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Minutes of the 104th meeting of the Article 29 Data Protection Working Party

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For

☒ **Information**
☐ **Discussion**
☒ **Adoption**

C.1 Consequences of the Schrems judgment

(a) Update from the Commission on Safe Harbour 2:

The Commission [redacted] informed about the Safe Harbour negotiations, which were taking place concurrently with the plenary meeting. In particular, the Commission was about to receive written undertakings from the US that access to EU data would be limited to what is necessary and proportionate. One of the new mechanisms is the planned appointment of an Ombudsperson.

(b) Working document/BTLE and International Transfers subgroups: DPA Netherlands introduced the working document. DPA UK pointed out that the text went further than the *Schrems* judgment, and it was not for the WP to adduce additional guarantees if the judgment merely required essential equivalence. DPA UK also queried if the document was really "bullet-proof", and, especially taking into account the European Data Protection Board, advised caution so as to avoid ending up in court. DPA Germany felt that a strong WP position on Safe Harbour and other transfer tools was needed in order to keep up the pressure.

The EDPS considered it essential that the WP went public immediately after the meeting, with a unanimously adopted document which was solid and undisputable, and which set out what DPAs would be doing over the following few months. Rather than an opinion, the EDPS advised a document reflecting the state of play of the current analysis, but not necessarily the final result, as well as a 1-page statement or press release setting out the main points. Both documents should be published. The EDPS was not in favour of promising action, and opted for a prudent approach instead.

DPA Estonia questioned the validity of the legal basis on which the WP was proposing to act, noting that the draft Regulation stipulated a risk-based approach, and queried if all EU countries were better than the US, suggesting that it would be wrong to divide the world on the basis of adequacy. DPA Estonia was not in favour of massive enforcement action, in the absence of intentional breach, against enterprises acting in good faith. DPA Spain observed that the Action Plan was deficient in relation to what was being proposed in the document, because DPAs did not have either unanimity or consistency mechanisms.

DPA Ireland doubted the added value of the voluminous, detailed reasoning leading to conclusions, suggesting instead a 3-5 page statement in the nature of an executive summary. The analysis could be put to good use by DPAs when assessing individual cases. DPA France questioned whether the WP could criticise US authorities for doing what EU authorities were doing, and suggested that the document could be improved. Since something further was being expected from the US, the current analysis necessarily had to be a work in progress, because the issue had not yet been resolved. The WP could say either that the transfer tools were invalid, and commence enforcement immediately, or that their analysis was ongoing. Neither option was acceptable, given that it had set itself a deadline. DPA France considered that the document was not an opinion, but an ongoing process, and that DPAs could not suspend data transfers to the US, otherwise they would have to suspend them to every other country in the world.

DPA Netherlands pointed out two problems – first, that the adequacy provisions of the draft Regulation would leave DPAs in the same situation as they were in now, and second, the *Schrems* judgment itself, which was quite radical, as a result of which a third way should be sought. DPA Belgium supported publishing the document, since putting pressure on stakeholders appeared to have achieved progress, even if there was no outcome yet; not as an opinion, but as a different type of document, so as to afford a margin of manoeuvre given that negotiations were continuing.

Generally, numerous delegates counselled caution, and most were in favour of a unanimous statement separate from the analytical body of the document.

The Chair noted that delegates were in favour of a robust public document, incorporating all the technical comments made during the discussions.

The WP agreed that the drafting team would express the position of the WP in a 2-page document which would not preclude further development, but which would analyse the US situation, allow the WP to analyse the Safe Harbour 2.0 negotiations taking place on the basis of WP concerns, and provide an assessment of other transfer tools, the ultimate relevance of which would depend on the outcome of the negotiations.

Following the televised Commission announcement about the Privacy Shield, the Chair explained to the delegates what she had discussed with the Commissioner earlier that day, and suggested that, in the light of the announcement, it was vital to have the 2-page summary document.

Numerous delegations suggested postponing the vote on the document until after the Commissioner had had the opportunity to inform the WP about the Privacy Shield and answer questions about it. DPA Spain could still not see the answer to the question whether

circumstances SCC or BCR could be used or not, pointing out that the WP would be saying that these tools were insufficient without offering alternatives, thereby sending a confused message. DPA Netherlands noted that the WP had applied pressure to achieve a political solution, and now that it had been achieved, the WP should look at it to see if it withstands *Schrems* or not. Change in US legislation in an election year is unlikely, and if Privacy Shield doesn't work, DPAs can always commence enforcement.

DPA France considered that the WP could refer to the Commission announcement, and say that it will study the proposal as well as SCC and BCR, and whether Privacy Shield could be extended to them also. This would allow the deadline to be deferred. Delegates generally agreed that it would be better to hear from the Commissioner first, but warned that the WP would have to decide immediately afterwards which way to go.

The Chair summed up that the WP could be pleased that, thanks to its pressure, there was an agreement, but the agreement related only to Safe Harbor, and they had not yet seen its text. A statement on enforcement could be agreed earlier, but aspects relating to SCC and BCR should be deferred until after the Commisioner had intervened. The WP will need time to study the agreement, and a plenary meeting will be needed for that purpose.

Intervention of Commissioner Jourová

Commissioner Jourová announced the Privacy Shield, a political agreement with the US, and informed that the assistance of the WP would be necessary for next steps, as the agreement is transformed into text. Key elements include limitations and safeguards on surveillance, with priority on targeted access over bulk access, and bulk access only where targeted access is impossible for technical or operational reasons. Any access to trans-Atlantic cables will be subject to Presidential Directive 28. If this Directive is changed, the Commission will be able to suspend the arrangement. DPAs will be invited to participate in joint reviews.

Judicial redress is limited in the national security area in both the EU and the US. The US will appoint an Ombudsperson, an administrative review mechanism, to deal with complaints. The Ombudsperson will be answerable directly to the Secretary of State, and will be independent of security agencies.

DPAs have jurisdiction over data exporters, and must ensure compliance with Directive 95/46/EC, but they have no jurisdiction over data importers in the US. DPAs will be able to refer complaints to the US Department of Commerce Federal Trade Commissioner (FTC), and assist EU data subjects in taking their cases to arbitration. DPAs are therefore expected to be essential partners in upholding this arrangement.

Commissioner Jourová set out the expected timetable, and confirmed that the WP would receive all documents it needs to provide its opinion. The intention is that the Ombudsperson would also be competent with respect to transfers effected pursuant to tools such as binding corporate rules and standard contractual clauses.

The Privacy Shield would be continuously monitored, and assessed each year, and there will be a Code of Conduct for entities using it.

Working document/BTLE and International Transfers subgroups (*resuming*):

Resuming deliberations on the document after the intervention of Commissioner Jourová, DPA Netherlands, supported by DPA Belgium, advised deleting the passages which could be misunderstood. DPA Croatia suggested pointing out that these were just interim observations.

The Chair stated that whatever happened, DPAs, according to their respective national laws, would begin to deal with complaints they had received. DPA UK warned that this could attract media attention. The Chair clarified that, in operational terms, until the WP had looked at the Privacy Shield, SCC and BCR could be used, but complaints had to be dealt with in a coordinated way.

The Chair concluded that Safe Harbor could no longer be used, as it was illegal; until the WP had assessed the Privacy Shield, there was no definite view on other transfer tools and therefore no enforcement action in respect of transfers pursuant to such tools; but no new applications to use such tools would be approved until the assessment of the Privacy Shield had been completed.

Following further discussions, the statement on the consequences of the *Schrems* judgment on international transfers was adopted as amended during the meeting, and will be published on the website.

Most delegates were against publishing the main document containing the analysis, either as an annex or at all.

The WP agreed that, rather than finalising the document, DPAs should send their comments to the drafting team within two weeks, so as to consolidate it, if possible, in a form immune from applications for access to documents. Rather, it should be considered a preparatory document consisting of temporary analysis. Since it does not represent an official document or a WP position, it should remain an internal document which can also serve as a basis in the analysis of the new Privacy Shield

(c) Impact on cooperation among DPAs and possible actions: DPA Hungary presented the implementation action plan. DPA UK pointed out that the WP was discussing enforcement of something which was not an opinion, thereby setting a dangerous precedent, and increasing the risk of DPAs being involved in court proceedings. DPA Germany considered that if the opinion was a provisional analysis only, then it made no sense to rely upon it for enforcement purposes. As regards enforcement, it was preferable to distinguish transfers pursuant to Safe Harbor, in respect of which DPAS could intervene, and transfers pursuant to other tools, which raised different issues and were subject to divergent national rules. DPA Luxembourg agreed that a distinction between transfers on this basis should be reflected in the action plan.

DPA Spain noted that, as regards other transfer tools, adopting the opinion would automatically lead to the implementation action plan. There would be a delicate situation in relation to contractual clauses, but DPAs would have to proceed in accordance with the action plan. The legitimacy of DPAs was at stake in relation to both the opinion/analysis and the action plan. DPA Slovenia advised that the WP should say what DPAs would be doing, even if the opinion was being deferred, since there were already complaints pending. Controllers were entitled to know what additional standards they should adduce.

The Chair warned that the credibility of the WP would be undermined if the DPAs were unable to coordinate their actions. The issue as regards Safe Harbor transfers is clear. The situation regarding other transfers requires further work, because although delegates agreed to not adopt an opinion, the statement intended to be published would have legal consequences.