



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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**THE CONSULTATIVE COMMITTEE OF THE CONVENTION
FOR THE PROTECTION OF INDIVIDUALS
WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA [ETS No. 108]**

PROPOSITIONS OF MODERNISATION

DG I – Human Rights and Rule of Law

Convention for the Protection of Individuals with Regard to the Processing of Personal Data

Preamble

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve greater unity between its members, based in particular on respect for the rule of law, as well as human rights and fundamental freedoms;

Considering that it is necessary, given the diversification, intensification and globalisation of data processing and exchanges of personal data, to guarantee human dignity and the protection of human rights and fundamental freedoms of every person, in particular through the right to control one's personal data and the processing of such data;

Recalling that the right to protection of personal data is to be considered in respect of its role in society and that it has to be reconciled with other human rights and fundamental freedoms, including freedom of expression;

Considering that this Convention permits account to be taken, in the implementation of the rules laid down therein, of the principle of the right of public access to official documents;

Recognising that it is necessary to promote at the global level the fundamental values of respect for privacy and protection of personal data, thereby contributing to the free flow of information between peoples;

Recognising the interest of a reinforcement of international cooperation between the Parties to the Convention.

Have agreed as follows:

Chapter I – General provisions

Article 1 – Object and purpose

The purpose of this Convention is to secure for every individual subject to the jurisdiction of the Parties, whatever their nationality or residence, the protection of their personal data when undergoing processing, thus contributing to respect for their rights and fundamental freedoms, and in particular their right to privacy.

Article 2 – Definitions

For the purposes of this Convention:

a. “personal data” means any information relating to an identified or identifiable individual (“data subject”);

[b. deleted – see 3.1 below]

c. “data processing” means any operation or set of operations which is performed upon personal data, and in particular the collection, storage, preservation, alteration, retrieval, disclosure, making available, erasure or destruction of data, or the carrying out of logical and/or arithmetical operations on data; where no automated processing is used, data processing means the operations carried out within a structured set established according to any criteria which allow to search for personal data;

d. “controller” means the natural or legal person, public authority, service, agency or any other body which alone or jointly with others has the decision-making power with respect to data processing ;

e. “recipient” means a natural or legal person, public authority, service, agency or any other body to whom data are disclosed or made available;

f. “processor“ means a natural or legal person, public authority, service, agency or any other body which processes personal data on behalf of the controller.

Article 3 – Scope

1 Each Party undertakes to apply this Convention to data processing subject to its jurisdiction, thereby protecting the right to protection of personal data of any person subject to its jurisdiction.

1bis This Convention shall not apply to data processing carried out by a natural person for the exercise of purely personal or household activities.

Chapter II – Basic principles for the protection of personal data

Article 4 – Duties of the Parties

1 Each Party shall take the necessary measures in its domestic law to give effect to the provisions set out in this Convention and ensure their effective application.

2 These measures shall be taken by each Party prior to ratification or accession to this Convention.

3 Each Party undertakes to allow the Convention Committee provided for in Chapter V to evaluate the observance of its engagements and to contribute actively to this evaluation, notably by submitting reports on the measures it has taken and which give effect to the provisions of the present Convention.

Article 5 – Legitimacy of data processing and quality of data

1 Data processing shall be proportionate in relation to the legitimate purpose pursued and reflect at all stages of the processing a fair balance between all interests concerned, be they public or private interests, and the rights and freedoms at stake.

2 Each Party shall provide that data processing can be carried out on the basis of the free, specific, informed and [explicit, unambiguous] consent of the data subject or of some legitimate basis laid down by law.

3 Personal data undergoing processing shall be:

a. processed lawfully and fairly;

b. collected for explicit, specified and legitimate purposes and not processed in a way incompatible with those purposes;

- c. adequate, relevant, not excessive and limited to the minimum necessary in relation to the purposes for which they are processed;
- d. accurate and, where necessary, kept up to date;
- e. preserved in a form which permits identification of data subjects for no longer than is necessary for the purposes for which those data are processed.

Article 6 – Processing of sensitive data

1 The processing of genetic data, of personal data concerning offences, criminal convictions and related security measures, the processing of biometric data uniquely identifying a person, as well as the processing of personal data for the information they reveal relating to racial origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life, shall only be allowed where the applicable law provides appropriate safeguards, complementing those of the present Convention.

2 Appropriate safeguards shall prevent the risks that the processing of such sensitive data may present to the interests, rights and fundamental freedoms of the data subject, notably a risk of discrimination.

Article 7 – Data security

1 Every Party shall provide that the controller, and, where applicable the processor, takes the appropriate security measures against accidental or unauthorised access, destruction, loss modification or dissemination of personal data.

2 Each Party shall provide that the controller shall notify, without delay, at least the supervisory authorities within the meaning of Article 12 bis of this Convention of those data breaches which may seriously interfere with the rights and fundamental freedoms of data subjects.

Article 7bis – Transparency of processing

1 Each Party shall see to it that the controller ensures the transparency of data processing by informing the data subjects, unless they have already been informed, of at least the identity and habitual residence or establishment of the controller, the purposes of the processing carried out, the data processed, the recipients or categories of recipients of the personal data, and the means of exercising the rights set out in Article 8, as well as any other information necessary to ensure fair and lawful data processing.

2 Where the personal data are not collected from the data subjects, the controller shall nonetheless not be required to provide such information where the processing is expressly prescribed by law or this proves to be impossible or involves disproportionate efforts.

Article 8 – Rights of the data subject

Any person shall be entitled:

- a. not to be subject to a decision significantly affecting him/her, based solely on an automatic processing of data without having their views taken into consideration;
- b. to object at any time to the processing of personal data concerning him/her unless the controller demonstrates compelling legitimate grounds for the processing which override their interests or rights and fundamental freedoms;
- c. to obtain, on request, at reasonable intervals and without excessive delay or expense confirmation of the processing of personal data relating to him/her, the communication in an intelligible form of the data processed, all available information on their origin, on the

preservation period as well as any other information that the controller is required to provide to ensure the transparency of processing in accordance with Article 7bis paragraph 1;

- d. to obtain, on request, knowledge of the reasoning underlying the data processing, the results of which are applied to him/her ;
- e. to obtain, upon request, as the case may be, rectification or erasure of such data if these have been processed contrary to the law giving effect to the provisions of this Convention;
- f. to have a remedy if a decision significantly affecting them has been taken without taking into consideration their views or no response is given to a request for confirmation, communication, rectification, erasure or to an objection, as referred to in this Article;
- g. to benefit, whatever their residence, from the assistance of a supervisory authority within the meaning of Article 12 bis, in exercising the rights provided by this Convention.

Article 8bis – Additional obligations

1 Each Party shall provide that the controller, or where applicable the processor, shall take at all stages of the processing all appropriate measures to implement the provisions giving effect to the principles and obligations of this Convention and to establish internal mechanisms to verify and be able to demonstrate at least to the supervisory authorities provided for in Article 12 bis of this Convention the compliance with the applicable law.

2 Each Party shall provide that the controller, or where applicable the processor, shall carry out a risk analysis of the potential impact of the intended data processing on the rights and fundamental freedoms of the data subject and design data processing operations in such a way as to prevent or at least minimise the risk of interference with those rights and fundamental freedoms.

3 Each Party shall provide that the products and services intended for the data processing shall take into account the implications of the right to the protection of personal data from the stage of their design and facilitate the compliance of the processing with the applicable law.

4 Each Party can take the measures needed to adapt the application of the provisions of the previous paragraphs, according to the size of the controller, or where applicable the processor, the volume or nature of data processed and, more generally, in light of the risks for the interests, rights and fundamental freedoms of the data subjects.

Article 9 – Exceptions and restrictions

1 No exception to the principles expressed in this Chapter shall be allowed, except to the provisions of Articles 5.3, 7.2, 7bis and 8 when such derogation is provided for by law and constitutes a necessary measure in a democratic society for:

- a. the protection of national security, public safety, important economic and financial interests of the State or the prevention and suppression of criminal offences;
- b. the protection of the data subject or the rights and freedoms of others, notably freedom of expression.

2 Restrictions on the exercise of the provisions specified in Article 12 may also admit where they are provided by law and constitute a necessary measure in a democratic society for the freedom of expression.

3 Restrictions on the exercise of the provisions specified in Articles 7bis and 8 may be provided by law with respect to data processing for statistical purposes or for the purposes of scientific research, when there is obviously no risk of infringement of the rights and fundamental freedoms of data subjects.

Article 10 – Sanctions and remedies

Each Party undertakes to establish appropriate judicial and non-judicial sanctions and remedies for violations of domestic law giving effect to the provisions of this Convention.

Article 11 – Extended protection

None of the provisions of this Chapter shall be interpreted as limiting or otherwise affecting the possibility for a Party to grant data subjects a wider measure of protection than that stipulated in this Convention.

Chapter III – Transborder flows of personal data

Article 12 - Transborder flows of personal data

1 A Party shall not, for the sole purpose of the protection of personal data, prohibit or subject to special authorisation the transfer of data to a recipient who is subject to the jurisdiction of another Party to the Convention, unless the Party referred to at the beginning of the present paragraph is regulated by binding harmonised rules of protection shared by States belonging to a regional international organisation and the transfer of data is not governed by measures provided for in paragraph 3.b.

2 When the recipient is subject to the jurisdiction of a State or international organisation which is not Party to the Convention, the transfer of data can only occur where an appropriate level of personal data protection based on the principles of the Convention is guaranteed.

3 An appropriate level of protection can be ensured by:

- a) the law of that State or international organisation, including the applicable international treaties or agreements, or
- b) ad hoc or approved standardised safeguards provided by legally binding and enforceable instruments adopted and implemented by the persons involved in the transfer and further processing.

4 Notwithstanding the provisions of the previous paragraphs, each Party may provide that the transfer of data may take place, if :

- a) the data subject has given his/her specific, free and [explicit, unambiguous] consent, after being informed of risks arising in the absence of appropriate safeguards, or
- b) the specific interests of the data subject require it in the particular case, or
- c) prevailing legitimate interests, in particular important public interests, are provided by law and constitute a necessary measure in a democratic society.

5 Each Party shall provide that the competent supervisory authority within the meaning of Article 12 bis of the Convention be informed of the modalities regulating the transfers of data provided for in paragraphs 3.b when ad hoc safeguards are set up, 4.b and 4.c. It shall also provide that the supervisory authority be entitled to request that the person who transfers data, or the recipient, demonstrate the quality and effectiveness of actions taken and that the

supervisory authority be entitled to prohibit, suspend or subject to condition such transfers of data.

Chapter III bis Supervisory authorities

Article 12bis Supervisory authorities

1 Each Party shall provide for one or more authorities to be responsible for ensuring compliance with the measures in its domestic law giving effect to the principles of this Convention.

2 To this end, such authorities:

- a. shall have powers of investigation and intervention;
- a'. are consulted when drawing up legislative and administrative measures relating to the protection of individuals with regard to the processing of personal data;
- b. shall perform the functions relating to transfers of data provided for under Article 12, notably the approval of standardised safeguards;
- c. shall have the power to issue decisions with respect to domestic law giving effect to the provisions of this Convention and may in particular sanction administrative offences;
- d. shall have the power to engage in legal proceedings or to bring to the attention of the competent judicial authorities violations of provisions of domestic law giving effect to the provisions of this Convention;
- e. shall be responsible for raising awareness of and providing information on data protection;

3 Each supervisory authority can be requested by any person to investigate a claim concerning the protection of his/her rights and fundamental freedoms with regard to the data processing within its competence and shall inform the data subject of the follow-up given to such a claim.

4 The supervisory authorities shall perform their duties and exercise their powers in complete independence. They shall neither seek nor accept instructions from anyone in the performance of their duties and exercise of their powers.

5 Each Party shall ensure that the supervisory authorities have adequate human, technical and financial resources and infrastructure necessary to perform their functions and exercise their powers independently and effectively.

5bis The supervisory authorities shall draw up a public report of their activities and shall see to it that transparency on their activities be ensured.

5ter. Members and staff of the supervisory authorities shall be bound by obligations of confidentiality with regard to confidential information they have access to or have had access to in the performance of their duties.

6 Decisions of the supervisory authorities, which give rise to complaints, may be appealed against through the courts.

7 In accordance with the provisions of Chapter IV, the supervisory authorities shall co-operate with one another to the extent necessary for the performance of their duties, in particular by:

- a. exchanging all useful information, in particular by taking, under their domestic law and solely for the protection of personal data, all appropriate measures to provide factual information relating to specific processing carried out on its territory, with the

exception of personal data undergoing this processing, unless such data is essential for co-operation or that the data subject has previously agreed to in an unambiguous, specific, free and informed manner;

- b. coordinating their investigations or interventions or conducting joint actions;
- c. providing information on their law and administrative practice relating to data protection.

8 In order to organise their co-operation and to perform the duties set out in the preceding paragraph, the supervisory authorities of the Parties shall form a conference/network.

9 The supervisory authorities shall not be competent with respect to processing carried out by entities acting in their judicial capacity.

Chapter IV – Mutual assistance

Article 13 – Co-operation between Parties

1 The Parties agree to render each other mutual assistance in order to implement this Convention.

2 For that purpose:

- a. each Party shall designate one or more supervisory authorities within the meaning of Article 12bis of this Convention, the name and address of each of which it shall communicate to the Secretary General of the Council of Europe;
- b. each Party which has designated more than one supervisory authority shall specify in its communication referred to in the previous sub-paragraph the competence of each.

Article 14 – Assistance to data subjects resident abroad

(this article is cancelled)

Article 15 – Safeguards concerning assistance rendered by designated supervisory authorities

1 A supervisory authority designated by a Party which has received information from an authority designated by another Party either accompanying a request for assistance or in reply to its own request for assistance shall not use that information for purposes other than those specified in the request for assistance.

2 In no case may a designated supervisory authority be allowed to make a request for assistance on behalf of a data subject, of its own accord and without the express consent of the person concerned.

Article 16 – Refusal of requests for assistance

A designated supervisory authority to which a request for assistance is addressed under Article 13 of this Convention may not refuse to comply with it unless:

- a the request is not compatible with the powers in the field of data protection of the authorities responsible for replying;
- b the request does not comply with the provisions of this Convention;

c compliance with the request would be incompatible with the sovereignty, national security or public order of the Party by which it was designated, or with the rights and fundamental freedoms of persons under the jurisdiction of that Party.

Article 17 – Costs and procedures of assistance

1 Mutual assistance which the Parties render each other under Article 13 and assistance they render to data subjects under Article 14 shall not give rise to the payment of any costs or fees other than those incurred for experts and interpreters. The latter costs or fees shall be borne by the Party which has designated the supervisory authority making the request for assistance.

2 The data subject may not be charged costs or fees in connection with the steps taken on his behalf in the territory of another Party other than those lawfully payable by residents of that Party.

3 Other details concerning the assistance relating in particular to the forms and procedures and the languages to be used, shall be established directly between the Parties concerned.

Chapter V – Convention Committee

Article 18 – Composition of the committee

1 A Convention Committee shall be set up after the entry into force of this Convention.

2 Each Party shall appoint a representative to the committee and a deputy representative. Any member State of the Council of Europe which is not a Party to the Convention shall have the right to be represented on the committee by an observer.

3 The Convention Committee may, by a decision taken by a majority of two-thirds of the representatives of the Parties entitled to vote, invite an observer to be represented at its meetings.

4 Any Party which is not a member of the Council of Europe shall contribute to the funding of the activities of the Convention Committee according to the modalities established by the Committee of Ministers in agreement with that Party.

Article 19 – Functions of the committee

The Convention Committee:

- a. may make recommendations with a view to facilitating or improving the application of the Convention;
- b. may make proposals for amendment of this Convention in accordance with Article 21;
- c. shall formulate its opinion on any proposal for amendment of this Convention which is referred to it in accordance with Article 21, paragraph 3;
- d. may express an opinion on any question concerning the interpretation **or** application of this Convention;
- e. shall prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of data protection of the candidate for accession;

- f. may, at the request of a State or an international organisation or on its own initiative, evaluate whether the level of data protection the former provides is in compliance with the provisions of this Convention;
- g. may develop or approve models of standardised safeguards referred to in Article 12;
- h. shall periodically review the implementation of this Convention by the Parties in accordance with the provisions of Article 4.3 and decide upon measures to take where a Party is not in compliance with the Convention;
- i. shall facilitate, where necessary, the friendly settlement of all difficulties related to the application of this Convention.

Article 20 – Procedure

1 The Convention Committee shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within twelve months of the entry into force of this Convention. It shall subsequently meet at least once a year and in any case when one-third of the representatives of the Parties request its convocation.

2 A majority of representatives of the Parties shall constitute a quorum for a meeting of the Convention Committee.

3 Each Party has a right to vote and shall have one vote. On questions related to its competence, the European Union exercises its right to vote and casts a number of votes equal to the number of its member States that are Parties to the Convention and have transferred competencies to the European Union in the field concerned. In this case, those member States of the European Union do not vote.

4 After each of its meetings, the Convention Committee shall submit to the Committee of Ministers of the Council of Europe a report on its work and on the functioning of the Convention.

5. Subject to the provisions of this Convention, the Convention Committee shall draw up its own Rules of Procedure and establish in particular the procedures of evaluation set out in Article 4.3 and of examination of the level of protection provided for in Article 19, on the basis of objective criteria.

Chapter VI – Amendments

Article 21 – Amendments

1 Amendments to this Convention may be proposed by a Party, the Committee of Ministers of the Council of Europe or the Convention Committee.

2 Any proposal for amendment shall be communicated by the Secretary General of the Council of Europe to the Parties to the Convention, to the other member States of the Council of Europe, to the European Union and to every non-member State which has been invited to accede to this Convention in accordance with the provisions of Article 23.

3 Moreover, any amendment proposed by a Party or the Committee of Ministers shall be communicated to the Convention Committee, which shall submit to the Committee of Ministers its opinion on that proposed amendment.

4 The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the Convention Committee and may approve the amendment.

5 The text of any amendment approved by the Committee of Ministers in accordance with paragraph 4 of this article shall be forwarded to the Parties for acceptance.

6 Any amendment approved in accordance with paragraph 4 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

7 Moreover, the Committee of Ministers may after consulting the Convention Committee, decide that a particular amendment shall enter into force at the expiration of a period of two years from the date on which it has been opened to acceptance, unless a Party notifies the Secretary General of the Council of Europe of an objection to its entry into force. If such an objection is notified, the amendment shall enter into force on the first day of the month following the date on which the Party to the Convention which has notified the objection has deposited its instrument of acceptance with the Secretary General of the Council Europe.

8 If an amendment has been approved by the Committee of Ministers but has not yet entered into force in accordance with the provisions set out in paragraphs 6 or 7, a State, the European Union, or an international organisation may not express its consent to be bound by the Convention without at the same time accepting the amendment.

Chapter VII – Final clauses

Article 22– Entry into force

1 This Convention shall be open for signature by the member States of the Council of Europe, the European Union and States not members of the Council of Europe which have been invited to accede to the Convention opened for signature on 28 January 1981. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

3 In respect of any member State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of ratification, acceptance or approval.

Article 23 – Accession by non-member States and international organisations

1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consulting the Parties to the Convention and obtaining their unanimous agreement and in light of the opinion prepared by the Convention Committee in accordance with Article 19.e, invite any State not a member of the Council of Europe or an international organisation to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

2 In respect of any State or international organisation acceding to the present Convention according to paragraph 1 above, the Convention shall enter into force on the first day of the

month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 24 – Territorial clause

1 Any State, the European Union or other international organisation may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2 Any State, the European Union or other international organisation may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

Article 25 – Reservations

No reservation may be made in respect of the provisions of this Convention.

Article 26 – Denunciation

1 Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

Article 27 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council and any Party to this Convention of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this Convention in accordance with Articles 22, 23 and 24;
- d. any other act, notification or communication relating to this Convention.

Article ... of the Protocol: signature and entry into force

1 This protocol shall be open for signature by the Parties to the Convention. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2 This protocol shall enter into force on the first day of the month following the expiration of a period of [three] months after the date on which all Parties to the Convention have expressed

their consent to be bound by the protocol in accordance with the provisions of paragraph 1 of this Article.

3 However, this protocol shall enter into force following the expiry of a period of [two] years after the date on which it has been opened to signature, unless a Party to the Convention has notified the Secretary General of the Council of Europe of an objection to its entry into force. The right to make an objection shall be reserved to those states which were Parties to the Convention at the date of opening for signature of this protocol.

4 Should such an objection be notified, the protocol shall enter into force on the first day of the month following the expiration of a period of [three] months after the date on which the Party to the Convention which has notified the objection has deposited its instrument of ratification, acceptance or approval with the Secretary General of the Council of Europe