minutes as their publication would undermine the protection of one or more of the following legitimate interests, in particular: the public interest as regards international relations; the privacy and integrity of the individual regarding the protection of personal data in accordance with Regulation 2018/1725; the commercial interests of a natural or legal person; ongoing or closed investigations; the decision-making process of the EDPB, in relation to matters upon which a decision has not yet been taken and/or the decision-making process of the EDPB, in relation to matters upon which a decision has been taken.

1 Adoption of the minutes and of the agenda, Information given by the Chair

1.1 Minutes of the 87th Plenary meeting – adoption

The minutes of the previous plenary meeting were adopted with one vote against and one abstention. The EDPB members also agreed on the public version of the minutes. The To-do list was also amended.

In connection with the minutes, which refer to exchanges with authorities of third countries, the European Commission recalled its readiness to present to the EDPB its assessment of the developments of the data protection framework in countries that are subject to an adequacy decision (in addition to the upcoming report on the 11 decisions). The European Commission also recalled the principles governing the post Brexit relations between the EU and the UK..

1.2 Draft agenda of the 88th EDPB meeting – adoption

The draft agenda was adopted with a modification of the title of item 2.3 to ‘Contribution of the EDPB to the report on the application of the GDPR under Article 97 GDPR’, the withdrawal of item ‘5.2 EC update on adequacy findings and tools for international transfers’, which will be postponed to the next plenary meeting and with the inclusion of a new item ‘5.2 Information on the rulings of the CJEU in cases C-634/21, SCHUFA Holding (Scoring) and C-807/21, Deutsche Wohnen].

The discussions relating to agenda points 2.1, 2.2 and 3.2 were declared confidential according to Art. 33 EDPB RoP.

The EDPB Chair recalled the need for the EDPB members to ensure respectful external and internal communications even in case of disagreements with the views agreed within the Board.

The EDPB Chair informed the EDPB members that on 7 December 2023 the EDPB's urgent binding decision of 27 October 2023 was published together with the IE SA's decision of 10 November 2023. Prior to the publication of the urgent binding decision, the EDPB Secretariat conducted an assessment of the possible need for redactions under the supervision of the EDPB Chair on the basis of the position of the controller and taking into consideration Guidelines 03/2021 on the application of Article 65(1)(a) GDPR.

2 Current Focus of the EDPB Members

2.1 Update from the European Commission on EU-US e-evidence negotiations – information

The Chair welcomed Mr. Nils Behrndt, Deputy Director General for Digital Transformation, Justice and Consumers at the European Commission - DG Just (chief negotiator for these negotiations) Mr. Behrndt informed the EDPB members about the state-of-play of the negotiations between the EU and the US on an agreement on cross-border access to electronic evidence in criminal investigations, aiming to resolve issues of conflict of laws including by putting in place the necessary data protection safeguards. In that respect, he referred to the EDPS Opinion of April 2019 on the negotiating mandate. The most recent round of negotiations took place on 4-5 December 2023 in Washington D.C. The EDPB will be kept regularly informed of developments in these negotiations.

The EDPB members took note of the information provided and showed appreciation for being informed early in the process.

2.2 'Pay or OK' model - discussion

The EDPB Chair invited the EDPB members to share their views on the role of the EDPB on the subject of 'Pay or OK' consent mechanisms.

Several SAs expressed the need for the EDPB to look into the matter from a broad perspective, to ensure a consistent interpretation of the GDPR in the various enforcement cases dealt with by the SAs (whether they are cross-border or not).

The EDPB members entrust the KEYP ESG with preparing a request for mandate to prepare guidance on the 'pay or OK' model. The request for mandate needs to include a timeline and is intended for discussion and adoption at the next EDPB plenary meeting.

2.3 Contribution of the EDPB to the report on the application of the GDPR under Article 97 GDPR – adoption

The EDPB Chair thanked the EDPB members for their efforts in providing the information needed under short deadlines, and expressed her appreciation for the work of the EDPB Secretariat to consolidate the contributions from the EDPB members into a coherent document under a very tight deadline.

The European Commission recalled the timeline for the report to be finalised, noting that the Council adopted their position on 5 December 2023. The Commission is also gathering contributions from the GDPR multi-stakeholder group .

Following a discussion on some elements of the report, the EDPB members adopted the contribution unanimously. The EDPB members further entrusted the EDPB Secretariat with final updates from EDPB members on national figures. The EDPB members were called to update their national report in the view of its publication alongside the EDPB report.

3 FOR DISCUSSION AND/OR ADOPTION – Expert Subgroups and Secretariat

3.1 Key Provisions ESG, Technology ESG and Cookie Banners Task Force

3.1.1 Letter to the European Commission on the cookie pledge initiative – adoption

The EDPB Chair recalled the European Commission’s voluntary cookie pledge initiative, which aims to promote best practices regarding cookie consent. The European Commission requested the EDPB to assess whether any of the envisaged principles for best practices would be contrary to GDPR or the ePrivacy directive. The rapporteur presented the draft letter explaining that it also recalls previous positions of EDPB, as explained in the annex containing feedback by way of references to previously adopted EDPB guidance.

The draft letter was adopted by the EDPB members, with 25 EU members in favour, 1 against, 1 abstention. The EEA members were all in favour of adoption.

The EDPB members decided to delay the publication of the letter until 19 December 2023, date of the release of the cookie pledge by the European Commission.

3.2 Enforcement ESG

3.2.1 Strategic Cases – discussion

The EDPB Chair recalled the existence of the selection process guide and criteria to select cases of strategic importance adopted in July 2022, which defines cases of strategic importance as cases where it is likely that a high risk to the rights and freedoms of natural persons in several Member States exists. Since then, the ENF ESG has gained some experience on the matter and has asked for an exchange of views among the EDPB members.

The EDPB members decided to continue with the selection of strategic cases in the future and requested the ENF ESG to look into supplementing the selection process guide in order to address the practical and procedural hurdles identified, following the selection of a case as being strategic, but also to shape best practices for enhanced cooperation. In this regard, the ENF ESG is invited to examine the role Article 62 GDPR could play in enhancing cooperation in strategic cases.

The EDPB members decided, upon the BE SA’s request, to withdraw the [REDACTED] case as strategic case, following the discussion in the EDPB meeting of 17 October 2023.

3.5 EDPB Secretariat

3.5.1 2024 EDPB Adopted Budget – discussion

The EDPS informed the EDPB members the adopted EDPB budget for 2024. As is the case for all EU institutions, no additional staff will be provided to the EDPB Secretariat. In addition, cuts were made in the budget for the building, IT equipment and services as well as for external consultancy, which relates to the law firm support for litigations.

The EDPB members took note of the information provided and underlined their concern about those cuts.

4 Awards to Andrea Jelinek, former EDPB Chair

4.1 GPA Giovanni Buttarelli awards and W@Privacy “Privacy Icon - Public category” awards to Andrea Jelinek

At the 45th Global Privacy Assembly in Bermuda (October) Andrea Jelinek, former EDPB Chair, was awarded the Giovanni Buttarelli Award for the leadership she has demonstrated in promoting international collaboration in the field of data protection.

The platform Women At Privacy nominated Andrea Jelinek as ‘Privacy Icon’ in the Public category.

Both awards were accepted on the former EDPB Chair’s behalf and are on this occasion handed to her personally.

3 FOR DISCUSSION AND/OR ADOPTION – Expert Subgroups and Secretariat (second part)

3.3 Key Provisions ESG, together with Cooperation ESG

3.3.1 Art 64(2) Opinion - Central Administration and Art 4(16)(a) – discussion and possible adoption

The EDPB Chair recalled that during the high-level meeting in Vienna the EDPB had decided to make greater use of the consistency opinions under Article 64(2) GDPR and that the current request is in line with this decision.

The EDPB Secretariat, as lead rapporteur, presented the draft opinion and recalled that its content reflects the conclusion of the SAESG ESG. The EDPB Secretariat further explained that the FR SA had agreed to break down the original question into three separate abstract questions.

Following this, the EDPB members discussed the draft. A few EDPB members expressed some remaining concerns regarding the draft document.

A few other EDPB members shared that they have not been able to consider sufficiently the possible unintended practical consequences of the opinion and that they need more time to reflect on this.

In light of the exchanges, it was concluded that the draft opinion as it stands is not ready for adoption and that further strategic discussions at expert subgroup level are necessary in order to reach an agreement.

3.4 Technology ESG

3.4.1 Reply to MEP Körner on the ‘Do Not Track’ function in browsers– adoption

The Chair underlined the fact that MEP Körner’s letter was already sent to the EDPB on 9 November 2022. The rapporteur presented the draft reply to MEP Körner’s letter. The draft reply sets out how ‘Do Not Track’ settings relate to consent under Article 5(3) Directive 2002/58/EC, as well as to the right to object under Article 21 GDPR or under Article 23(3) Regulation 2018/1725.

Following a discussion and one modification to the draft, the letter was adopted by the EDPB members unanimously.

3.4.2 EDPB Statement on recent legislative developments regarding the Proposal for a Regulation laying down rules to prevent and combat child sexual abuse – request for mandate

The EDPB Chair recalled the proposal for a regulation laying down rules to prevent and combat child sexual abuse material (CSAM), on which the EDPB and EDPS jointly issued an opinion on 28 July 2022. Since then, the European Parliament has adopted its position in November 2023.

The rapporteur presented a request for mandate for drafting an EDPB statement on the proposal in order to offer analysis and support the co-legislators in making sure that any finally agreed text fully complies with the Charter, and in particular with the fundamental rights to privacy and data protection. To ensure timeliness, a statement should be prepared for adoption in the January or February plenary meeting.

The EDPS noted they have received a request for consultation from the European Commission on a prolongation of the interim CSAM regulation. This request is not addressed to the EDPB, hence this matter is not in scope of the request for mandate.

The EDPB members adopted the mandate unanimously.

3.5 Secretariat (continued)

3.5.1 Possible Memorandum of Understanding with PEREN (Pôle d'Expertise de la Régulation Numérique, FR) – information

The EDPB Secretariat presented the possibility of entering into a memorandum of understanding with PEReN, an interdepartmental office with national competence placed under the joint authority of the French Ministers of Economy, Culture and Digital Technology. PEReN was created as a centre of expertise in data science that can provide technical support and guidance to administrations, either by assisting regulators in their activities or by providing expertise in research work commissioned by administrations. PEReN is actively involved in the field of personal data protection, for instance it is developing tools for inspections or audits of mobile applications. PEReN has a memorandum of cooperation in place with the European commission and with the FR SA.

The EDPB Secretariat proposed to prepare a memorandum of understanding with PEReN for approval by the EDPB, with the aim of making some enforcement tools available to the SAs.

One EDPB member took the view that the EDPB should - in addition to the proposal above - discuss guiding principles for the conclusion of memoranda of understanding. Another EDPB member suggested that the term “memorandum of understanding” would be reserved for cooperation with EU or international partners, and a different term would be used for possible cooperation with PEReN.

The EDPB Chair concluded that the EDPB Secretariat was entrusted by the EDPB with the preparation of a memorandum of cooperation with PEReN and that the need for a general position could be discussed at ESG level at a later stage.

5 AOB

5.1 ES SA - Presentation of age verification criteria

The ES SA informed the EDPB members of their event on 14 December 2023 to celebrate their 30th anniversary and to present the "Age Verification Criteria" developed by the AEPD. The criteria aim to prevent access by minors to inappropriate content, while ensuring the anonymity of Internet browsing for the adults. The ES SA proposed to work on the subject of age verification within the EDPB.

The EDPB members took note of the information provided and invited the ES SA to raise the preparation of a request for mandate on the topic of age verification criteria at expert subgroup level.

5.2 Information on the rulings of the CJEU in cases C-634/21, *SCHUFA Holding (Scoring)* and C-807/21, *Deutsche Wohnen*

The DE SA drew the attention of the EDPB members to two CJEU rulings.

In ruling C-807/21 the court ruled that the GDPR precludes national legislation from adding substantive conditions to the wording of Article 83(4) to (6) GDPR, such as a requirement that an infringement has previously been attributed to an identified natural person in order for an administrative fine to be imposed on a legal person in its capacity as controller. Further, an administrative fine may be imposed only where it is established that the controller intentionally or negligently committed an infringement.

In ruling C-634/21, the court ruled that Article 22(1) GDPR must be interpreted as meaning that the automated establishment, by a credit information agency, of a 'credit score' (probability value based on personal data relating to a person and concerning his or her ability to meet payment commitments in the future) constitutes 'automated individual decision-making', where a third party receiving this 'credit score' draws strongly on it to establish, implement or terminate a contractual relationship with that person. Automated decisions are permitted only under certain conditions, which the referring court shall assess. Further, information relating to the granting of a discharge from remaining debts, may not be kept by private entities for longer than the public insolvency register keeps it.

The DE SA suggested to discuss the rulings in more detail in an upcoming KEYP ESG meeting.

5.3 Plenary dates for October, November and December 2024

The EDPB Chair informed the EDPB members that the European Commission service in charge of assigning meeting rooms has warned that the weeks during which the EDPB planned plenary meeting in the fall of 2024 will be very busy. The EDPB Secretariat proposed alternative dates for the plenary meetings to be held in October, November and December 2024.

The EDPB members decided to change the plenary meeting dates to 7-8 October (in-person), 4 November (remote) and 2-3 December 2024 (in-person). Where meetings start on a Monday, they will begin later to allow EDPB members to travel on the same day.

5.4 Extension of the deadline for the public consultation on the ePrivacy guidelines

The EDPB Secretariat recalled the EDPB guidelines on technical scope of Article 5(3) of the ePrivacy Directive, which were adopted in November 2023. A public consultation on the guidelines was launched until 28 December 2023. Considering the holidays period, it may be challenging for stakeholders to provide their feedback on time, whereas their input will be important for further work on these guidelines.

The EDPB members agreed to extend the public consultation until 18 January 2024.

Annex: Attendance List

SAs:

AT SA, BE SA, CY SA, CZ SA, DE SA, DK SA, EDPS, EE SA, EL SA, ES SA, FI SA, FR SA, HR SA, HU SA, IE SA, IS SA, IT SA, LI SA, LT SA, LU SA, LV SA, MT SA, NL SA, NO SA, PL SA, PT SA, RO SA, SE SA, SI SA, SK SA

- European Commission

- Observers: Georgia

In line with Art. 8 of the EDPB RoP, the observers were present during the plenary meeting except for points 2.1, 2.2 and 3.2 of the agenda.

- EDPB Secretariat

Dr. Andrea Jelinek, former EDPB Chair, attended point 4 of the Agenda.