



Final

87th Plenary meeting

14 November 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 85th and 86th Plenary meetings – adoption

The minutes of the 85th plenary meeting were adopted unanimously. The members of the EDPB also agreed on the public version of the minutes.

The minutes of the 86th plenary meeting were approved with two modifications and adopted unanimously. The members of the EDPB also agreed on the public version of the minutes.

1.2 Draft agenda of the 87th EDPB meeting – adoption

The draft agenda was adopted with the addition of four AOB points: an update from the NL SA on their progress in the area of PNR, information from the EU COM regarding a forthcoming call for proposal for grants to DPAs, a request from the LV SA concerning the date of the EDPB plenary meeting in May 2024 and finally an item concerning the publication of EDPB Urgent Binding Decision 1/2023.

The discussions relating to agenda point 4.6 were declared confidential according to Art. 33 EDPB RoP.

1.3 Update on Global Privacy Assembly – discussion

The EDPB Chair provided an update from the 45th Global Privacy Assembly (GPA) that took place in Bermuda in October. The EDPB Chair informed that seven Resolutions have been adopted and that

Andrea Jelinek has been awarded the Giovanni Buttarelli award for her leadership as the first Chair of the EDPB. The Federal data protection commissioner of Germany (BfDI), the EDPS, the ES SA and the EL SA have also received awards. In addition, the BG SA has been elected to the GPA Executive Committee and will now contribute significantly to the work of the GPA.

The EDPB Chair informed that at this year's GPA, the EDPB has provided an update in the closed session and has organised an EU side meeting. She also provided a brief update from her bilateral meetings during the GPA, and the informal discussions she had with the participants of the conference including the ICO.

Following this, the EDPB members shared their impressions from the GPA in Bermuda. Then, they exchanged on what the EDPB priorities should be for the next GPA and on how coordination in this context can be further improved.

2 Current Focus of the EDPB Members

2.1 Guidelines on Technical Scope of Art. 5(3) of ePrivacy Directive – discussion and adoption

The rapporteur presented to the EDPB members the work done on the guidelines and recalled that while the applicability of Art. 5(3) of the ePrivacy Directive (ePD) is well established for some tracking technologies such as cookies, the purpose of the guidelines was to bring more clarity regarding the application of this provision to other tracking tools. The rapporteur explained that the guidelines address this issue and identify key elements for the applicability of Art. 5(3) of the ePD. In addition, a number of use cases are included.

Following this, the EDPB members discussed the guidelines. Some editorial changes made after the final discussions at sub-group level were approved. One EDPB member indicated that use case no. 3.3 may need to be re-examined depending on the outcome of the public consultation.

The Guidelines were adopted by the EDPB members. 22 EU members of the EDPB voted in favour of adoption. 5 EU members of the EDPB abstained. 2 EEA members of the EDPB were in favour of adoption, 1 EEA member abstained.

Some of the abstaining members indicated that they have abstained because they are not competent for article 5(3) e-privacy matters under their national laws.

The Guidelines will be subject to a public consultation for 6 weeks.

3 Expert Subgroups and Secretariat

3.1 COOP ESG

3.1.1 Exchange of information on designated representatives under Article 27 GDPR - request for mandate

The EDPB Chair recalled that this item has already been discussed during the December 2022 plenary meeting and that the COOP ESG has been given a mandate to explore the interest and legal feasibility of the project. The rapporteur then presented the new request for mandate to pursue the work and provided further information on the discussions that have taken place at sub-group level following the plenary meeting in December.

Following this, the EDPB members discussed the content of the proposal. They were invited to choose between the two options presented in the request for mandate. They opted for Option 1 and decided that the list should indicate which SA has the information on the representatives but without including the representatives themselves.

Then, the EDPB members voted on the mandate for the COOP ESG to pursue and finalise the project, and for the IT Users to assist the COOP ESG with the technical implementation, including with the choice of the most appropriate platform to host the “list”. The EU members of the EDPB adopted both mandates unanimously. 1 EEA member of the EDPB abstained.

3.1.2 Application of Article 55(2) and Chapter IX GDPR - request for mandate

The rapporteur introduced the item and explained that some EDPB members have identified the need to agree on a common approach with regard to the application of Article 55(2) GDPR and the national rules transposing Chapter IX GDPR in the context of cross-border processing. Therefore, the guidelines would analyse the impact on the cooperation procedure when national legislation is applicable and examine concrete practical cases.

The EDPB Chair recalled that the COOP ESG still has some open work items that are important and should take precedence in case there is a need to prioritise depending on the workload and timing.

The EDPB members adopted the mandate unanimously.

3.2 BTLE and ITS ESG

3.2.1 Update on subgroup activities on DPF implementation - discussion

The EDPB Chair explained that the purpose of this agenda item is to have a state of play on the work carried out by the BTLE and ITS ESG, but also to prepare for the discussion with the representatives from the US government in the afternoon. It was recalled that the focus of the BTLE has been on the new redress mechanism in the area of national security relating to complaints alleging unlawful access by US intelligence agencies to personal data transmitted from the EU to the US. The ITS is discussing the commercial complaint process with a view to updating the documentation in relation to the setting up of the Informal Panel under the DPF.

The rapporteurs provided an update on the work done at the BTLE subgroup so far and presented the three documents that the group has been working on, namely the draft Rules of Procedure, the draft Individual Complaint Template and the draft public information note. The intention is to share these documents with the US counterparts for their feedback too and to organise a meeting at technical level to further discuss the practicalities of the new redress mechanism. The Secretariat also informed that a functional mailbox with encrypting capabilities has been set up and the work on encryption testing has progressed.

The EDPB members then briefly exchanged on the content and format of the meeting with the US representatives.

3.3 SAESG

3.3.1 EDPB best practices on the organisation of the EDPB plenaries - adoption

The EDPB Chair recalled the background and highlighted that the aim of the document is to improve the functioning of the EDPB plenary meetings by collecting best practices and making concrete suggestions for changes.

The Secretariat provided an overview of the suggestions, which are explained in detail in the info note. The main novelty is the structure of the plenary agendas. Under points A, the EDPB members would adopt without discussion non-strategic documents that enjoy consensus; it will however always be possible for members to request a specific debate and vote on a point A item and if needed the point can be placed on the agenda of one of the following Plenary sessions. The purpose is to reduce the number of written procedures and to therefore increase transparency on documents that used to be adopted in written procedures as they will be embedded in the public agenda. Points B would be for matters requiring discussion at plenary level. The next points will be for organisation matters, for information and for written state of play.

Concerning the requests for mandates, the best practices provide that they should always be motivated in relation with the EDPB strategy, in writing and include at least a lead rapporteur.

This will be a pilot project, applying for 6 months as of January 2024. After that, the EDPB members will discuss any potential need for changes.

After accepting two changes proposed by the Secretariat, the EDPB members adopted the document unanimously and also agreed to publish it.

4 AOB

4.1 Draft EDPB Guidelines on anonymisation and pseudonymisation: proposal to temporarily suspend the ongoing work

The EDPS thanked the drafting team for all the work done on the draft guidelines since 2020 and recalled that the EDPS is currently involved in a litigation in a case concerning the concept of personal data. The EDPS also referred to the recent judgment of the European Court of Justice in case C-319/22. In this context, considering that fundamental concepts are at stake and that two other relevant court cases are pending in appeal before the Court of Justice (Case-413/23 P and Case C-479/22 P), the EDPS suggested to temporarily suspend the work on the anonymisation and pseudonymisation guidelines.

The EDPB members exchanged views on the proposal. Several EDPB members spoke in favour of pursuing the work, underlining that the EDPB's general approach so far is not to suspend its work because of pending cases; that the mandate for this item has been granted a long time ago and that it is important to ensure that the guidelines reflect the state of the art. An EDPB member underlined the need to ensure that the guidelines will not present the matter in a too long or complex manner.

The EDPB members decided to pursue the work on the guidelines. The EDPB also decided that the TECH ESG will consult the SAESG for further guidance on the strategic points of the guidelines.

4.2 Resignation of Tiina Ahtonen of the ETIAS Fundamental Rights Guidance Board

The EDPB members were informed that Ms. Tiina Ahtonen from the FI SA has resigned from the ETIAS Fundamental Rights Guidance Board for personal reasons. Considering that originally three persons were appointed, it was decided to proceed with two persons (one member and one alternate), without appointing an alternate to replace Ms. Ahtonen.

4.3 NL SA update on their progress in the area of PNR

Considering the lack of time to address the matter during the plenary meeting, the NL SA agreed to share information in writing.

4.4 Dates of the Spring Conference and EDPB plenary meeting in May 2024

The LV SA recalled that the 2024 Conference will be hosted by them and take place in Riga and the most suitable dates would be 14 to 16 May 2024. The LV SA therefore requested to reschedule the remote EDPB meeting planned for 16 May.

The EDPB members decided to have the plenary meeting on 23 May 2024 (remotely).

4.5 Information from the EU COM on a forthcoming call for proposal for grants to DPAs

The EU COM informed that it will soon make a new call for proposals for grants to DPAs. The EU COM referred to the previous waves of grants, which have benefited numerous authorities. The call will be published in the next days and there will be a specified period for applications. There will be a limit of 250k€ of funding per project. The EU COM encouraged the SAs to apply.

4.6 Publication of the EDPB Urgent binding decision on processing of personal data for behavioural advertising by Meta

The EDPB Chair introduced the topic and indicated that the IE SA informed her today that it had adopted a decision on [REDACTED] and it had been notified to the controller [REDACTED]. The Chair asked if the IE SA could share some information on the content of the decision and on the time frame given to the controller to provide requests for redactions on the basis of Article 339 TFEU. The IE SA informed that they are waiting for the controller to indicate whether any redactions would be necessary. The IE did not share any information on the timeline and undertook to provide a written update at a later day.

One SA asked the IE SA to share its own position on Meta's "pay or okay" consent mechanism. Following this, the members of the EDPB discussed possible ways to further work on "pay or okay" consent mechanisms at EDPB level and agreed that the topic would be discussed at EDPB level.

5 Meeting with US representatives on the practical implementation of the EU-US Data Privacy Framework

The EDPB Chair welcomed the US representatives from the Department of Commerce, the Office of Privacy and Civil Liberties at the US Department of Justice, the ODNI Civil Liberties, Privacy, and Transparency Office and from the US mission to the EU. The US representatives then introduced themselves and expressed their willingness to pursue the so-far strong and successful collaboration with the EDPB members and its Secretariat. Following this, they provided an update on where they stand with the DPF implementation in general and more specifically with the national security redress mechanism. The EDPB members asked some follow-up questions based on the content of their presentation.

Then, the EDPB Chair gave the floor to the BTLE Coordinator who presented the work done on the EDPB side, including the three draft documents that the BTLE is preparing. The US representatives were invited to a follow-up meeting at technical level. The EDPB and the US representatives discussed their respective actions to inform individuals about the redress mechanisms.

The EU COM recalled that the EU-US DPF provides for a first evaluation one year after the adoption, so in July 2024. The EDPB will be a part of this exercise and the EU COM will reach out to the US

colleagues. The purpose of the evaluation would be to make sure that everything is in place and functioning as expected.

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

- EDPB Secretariat