

Internal EDPB Documents



Internal EDPB Document 3/2021 providing guidance on the planning and preparation of EDPB Binding Decisions under Article 65(1)(a) GDPR

Adopted on 13 April 2021

Important note:

This document was originally written for internal use among EDPB members. At its Plenary meeting of 14 June 2022, the EDPB has decided, in the interests of transparency, to make this document available to the public by publishing it on its website.

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The European Data Protection Board

HAS ADOPTED THE FOLLOWING INTERNAL DOCUMENT

1 PLANNING

1. In order to ensure the timely adoption of the binding decisions of the Board, the Secretariat should plan the work on the drafting and discussion of the draft binding decision. In principle, the Secretariat will communicate a draft planning to the Chair and the members of the Enforcement Expert Subgroup (ENF ESG) within one week after the file has been declared complete and the subject matter has been referred to the EDPB.
2. The draft planning should generally include:
 -) the date(s) of the Plenary meeting(s) during which the binding EDPB decision should be adopted;
 -) an indicative date of completion of the initial assessment of whether the objections meet the threshold of Article 4(24) GDPR and the date(s) of discussion with members of the relevant expert subgroup (in accordance with the decision of the Chair);
 -) an indicative date of completion of the assessment of the objections meeting the threshold of Article 4(24) GDPR and of the substance of the case and the date(s) of discussion with members of the relevant expert subgroup(s) (in accordance with the decision of the Chair);
 -) any further meeting dates of the relevant expert subgroup (including any extraordinary meetings of the expert subgroup(s), where appropriate and as agreed with the coordinators).
3. The draft planning may also (be updated to) include reference to possible SAESG meetings to enable a high-level exchange on matters having significant impact on the drafting process, where appropriate.
4. The draft planning should also include the evaluation of the need to redact elements or portions of the final EDPB binding decision on the basis of EU law obligations of professional secrecy to avoid any undue delay in publication.

2 PREPARATION OF THE DRAFT EDPB BINDING DECISION

5. According to Article 11(5) of the EDPB Rules of Procedure (“RoP”), the binding decisions “*shall be prepared and drafted by the secretariat and, upon decision of the Chair, together with a rapporteur and expert subgroups members*”.¹ Therefore, the EDPB Secretariat should act as lead rapporteur and the Chair should decide on the involvement of an expert subgroup and of co-rapporteurs.
6. As soon as the LSA has submitted the matter to the EDPB for dispute resolution, the Secretariat should start the assessment of the completeness of the file. During this assessment, the Chair is invited to decide on the possible involvement of co-rapporteurs and will invite EDPB members to express an

¹ See also Article 75(6)(g) GDPR, which provides that the Secretariat shall be responsible in particular for the preparation, drafting and publication of decisions on the settlement of disputes between supervisory authorities.

interest to become co-rapporteurs (unless the Chair decides not to involve co-rapporteurs for this case)². In order to ensure fairness and impartiality, the (group of) co-rapporteur(s) should not include delegations from either the LSA or CSAs that submitted objections in relation to the draft decision³.

7. Due to its expertise and due to the subject matter, the ENF ESG will generally be the subgroup involved in the discussion and work on binding decisions pursuant to Article 65(1)(a) GDPR. Depending on the agenda of the ENF ESG, the discussions related to the draft binding EDPB decision may also take place in the context of extraordinary meetings of the ENF ESG so as not to unduly disrupt the execution of the workplan of the ENF ESG or with an ad hoc format of the ENF ESG dedicated to a Article 65(1)(a) procedure⁴.
8. Finally, it should be noted that the Chair may also decide to involve the members of one or more other expert subgroups, depending on the needs of the case.
9. The Secretariat, together with the co-rapporteur(s) if applicable, should work on the preparation of the draft binding decision and regularly submit discussion points and/or draft decisions for discussion at the meetings of the designated expert subgroup. The discussion at subgroup level should aim at ensuring that the substance of the case is examined and that the direction of the work is shared by a majority of delegations and at resolving any outstanding issue.
10. The Secretariat and the co-rapporteurs, if any, should identify the views shared by the majority of the members during the discussions and take them into account.
11. As indicated earlier, Article 11(2) RoP states that the EDPB shall take into account *only* the documents which were provided by the LSA and the other CSA(s) once the matter is referred to the EDPB. This means that the LSA or CSA(s) cannot during the drafting stage introduce new elements of fact supporting their respective positions. Both the LSA and CSA(s) may of course explain and defend their respective positions during the discussions within the expert subgroup and clarify their respective positions and share their views as members of the EDPB, without introducing new information which was not already provided at the moment when the matter was referred to the EDPB.
12. In accordance with Article 76(1) GDPR, discussions of the Board and of expert subgroups shall be confidential when they concern the consistency mechanism⁵. Moreover, an obligation of professional secrecy is also imposed on the staff of all EEA national supervisory authorities⁶, the EDPS and the EDPB Secretariat⁷. This means that the duty of confidentiality and professional secrecy, which is of paramount importance, shall be respected by the EDPB and its members also in relation to Article 65(1)(a) dispute resolution cases. This concerns both the discussions and the documents exchanged.

² If the call for expression of interests to serve as co-rapporteur is made prior to the assessment that the file is complete, care should be taken not to disclose any elements of the file until after the assessment has been made and the subject matter has been referred to the EDPB.

³ See also the Judgment in *Dr. August Wolff GmbH & Co. KG Arzneimittel*, Case C-680/16 P, 27 March 2019, ECLI:EU:C:2019:257, paragraphs 29-41.

⁴ Whilst assessing the completeness of the file, the Secretariat may consult with the coordinators of the ENF ESG to assess whether it is necessary to establish an ad hoc format of the ENF ESG dedicated to a Article 65(1)(a) procedure.

⁵ Article 33 RoP.

⁶ Article 54 (2) GDPR.

⁷ Article 56 of Regulation (EU) 2018/1725.

For the European Data Protection Board

The Chair

(Andrea Jelinek)