

Minutes of the second meeting of the Commission expert group on the Regulation (EU) 2016/679 and Directive (EU) 2016/680

10 October 2016

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

1. Rules of procedure of the expert group

The majority of Member States welcomed the changes made by the Commission to the draft Rules of Procedure (RoP) of the expert group following comments (e.g. removal of article on recommendations by the group; clarification that minutes shall be approved by the members). During the meeting, the Commission also clarified further the mandate of the group. In order to give sufficient time to delegations to consult their capitals on the latest changes the RoP were adopted by written procedure on 18 October 2016.

2. Discussion on the flexibility for Member States authorized in the GDPR with particular focus on Articles 6(2) and 6(3)

The Commission explained the rationale of the Articles 6(2) and (3). They are clauses giving Member States the possibility to further specify the application of the rules of the GDPR in regard to processing necessary for compliance with a "legal obligation" and processing necessary "for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller." Article 6(3) is providing indicative elements of what these specifications can be: "specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed [...]".

The key issue in relation to these provisions was the view of some delegations that some provisions of the GDPR can be interpreted as Directive-like provisions which need to be "transposed" into a general law at national level. This concerns for instance the interpretation given to the provision in Article 6(1)(e) on "processing necessary for the performance of a task carried out in the public interest" linked to Article 6(3) which requires that the basis for processing for Article 6(1)(c) and (e) be laid down either in Union law or Member State law. For one delegation the fact that an authority is entrusted with a task by law does not automatically mean that that authority can also process data for the fulfilment of its tasks (division task-competence). This raises the question of direct applicability of the provision of Article 6(1)(e) of the GDPR which already indicates that "processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller". In contrast, for several other Member States it is enough that national law gives the tasks of the authorities and the GDPR provides that processing of personal data is necessary for the performance of the task (so direct effect of Article 6(1)(e) of the GDPR).

Another issue raised by delegations was the situation where processing by the same authority (e.g. police) would be covered by two legal regimes (GDPR and Directive (EU) 2016/680, hereinafter the Police Directive) and how could this be done at national level so that not to complicate the understanding for the actors on the grounds. The Commission indicated that one legal technique could be to have one law at national level

regulating processing by a certain sector covered by the two legal regimes (e.g. police). One part of the law could deal with specifications of the GDPR and to that effect in line with recital 8, Member States "may, as far as necessary for coherence and for making the national provisions comprehensible to the persons to whom they apply, incorporate elements of this Regulation into their national law". The other part of the law could deal with the transposition of the Police Directive to the police sector.

### 3. Discussion on the rules on processing of special categories of data (Article 9)

The Commission recalled the approach to processing of special categories of data for which there is a prohibition principle coupled with an exhaustive lists of situations in which processing is allowed (always supported by a legal basis in Article 6). The GDPR also provides for a possibility for Member States to have "further conditions, including limitations" on processing of health, genetic and biometric data for as long as these conditions do not affect the free flow within the Union (Article 9(4)).

A few delegations had similar questions as those on Articles 6(2) and 6(3). They pertained to the effect of those provisions in Article 9 which refer to national law and what the national legislators is required to do including in terms of appropriate safeguards for the rights and freedoms of individuals.

Other delegations raised the issue of being able under Article 9(4) to still impose restrictions to processing of genetic data for health insurance purposes while one delegation questioned whether under the conditions under Article 9(4) one could include the requirement of written consent.

The key point stressed by several delegations and the Commission was that Article 9(4) should not lead to the hampering of the free flow principle.

The issue of further processing of special categories of data was raised by one delegation but given the depth of the topic it was agreed that this point will be addressed in a subsequent meeting of the expert group.

### 4. Discussion on the rules on specific processing situations (Chapter IX)

The Commission explained that the rules on Chapter IX can be divided into two categories. A first category concerns derogations and exemptions to the GDPR provisions. These provisions are on freedom of expression (Article 85) and on safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes (Article 89). Article 85 on freedom of expression has a broad remit of exemptions/derogations covering several chapters of the GDPR while Article 89 only gives the possibility to Member States to limit rights of individuals on grounds linked to the "privileged purposes" of processing (e.g. archiving, research, statistics). The second category concerns further specifications for the processing by Member States of the national identification number (Article 87), for processing in the employment sector (Article 88) and specific rules regarding the powers of supervisory authorities to access premises or data in relation to controllers/processors subject to an obligation of professional secrecy (Article 90).

While Member States are quite familiar with the balancing of the freedom of expression with data protection given that a similar article exists under the current Directive 95/46/EC, the question how to address processing for privileged purposes was more novel. Several MS queried how one should interpret Article 89(1) which requires that safeguards for such processing are put in place. The Commission clarified that such safeguards must be put in place by public and private sectors alike depending on the processing (for public sector these safeguards might be provided for in the law or should be implemented by the controller as part of the principle of accountability which underpins the GDPR).

Member States also inquired about the roadmap on Regulation 45/2001 and e-Privacy as well as about the initiative on free flow of data. One delegation raised the issue of the interaction between data protection legislation and the money laundering directive while another one raised again the issue of the material scope of the GDPR and what is outside Union law scope.