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

1. Scope of the Directive

The meeting started with a new round of discussions on the scope of the Directive. The discussion showed that a majority of Member States plan to limit the application of the Directive to traditional, ‘third pillar’ law enforcement authorities (Police and Criminal Justice Authorities) with some exceptions for some authorities such as customs and border guard but only when acting for the purposes of the Directive. One Member State presented a clear-cut solution, where the GDPR will apply to all types of administrative proceedings, notwithstanding whether or not such proceedings may eventually become criminal proceedings. Only in the latter case the Directive will begin to apply. Some Member States will apply the Directive also to minor offences which may lead to criminal proceedings within their national systems. While some of them will cover only traditional law enforcement authorities in this manner, other Member States intend to apply the Directive also to authorities which otherwise carry out administrative tasks, where such authorities handle minor offences that may lead to criminal proceedings.

2. International transfers (Chapter V)

The Commission presented Chapter V of the Directive (international transfers). The Commission explained the structure of international transfers, which differs from the GDPR. Transfers under the Directive can be, as a rule, carried out only between law enforcement authorities, i.e. through official channels of communication. If personal data was received from another Member State, as a rule the originating Member State needs to give its consent prior to the transfer. As regards the conditions for transfers, competent authorities can rely either on the Commission adequacy decision, or on transfers by way of appropriate safeguards (which can be laid down in a legally binding instrument or the controller needs to carry out a self-assessment) or on the basis of derogations for specific situations. The Directive also contains documentation and information requirements for certain types of transfers. By way of derogation from the general rule that transfers have to be carried out through the official channels of communication, in individual and specific cases the Directive allows, under certain conditions, transfers by competent authorities to private parties in third countries.

One Member State asked whether each time the Commission starts preparing an adequacy decision under the General Data Protection Regulation it will also simultaneously consider preparing one under the Directive, whether Commission has a plan for countries that will be first to benefit from an adequacy decision under the Directive and whether it plans to involve Member States in its adequacy work before the official launch of an implementing act and “comitology”, thereby benefiting from the Member States’ experience with a particular third country. The Commission replied that, under the recent case law of the Court of Justice of the European Union (Schrems), it always has to assess access by third country public authorities to personal data for law enforcement purposes and their subsequent use, which can provide a
basis for considering a separate adequacy finding also under the Directive. This being said, there will be no automatism in this respect. Rather, the Commission will always assess whether there is a (request and a) need for such a separate adequacy finding (which makes sense for instance for important partners in the area of law enforcement cooperation, or where the third country will host a major event (e.g. Olympic Games) that will likely create a real need for such cooperation in the future). As regards involvement of the Member States when carrying out an adequacy assessment, nothing will change from the current situation where the Commission keeps the Member States informed at regular intervals and/or at critical junctures in the assessment.

Other issues raised by the Member States focused on balance between compliance with fundamental rights and public interest (Art. 38(2)), whether legally binding instruments laying down appropriate safeguards for transfers may include multilateral agreements such as Council of Europe Convention 108 (Art. 37(1)(a)), what are “categories of transfers” referred to in Article 37(2) and what is the difference between processing that is "necessary" and "strictly necessary" for law enforcement purposes (Art. 39). The Commission explained the balancing exercise as a case-by-case assessment and argued that guidance on “strict necessity” is provided by the courts. In the particular instance of Article 39, it requires a strong nexus between the core activity of the law enforcement authority and the necessity of a transfer. One Member State provided a practical example of “strictly necessary”, arguing that in the fight against cybercrime competent authorities sometimes do not have other means to gather evidence timely and are forced to contact the service provider directly, due to the loss of location or because of other types of volatile electronic evidence. On “categories of transfers”, the Commission argued that these could be certain types of transfers that are normally carried out to recipients for which the controller had concluded that they provide for appropriate safeguards. The question of Convention 108 will have to be assessed in the next meeting.

3. Supervision of courts acting in their judicial capacity (Article 45)

Some Member States consider that the independent supervision of courts acting in their judicial capacity can be ensured through the appellate system, while some foresee a creation of independent judicial panels or other bodies competent to hear data protection complaints. One Member State does not see a need for a separate system of supervision, but it also has a very narrow interpretation of “courts acting in their judicial capacity”, limiting it to judicial decision-making. The Commission wondered how data subject rights of persons who were not parties to the proceedings can be ensured through the system of appeal courts. One Member State argued that this can be done by envisaging additional remedies for such data subjects.

4. Effective powers of data protection authorities (Articles 41 and 47)

The Commission presented the provisions of the Directive on powers of supervisory authorities and on facilitating the right to lodge a complaint with a single supervisory authority. Most Member States will have only one supervisory authority (DPA) for both the GDPR and the Directive (for the moment, only one Member State plans to have two DPAs), but some Member States will limit the powers of their DPAs when acting in the scope of the Directive. The Commission took the view that crucial challenge for Member States opting for two sets of corrective powers will be to ensure they are effective, also in respect of processing activities governed by the Directive.
5. Right to compensation (Article 56)

The Commission explained that the access to compensation could not be based on a requirement of fault from the controller. One Member State wondered why a fault system could not be envisaged in the transposition of the Directive. The Commission referred to the CJEU case-law, where the Court held that fault cannot constitute a condition of Member State non-contractual liability for damages caused by a breach of Union law.

6. Any other business

As a follow up to the January meeting, the Commission took the view that the data protection impact assessment under the Directive could be carried out as a part of the legislative impact assessment, if the conditions of Article 27 of the Directive are met. It also took the view that the function of a data protection officer could be externalised.

The meeting finished with a tour de table on the Member States’ transposition work on the Directive. Some Member States are still in an early phase but most of them indicated that they expect to complete the transposition by the end of 2017 and in any case before the deadline for implementation. Two Member States are well advanced and expect the adoption of national law transposing the Directive in April and September respectively. Some Member States will transpose the Directive in the act implementing the GDPR, while some will have one act for both Police and EU PNR Directives.

Next meeting of the expert group is on the Regulation (EU) 2016/679 (GDPR) and will take place on 27 April 2017.