Minutes of the sixth meeting of the Commission expert group on the Regulation (EU) 2016/679 and Directive (EU) 2016/680
14 February 2017

Main topic of the meeting: Regulation (EU) 2016/679

1. Discussion on which national law is applicable in cross-border cases (including Article 9(4) scenarios)

The exchange of views on this topic, although in its early stages, showed that many of the MS which finalized their assessments would favour an "establishment" rather than a "residence of data subject" criteria. The discussion will continue as MS are closer to finalizing their internal deliberations on the draft laws on GDPR and Police Directive.

MS also provided updates on where they are in their national procedures regarding the necessary legal changes required by the adoption of the GDPR and the transposition of the Police Directive. All MS present indicated they are assessing the national legal system in terms of data protection and the changes that have to be brought forward.

While a few MS have already draft laws submitted or soon to be submitted to Parliament, other MS are contemplating a submission of the draft laws to Parliament in autumn or at the end of the year.

2. Discussion on legal persons and the GDPR

COM recalled that the GDPR only applies to natural persons. If in MS an individual is exercising economic activities, but he/she is not considered under the national law of that MS a legal person then that individual should benefit from all the protections of the GDPR.

3. Discussion on lawfulness of processing

COM reiterated the distinction between processing based on "legal obligation" (law imposing an obligation to process data and not merely providing for a possibility to process) (Art 6(1)(c)) and "exercise of official authority or public task" (possibility for the controller to process data if necessary) (Art 6(1)(e)). While one MS is considering limiting the exercise of official authority or task only to the public sector, other MS consider making use of the clause of Art 6(1)(e) for both public bodies and private bodies entrusted with public tasks (as per recital 45).

As regards further processing (Article 5(1)(b) and Article 6(4)) COM underlined the approach of the GDPR:
- compatible processing is possible on contract, legitimate interests and vital interests
- compatible processing is on the same legal basis and by the same controller
- no compatibility test possible if the initial processing takes place on the basis of consent or law
- Art 6(4) is not an opening clause
The core of the discussion revolved around the issue of how to tackle situations in which transmission of data would be necessary for communicating possible criminal acts, threats to public security or risk situations to child welfare or social protection services. Some MS are considering providing by law that such transmission is allowed. Other MS enquired whether the legitimate interests of the controller could not be used as a legal basis for the transmission of data from the initial controller to the enforcement authorities. This issue remains to be further discussed within the group. What is key is to understand on what legal basis the initial processing took place and whether further processing can occur on this legal basis or if there is a legal obligation to process data.

4. Restrictions on the rights of data subjects (Article 23)

This point was only touched upon when MS provided updates as to their legislative process. Some MS stressed that they needed specific legislation to tackle the precise situations of restrictions provided for in Art 23.

5. Discussion on data protection authorities (Articles 51 et seq)

MS provided updates on the work currently ongoing for the set-up of the DPA. It seems that several MS are considering upgrading the resources of the DPA while in a few MS these budgets are decreasing. Some MS are also envisaging dividing DPAs internal organization by creating a department responsible for investigation and another one for prosecution. MS are considering what type of procedural safeguards similar to a fair trial situation should be put in place. One MS will change completely the way the DPA is nominated (e.g. will be nominated by the Prime Minister).

6. AOB

a) Digital contracts

Several MS raised again the issue of digital contracts proposal and its compatibility with the GDPR. In particular two MS were critical of the concept of "data as counter-performance" and "data not necessary for the performance of the contract". Several MS referred to the forthcoming discussion at the 22-23 February Council Working Group meeting (Contract Law) and stressed that legal certainty had to be reached on this subject so as to ensure that the principles of GDPR are fully respected.

COM indicated that in order to dispel any doubts about the compatibility of the proposal with the GDPR further clarification in the text of the proposal can be made.

b) Discussion on the Communication paper international data flows

At the end of the meeting, several MS raised concerns on the "concept paper" regarding data flows provisions in trade agreements. These concerns related, in particular, to the "data protection" voice (Dapix, Art. 29 WP, EDPS) not being sufficiently heard on this issue, on the risks that this proposal pose to the EU data protection acquis (e.g. rules on international transfers could be seen as circumventing the obligation on free data flows), on whether this signals a change of position of COM as regards "data protection is not negotiable" etc. COM (C4) explained that the sensitivity of this issue and the importance of "getting it right" is fully
understood. This is precisely why a consultation process is ongoing with EP and Council and COM is looking forward to hear MS views at the Dapix meeting of 21 Feb. MS insisted with COM and the MT Presidency that sufficient time is allocated to this point at the Dapix meeting.