Main topic of the meeting: Directive (EU) 2016/680

1. Scope of the Directive

The meeting started with a presentation of the Commission on the scope of the Directive. The Commission underlined the importance of a clear delimitation between the Directive and the GDPR. For that, it is important to rely on the EU law notion of a criminal offence in view of establishing a harmonised scope of application of the Directive.

In order to define a criminal offence, Member States have to apply the Engel criteria of the European Court of Human Rights which has been accepted by the case law of the CJEU. The first criterion and starting point is the classification of an offence as criminal under national law. The second criterion is the nature of the offence and whether the penalty imposed has a punitive or a deterrent purpose. If the penalty is aimed at repression and prevention, this indicates its criminal nature. The third criterion is a nature and degree of severity of the penalty the person concerned risks incurring. The second and third criteria are the decisive ones and can be applied in a cumulative or alternative manner.

The processing activities covered by the Directive include the processing activities of police and law enforcement authorities related to threats that may lead to a criminal offence. Criminal court proceedings are also covered by the Directive. On the other hand, processing of HR data of law enforcement authorities, asylum, border control, or processing by the banks is not covered and falls under the GDPR.

Personal scope of the Directive includes competent public authorities but also private entities exercising public powers that are typical of law enforcement authorities, such as judicial and police powers including the power to arrest.

Some Member States underlined that their national systems recognise minor offences (misdemeanour) as a branch of criminal law. They stated that such minor offences are qualified as criminal offences under the Engel criteria and that the authorities detecting and prosecuting them (e.g. fishing inspectorate, fire department) should be considered as competent authorities for the purposes of the Directive. They consider the exact delimitation between the GDPR and the Directive as a difficult exercise.

Other Member States stated that they do not face a problem with the delimitation between the GDPR and the Directive. They have a clear division line between administrative and criminal law, whereby administrative law (including fines) would fall under the GDPR while criminal law would be covered by the Directive.

Some Member States raised the issue of specific regulated professions with the authority to carry out investigations or even prosecute a criminal offence. In some Member States the financial intelligence units set up under the Anti-Money Laundering Directive are administrative authorities, while in others they are considered as law enforcement authorities. The Commission’s legal service said that it is important to distinguish between the administrative offences (covered by the GDPR) and criminal offences (covered by the Directive).
2. Principles of the Directive and the interaction with the GDPR

The Commission said that most of the principles of the Directive are common to the GDPR and should therefore be interpreted in a consistent manner with it but there are some differences. For example, the principle of transparency does not exist in the Directive, although the principle of fair processing implies some degree of transparency. The principle of data minimisation is also different and offers more flexibility to the controllers under the Directive.

Unlike the Regulation, the Directive does not contain the concept of further processing. Subsequent processing by the same or a different competent authority is allowed for other purposes of the Directive, if it is provided by law, necessary and proportionate. The Commission also presented how the provision for transmission of data from the Directive to the GDPR works.

Member States had no comments on this issue.

Article 39 of the Directive

The Commission presented the general principles of international transfers under the Directive. They are allowed only if necessary for the purposes of the Directive, are made to law enforcement authorities in a third state or an international organisation (as a rule), rely on either an adequacy decision of the Commission, appropriate safeguards or on derogations, and it is ensured that the level of protection of natural persons guaranteed by the Directive is not undermined.

As regards Article 39, it qualifies as derogation from the general rule that transfers are made to an authority in a third country which is competent for the purposes of the Directive. In individual and specific cases, transfers can be made to private parties. This is provided as an option and does not create an obligation for Member States. The Article does not derogate from the existing international agreements (e.g. MLATs), and all other requirements of the Directive need to be fulfilled in order for a transfer to be lawful. The Commission presented in detail the conditions for transfers under this Article, notably the documentation requirements and the obligation to inform the supervisory authorities.

Some Member States said that while this Article should be an exception, it might become a rule in certain situations such as in urgency situations on fighting cybercrime, where there is a need for data preservation. Another example is the fight against credit card fraud. Also, but more exceptionally, this Article might be used for contacting airline companies during a transfer of a prisoner. Other Member States wondered about the exact involvement of supervisory authorities in transfers under this Article. The Commission replied that the Directive does not require competent authorities to seek authorisation of such transfers. However, competent authorities have to duly inform supervisory authorities about such transfers, so the latter can adequately react if necessary.

Any other business

Some Member States asked for bilateral meetings with the Commission on their specific issues related to the exact delimitation between the Directive and the GDPR. Others wondered how to organise the independent supervision for courts acting in their judicial capacity, which are excluded from the administrative supervision of the supervisory authorities. The Commission took the view that such supervision could be organised through internal judicial
panels. Some Member States then wondered about the involvement of such internal supervision bodies in the consistency mechanism under GDPR. It was agreed that this issue will be further discussed in the next meeting of the expert group, as well as the issues around the anti-money laundering legislation.