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Addendum

AD HOC COMMITTEE ON DATA PROTECTION

COMITE AD HOC SUR LA PROTECTION DES DONNEES

(CAHDATA)

Working Document on Convention 108 – compilation of replies

Document de travail sur la Convention 108 – compilation des réponses

Directorate General / Direction Générale
Human Rights and Rule of Law / Droits de l'Homme et Etat de droit

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23.04.2014

Proposals for modernisation of Convention 108

Reference is made to your request 25 March 2014 for written comments on the proposals for modernisation of Convention 108 prior to the second meeting of the CAHDATA. We are grateful for the effort the Secretariat has put in preparing the working document for this meeting, as well as for the opportunity to submit our opinion of the proposals set out therein. Please find below Norway's comments on selected parts of the proposal:

Preamble – the principle of access to public documents
It is of great importance to ensure that the principle of access to public information is not unduly impinged by international data protection rules, so that national rules on such access may be maintained. We therefore strongly support the reference to the principle of access to official documents, which has been included in the preamble. We also believe this solution, i.e. including the reference in the preamble, is a suitable way to reconcile laws in states where the right of public access varies.

Article 3 – the scope of the convention
In general, we support the proposed expansion of the scope of Convention 108 and the link with the term "jurisdiction". On a technical note, however, we are not convinced the current proposal is sufficiently clear in terms of its regulation of the scope. It appears that paragraph 2 of Article 2 little c – which defines data processing when automated processing is not used – is in fact a provision which regulates the scope of the Convention. Hence, we believe that this provision does not belong in the definitions in Article 2 and propose that its content rather be incorporated into Article 3. Article 3 could then be worded as follows:

«1. Each party undertakes to apply this Convention to data processing subject to its jurisdiction in the public and private sectors.

2. This Convention shall apply to automatic data processing, and, where automated processing is not used, to data processing carried out within a structured set of such data which are accessible and retrievable according to specific criteria.

3. This Convention shall not apply to data processing carried out by a natural person for the exercise of purely personal or household activities.»

This would also help to bring the drafting more in line with Directive 95/46 (see Article 3).

Article 6 – processing of sensitive data
With regard to the definition of sensitive data relating to criminal offences etc., we support the expansion of the wording in the latest proposal. It is evident that to the person concerned, the dissemination of information about a suspicion which later reveals itself unjustified, may be all the more damaging than the dissemination of information when the person is actually guilty. Therefore, we find it necessary that the definition of sensitive data in Article 6 also covers data concerning suspected offences.

Article 7 – data security
Overall, we support the content of current Article 7 on data security. We do however question the alteration of the wording in paragraph 1, where the word “dissemination” has been replaced by “disclosure”. “Disclosure” may be interpreted as a narrower term than “dissemination”, and suggests that the information in question must be confidential to deserve protection. In our view, undue dissemination of personal data should be avoided, regardless of whether the data are confidential. We therefore believe the former wording (“dissemination”) is preferable and fail to see what has been the object of the proposed modification.

Article 7bis – transparency of processing
It appears to us that the current wording of the proposed Article 7*bis* is somewhat difficult to grasp, mainly due to the text that has been added at the beginning of paragraph 1. We therefore question the added value of the changes made in the latest proposal.

Article 8 – rights of the data subject
We agree with the substance of Article 8. However, the current wording is in our opinion somewhat unfortunate. When the term “be entitled” is repeated at the beginning of each subparagraph, instead of being mentioned once in the heading of the provision, the wording of the provision appears rather verbose. We would therefore prefer that the previous wording be kept on this point.

Article 12 – transborder flows of personal data
We support the alteration which has been made in paragraph 1 of Article 12, which makes it clearer that the exemption set out in the provision also applies to EEA EFTA states bound by EU data protection rules.

Article 12bis – supervisory authorities
According to paragraph 8 of Article 12*bis*, the supervisory authorities of the parties to the Convention shall form a conference/network. It is still somewhat unclear to us which obligations derive from this provision and how it relates to the Convention Committee provided for in Chapter V. We therefore ask that this be clarified, e.g. in the explanatory memorandum to the Convention.

Yours sincerely

Lise Lehrmann
Legal adviser

Mari Vindedal Strand
Higher executive officer

FRANCE

Vous trouverez ci-dessous les commentaires et remarques formulés par la France sur le texte de la Convention 108 préparé pour la réunion du CADHATA – 28-30 avril 2014-.

Préambule

• Troisième considérant : le droit de contrôler ses données personnelles et leur traitement est érigé en droit autonome. Cela ne suscite pas de difficulté au regard de l'autonomisation grandissante de la question de la protection des données personnelles dans les textes européens : la charte européenne des droits fondamentaux fait une distinction entre le respect de la vie privée et familiale et le droit à la protection des données personnelles ; le traité sur le fonctionnement de l'Union européenne prévoit en son article 16 que « toute personne a droit à la protection des données à caractère personnel la concernant ».

• Troisième considérant : la proposition visant à remplacer « exchange of personal data » par « personal data flows » appelle une explication, même si cette expression semble reprise des termes de la convention de 1981.

Article 2 « Definitions »

• Dans la définition du « data processing » (traitement de données), il est préférable d'utiliser le terme de « destruction » plutôt que celui d'« erasure » (effacement), afin de garantir l'irréversibilité de l'opération.

Article 3 « Scope »

• Nous souhaitons le maintien du texte initial car il est important de souligner que la convention s'applique « à toute personne ».

• L'ajout proposé dans la nouvelle version concernant le champ de la convention aux secteurs public et privé doit être soutenu.

Article 4 « Duties for the Parties »

• Plus généralement, nous nous interrogeons sur la portée du remplacement de « ensure » par « secure ». La différence de portée de ces deux termes anglais doit être évaluée. S'il s'avérait que « ensure » requiert une obligation de résultat et « secure » une simple obligation de moyen. La traduction française serait « garantir » ou « assurer ».

Article 5 "Legitimacy of data processing and quality of data"

• Le paragraphe 2 indique que "Each Party shall provide that data processing can be carried out on the basis of the free, specific, informed and [explicit, unambiguous] consent…". Dans un souci de clarté, l'utilisation du terme « explicit » nous semble préférable pour qualifier le consentement des personnes concernées par un traitement de données.

• Le paragraphe 3, c évoque le caractère « adequat, relevant, not excessive and limited to the necessary » du traitement de données. Il apparaît que le principe de minimisation des données (à savoir limiter le traitement des données à ce qui est strictement nécessaire) est un principe important qui doit figurer dans le projet de convention. A cet égard, la mention de « limited to the necessary » doit être soutenue.

• Nous appuyons la nouvelle formulation ainsi que l'ajout de « in a transparent manner » qui semble renvoyer au nouveau principe de transparence des traitements prévu à l'article 7 bis du projet de convention.

Article 6 « Processing of sensitive data »

• Le changement de perspective logique consistant à passer de « Personal data revealing racial origin (…) may not be processed unless (…) safeguards » à « The processing of genetic data (…) shall only be allowed where specific and appropriate safeguards" peut être accepté car les garanties requises demeurent. Le sort réservé aux données biométriques devrait cependant être précisé.

• Nous sommes en accord avec la version initiale du projet qui réservait la possibilité pour la législation nationale de prévoir des garanties supplémentaires. En conséquence, nous soutenons la modification proposée de la fin de l'article qui indique : « complementing those of the present Convention ».

Article 7 bis "Transparency of processing"

• La nouvelle version semble en retrait par rapport à la précédente. Nous soutenons la rédaction initiale de cet article en insistant sur la nécessité de maintenir dans le corps du texte les mots « at least », ce qui constitue une garantie supplémentaire.

Article 8 « Rights of the data subject »

• Se pose le problème de la portée exacte de l'expression "shall be entitled not to be subject" par rapport à "shall not be subject" et "shall have the right". Une formulation telle que « shall have the right » semble à la fois plus simple, plus claire et plus adaptée que « be entitled to ».

• Par ailleurs, il convient d'être attentif, au paragraphe d, à l'utilisation du terme « compelling » (pouvant être traduit par « prépondérant ») qui semble approprié afin de rétablir un équilibre dans la balance des intérêts en jeu dans cet article.

Article 8 bis « Additional obligations »

• Nous proposons le maintien partiel de la version initiale du passage compris entre « to implement » et « to verify », tout en soutenant la suppression de « at all stages of the processing » (qui peut soulever des interrogations sur son interprétation) et de la fin du paragraphe.

• Le concept de « privacy by design », évoqué au paragraphe 3, aurait davantage sa place dans le préambule dans la mesure où il ne constitue pas une obligation juridique.

Article 9 « Exceptions and restrictions »

• Il convient de demander des explications sur l'étendue très importante de l'exception permise aux principes édictés par l'article 5.3. En particulier, il apparaît peu admissible qu'il puisse être dérogé à des principes aussi essentiels que ceux de traitement licite ou loyal des données.

Article 12 « Transborder flows of personal data »

• La nouvelle rédaction du paragraphe 1er soulève des interrogations sur sa portée, voire sa signification ; il conviendrait en conséquence de le rédiger plus clairement.

Article 12 bis « Supervisory authorities »

• La nouvelle rédaction prévoit de remplacer « to issue decisions » par « to take corrective action ». La version initiale apparaît préférable en vue d'assurer l'effectivité de l'action des autorités de contrôle.

Articles 18 et 19 "Composition of the committee - Functions of the committee"

• Certains aspects de ces articles devraient être soumis pour avis au bureau des traités du Conseil de l'Europe. Nous souhaiterions disposer d'informations sur le calendrier de remise de cet avis.

• S'agissant du rôle dévolu au Comité, il convient d'être attentif à ce que ce dernier ne soit pas érigé en organe para-juridictionnel, doté de pouvoirs de contrainte à l'égard des Etats. L'édiction de recommandations de caractère général dont la mise en œuvre resterait à l'appréciation des Etats, doit de ce point de vue être envisagée comme un maximum.

PORTUGAL

Dear Chair,
Dear European Commission,
Dear Secretariat,
Dear Colleagues,

Please find the Portuguese amendment to the text prepared for discussion according to the document CAHDATA(2014)1 of the 25th of March.

In relation to the Preamble, we have the following remarks:
In third paragraph we suggest to replace "secure" by "guarantee" as in the T-PD text. It should read then: "*Considering (…) to guarantee human dignity and (…)*".
In the sixth paragraph, we suggest to delete "at the global level" in the second line, and to keep it in the fourth line. It would be read as: "*Recognizing that it is necessary to promote the fundamental values (…) and protection of personal data at the global level (…)*".

7.2 In article 2, paragraph c), we suggest replacing "or destruction of data" by "any forms of voluntary or involuntary human caused destruction of personal data".
The explanation is that among the situations in relation to whom a human responsibility may be invoked there are either voluntary or involuntary actions of destruction of data, only destruction caused by acts of nature are excluded.
The sentence will read: "*Data processing means (…) making available, erasure or other forms of voluntary or involuntary human caused destruction of personal data (…)*".
In fact, we can even suppress the reference to erasure, by saying "*(…) making available, any forms of voluntary or involuntary human caused destruction of personal data, (…)*".

7.3 Article 4, paragraph 1. We suggest keeping "ensure", as in the T-PD proposals, therefore replacing "secure" by "ensure".
Paragraph 3 - We suggest to delete "in its law", and some draft arrangements. It is not enough to enact legal provisions, it is necessary to effectively implement the measures. It will read as follows: "*Each Party undertakes to allow the Convention Committee provided for in Chapter V to evaluate the measures it has taken to give effect to the provisions of this Convention and to contribute actively to the evaluation process, by submitting reports on the measures it has taken.*"
7.4 Article 5, par. 2 – We believe that good reasons can be invoked either to express preference for "explicit" or for "unambiguous". We think however that both words should be kept. That is to say consent should be explicit and unambiguous.
Subparagraph a of paragraph 3 - we agree with the draft proposed by CAHDATA. Therefore we can support: "*processed lawfully, fairly and in a transparent manner.*"
Subparagraph c) of par. 3 – The principle of data minimization is one of the core principles of personal data protection; we therefore strongly support to keep the text now in square brackets.

7.5 Article 6 par. 1 – We would like the expression "suspected offences" to be deleted. We cannot accept it. First in relation to the use of the word offences we must decide if we are referring to administrative offences, criminal offences or both. Secondly, in democratic Countries governed by law, a criminal or an administrative offence is a behavior that is qualified as such in a law enacted by the legislative power. Is a "suspected offence" a new category of crime or administrative offence defined by law? If not who decides what a

suspected offence is? Are we not instead referring to crime prevention therefore to personal data lawfully collected with that purpose?
We therefore suggest amending the draft in the following way:
"*1 – The processing of*
- Genetic data;
- Crime prevention data, including security measures;
- The investigation of crimes or administrative offences;
- Criminal proceedings and convictions;
- Biometric data uniquely identifying a person;
- Personal data for the information they reveal relating to racial origin, political opinions, trade-union membership (…) shall only be allowed where specific and appropriate safeguards are enshrined in law."
Par. 2 – We support the wording "specific and appropriate safeguards" in the beginning of paragraph as proposed.

7.6 – Article 7 par. 1 – We suggest adding the following wording to "additional information": "such as data, recipients or categories of recipients".
The draft of par. 1 would be: "*Each Party shall provide that where personal data are collected from data subjects or indirectly from another source, unless they have already been informed, the controller shall be responsible for informing the data subjects of the identity and habitual residence or establishment of the controller and the purposes of the processing for which the data are intended, as well as to provide them with any additional information such as data processed, recipients or categories of recipients, necessary to ensure fair and transparent processing of personal data.*"

7.7 – Article 8 par. d – We do not agree with the suppression of the word "compelling". The mere invocation of a legitimate interest is not enough. Any interest provided not illegal, is, at least under that point of view, perfectly legitimate. However we believe the reasons to be invoked here are legitimate and serious, they must be of a real compelling nature. The intention here is that between two interests one really must take priority given its utmost importance in relation to the other.

Par. f – We do not agree with restriction being introduced here. Why the right to have a remedy should be limited to the situations where an automated processing took place? Is the modernized Convention not admitting the non-automatic processing?

7.8 Article 8-bis Par. 3 – We do not agree with the deletion of this paragraph. Though we think that it is to the industry and other relevant actors, basically in the private sector, to create and made available the products and services referred to in this paragraph, Parties can/should be required to establish policies considered to be adequate to facilitate the offer of those services and the creation of those products.
We suggest therefore the following draft: "*Parties shall put in place relevant policies so that products and services to be made available intended for the data processing (…).*"

7.9 Article 12-bis Par. 2 sub paragraph c – We prefer the version proposed by T-PD for readability.
Par. 2bis – We propose this paragraph to end at "personal data".
We suggest therefore the following draft: "*The competent supervisory authorities shall be consulted on proposals for any legislative or administrative measures involving the processing of personal data.*"
The consultation initiative by the legislative power of the State, the Parliament or the Government, does have the character of a technical obviously non-binding consultation,

being that the situation, why is it necessary to limit the measures to those who “may severely affect data subjects by virtue of the nature, scope and purpose of such processing”. That is for the legislative power of the State to decide.
In what administrative decisions are concerned, except for situation where such a decision would be illegal, in which case the supervisory authority should issue a decision, not mere a opinion, technical opinions of Supervisory Authorities are not binding, if they were binding, the Supervisory Authority would be replacing the Executive Power of the State, essentially the Government.

In conclusion, the mere obligation of consulting in order to obtain a non-binding technical opinion is in our opinion fully and unrestrictedly acceptable as principle.

Par. 4 – For this paragraph we prefer the opinion of the T-PD to be kept. The option to use the expression “complete independence”, as we understand it, avoids the interpretation that a supervisory authority would be independent for some purposes, not for others, which is no acceptable.
Subparagraph A of paragraph 7 – Why are we simply deleting the extent of the cooperation between supervisory authorities?

João Pedro CABRAL