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

1. Member States implementation state of play

Member States provided updates on their legislative process in view of the application of the GDPR on 25 May 2018.

2. Discussion on which national law is applicable in cross-border cases

The discussion covered the issue of which Member States will use the "establishment" and/or "residence" criteria and for which provisions of the GDPR containing an opening clause (e.g. Art 8; Art 9(4)). The Member States who expressed a position tend to choose the establishment criterion or to apply a mix of both criteria. Some Member States argue that the criterion of establishment can be deduced from GDPR, while others point to the fundamental rights perspective which would favour the residence criterion. Several Member States would be in favour of a mix approach, where the national law would apply in cases where a) there is an establishment of the controller or the processor on its territory, or b) the controller (within or outside the EU) is processing personal data of individuals located on its territory. Some Member States point out that by choosing the residence criterion, controllers (as well as DPAs) will need to apply the national laws of the countries where they target individuals. In the particular case of children, most Member States who expressed a position would seem to favour the residence criterion. For many Member States this issue is still under discussion at national level.

3. Discussion on national approaches for specific articles of the GDPR

The discussion covered the issue of whether Member States will make use of the possibility in Article 8(1), paragraph 2, GDPR to lower the threshold for parental consent for children below 16 years. Amongst those Member States who provided feedback, a majority indicated that they will indeed lower the threshold to 13 or 14.

Several delegations raised questions about Article 10 GDPR on the processing of personal data relating to criminal convictions and offences. The Commission recalled that there was very scarce evidence of how Member States transposed Article 8(5) of Directive 95/46/EC (predecessor of Article 10 GDPR). The Commission clarified that in their view the notion of "related security measures" must be read in the context of Member States national law. For example, it can relate to measures such as restraining orders. Some Member States pointed out that the notion of "control of official authority" is not defined in GDPR. The Commission clarified that processing of Article 10 data can only be carried out by a public body or a
private body vested with public sector tasks or where such processing is authorised on the basis of a law.

The expert group discussed how Member States will implement Article 43(1) GDPR. Article 43(1) GDPR gives Member States the option that the certification bodies are accredited by one or both of the following: (a) the supervisory authority which is competent pursuant to Article 55 or 56; (b) the national accreditation body named in accordance with Regulation (EC) No 765/2008. Some Member States indicated that they will appoint only the DPA as the authority in charge of accrediting certification bodies for GDPR while other Member States have chosen the national accreditation body for this while some have provided for both the DPA and the national accreditation body. Some Member States are still assessing the situation. The Commission informed about the ongoing study on certification.

4. Discussion on articles 6 and 89 GDPR and the role of the national legislator

The Commission recalled that GDPR is a directly applicable norm, which has immediate effect in national law, therefore no implementation measure is required in national law. There is a need to ensure a uniform application of the GDPR within the EU. In this respect, any national law such as one that would purport to convert a rule of EU law into national law would be contrary to EU law (CJEU, case 94/99, Zerbone, and CJEU, 34/73, Variola). Some Member States have chosen to implement the police directive and the measures for the application of the GDPR in the same legislative act. It is recommended to make it clear which parts of national law are addressed to whom and if they concern specifications of the GDPR or the implementation of the police directive.

As regards the legal basis specified in Article 6 GDPR, the national legislator cannot encroach upon independent legal bases from Article 6 GDPR. In accordance with CJEU case law, the national legislator cannot impose additional conditions to those set in the GDPR for the application of Article 6(1)(f) GDPR.

Where Member States decide to use the possibility to provide derogations on the basis of Article 89 (2) or (3) GDPR concerning the processing of personal data in the field of archives, scientific or historical research, the national legislator must determine the scope of the processing concerned and the rationale for the restrictions.

As regards Article 83 GDPR, the Commission reminded delegations that it is not possible to exclude specific groups of controllers in the private sector from the application of fines. In addition it was underlined that the possibility provided in Article 83(9) that the fine is initiated by the competent supervisory authority and imposed by competent national courts applies only vis-à-vis two specific Member States as mentioned in Recital 151 GDPR; apart from these Member States, it is not possible for other Member States to decide on the implementation of such a system.

5. Other questions from MS

On the law applicable for activities falling within the scope of Chapter 2 Title V TEU, the Commission clarified that in the absence of EU legislation under Article 39 TEU, national law applies.
It was decided to include on the agenda of the next meeting the issue of how Member States are dealing with sector specific laws containing provisions concerning processing of personal data versus general national data protection law and how they will amend sector specific laws.

Delegations were asked to share their intended solutions on how they intend to implement paragraph 65 of the Schrems judgment. Several delegations indicated that their draft law would provide the DPA with the powers to go to court even if they are not acting upon a complaint. Other delegations contemplate empowering their DPAs to do so only if acting upon a complaint.

6. A.O.B

The Commission informed delegations about the upcoming workshop on health organised by the Commission, DG SANTE and DG GROW, to be held in Brussels on 23 October. The Commission also mentioned the upcoming event with UAPME in Brussels to be held before the end of 2017.