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BUREAU OF THE CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA

(T-PD-BUR)

Report on the modalities and mechanisms for assessing implementation and follow-up of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and its Additional Protocol

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INTRODUCTION

1. The present report is intended to provide food for thought about the modalities and mechanisms which would be appropriate to develop for the purposes of assessing and monitoring implementation of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[1] - hereafter referred to as 'Convention 108' - (basic principles, mutual assistance and Consultative Committee) and its Additional Protocol regarding independent Authorities and Transborder Data Flows to non-member countries[2].

2. In this respect, the report takes account of tree major factors with regard to the necessary durability of the protection of personal data in support of a sustainable democracy. The first of which is the rapidity and seemingly unlimited multiplicity of technical, economic, social and legal developments affecting the processing of personal data. The processing of personal data is already in many ways a feature of everyone's daily life and more frequently concerns the exercise of freedom and fundamental rights, even in the most remote and the poorest regions[3]. It underlies, or plays a part in, all economic, state, social, medical, relational, scientific, media and political activities. The second factor is the complexity of evolving division of work worldwide, which affects processing at all stages of its implementation. It also affects innovation and design. The third factor is the "safe" period which continues, the temptations to deviate massively and in an inprecendented manner from the principles laid down by the Convention, to which our democracies have difficulty resisting (e.g. PNR and SWIFT cases)

3. This report reflects the fact that the Council of Europe has chosen to take an all-embracing approach in this context in terms of time and space. This approach relies on the universal potential of Convention 108 and its Additional Protocol, which remain the only binding legal instruments at international level and which are open to accession by non-member countries. It should be noted that in the absence of any UN initiative to promote, enforce and establish true governance for the implementation of the Guidelines adopted in 1990[4], this approach seems the most relevant and the most accountable to ensure the protection of the concerned citizens.

4. The monitoring of implementation of the Convention was a priority of the Convention Committee, which it had consequently included in its work programme. The Committee of Ministers of the Council of Europe welcomed the adoption of this work programme (Appendix II to document CM (2009) 189) at its 1079th meeting on 10 March 2010 and encouraged in this regard the Convention Committee to start preparing, in accordance with priorities mentioned in the work programme, a draft additional protocol to Convention 108.

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[1] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, opened for signature on 28 January 1981, entered into force on 1 October 1985).

[2] Additional Protocol to Convention ETS No. 108 regarding Supervisory Authorities and Transborder Data Flows and Explanatory Report (ETS No. 181, opened for signature on 8 November 2001, entered into force on 1 January 2004).

[3] There are 5 billion mobile telephones in use, according to a study by Ericsson cited in *Le Monde* on 15 July 2010 (http://www.lemonde.fr/technologies/article/2010/07/15/le-nombre-d-abonnements-a-la-telephonie-mobile-a-depasse-les-5-milliards_1388475_651865.html). More than 2 billion persons accessed the Internet in 2010.

[4] Guidelines for the Regulation of Computerized Personnel Data Files unanimously adopted by the United Nations General Assembly in its Resolution 45/95 of 14 December 1990.

5. During that meeting, the Ministers' Deputies also encouraged the Convention Committee "to increase co-operation with the European Union in the field of promotion of international standards for personal data protection and to seek its support for encouraging non-member States to accede to Convention 108".

6. Modernisation work was also welcomed by the Ministers of Justice who met in Istanbul on 24-26 November 2010 for the 30th Council of Europe Conference of Ministers of Justice, in Resolution No. 3 on "data protection and privacy in the third millennium".

7. It is worth noting that, on 2 July 2008 at their 1031st meeting, the Ministers' Deputies took note of the Convention Committee's recommendation that non-member States with legislation on data protection in line with Convention 108 be allowed to accede to this Convention.

8. Taking note of the present weak state of the development of the right to data protection in the world[5] with regard to the stakes and of the absence of organised world governance in this sphere, the report takes into consideration both the Council of Europe's own mechanisms and the additional external mechanisms that might be used in order to contribute to the promotion of Convention 108 and its Additional Protocol and to the improvement of the application and effectiveness of their implementation.

9. The report is structured as follows: after a presentation of the composition of the present Consultative Committee and its functions, together with some observations and thoughts about, in particular, the limits of its standard-setting function and the absence of mechanisms for investigation upon request (I), the report then examines the needs in terms of assessment and monitoring mechanisms in the light of two virtuous circles into which they should fit and should be used: firstly from promotion of Convention 108 and its Additional Protocol to accession or ratification by countries or regional organisations of States (II), and, secondly, monitoring leading to the drafting of standards, including the results of periodic assessments of actual application of texts (monitoring) and those of multidisciplinary monitoring of innovations and their assessment (III)[6].

10. The report does not include a quantitative assessment of the costs of the various mechanisms suggested, which are mostly based on existing structures, but concludes with a summary of the proposals and a strategy for their implementation in time according to the gradual objectives to be achieved.

I – THE CONSULTATIVE COMMITTEE OF THE CONVENTION: ITS CHARACTERISTICS, OBSERVATIONS AND THOUGHTS

1. Composition and functions

11. The Committee is governed by Chapter V of Convention 108 and its Articles 18, 19 and 20. The Committee is composed of a representative and a deputy representative appointed by each Party. Member States of the Council of Europe which are not Parties to the Convention are ex officio observers to the Committee. The Committee may, by unanimous decision, invite a non-member State of the Council of Europe to

[5] Some 60 out of 193 States (members of United Nations) in the world have implemented data protection legislation for public and private sectors, including 43 members of the Council of Europe (including 13 outside the European Union and European Economic Area), six in America (Canada, Mexico, Argentina, Chile, Peru, Uruguay) and one partly (USA), six in Africa (Bénin, Burkina Faso, Maroco, Mauritius, Senegal,Tunisia) , one in the Middle East (Israel), two in the Asia-Pacific region (Australia and New Zealand), and two special administrative regions of the People's Republic of China (Hong Kong and Macao).

[6] A diagram of the dynamic process driven by the proposed mechanisms, together with the principal legal and institutional questions which they raise, can be found in the appendix.

participate in its work. According to its own rules of procedure, it may also invite as observers, experts, organisations and international institutions or organisations. The Council of Europe Data Protection Commissioner may participate in the Committee's work.

12. The purpose of the Committee is primarily to facilitate the application of Convention 108 (by producing guides, delivering interpretative opinions at the request of a party, for example the opinion on the draft agreement between the European Union and the United States of America on the transmission to the USA of information held by the financial messaging service SWIFT, the opinion on the compatibility of the international standard for the protection of data and personal information of the World Anti-Doping Agency with the standards of the Council and the stage report on biometry[7].

13. In practice, the Committee also had to take over the functions of the Committee of Experts, removed in 2003, developing draft recommendation standards, adopted by the Committee of Ministers, which may go beyond Convention 108 (non-binding recommendations), geared to practices of a sectoral nature or to specific technologies (Recommendation CM/Rec(2010)13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling).

14. Lastly, if necessary, it proposes the improvement of Convention 108 (see the Additional Protocol on Supervisory Authorities and Transborder Data Flows, adopted in 2001, and the work in progress on the modernisation of Convention 108).

15. Essentially, therefore, it successfully advises the Committee of Ministers on policies to be developed[8].

2. Observations and thoughts

a) On the nature and functions of the Committee

16. The Consultative Committee of the Convention is non-judicial (the judicial role is passed on to the European Court of Human Rights for the member States of the Council of Europe, see below). It is an egalitarian multilateral platform for co-operation (one state, one vote) essentially dedicated to the exchange of ideas and better practices, to support implementation of texts and to develop new draft standards to be transmitted to the Committee of Ministers for adoption.

17. The Committee therefore has no binding interpretative power, nor investigative and supervisory power, and no power to settle disputes (on an individual or collective complaint, or between the Parties).

18. However, it might be appropriate, besides to explain its functions in the text of the Convention, to examine two questions: the interpretative scope of its opinions and the non judicial resolution of conflicts.

b) On the need for a uniform interpretation of the principles and the non judicial resolution of conflicts

- ***The need for a uniform interpretation of the principles***

[7] Please contact the Secretariat at dataprotection@coe.int to obtain these opinions.

[8] This advice goes beyond the sphere of normative activity; see in this respect proposals approved by the Committee of Ministers, mentioned in paragraphs 4 to 7 above.

19. Given the horizontal nature, wholly relevant and beneficial to Convention 108, technological developments and their uses but also the general and technically neutral nature of its basic principles, practice shows that questions of interpretation arise as and when, which increasingly require uniform answers on the international level, and within deadlines that are compatible with new legislative initiatives derogatory to the convention's principles or with the deployment of new systems and services based on new technologies.

20. It might therefore be useful to examine the possibility of conferring a binding interpretative power on the Committee on the principles set by the Convention and its additional protocols as well as by the recommendations adopted by the Committee of Ministers. For example: is an IP address (mostly with a date and a time of use) considered as personal data?

21. Those binding interpretative opinions should be adopted with a qualified majority or unanimously.

22. They would be binding for other bodies of the Council of Europe and for the Parties to the Convention and its additional protocols. Parties to the Convention should make their best efforts to meet them within their national legal systems and other relevant regional or international organs of which they are members or within which they work.

- ***The question of remedies***

23. Under Convention 108, any remedies are essentially a national matter and lie with the supervisory authorities and the courts before which the European Convention for the Protection of Human Rights may be invoked, since Convention 108 has its origins in Article 8 ECHR on private life, and article 10 ECHR on freedom of information[9]. An individual who has exhausted all domestic remedies may bring his or her case before the European Court of Human Rights (subject to conditions of admissibility).

24. In the context of the opening for accession by non-member States, it is appropriate to consider whether such remedies exist in the international courts of human rights having jurisdiction on other continents, such as the Inter-American Court of Human Rights and the African Court of Justice and Human Rights under development[10].

25. Beyond that, a State may seize the International Court of Justice in a dispute with another State, a possibility which, to our knowledge, has not been used so far in the protection of personal data.

- ***The opportunity to foresee a non judicial appeal procedure with the Committee and an investigation procedure***

26. Given the time taken by such judicial procedures, while the impact of certain State practices of the same type in several State Parties to the Convention may rise doubts

[9] ECHR, *Rotaru v. Romania* judgment of 5 April 2000.

[10] The merger of the African Court of Justice with the African Human Rights Court, decided in 2008, will give the Court judicial competence to process remedies for citizens, on an individual or a collective basis (NGO), from the African continent who will have acceded to the additional protocol on such remedies (Protocol related to the establishment of the African Court of Justice and Human Rights of 2008). Already five States have ratified this protocol, such as Burkina Faso. These remedies will be able to base themselves on the Public Service Charter adopted in 2011 which lays down well developped provisions on the right to the protection of personal data (Article 14), on the African Charter on the Rights and Welfare of Children adopted in 1990 and on the African Charter on Youth adopted in 2006, which foresees the fundamental right to privacy respectively in their Articles 10 and 7. Indeed, as it is currently, the African Charter on Human and Peoples' rights does not foresee the right to privacy, unlike other (internationally recognised) freedoms and fundamental rights.

as to their conformity with the convention, or improper private sector's practices affecting millions of persons in several State Parties to the Convention, give rise to the development of mass reactions in particular via the Internet[11], one should consider the opportunity to provide the possibility of non-judicial[12] appeal as well as modalities for the exercise of investigation and questioning powers, opinions and recommendations. Thus, depending on the case, States in which these services are established (whether or not they are Parties to Convention 108, or member States or non-member States of the Council of Europe) could be questioned and States in which such governmental practices are implemented and which are members of the Council of Europe or Parties to Convention 108 could be invited to review their practices.

27. The decision to carry out, if necessary, investigations could be entrusted to the Committee, on the basis of a collective application, implemented according to a fair procedure of dialogue in order to develop solutions[13].

28. In this framework, it would also be necessary to consider the body carrying out the investigations, which could be either a group of independent experts or national supervisory authorities working together on the basis of their competences. In these cases, the investigation report would be completed with conclusions and forwarded to the Committee for its opinion or recommendations.

29. The Committee's opinions or recommendations would be transmitted to the supervisory authorities and the governments concerned. In the case of member States of the European Union, the opinions or recommendations would be transmitted to the European Commission.

30. A procedure of dialogue with the concerned States should also be foreseen in order to look for solutions and to follow up on the recommendations.

- The co-operation between supervisory authorities and the opportunity to institutionalise the Supervisory Authorities Network

31. The procedure launched by the Committee, as described above, would not be intended to replace the co-operation efforts which exist institutionally (European Union) or which are currently promoted to some extent by supervisory authorities at global level, but to give them coherence with universal purpose. Indeed, co-operation between supervisory authorities and especially in investigations are already organised within the EU[14], or are partially promoted by them or their counterparts in other regions of the world[15] but within or under the aegis of specific international organisations, rather economic or political and with no global potential[16].

[11] See the current practice in certain States of keeping on a central database, for a very long period, the biometric data of all their nationals when a purely administrative document, for example an identity card or a passport, is issued. In 2010 the cases of Google Buzz (an attempt to transform the address books of users of its Gmail electronic messaging service into a social network, without the users' knowledge), Google Street View (which collected secretly confidential data from residents using wireless networks), the changes to the confidentiality parameters of the social network platform Facebook made without members' knowledge and the use made of members' address books without their consent.

[12] Those non judicial remedies are often called in the international texts of the United Nations system, « communications of individuals » or « collective claim », in the field of social rights for instance.

[13] According to conventions (UN, Council of Europe), notably in the field of human rights and employment, non-judicial remedies before conventional committees, when they exist, are designed according to the case under terms of communication, complaint, investigation or claim.

[14] See Article 29 Working party joint investigation programmes, established by the 1995 European Directive, those of joint supervisory authorities ("ex-third pillar": Schengen, Europol) or with the European Data Protection Commissioner for the European Institutions.

[15] See the setting up in 2010 of a supervisory authority network within APEC and the Global Privacy Enforcement Network (GPEN) set up within the framework of the OECD.

[16] GPEN, see previous footnote, only appears to have commercial personal data as field of exchange and as vocation to regroup only authorities of developed or emerging countries.

32. On the contrary, we believe that co-operation between all national supervisory authorities of the Parties to Convention 108 and its additional protocol, the principle of which is laid down in the Protocol (Article 1.5), should not only be sustained but also developed and institutionalised within the framework of the Convention.

33. In that regard, it seems legitimate to raise the question of the preparation, in co-operation with them, of a type of regulation governing their co-operation, not only in supporting the development of doctrines by the Committee, but also for the processing of cross-border complaints and joint investigations. This regulation should aim in particular to lift obstacles to the transmission of personal data under investigation between supervisory authorities when necessary.

34. It is understood that such investigations jointly carried out by supervisory authorities are all invested at least with a power of investigation. This power is foreseen in Article 2.2 of the additional protocol.

35. This network could be organised from the existing platform of the European Conference of Commissioners on Data Protection. This Conference includes, in addition to the 30 national authorities from the EU and European Economic Area and the European Supervisor, the other 13 national authorities from other member States of the Council of Europe Parties to the Convention. This network could also integrate as and when the national authorities of non-member States of the Council of Europe join the Convention.

36. The effectiveness of this network of global potential of which institutionalisation becomes increasingly necessary, will however depend on the Council of Europe being able to provide the services of a permanent secretariat.

- Conclusions on non-judicial remedies and investigations

37. The collective remedies procedure should be complete with an investigation procedure, implemented when necessary, based on:

- a definition of cases for which a collective request is possible, notably when covering sovereign matters the assumption of several States implementing similar reprehensible practices and for example cases of abuse towards populations from several Parties invoked against a private sector controller, or even initiatives for concern taken within international or regional organisations,

- a collective request from associations for the defence of human rights represented within the Committee or accredited by the Council of Europe,

- an investigation mandate drawn up by the Convention Committee, or its Bureau in case of urgency, delivered if necessary to resolve the case,

- the mandate would be executed by a group of independent experts from, for example, the supervisory authority network or more simply by the supervisory authorities network,

- the transmission of an investigative report to the Committee, completed with conclusions for its opinion and recommendations,

- a dialogue procedure between the Committee and the concerned State(s) and regional or international organisation, for the finding of solutions and the monitoring of recommendations.

c) *on the composition of the Committee*

- <u>The Committee's strong point: its composition</u>

38. The Committee is composed of voting members (representatives appointed by the State Parties to the Convention) and observer members. The Convention foresees that member States of the Council of Europe not Parties to the Convention may be represented by an observer and that the Committee, unanimously, can invite a non-Party State as observer. It is interesting to note that, very early, the Committee was able to be surrounded by representatives from almost all stakeholders, International Chamber of Commerce, civil society, international organisations. Hereafter its precise current composition and capacities.

39. The Parties' representatives are generally data protection specialists. In 2009 two-fifths were from executives, practically all from European Union members, including three of the big countries, and three-fifths were from national supervisory authorities, a large proportion being senior officials, principally countries in Central, Eastern and Southern Europe and not members of the European Union. This duality was not foreseen in the texts and deserves to be perpetuated, for example by explicitly providing in the Convention that the Parties' representatives may have one or another institutional origin.

40. It will be noted, however, that not all 43 Parties to Convention 108 regularly participate in the Committee (34 in 2009 and 36 in 2010). Therefore efforts should be made with regard to those non participating Parties in view of a a better co-operation.

41. Electing its Chair (and also two Vice-Chairs and four other members who make up its Bureau for a two-year term), it will be noted that the Committee is chaired either by a delegate from a government or a data protection authority. This characteristic is particularly noteworthy and relevant since at national level supervisory authorities centralise the most legal knowledge and practices in the field of personal data processing and should be naturally sustained.

42. Among the States or regional organisations which are observers, the presence of the European Commission[17] and non-member States of the Council of Europe (Australia and Canada for many years and since 2010 the USA) should be noted.

43. It will also be noted that, gradually, since 2008, the participation of supervisory authorities has been reinforced considerably, since the international networks created at their initiative have also been admitted as observers: the French-Speaking Association of Personal Data Protection Authorities[18], the Ibero-American Data Protection Network and, in 2010, the International Conference of Data Protection and Privacy Commissioners[19].

[17] The amendment for European Union accession has not at the time of writing entered into force.

[18] 20 supervisory authorities from three continents (Africa, America, Europe and representatives of other Francophone States interested in developing the legal framework of data protection, in particular in Asia, the Maghreb countries and the southern Sahara).

[19] The International Conference of Data Protection and Privacy Commissioners gathers more than seventy national, federal and provincial authorities from the five continents.

44. As regards the other significant actors, Industry has been represented by the International Chamber of Commerce for many years. It will be noted, however, that the information and communication technologies (ICTs) industry is not represented as such.

45. Civil society is also associated as an observer. The European Privacy Association (EPA) obtained this status and the application of the European Human Rights Association who responded to the public consultation which took place this year on the modernisation of the Convention, is being considered.

46. Without having applied for observer status, it will be noted that a reputed organisation of American society (EPIC), which campaigns for accession of the USA to Council of Europe Convention 108 - with the support of members of a global coalition[20] - responded to the public on-line consultation carried out during the drafting of Recommendation CM/Rec(2010)13 of the Committee of Ministers to member States on the protection of individuals with regard to automatic processing of personal data in the context of profiling.

47. It will be noted that other NGO networks specialised in the defence of human rights with respect to the digital field and the Internet, including from the technical community committed to the promotion of "free" software, participate in the work of the Council of Europe's Committee on the Media. The recent inclusion of data protection activities within the Information Society, Media and Data Protection Division should boost the interest of those networks in the Convention 108 Committee.

48. Council of Europe institutions and several of its steering committees participate in the work of the Committee, and this is very important (some of their initiatives may raise questions relating to personal data protection).

49. In view of some remarks from delegates of the Committee, sufficient dissemination of information should be ensured to all other Committees and bodies of the Council of Europe on the expertise and capacity of the Committee to give opinions on issues of data which could be brought up in their fields, following the example of what was contributed to the CODEXTER committee. In this respect, a periodic circulation of a summary document on the work of the Committee would be useful.

50. The presence of Parliamentary Assembly representatives is particularly welcome in the light of what is at stake in the field with which we are concerned.

51. Finally, other concerned international organisations with generalist or specialist fields of competence have participated in the Committee's work for a long time: the International Labour Office, Interpol and the OECD. Others would also deserve to be invited in future, especially when they are involved in the drafting of standards touching on the processing of personal data, whether from a functional or technical point of view[21].

Conclusions on the composition of the Committee

52. The institutional plurality of its members (voting) and the way the Committee was able to attract other stakeholders as observer members are two particularly valuable criteria in relation to standard-setting since they reinforce its expertise and allow the Committee to

[20] The Public Voice, Madrid Declaration, 2009 (http://thepublicvoice.org/madrid-declaration/).

[21] In particular the WHO, ICAO, as well as the ITU, IETF and the W3C (organisations focusing on technical standards), networks promoting OPEN DATA of administrations based on free software, and also the UNDP as international donor for the aspects of development related to information technology.

engage in dialogue with all stakeholders, including at global level. This last dimension would merit being taken further towards other sectoral or generalist international organisations involved in the development and use of technologies (see footnote page 20) .

53. These developments also give the Committee a capacity to contribute to the preparation of policies for the promotion of the Convention and for co-operation at global level and their implementation by calling on experts of the networks thus brought together and to sources of partnerships and financing (see part II of the report).

54. This exchange structure has its limits, however, in terms of the monitoring and forecasting needed for standard-setting activity, and could be reinforced in line with the considerations set out in part III of the report.

d) Standard-setting activities

55. The current modernisation of Convention 108 was suggested by the Committee and approved by the Committee of Ministers (see paragraph 4 above).

56. However, it should also be noted that besides the recently adopted recommendation on profiling prepared by the Convention Committee, the other sectoral recommendations[22] adopted as proposed by the Committee of Experts which ceased to exist in 2003, could be assessed and updated by the Convention Committee (current examples are the recommendation on the police sector[23] and the recommendation on employment[24]).

57. Some of these recommendations have already had a strong legal impact. Thus, within the European Union, Recommendation No. R (95) 4 on the protection of personal data in the sphere of telecommunications forms the basis of a harmonisation directive supplementing the 1995 general directive (the 1997 "telecommunications" directive[25]), and Recommendation 87 (15) regulating the use of personal data in the police sector forms an integral part of the Schengen agreements (Europol, SEE-Pol, etc).

58. This strong impact already goes beyond the framework of the Council of Europe: the European Union's 1995 general directive, which develops Convention 108, and the 1997 "telecoms" directive, stemming from the above-mentioned recommendation on telecommunications, which became the "e-Privacy" directive after amendment, have a strong influence outside Europe on the drafting of general and supplementary legislation on data protection.

59. However, it is also clear that the other recommendations would be worthy of being updated and that work should be started on others on the basis of a reinforcement of activity put on hold and forecast. It is expected, for example, that within the next few weeks facial recognition applications will arrive on "smart phones", as a means of establishing a link between a person (unknown but photographed or filmed) and his or her data made public on the internet without knowing what measures are taken to ensure freedom to come and go. The question of combined use of such applications

[22] http://www.coe.int/t/dghl/standardsetting/dataprotection/Legal_instruments_en.asp

[23] Recommendation R (87)15 regulating the use of personal data in the police sector (17 September 1987) and three subsequent reports assessing the Recommendation.

[24] Recommendation R (89) 2 on the protection of personal data used for employment purposes (18 January 1989) and explanatory memorandum.

[25] Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

including private or public video monitoring services also deserves to be examined in a prospective way in this context.

e) On the means

60. In the light of present and foreseeable standard-setting needs, in respect of opinions requested by the Parties or by other Council of Europe Committees, also in light of wishes expressed to extend the Committee's tasks (pre-accession assessment for example), it is appropriate to recall that at present the plenary Committee meets only once a year, and that its Bureau which meets three times a year, is entrusted, and not the working groups as was previously the case, with preparing draft opinions and draft standards. The means made available to the Committee seem far from adequate.

61. The means currently made available to the Committee, whose budget was even reduced in 2008, and the procedures for the adoption of standards, which involve the European Committee on Legal Co-operation, only make possible the production of very few standards, and at a speed insufficient to keep pace with international needs: just one new recommendation since 2003, on profiling[26], which took more than three years to draft and adopt, and work on revising only two existing recommendations (on police and on employment).

62. These deficiencies also fall short of the ambitions which the Council of Europe might have in the light of the network of stakeholders with which the Committee meets and of the speed of developments in services related to the automatic processing of personal data. This situation prompts the proposals set out in part III of the report.

63. The Organisation, which is currently undergoing a strategic reform exercise, seems to have understood these necessities, and the Ministers' Deputies, at their 1106th meeting (16 February 2011), indicated their agreement with the outline priorities for the future Programme of the Organisation (2012-2013) as presented in document SG/Info (2011)4 final, highlighting data protection amongst the future priorities.

II – PROMOTION OF THE CONVENTION AND ITS ADDITIONAL PROTOCOL AND THE MECHANISMS OF PRE-RATIFICATION OR PRE-ACCESSION ASSESSMENT

1. Towards a definition of new promotion programmes outside the borders of the Council of Europe

64. The promotion of Convention 108 and its Additional Protocol is carried out by the Directorate of Co-operation and at present is targeting essentially countries in Central, Eastern and Southern Europe, relying notably on the members of the Consultative Committee and their networks of experts, as well as on finance provided by the European Union.

65. So, in addition to the 27 States of the European Union and the associated three States of the European Economic Area, another 13 member States of the Council of Europe have ratified Convention 108.

66. Furthermore, the Consultative Committee and its secretariat increasingly from a worldwide exchange forum, as we have just seen, having been able to attract

[26] Recommendation CM/Rec(2010)13 of the Committee of Ministers to member States on the protection of individuals with regard to automatic processing of personal data in the context of profiling.

observers from non-member countries on several continents, as well as from networks created by the supervisory authorities[27].

67. The Council of Europe is also building up links across the world within the framework of its active participation in the Internet Governance Forum in the field of cybercrime, freedom of expression and, more recently in the field of the right to data protection. In this context it has strengthened its relations with other structures of international organisations within the UN system which promote information technologies, their regulation and ethical dimensions of information society (ITU and UNESCO).

68. Lastly, through its programme to promote the Budapest Convention on Cybercrime, the Council of Europe has acquired experience in the promotion of instruments concerning ICT-related law on all continents, which could be used to the advantage of the promotion of Convention 108.

69. On the basis of all the information gathered from all their contacts (without forgetting the Venice Commission in relation to many non-member States thanks to its constitution expertise), it seems possible that the Directorate of Co-operation, together with the Convention Committee, could draw up a list of potential partners for the organisation of regional awareness-raising seminars, legislative support and the reinforcement of the capacities of recently set up data protection authorities or which might be set up on other continents.

70. In this context, some regional organisations in a few parts of the world concerned with the development of law on ICTs, including the right to data protection, should also provide support. These are, in particular, the Economic Commission for Africa, ECOWAS in West Africa[28], Mercosur in Latin America and ASEAN in Asia which announced two years ago that it wished to harmonise data protection legislation.

71. In this promotion programme, the European Union should constitute a major support in the context of economic partnerships with emerging and developing countries which it forms across the world. These partnerships include in their general framework a concern for data protection. Furthermore, the European Union is very much involved in the financing of development projects based on ICTs, most frequently in partnership with member States and the UNDP.

72. In addition, it is appropriate to take into consideration the activities of the UN Human Rights Committee (and of certain specialist committees, such as the Committee of the Rights of the Child). Indeed, progress made or data protection deficiencies in a State are sometimes covered by periodic examinations or in the context of the activities of special rapporteurs[29], referring to the data protection guidelines adopted by the UN[30]. And the Council of Europe might consider the usefulness of approaching these structures with a view to determining whether all the (approximately 120) States in the world which have not yet adopted data protection legislation should be systematically asked what they propose to do in that regard.

[27] See I.2. above.

[28] Supplementary Act to the treaty adopted on 19 Fevruary 2010, A/SA. 1/01/10 on Personal Data Protection within ECOWAS.

[29] Examples of the latest examinations relating to Croatia emphasise the need to adopt Data Protection legislation, and to France on cases of legal violations, and the special report on security services responsible for the prevention of terrorism recommending the application of UN guidelines by those services and pointing to the good practices of the Netherlands in that field.

[30] Guidelines for the Regulation of Computerised Personal Data Files, adopted by the General Assembly of the United Nations in Resolution 45/95 of 14 December 1990. These Guidelines lay down the basic principles of data protection, including enhanced protection of sensitive data and the existence of an independent supervisory authority.

73. Lastly, in the context of protection of the right to data protection, the European Court of Human Rights, if it has not already done so, might feel it appropriate to engage in an exchange of views with its counterparts worldwide, in particular the Inter-American Court of Human Rights and the African Commission of Human Rights.

2. Advantages and limits of current requirements for accession in the light of the objective of free flow of data between the Parties, and avenues to be explored

74. At present the requirement of comprehensive Data protection legislation, which must now make provision for a supervisory authority (Additional Protocol), is a condition for being able to lodge instruments of ratification of the Convention and its additional protocol with the Secretariat General. Such a requirement is noteworthy, given the absence of such a condition for accession to other international conventions on human rights. The condition of having a supervisory authority is only required if the additional protocol has been ratified, which is highly recommended for the recognition of the appropriate level of protection ensured by another country (Additional protocol).

75. It has been the case, however, that such a legislative requirement has not been observed before ratification, which is particularly harmful in light of the Convention's objective of ensuring the free flow of data. The question therefore arises today of the preliminary conditions that ought to be set for ratification of or accession to Convention 108.

76. It will be observed that there is no provision for an official mechanism to assess conformity with the Convention and the effectiveness of the legislation concerned.

77. Furthermore, upon accession, a State may declare (Article 2.2 of Convention 108) that it will not apply the Convention to certain categories of data files or a specific area or, on the contrary, that it will apply it to data kept in "paper" form.

78. Yet current developments could in practice thwart the objective pursued, owing to the globalisation or very numerous transfers of data processing operations, including in sovereign spheres, which may occur independently of the rules governing transfers of data to non-member countries provided for in the Additional Protocol. There may be, for example, data on paper forms which are entered in one foreign country, stored in another country, accessed for processing purposes from several other countries and remotely maintained from yet another country.

79. That is why, with regard to the basic objective of Convention 108, which is the free flow of data between Parties to the Convention, it seems necessary and obvious to establish a procedure for the assessment of the level of protection prior to ratification or accession. It would also be appropriate to examine beforehand two questions not within the scope of this report:

    - Is maintenance of the principle of declarations restricting or extending the scope of protection still relevant? Or should it be advised to remove this principle so as to ensure the broadest protection under the Convention?

    - Should certain requirements more specific than general legislation and arising in particular from the main points included in some of the sectoral recommendations adopted by the Council of Europe not be set down, especially where they are particularly relevant in the context of internalisation of practices and processing

operations[31]? Or should those main points not at least be regarded as good-practice references in the context of the assessment mechanisms?

3. Proposal for a mechanism for pre-ratification and pre-accession assessment

80. The proposal set out below concerns the following points: the purpose and objectives of an assessment activity, the method and process of assessment, the body to be responsible for assessment.

a) Purpose

81. The purpose of an assessment activity is to characterise the level of protection achieved in a State and its conformity with the Convention, facilitating objective verification prior to the deposit of the instruments of ratification or the agreement of the Committee of Ministers necessary for accession.

82. To that end, the assessment must take into account all the elements necessary to the attainment of the objective of the Convention (to ensure the protection of persons with respect to their personal data and thus permit the free movement of information between the Parties).

83. It will be observed that the methodological elements of analysis that might emerge could also be useful to the Parties when they fulfil their obligations relating to respect for the principle of an adequate level of protection in countries, not Parties to the Convention, to which personal data are transferred. That procedure would also favour, in a homogenous manner, the implementation of the Committee of Ministers' decision of 2 July 2008 to encourage (non-Member) States having an adequate standard to accede to Convention 108 and its Additional Protocol.

b) Method: a common framework for relevant, objective and instructive analysis

84. A common framework of analysis must make it possible to collect all the information necessary for assessing the measures adopted for the purpose of giving effect to all the basic principles of protection contained in Chapter II of Convention 108 and in the Additional Protocol. It must also provide information about the way in which those principles are observed (control of effectiveness) and in particular about the way in which concerned individuals can and in fact do rely on their rights.

85. The common framework of analysis should also concern the other main elements of a State's protection system: its constitutional framework and case-law on data protection and also the state of development of its ICTs.

86. To that end, a series of practical forms for gathering information might be prepared on:

- ***The main features of the development of ICTs*** in the State concerned[32] to evaluate the context and the nature of measures taken in respect of data protection and the possible difficulties in implementation.

[31] For example Recommendation No. R (95) 4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services (7 February 1995), and Recommendation No. R (87) 15 regulating the use of personal data in the police sector (17 September 1987).

[32] It concerns, for example, information on areas of competence or activities particular to the field of innovation, the level and progression of investments, production and expenses by large sectors of public and private activities (who import and export information technologies),

- The constitutional, legislative, regulatory and case-law framework of both general and specific relevance to data protection, including where this is sector-related or concerns international commitments. Some of this information might be gathered on the basis of a list of questions.

- ***The specific institutional framework of data protection*** relating to the supervisory authority[33], its powers, main actions which it has already carried out and those which it proposes to carry out;

- ***The existence of awareness-raising and training programmes*** on the right to data protection and its implementation.

87. These forms might be accompanied, as regards the legal and practical framework for data protection, by information relating to good practices of a general or specific nature implemented by States Parties to the Convention, particularly those resulting from the sectoral recommendations adopted by the Council of Europe[34].

88. It will be noted that such a framework for analysis might also constitute a tool for self-assessment by member States and also be instructive within the framework of the policy of promoting Convention 108 amongst non-member countries.

c) Process of transparent, fair and instructive assessment

89. Such a process might go through the following stages:

- ***gathering information*** on the basis of the forms mentioned above, asking the State concerned (information of a general nature could be provided, where appropriate, by the Council of Europe departments already holding such information), and by having them completed by the international networks of authorities which have observer status in the Convention Committee and by the networks of non-government organisations which are also observers;

- ***examining information gathered and establishing the extent of conformity*** with Convention 108 and its Additional Protocol of the protection system implemented and identifying exemplary measures taken;

- ***engaging in dialogue with the State concerned about the findings made***, in the presence, at their convenience, of representatives of the NGOs concerned and of other international organisations (observers to the Convention Committee);

- ***drafting an opinion containing general and specific conclusions*** (in particular on the areas identified as being likely to cause difficulties in relation to cross-border flows) and recommendations which could include, if necessary, a section on suggestions regarding further co-operation, particularly when the right to data protection constitutes a new type of right for the applicant State;

- ***receiving observations of the State concerned*** on the conclusions and recommendations;

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the number and progress of internet and mobile telephone users by age bracket, indications on policies and current or foreseen technology development programmes.

[33] Criteria of independence, composition, tasks, powers – a priori and a posteriori – and the procedures in practice, other fields of competence, if any (e.g. in relation to access to information).

[34] A similar practice is in operation within the Schengen area.

- ***forwarding*** the opinion (conclusions and recommendations) and also the observations of the State concerned to the Secretary General in the event of ratification, or to the Committee of Ministers for examination of the application for accession.

90. This process should not extend over a long period (a few months), in order to enable the applicant State to rapidly initiate improvements, if necessary, and co-operation where appropriate.

d) Body responsible for assessment

91. The Consultative Convention Committee is authorised to give an opinion at the request of a Party on the level of protection provided in a non-member country (see the Additional Protocol). It would therefore be logical that the Committee should be empowered to give an opinion on conformity when instruments of ratification are deposited or when accession requests are examined by the Committee of Ministers.

92. Nonetheless, the state of the texts and current practices leads to two sets of observations, from the legal and institutional points of view.

- ***Legal issues:***

- the obligation for a State to be subjected to an assessment must be provided for in the texts;

- the assessment activity must be given official status in the Convention and the process described above should be set forth in the main statutes of the body responsible for its implementation;

- the standard documents adopted for the purpose of gathering information should be made public, as well as the opinions and recommendations (see below).

- ***Institutional issues:***

93. According to the internal rules of the Convention Committee, its Bureau is responsible for preparing draft opinions and the Committee decides to set up working groups, specifying their composition and terms of reference. Therefore,

- either a particular assessment working group is established within the Committee, composed of four to six members appointed for three years, one-third of members being renewed each year, in order to ensure some stability in the applied method and developed doctrine (according to the experience of the International Conference of Commissioners on Data Protection and Privacy), Its composition should also respect a geographical balance and institutional origin (representatives of Governments and supervisory authorities). This working group would prepare a draft opinion to be submitted to the Convention Committee for approval. The Committee's opinion would be transmitted to the Committee of Ministers.

This "peer assessment" approach, in accordance with the supervisory mechanism currently provided for in the Convention and with the Committee's internal rules, seems an appropriate way of assessing Council of Europe member States;

- or a committee of independent experts responsible for assessments is set up, for which guarantees of its independence would have to be provided for in the texts.

This method, which departs from the "peer assessment" approach, might have the advantage of presenting an independent nature that would reassure non-member countries. Such a committee could be composed of recognised experts from civil society, appointed in their personal capacity and recognised practitioners in the field of data protection law, and could also include an expert in constitutional systems.

This committee of experts would forward its report and conclusions to the Convention Committee in order to prepare its opinion. The Committee's opinion would be transmitted to the Committee of Ministers.

III – FOLLOW-UP MECHANISMS: SUPERVISION, MONITORING AND FORECASTING, STANDARD SETTING

94. The large number and increasing speed of developments affecting ICTs and their uses and consequently the processing of personal data and their deployment, with their advantages but also their possible associated risks for rights and freedoms[35], should lead to a reinforcement of the follow-up mechanisms in order to ensure, in terms of both time and space, protection of individuals' rights and freedoms and democratic sustainability faced with policy[36], legal[37], technical/social/economic developments[38]. In particular, the scope of current and future technological innovations is practically infinite on the human timescale[39]. In addition, there are innovations in design methods, including participatory design, new procedures for use, the emergence of new economic models[40] and new international divisions of labour, involvement of multiple specialist standardisation bodies in ITU, IETF, W3C networks or in generalist and sectoral ISO, ICAO, WHO, etc applications.

95. In such circumstances, and while miniaturisation and steadily falling costs for central or terminal equipment of equal power, there is every reason to think that what matters from now on is the capacity to maintain the effectiveness of implementation of all the principles drawn up and established specifically in order to preclude the various risks inherent in the digitisation of information[41], for the benefit of the rights and freedoms of persons concerned by these technologies.

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[35] In thirty years the passage from computer management to the computerisation of remote relationships between citizens, administration, consumers and business, then to the computerisation of relationships between individuals and now to their ecosystem.

[36] Policy of developing ICTs and their use in the interest of the pursuit or recovery of growth, whatever the level of development of the countries, by comparison very small increases in budgets allocated to data protection control policies, instability of political regimes – what about the central data files that have been set up?

[37] Legislative and regulatory amendments, particularly during a period when the prime concern is "security", or under pressure from industry or management, making sometimes disproportionate use of the scope available under Article 9 of the Convention for derogating from the application of the basic principles.

[38] Remote knowledge service providers and those targeting relationship building between individuals (so called social network platforms) seem to slide further and further towards commercial services set up for their financial remuneration and their development by exploiting data concerning people there, that is their "users" or customers.

[39] Thus, for example, in the space of less than five years, 600 million individuals on all continents, young and old, including prominent businesspersons and leaders of nations on every continent, have opened a private utility account, the pioneering and leading social network in terms of geographical cover (the Chinese equivalent has almost as many members as Facebook, but covering only a more limited part of the world…), established in a non-member Council of Europe State or a non-Party to the Convention. Likewise, it can only be expected that technologies developed for specific needs will continue to be barely standardised and come to be used in different fields and for other purposes. One example is the case of RFID chips, designed for the needs of managing flows and stocks and the distribution of goods at international level, which, shortly after being standardised, were the subject of a recommendation in 2003 that they be inserted in ICAO travel documents for the purposes of biometric identification and managing cross-border movements of persons.
To give an idea of the scale of things to come: the internet address protocol IPv6, which is currently being rolled out, already offers the possibility of allocating 2,000 "object" addresses to each of the 6 billion inhabitants on Earth, and experts predict that nanotechnologies will one day be used for 60% of data processing.

[40] For example, recourse to immense private platforms offering so called social network service uses, could be replaced as of today by personal equipment which communicate "end to end" to each other, not much bigger than a mobile telephone charger.

[41] That is to say, compliance with the legitimate aim, data minimisation/proportionality in quantity and duration, enhanced protection of so-called "sensitive" data, the principle of security, the fair processing of data, their transparency vis-à-vis individuals, the individual's right to access, correct, object, delete, in order to prevent the risks of data gathering, preservation/persistence, use, sharing/transfer/interconnection for purposes other than those for which the data were gathered and without the individual's knowledge, the establishment of behaviour patterns that could lead to arbitrary or discriminatory decisions, errors, the use of outdated information,

96. Protection for each and every person can only be effective if the principles laid down are respected from the innovation stage (why should an innovative undertaking not respect them?) in such a way as to cover the entire chain of means/operations for particular uses (often coming within the international division of the electronic, IT and network sectors) and if they are interpreted and applied similarly, indeed in "one and the same" manner, and consistently.

97. These challenges are enormous and some arguments that are weighty and perhaps conflicting, justified on first analysis, are: sovereignty, cultural differences, not to inhibit innovation. Nonetheless, the accession of developing or emerging countries to the universal principles laid down and the observation of critical situations in recent years can but lead to a desire to see the emergence of a global governance of data protection incorporating a procedure for verifying conformity at regular intervals and a mechanism enabling areas in which common interpretations and practices needing to be promoted to be speedily identified.

1. Verification of conformity over time

98. It is suggested that the appropriateness of establishing a procedure and periodic assessment (or examination) methods of the same kind as those proposed in the context of ratification or accession (II-3 above) be examined. This would be based on a three-year cycle, of the same type as that applied in the context of the UN human rights committees. There are, of course, other forums that carry out such periodic assessments: the Council of Europe GRECO (Group of States against corruption), its OECD equivalent for the implementation of its anti-bribery Convention.

99. These periodic assessments could relate to countries as well as to themes determined by the Committee. These themes could be sectoral or relating to a population group: police, finance, social, medical, children, immigrants…

100. The Committee should also periodically learn lessons from these assessments, notably with a view to drafting new standards.

101. Lastly, it should examine the consequences of a non-compliance assessment of a Party to the Convention, member or non-member of the Council of Europe. This politically sensitive issue could be handled according to a step by step plan.

102. The observation of non-compliance should be accompanied by gradual measures: delay for compliance (if appropriate, with a proposal of co-operation) of which the Convention Committee would inform the Party (Government and supervisory authority) while informing the Committee of Ministers; in case of persistence, the Committee could suspend the Party as a Committee member (with notification to the Committee of Ministers) and as a final measure, the issue of excluding the Party to the Convention could be examined. Such a situation should lead, if appropriate, to the preparation of an assistance programme with a view to the reinstatement of such a concerned State. The exclusion measure should be subject to an opinion of the Convention Committee to be transmitted to the Committee of Ministers for decision.

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security failures – and the criterion of derogation from these principles on the ground of major public interest in so far as is necessary and proportionate in a democratic society.

103. These measures may be taken either following periodic assessments or on account of exceptional circumstances[42].

2. Reinforcement of the Committee's monitoring function: setting up of a multidisciplinary observatory of multi-dimensional innovations relating to ICTs

104. It should be questioned beforehand on the need to reinforce the monitoring and forecasting function in the area of legal and of multi-dimensional innovation and ICTs, not only on the sustainable right to data protection, but probably more widely on the body of activities of the Information Society, Media and Data Protection Division, or even the Council of Europe as a whole. Indeed, it might be useful to mobilise some specialists, especially renowned experts, legal experts specialised in ICTs, information society economists or technologists (or research teams in these fields), who could bring in their knowledge, their monitoring and forecasting ability for the benefit of each activity.

105. If the answer to this question was positive, the following mechanism could be examined and introduced if the means where gathered. The observatory proposed hereafter would be either dedicated to data protection, or with a wider vocation (freedom of expression and information, data protection, security and ITCs…).

- ***Multidisciplinary observatory mission (non-permanent expert network)***

106. The observatory's mission should be to regularly inform, alert if need be and to advise the Committee.

107. In order to do this, the observatory members should, as time goes by, identify and qualify noted innovations, of what ever nature (legal, technical, social, economic..) and their processes, whether they reinforce the sustainability of the protection of persons or raise questions relating to the application of a particular principle of protection, irrespective of their origin (including their geographical origin) or their technical, economic, social or legal nature.

108. The Convention Committee could also refer specific questions to the observatory, notably relating to technological matters (including implementation methods).

109. Apart from a periodic (quarterly?) memorandum which the observatory would provide the Committee and which the Bureau might decide to publish, it may be useful for the Committee and the observatory to meet, for example twice a year (during the plenary sessions of the Committee?) in order to examine initiatives to be taken, for example with respect to emerging practices at sectoral level or a particular technical standard being prepared by a particular international body which should be the subject of recommendations. These meetings would also provide the opportunity to review initiatives already taken.

- ***Number and quality of experts, procedures for appointment, functioning***

[42] The methods and procedures to be used in dealing with such situations have not been investigated in greater detail in this report. But they could be examined in light of other international organisations' experience, for example that of the International Organisation of La Francophonie, in respect of the exclusion of a member whos regime would no longer be democratic and of its co-operation programmes during transition periods.

110. It would be appropriate to determine, in addition to the method of appointment and way of working (in a network), the quality and number of experts by speciality (two or three), or research centres in each field (research and technological development, social, economics and development, legal), but also no doubt at sectoral level. It is hard to imagine that the observatory would consist of a total of fewer than around twenty non-permanent experts.

111. The fields in question include many specialities, and for that reason the small number of recognised expert members of the observatory or research centre should have recourse to their networks of experts in the fields with which they are not thoroughly familiar.

112. It is suggested that the members of the observatory "data protection" training should be appointed or registered by the Convention Committee (by a majority of the voting members) on the basis of a call for candidates or on presentation by the various stakeholders represented within the Convention Committee.

113. The Chair of the observatory (or of its multidisciplinary "data protection" training) should be appointed by the Convention Committee on a proposal by its members (voting and non-voting members). The Chair's function would essentially be to lead and co-ordinate the members of the observatory (especially when it might be useful for several experts having different competences to work together in order to evaluate together certain innovations) and to liaise with the Committee (by taking part in its meetings).

114. An annual meeting of the observatory (or its multidisciplinary "data protection" training) could be devoted to the collective updating of working methods and a discussion on the current state of affairs and thoughts about the future, the results of which could be made public.

115. The observatory (or its multidisciplinary "data protection" training) should be provided with a small secretariat (shared if appropriate with the Convention Committee Secretariat).

3. Standard-setting activity

116. The Committee's standard-setting activities are already foreseen in Convention 108.

117. In a changing world, characterised by the interdependence of States in relation to economics, security, ICTs and the processing of personal data, the objective should be sustainability of the right to protection of personal data in space and time. Consequently, the Committee' standard-setting activities are essential. They are and must remain at the heart of the Committee's activities and should continue at a faster pace.

118. Regarding the fixing of new subjects to be broached and the collection of the required core documents, the Convention Committee will benefit from lessons learnt both from periodic assessments, monitoring and multidisciplinary forecasting activities, as well as the Committee's multi-stakeholder composition, notably the Data Protection Authorities network, periodically called upon.

119. Regarding the drafting method, it would be appropriate to find the necessary means to create temporary ad hoc working groups. Thus, the Bureau could concentrate on strategic issues raised by the projects themselves and other Bureau functions.

120. The working groups composed of experts in the field of the Parties including those of their supervisory authorities could also consult the Committee's other stakeholders and observatory members on the basis of a first working document outlining the topic and underlining the group's preoccupations.

121. To reduce costs, the working groups could hold some of their meetings using conference calls / video-conferences though the internet.

122. Moreover, the recently initiated practice of a global (online) consultation on standard-setting projects should be pursued.

CONCLUSION: TOWARDS IMPLEMENTATION OF A UNIVERSAL GOVERNANCE FOR SUSTAINABLE PROTECTION OF PERSONAL DATA

123. If we wish the the rapid development of ICTs and their old and newer applications within increasing numbers of human activities to be, and remain, of service to all citizens, to development and to sustainable democracy, a degree of boldness is necessary in order to promote a genuine universal governance of the protection of personal data. Such governance should be geared to sustainably ensuring human dignity, privacy, freedom of information and expression, freedom of association and all the other rights and freedoms. Any activity involving the exercise of a right or freedom is based, in the digital space, on amenities, services (and their intermediaries) and personal data processing systems which are focusing increasingly on transfrontier and open-ended aspects in their design and implementation.

124. Central to this governance are three major mechanisms set out in Convention 108 and its additional protocol: the substantive rules (personal rights and obligations of those responsible for data processing and other individuals involved in the ICT sector), rules on implementation at national level (supervisory authorities and judicial remedies/sanctions) and rules on supervisory and monitoring mechanisms, which are the subject of this report.

125. The mechanisms examined for driving the necessary dynamic processes, although ambitious ones, might be developed according to a programme which would evolve over time, taking account of the gradual objectives to be achieved, the bodies concerned and the facilities, or conversely, of the extent of the resources to be employed. These are summarised below in two different ways, by objective and by body concerned:

A – Summary of proposals by objective (and function) to be gradually achieved

1st proposal – Promoting the Convention and its additional protocol

- Drawing up an action plan aimed at the other Council of Europe committees, third countries and their regional organizations, and at organisations belonging to the UN human rights system;
- Identifying opportunities and implementing activities with the networks of members of the Committee of the Convention, and networks set up by other Council of Europe bodies (cybercrime co-operation, Venice Commission, ECHR, etc);
- Seeking support from the regional, continental and UN organisations interested (partnerships);

- Providing for diversified modes of financing, particularly from the European Union (e.g. facilitating adequacy of the protection systems of third countries receiving data, various types of aid for development based on ICTs[43]);
- Producing a consolidated document on the Council of Europe's work on Convention 108, on the accession to the Convention and on the Committee.

2nd proposal – Assessing conformity: establishing an assessment mechanism operated by the Committee of the Convention:

- Introducing, under the Committee's authority, an objective, fair, transparent and pedagogical process of compulsory evaluation of the level of protection provided in specific countries and of the conformity of their protection systems to the Convention and the additional protocol, to be implemented prior to accession or ratification, as well as periodically post-accession (every three or four years);
- Publishing the model form for information collection and evaluation;
- Ensuring evaluation by a working group (peer assessment) or, preferably, by a Committee of Independent Experts, producing a report and conclusions;
- Establishing a decision-making procedure including:
    - dialogue with the State concerned, open to the other parties involved;
    - adoption by the Committee of the Convention of its opinion, accompanied, where appropriate, by recommendations and proposals for assistance, transmitted to the Committee of Ministers for decision in the context of an application for accession, and post-ratification, to the supervisory authorities and governments concerned (to the European Commission, in the case of EU States);
    - gradual measures to be implemented by the Committee of Ministers, following an opinion from the Committee of the Convention, in the event of post-accession findings of non-conformity.

3rd proposal – Developing the Committee's interpretative and prescriptive activities:

- conferring on the Committee of the Convention a power of binding interpretation of the principles set out in the Convention, its additional protocols (and the recommendations adopted) vis-à-vis other Council of Europe committees and the States Parties to the Convention and the additional protocols;
- requiring parties to do their best efforts to put these interpretative opinions into practice in their national legal systems and to ensure compliance with them in other regional and international bodies in which they are involved;
- enabling the Committee to set up temporary working groups to devise new recommendations (based on the results of the periodical evaluations, the monitoring and forecasting activities, surveys, outcomes of the work of the network of supervisory authorities and of national delegates).

4th proposal – Establishing procedures for non-judicial collective remedies and investigations:

- establishing a procedure for non-judicial collective remedies before the Committee of the Convention;
- empowering the Committee to issue investigatory mandates to the network of supervisory authorities;

[43] European aid for computerisation of electoral lists, civil status registries, medical files, etc.

- empowering the Committee to issue opinions and seek solutions with the State(s) concerned, drawing on the basis of the investigatory report and its conclusions;
- enabling the Committee to notify its opinion to the supervisory authorities and governments concerned or to the European Commission in the case of EU States.

5th proposal – Setting up a pluridisciplinary human rights observatory of multidimensional inovations in relations with ICT :

- pluridisciplinary network serving the Committee and the network of supervisory authorities, with some twenty non-permanent experts (who are themselves networks' members), on multidimensional innovations related to ICT (social, economic, technological and legal), meeting, preferably in enlarged formation to deal with (interdependent) freedoms and human rights, or in restricted formation to deal with data protection;
- choice of experts by the Committee following an invitation to submit candidatures or as nominated by Committee members;
- mandate: keeping the Committee and the public regularly informed of the results of monitoring and forecasting (quarterly), alerting the Committee and advising it on requisite initiatives, and contributing to the drafting of standards.

Other proposals to back up the aforementioned objectives

- studying, with the relevant institutions, the possible remedies based on Convention 108 and its additional protocol for the citizens of States on the American continent which would have ratified them, before the Inter-American Court of Human Rights, and for African citizens on the same basis before the African Court of Justice and Human Rights;
- principles contained in Convention 108: in the framework of modernising the convention's principles, considering the relevance and advisability of:
    - abolishing (scope: Art. 2 a) and c)) the principle of declarations by States on acceding to the Convention or at any other time restricting the scope of protection, or extending its application to manual data (which should now be covered by the principles if they are at least linked to automatic processing of personal data, especially where these activities take place in different countries);
    - incorporating the major guarantees which are added to the Convention under sectoral recommendations, and which are particularly relevant in the context of the internationalisation of data processing practices;
- principles set out in the additional protocol: advisability, in the context of modernising the Convention, of specifying the tasks and powers of the supervisory authorities so that they can operate at the international level; informing data subjects of their rights and obligations, monitoring new technologies, supervising, prior to their implementation, the types of processing presenting particular risks vis-à-vis fundamental freedoms and rights, conducting *in situ* verifications of data processing operations *ex officio*, and on the basis of individual or collective complaints or at the request of the Committee of the Convention, co-operating as necessary with a view to settling complaints or conducting co-ordinated verifications, with their counterparts in the Parties to the Convention and in other countries for which the level of data protection as been recognised as adequate, advising their governments or representing them in any international negotiation with an impact on personal data processing.

B – Summary of proposals by body concerned

1. The Committee of the Convention: competences and procedures of a Committee responsible for standard-setting, monitoring and non-judicial settlement of disputes

In addition to its current competences, it is proposed that the Committee, without amending the overall features of its composition:

- help devise and implement an Action Plan to promote the Convention, its additional protocol and recommendations among the other Council of Europe committees, third countries and the relevant regional and international organisations, especially those working in the human rights field, in the economic and social development field and in the ICT development field;
- be vested with a power of binding interpretation of the principles set out in the aforementioned instruments;
- introduce a procedure for the objective, transparent and educational evaluation of the level of protection and conformity of the protection system implemented by States, prior to accession to or ratification of the Convention and the additional protocol, as well as periodically after accession or ratification by the Parties, assisted by an independent committee of experts; propose gradual measures in the event of a finding of non-conformity;
- receive collective complaints concerning persons who reside in several Parties or whose data are processed in the territory of several Parties;
- be empowered to commission the requisite investigations from the network of supervisory authorities, to issue opinions based on the investigatory report, to alert the States concerned and to seek solutions with the Parties concerned;
- be assisted in its monitoring and forecasting functions by a pluridisciplinary observatory of multidimensional innovations in relation with ICTs;
- have the necessary resources to devise new standards capable of ensuring sustainable protection of individuals (ad hoc working groups);
- work in consultation with the regional or international organisations representing the other parties involved.
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Furthermore, it is proposed that the Committee step up its co-operation by inviting them as observer members with the international organisations on the sectoral missions of the UN system, the ICT industry's regional and international professional organisations and the networks of associations promoting co-operative and open approaches aimed at network architectures, amenities and open-source software.

2. The Parties' supervisory authorities: institutionalising the potentially global network of Parties' supervisory authorities

- Tasks and competences:
  - helping to identify standard-setting needs and to devise guides, new standards and opinions;
  - conducting inquiries into transfrontier complaints and implementing the requisite investigations;
  - helping to devise and implement programmes to promote the Convention and the additional protocol;
  - where necessary, alerting the Committee to persistent difficulties encountered.
- Requisite measures:
  - providing secretariat services (secretariat of the Committee of the Convention?);

- taking the requisite action to remove obstacles to personal data communication between supervisory authorities in the framework of their investigations (in order to offset the difficulties noted within the European Article 29 Working Party, but also by other bodies in which they participate).

3. Other Council of Europe bodies

- request opinions from the Committee of the Convention on any initiative involving personal data processing;
- help draw up the plan to promote the convention on the basis of the relevant networks in third countries and in the relevant regional or international organisations.

4. Organisations outside the Council of Europe

- approach the UN Human Rights Council with a view to the possible systematic inclusion in the universal periodical review of States of a question on the existence of a legal framework for personal data protection in conformity with the 1990 guiding principles;
- continuing the contacts with the European Union and making contact with the other relevant regional and international organisations with a view to implementing the action programme to promote the Convention and additional protocol vis-à-vis third countries, and, where appropriate, providing assistance in taking account of its principles in their activities.

APPENDIX - INCORPORATION OF MONITORING FUNCTIONS IN THE TWO VIRTUOUS CIRCLES DESIGNED TO ENSURE THE SUSTAINABILITY IN SPACE AND TIME OF THE PROTECTION OF PERSONAL DATA