



Final

## 92nd Plenary meeting

16-17 April 2024, in person

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.

### I. Adoption of the minutes and of the agenda, Information given by the Chair

#### I.1. Minutes of the 91st Plenary meeting – adoption

The minutes of the previous EDPB plenary meeting were adopted unanimously, with a correction in the first paragraph of item I.1 and in item D.3.4. The EDPB members also agreed on the public version of the minutes.

#### I.2. Draft agenda of the 92nd EDPB meeting – adoption

The draft agenda was adopted with the inclusion of an AOB item from the HR SA and one from the IE SA.

The discussions relating to agenda points B.1.1, B.1.4, were declared confidential according to Art. 33 EDPB RoP.

### A. Agenda items for adoption

There was no request to discuss any of the proposed A items. A single vote was organised for the three point A agenda items and they were all adopted unanimously:

- A.1. Article 64(2) Opinion on the draft list of the Latvian SA on processing operations exempt from the requirement of a data protection impact assessment under Article 35(5) GDPR (Technology ESG);
- A.2. Letter to the BEUC on "coordinated GDPR enforcement action against Meta" (Enforcement ESG);
- A.3. Reply letter to the UK SA (International Transfers ESG).

## B. Agenda items for discussion

### B.1. Agenda items for discussion in view of adoption

#### B.1.1. Article 64(1) GDPR Opinion on AUDITOR certification criteria

The chair highlighted the importance of this topic and noted that further opinions on certification criteria are expected to follow in the future.

The rapporteur presented the state of play of the file, referring to the work done in the CEH ESG, KEYP ESG and SAESG. The DE SA requested an opinion on their draft decision concerning the EU Cloud Service Data Protection certification criteria. The rapporteur explained that the main objective of the scheme is to allow the certification of processing operations conducted by Cloud Service Providers when acting as processors on behalf of a cloud user and for limited processing operations of Cloud Service Providers when acting as a controller. Furthermore, it was noted that the scheme is limited to private sector Cloud Service Providers. Among others, the opinion contains a recommendation regarding the personal/household exemption, concluding the scheme can cover both business-to-business and business-to-consumer services.

The EDPB members adopted the opinion. 24 EU members voted in favour; none voted against; 2 EU members abstained. The 3 EEA SAs expressed their position as being in favour.

#### B.1.2. Draft Memorandum of Cooperation with PEReN

The chair recalled the mandate given to the EDPB Secretariat in December 2023 to prepare a Memorandum of Cooperation with PEReN (Pôle d'Expertise de la Régulation Numérique).

The EDPB Secretariat recalled that PEReN is an office with national competence placed under the joint authority of the French Ministers of Economy, Culture and Digital Technology. 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 understanding in place with the European commission and with the FR SA. For the EDPB, the objective of cooperating with PEReN would be to make use of their expertise in specific areas, including in the form of workshops, training, tools and exchanges on best practices. Cooperation would in any case be on a voluntary basis on both sides and subject to available resources.

The EDPB approved the memorandum of cooperation and entrusted the EDPB Chair with signing it. 26 EU members voted in favour; none voted against; 1 EU member abstained. The 3 EEA SAs expressed their position as being in favour.

#### B.1.3. Generative AI - Request for a mandate

The chair recalled that at the EDPB Plenary of 16 January 2024, the EDPB members had decided that the KEYP and TECH subgroups should jointly prepare a request for a new mandate outlining the proposed actions in relation to generative AI. The EDPB Secretariat presented a request for mandate on generative AI.

As a first step, it is proposed to develop guidelines on data scraping in AI training. The work on this topic would be led by the TECH ESG, while the KEYP ESG would be consulted on any relevant legal matters. Several EDPB members have volunteered as co-rapporteur, however no one has volunteered to act as lead rapporteur.

In accordance with the best practise on the organisation of Plenary meetings, the EDPB members took note of the proposed request for mandate and postponed the adoption until a lead rapporteur is identified.

The chair emphasised the importance of producing guidance on this very topical subject and encouraged the EDPB members to take the lead in this important work.

#### B.1.4. Article 64(2) GDPR Opinion on Consent or Pay Models

The EDPB Chair recalled the background of the request by the NL SA, acting also on behalf of the NO SA and DE (Hamburg) SA), concerning so-called 'consent or pay-models' and the conditions under which consent can be considered valid in the context of processing of personal data by large online platforms for the purpose of behavioural advertising, also taking into account the CJEU ruling in Case C-252/21 *Bundeskartellamt*.

The EDPB Chair noted that the European Commission announced it has launched investigations into the compliance of consent or pay models with the DMA and the DSA. Further, the EDPB Chair recalled that several stakeholders have sent letters to the EDPB expressing their views on consent or pay models as well as asking the EDPB engage with stakeholders on this matter.

The EDPB Chair and EDPB Secretariat thanked the drafting team and the Key Provisions and Strategic Advisory Expert Subgroups for the work done.

The EDPB Secretariat explained that the draft Opinion provides clarification on the application of the requirements for valid consent under the GDPR to consent or pay models when used as a legal basis to process personal data for the purposes of behavioural advertising in the context of 'consent or pay' models deployed by large online platforms. These terms are defined within the Opinion, and a non-exhaustive list of criteria to identify large online platforms is provided.

The EDPB members exchanged views on the approach taken in the draft opinion. A few SAs took the view that within the timespan allowed for an Article 64.2 GDPR opinion it is not feasible to address the issues with sufficient clarity. In particular, IT SA highlighted that a postponement of the adoption would be appropriate in order to overcome some issues contained in the opinion and expressed its intention to vote against the adoption at this Plenary in case of no postponement. Many SAs took the view that there was a clear need for the EDPB to express itself on the questions put forward in the request within the deadline for the opinion.

The EDPB Secretariat presented three remaining discussion points to the EDPB members. The EDPB members decided to insert in the opinion's conclusion and executive summary "*that, in most cases, it will not be possible for large online platforms to comply with the requirements for valid consent if they confront users only with a binary choice between consenting to processing of personal data for behavioural advertising purposes and paying a fee*". Further, the EDPB members decided to insert in the opinion's conclusion and executive summary that "*whether a further alternative without behavioural advertising is offered by the controller, free of charge, will have a substantial impact on the assessment of the validity of consent, in particular with regard to the detriment aspect. The offering of a free alternative without behavioural advertising should therefore be given significant consideration by large online platforms.*" Finally, the EDPB members decided to insert in the opinion's conclusion, as well as similar wording in the section on detriment and executive summary, that "*as a result, detriment is likely to occur when large online platforms use a 'consent or pay' model to obtain consent for the processing.*"

The EDPB members adopted the opinion, with 21 EU members voting in favour; 4 EU members voting against; 2 EU members abstaining. The 3 EEA SAs expressed their position as being in favour.

The EDPB Chair recalled that in December 2023, the EDPB members entrusted the KEYP ESG with preparing a request for mandate for guidelines on consent or pay models, explaining that the newly

adopted opinion addressed only some of the issues on this matter. In connection with such future guidelines, the EDPB members exchanged views on how to engage with stakeholders. The EDPB members decided that on this subject, input from stakeholders should be sought at the start of the work on guidelines. Further details will be determined once the mandate for guidelines has been approved.

At the close of this topic, the EDPB Chair took note that an extract of the opinion had been disclosed to the press just after its adoption. The EDPB Chair expressed her deep concerns, the EDPB had planned to provide shortly a press release on the matter. Such disclosures undermine the hard work done by the communications staff of both the EDPB members and EDPB Secretariat to provide an official presentation of the EDPB work and an accurate and balanced summary of the opinion as a whole. The Chair recalled the importance of coordinated communications work.

#### B.1.5. EDPB Strategy 2024 – 2027

The rapporteur presented the draft EDPB strategy for 2024-2027, which is based on four pillars and highlights main objectives and key actions for achieving them.

The EDPB members unanimously adopted the EDPB Strategy. The EDPB Strategy will be operationalised via the work program that will be adopted in the near future.

#### B.1.6. DPF National security part – RoP, Complaints Form and Information Note

The EDPB Chair recalled that this subject concerns the implementation of the redress mechanism for national security purposes under the EU-U.S. Data Privacy Framework.

The EDPB Secretariat and BTLE coordinator presented the draft rules of procedure, template complaint form and accompanying public information note prepared within the BTLE ESG. The U.S. Government was consulted in the drafting process. The complaint form will be translated into all the official EU languages by the EDPB members, enabling data subjects to file a complaint in their own language. The rules of procedure aim to guide the cooperation between the complaint-receiving SAs and the EDPB Secretariat.

The European Commission welcomed the work done on these documents, as this effort demonstrates the commitment on the part of the European supervisory authorities to ensure the EU-U.S. Data Privacy Framework is operational.

The EDPB unanimously adopted the rules of procedure, the template complaint form and accompanying public information note.

#### B.1.7. DPF Commercial part – RoP of DPA panel and Template for Complaints

The EDPB Chair recalled that the EU-U.S. Data Privacy Framework provides for an informal panel of EU DPAs to give advice on complaints relating to HR data as well as the possibility for organisations to voluntarily submit to the oversight of this DPA panel for complaints.

The EDPB Secretariat presented the draft rules of procedure on the organisation of the informal panel of EU DPAs as well as a template complaint form prepared within the ITS ESG. The EDPB Secretariat recalled it is not involved in the functioning of the informal panel of EU DPAs.

The EDPB unanimously adopted the rules of procedure and the template complaint form.

The European Commission welcomed the adoption of these documents, noting their importance to ensure the applicability and usability of the DPF for data subjects. The European Commission provided information on the timeline of the first joint review of the Data Privacy Framework.

## B.2. Agenda items for discussion

### B.2.1. Publication of the Report on the use of SPE external experts

The chair recalled that in February, the EDPB asked the EDPB Secretariat to produce a report on the work done by the Support Pool of Expert.

The EDPB Secretariat presented the draft report, explaining that it had been discussed with the stakeholders (in particular the SPE contact points, the requesting SAs and experts involved in projects).

The EDPB members approved of the report and agreed to publish it. 25 EU members voted in favour of publication; 1 EU member voted against; 1 EU member abstained. The 3 EEA SAs expressed their position as being in favour of publication.

Following a discussion on the matter, the EDPB members decided to publish deliverables of four additional SPE projects with a disclaimer stating that it does not represent the views of the EDPB. 24 EU members voted in favour of publication; 2 EU members voted against; none abstained. The EEA SAs expressed their position, with 3 EEA SAs in favour of publication.

## C. Organisational matters

### C.1. Designation of second coordinator for Cooperation ESG

Following the decision of one of the coordinators of the COOP ESG to step down, a call for interest was circulated among the COOP ESG members. The COOP ESG proposed for nomination a second coordinator and requests the EDPB to formally designate them.

The EDPB members unanimously designated [REDACTED] (DE SA) as second coordinator for the COOP ESG.

### C.2. Appointment of representatives to the Article 7 DMA Subgroup

The chair recalled that the EDPB has previously appointed five representatives and an alternate for the DMA High Level Group, as well as five representatives to the DMA HLG Subgroup on Article 5.2 DMA.

The chair then explained that the present request relates to a subgroup of this High Level Group which focuses on Art. 7 DMA, and is an important point of connection between the DMA and the GDPR. The chair then gave the floor to the EDPB Secretariat.

The EDPB Secretariat explained that the EC had invited the EDPB to appoint 5 representatives. Together with the EDPS representative, they will constitute the EDPB-EDPS delegation. The appointed representatives will be called to represent the EDPB, and, consequently, will align their positions with the taskforce on competition and consumer law. The EDPB Secretariat informed the members that the first meeting will take place at the end of April 2024.

Following calls for candidates sent to the members, three candidates have stepped forward for the role of representative and one for the role of alternate.

The EDPB members unanimously appointed the following 3 candidates as EDPB permanent representatives: [REDACTED] (ES SA), [REDACTED] (IT SA), and [REDACTED] (BE SA) as EDPB Representatives for the Article 7 DMA Subgroup, and [REDACTED] (ES SA) as alternate.

### C.3. Proposal of suspension of EDPB work on the right to be heard in cooperation procedures according to Article 60 GDPR considering the draft regulation laying down additional procedural rules relating to the enforcement of GDPR

The chair recalled that the ENF ESG was mandated to produce recommendations addressed to SAs on questions they may face in consistency procedures when applying the rights to be heard and to access to the file.

The rapporteur explained that the ENF ESG had started discussions on the matter. Pending the adoption of a Regulation laying down additional procedural rules relating to the enforcement of the GDPR, the ENF ESG members are in favour of suspending the work on recommendations to avoid inconsistencies.

The EDPB members unanimously agreed to suspend the work on this matter.

### C.4. Launch of the secondment programme

The chair recalled the recently signed EDPB - EDPS joint decision on a regular secondment programme to be launched every two years from 2024 onward.

The EDPB Secretariat explained that a call for interest will be circulated to both the EDPB members and to interested staff members. A kick-off event will take place in Brussels in autumn 2024.

The EDPB took note of the information provided.

### C.5. 2023 EDPB budget execution and 2025 draft budget

The EDPS Head HR, Budget and Administration of EDPS presented the 2023 budget execution and informed that almost 92.8% of the budget has been executed.

The budget proposal for 2025 prepared by the EDPB Chair and the EDPB Secretariat with the help of the EDPS Finance sector was also discussed. A request for reinforcement of the EDPB Secretariat's staff was included. This request will be examined by the budget authorities. The costs related in particular to the increase of litigation cases, consistency work and support for the CSC was highlighted.

The EDPB Chair thanked the EDPS HRBA for the support provided for the preparation of the EDPB budget proposal, its defence before the budgetary authorities as well as the cooperation on the budget's execution. The EDPB Chair and EDPS called upon the members to provide support for the budget proposal at national level, by highlighting the need for sufficient funding for the EDPB to the financial authorities or the permanent representation of their Member State to the EU.

The EDPB members took note of the information.

## D. Agenda items for information

### D.3. Any other business

#### D.3.1. Invitation from the HR SA

The HR SA extended an invitation to the EDPB members to attend their conference marking the 20<sup>th</sup> anniversary of the establishment of the Croatian Personal Data Protection Agency and of personal data protection in the Republic of Croatia.

#### D.3.2. IE SA update

The IE SA provided information to the EDPB members regarding ongoing investigations.

The EDPB members took note of the information given.

The EDPB Chair and IE SA also provided information on the hearing held by the CJEU on 16 April 2024 in the joined cases T-70/23, T-84/23 and T-111/23 regarding the applications for annulment in part of binding decisions 3, 4 and 5/2022. The IE SA emphasised they lodged these cases to obtain clarification on the competences of the EDPB within the scope of Article 65 GDPR, as well as of the respective competences of the LSA and the CSAs in cross-border cases, and that these cases do not affect the IE SA commitment to cooperation with all SAs and with the EDPB.

## E. State of play

### E.1. State of play of the TF C&C work on interplay between data protection, competition and consumer protection

The EDPB members took note of the written state of play, titled Frequently Asked Questions (FAQ) on cooperation with competition and consumer protection authorities.

### Annex: Attendance List

AT SA, BE SA, BG 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, MT SA, NL SA, NO SA, PL SA, PT SA, RO SA, SE SA, SI SA

- The SK SA delegated voting rights to the CZ SA pursuant to Art. 22.5 RoP.
- The HR SA delegated voting rights to the IT SA pursuant to Art. 22.5 RoP for 17 April 2024.

European Commission

Observers:

- GE SA, MD SA. In line with Art. 8 of the EDPB RoP, the observers were present during the discussions of the plenary meeting except for points A.1, B.1.1, B.1.4 of the agenda.

EDPB Secretariat

Note: The meeting on 16 April 2024 was chaired by Deputy-Chair Nicolaidou (items I, A, B.1.1, B.1.2, B.1.3, B.2.1, C.1, C.2, C.3, C.4, D.3.1, E).