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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]**

(T-PD)

Modernisation of Convention 108: new proposals

DG I - Human Rights and Rule of Law

INTRODUCTION

The content of this document is based on the outcome of the public consultation in spring 2011, discussions at meetings of the T-PD and its Bureau in 2011 and 2012 as well as contributions from experts and observers associated with the work of modernisation.

This document is subject to public consultation to allow the T-PD to review and discuss these proposals at its 28th Plenary meeting (19-22 June 2012), for their completion and submission to the Committee of Ministers.

General orientations

The process to modernise Convention 108 started on the occasion of the 5th edition of Data Protection Day (28 January 2011), when the Secretary General of the Council of Europe launched a public consultation aimed at hearing concerns of governments, civil society and the private sector. Some 50 replies were received (amounting to nearly 400 pages) from all sectors concerned; governments, data protection authorities, NGOs, private sector, professional associations, including many non-European contributors, mainly from the Americas and Africa. Those responses were analysed and fed into the modernisation proposals.

The modernisation and promotion of Convention 108 will be a priority for the Organisation during the biennium 2012-2013.

The revision process will pursue two main objectives:

- to deal with challenges for privacy resulting from the use of new ICTs;
- to strengthen the Convention's follow-up mechanism.

There appears to be a large consensus on the objectives to be pursued, which also clearly emerged from the public consultation, namely to:

- maintain the general and technologically neutral nature of the Convention's provisions with more detailed sectoral texts by way of soft-law instruments (opinions and recommendations);
- ensure for coherence and compatibility with the legal framework of the European Union;
- reaffirm the Convention's potential as a universal standard and its open character.

Preamble

The preamble underlines the human rights based approach of the Convention. Putting individuals in control of their personal data being a major objective of the

Convention, it is proposed to specifically mention the right to control one's data and human dignity in the preamble.

A new recital should consider the need to balance the protection of personal data not only with freedom of expression (which takes on another dimension with the Internet) but also with other fundamental rights and freedoms.

Article 1 – Object and purpose

It is proposed to refer, in addition to the right to privacy, to the right to the protection of personal data which has acquired an autonomous meaning over the last thirty years. Reference to the concept of "jurisdiction" instead of "territory" to define the Convention's geographical scope of application is in line with general public international law.

Article 2 – Definitions

"Personal data": this definition should not be changed but the explanatory report should be reviewed in order to extend the items relating to this definition (see in particular Recommendation (2010)13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling: "[A]n individual is not considered 'identifiable' if identification requires unreasonable time or effort"). A definition of genetic and biometric data is proposed.

"Automated data file": consensus to abandon this notion which is outdated and is only relevant in relation to non-automated files. Should the scope be extended to manual processing, a reference to "structured files" (see Directive 95/46 EU) may be necessary, in particular to avoid the risk of bypassing obligations under the Convention (see the definition proposed for the notion of "processing" under article 2c).

"Automatic processing": this definition, exhaustive at present, should be revised in order to be made open-ended and should in any case incorporate the step of the collection of data (to include, for instance, the consultation and the destruction of data). Reference could be made to "processing" in general, which would cover automated processes and manual processing alike.

"Controller of the file": notion to be revised and replaced by "controller", with a reference to the various levels of responsibility to be explained further in the explanatory report.

New definitions, such as "recipient" or "service provider" have been incorporated.

Article 3 – Scope

It clearly emerges from the replies to the consultation that it is advisable to preserve the comprehensive approach of the Convention, which applies to the public and private sectors alike.

It is proposed to apply the Convention to any processing (by public or private sector alike) subject to the jurisdiction of a Party. The question of processing deriving from activities and services offered to individuals, carried out by controllers which are not subject to the jurisdiction of a Party, remains to be examined, in particular in light of the judgments of the Court of Justice of the European Union in the Lindqvist and Pammer/Alpenhof cases, and with leading decisions of national courts dealing with Internet jurisdiction.

It appears necessary to include an exception for household data processing. Social networks, blogs etc. require specific attention. In this particular context, it is nevertheless proposed to fully apply the Convention whenever personal data is accessible to persons outside the personal or domestic sphere.

With regard to legal persons: Parties to the Convention should keep the possibility to extend the scope of the Convention to their data.

Article 4 – Duties of the Parties

Whether all ‘necessary measures’ have been taken will be scrutinised *a priori* by the Consultative Committee, in order to ensure that the conditions for the free flow of data are met.

Article 5 – Legitimacy of data processing and quality of data

This article addresses in more detail the legitimacy of data processing. It is foreseen to expressly incorporate the principle of proportionality. The proposed wording takes the case-law of the European Court of Human Rights into account, which requires a fair balance between the competing public and private interests (*S and Marper v UK* [2008], § 118).

The original article 5 did not mention consent explicitly. It is now proposed to require specific, free and informed consent, legally recognised overriding legitimate interests or legal or contractual obligations as conditions for the lawfulness of processing.

Article 6 – Processing of sensitive data

It is proposed to revise the present definition to also cover health, genetic and biometric data. The explanatory report will contain illustrations underlining the

functional aspect (data may become sensitive according to the purpose of the processing considered).

Article 7 – Data security

Security should apply to data as well as to its processing. Guarantees will be strengthened by requiring the reporting of security breaches, distinguishing between obligations of data controllers and processors.

A new article on transparency has been added.

Article 8 – Rights of the data subject

Access to the origin of the data and to the underlying logic of the processing as well as the right of opposition should be introduced.

The proposal does not provide for an explicit inclusion of a “right to oblivion” which would have to be reconciled with freedom of expression. It was felt that the existing safeguards (notably article 5.e – length of time of data storage, and article 8.c – right of rectification or erasure of data) coupled with an effective right of opposition would offer adequate protection.

Article 8bis - Additional measures for the controller

This new measure transposes the principle of accountability in concrete measures for the controller, such as the obligation in specified cases to carry out a data protection risk analysis, to design processing in such a way as to minimise the risk or to establish internal mechanisms to demonstrate the compliance of the processing with the applicable law. Those requirements will be adjusted notably depending on the size of the company concerned.

Article 9 – Exceptions and restrictions

Apart from few terminological changes proposed, exceptions from the requirements of certain provisions are necessary to reconcile the right to the protection of personal data with freedom of expression and information and this is now expressly mentioned.

A new exception is proposed for data flows for the purposes of freedom of expression and information.

Article 10 – Sanctions and remedies

No change.

Article 11 – Extended protection

No change.

Article 12 – Transborder data flows

The issue of transborder data flows will be key in the modernisation process. The proposed provisions will revise the existing provisions on transborder data flows in both the Convention and article 2 of the 2001 additional Protocol (transfer of data to States which are not Parties).

The proposed provisions are still be based on the well-known notion of an “adequate level of protection”. The Convention shall continue to require such protection, in particular if data is communicated or disclosed to recipients not subject to the jurisdiction of a Party to the Convention, recognising that this rule has promoted the development of data protection laws around the world.

The starting point is that any “external” communication or disclosure (any communication or disclosure of data to a recipient who is not subject to the jurisdiction of the concerned Party), whether the recipient concerned be a Party or not to the Convention, can only be made on the condition that an adequate level of protection can be guaranteed. This adequate level of protection will be presumed to exist between Parties of the Convention. When the recipient is not subject to the jurisdiction of a Party to the Convention, it will be able to be guaranteed by several mechanisms. The use of standard contractual clauses and binding corporate rules (BCRs) will also be foreseen and encouraged, provided that suitable and effective control measures by supervisory authorities are in place.

New Chapter III bis – Supervisory authorities

A new chapter will integrate the provisions so far contained in the 2001 additional protocol into the Convention, while reinforcing the independence and powers of supervisory authorities at the same time (e.g. ex officio action, intervention before the courts for existing proceedings, coordinated investigations in transborder cases).

Articles 13, 14, 15, 16, 17 - Mutual assistance

No major changes to the exception of the deletion of Article 14, partly covered by Article 8.g.

Articles 18, 19 and 20 – Consultative Committee

A strengthening of the Consultative Committee's functions and powers is another key feature of the modernisation process. It is notably proposed that the committee would:

- develop further its standard-setting functions, acting as an international forum to discuss emerging issues and agree on common approaches to new challenges for privacy, in particular resulting from the development of ICTs, developing guidelines and recommendations applicable to specific sectors such as biometrics, insurance, medical data or police;
- formulate opinions on requests for accession to the Convention by third countries or international organisations;
- follow more closely the implementation of the Convention by States Parties, providing assistance and advice.

Article 21 – Amendments

Two new paragraphs have been included to introduce more flexibility for amendment procedures, whilst respecting the technical constraints of treaty law, connected to the changes proposed and the possible legal form of these changes.

Article 23 - Accession by non member States or international organisations

This article has been modified to include a reference to the opinion formulated by the Consultative Committee when accession is requested.

TEXT OF THE CONVENTION – PROPOSALS

| CURRENT TEXT OF THE CONVENTION | PROPOSALS |
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| Preamble | Preamble |
| The member States of the Council of Europe, signatory hereto, | The signatories of this Convention, |
| 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; | unchanged |
| Considering that it is desirable to extend the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing; | Considering that it is necessary to guarantee the protection of fundamental rights and freedoms, as well as everyone's dignity, in particular through the right to control one's own data , taking account of the intensification of processing and exchange of personal data ; <i>Explanatory report will underline that human dignity implies that individuals can not be treated as objects and be submitted to machines, and consequently that decisions based solely on the grounds of an automated processing of data can not be made without individuals having the right to express their views.</i> |
| Reaffirming at the same time their commitment to freedom of information regardless of frontiers; | Recognising that it is necessary to reconcile data protection and human rights and fundamental freedoms, notably freedom of expression which includes the freedom to receive and impart information, regardless of frontiers; |
| Recognising that it is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples, | deleted |
| | Considering that this Convention allows account to be taken, in the implementation of the rules laid down therein, of the principle of the right of access to public documents, |
| | <i>The Explanatory Report will refer to the Madrid Resolution.</i> |

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| Have agreed as follows: | unchanged |
| Chapter I – General provisions | Chapter I – General provisions |
| Article 1 – Object and purpose | Article 1 – Object and purpose |
| The purpose of this Convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him (“data protection”). | The purpose of this Convention is to secure for every individual, subject to the jurisdiction of the Parties , whatever their nationality or residence, the right to the protection of personal data, thus ensuring the respect for their rights and fundamental freedoms, and in particular their right to privacy , with regard to the processing of their personal data. |
| Article 2 – Definitions | Article 2 – Definitions |
| For the purposes of this Convention: | unchanged |
| a “personal data” means any information relating to an identified or identifiable individual (“data subject”); | unchanged <i>Make an addition to the Explanatory Report, specifying in particular that an individual is not considered “identifiable” if identification requires unreasonable time or effort for a person who would be informed of it. Also specify that “identifiable” does not only refer to the individual’s civil identity but also and foremost to what allows to “individualise” one person amongst others.</i> |
| b “automated data file” means any set of data undergoing automatic processing; | Deleted – see 3.1 below |
| “automatic processing” includes the following operations if carried out in whole or in part by automated means: storage of data, carrying out of logical and/or arithmetical operations on those data, their alteration, erasure, retrieval or dissemination; | 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 carried out, data processing means the operations carried out on personal data within a set structure which allows to search the data related to a specific subject; |

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| <p>d “controller of the file” means the natural or legal person, public authority, agency or any other body who is competent according to the national law to decide what should be the purpose of the automated data file, which categories of personal data should be stored and which operations should be applied to them.</p> | <p>d “controller” means the natural or legal person, public authority, agency or any other body which alone or jointly with others has the decision-making power with respect to data processing. <i>In the explanatory report, specify that ‘decision-making power’ covers the purposes and conditions of processing, the means used for the data processing, as well as the reasons justifying the processing and the choice of data to be processed.</i></p> |
| | <p>e “recipient” shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed or made available;</p> |
| | <p>f “processor” shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller; <i>In the Explanatory Memorandum indicate that this does not apply to the employees of the controller.</i></p> |
| <p>Article 3 – Scope</p> | <p>Article 3 – Scope</p> |
| <p>1 The Parties undertake to apply this Convention to automated personal data files and automatic processing of personal data in the public and private sectors.</p> | <p>1 Each Party undertakes to apply this Convention to data processing carried out by any controller subject to its jurisdiction.</p> <p>1bis This Convention shall not apply to data processing carried out by a natural person for the exercise of purely personal or household activities, unless the data are made accessible to persons outside the personal or household sphere.</p> <p><i>In the explanatory report, specify what is meant by exercise of purely personal or household activities, and making accessible to persons outside the personal or household sphere.</i></p> <p><i>Specify that while the processing concerns data of natural persons, the Parties nevertheless have the possibility to extend the protection to legal persons.</i></p> |

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| <p>2 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later time, give notice by a declaration addressed to the Secretary General of the Council of Europe:</p> | <p>delete</p> |
| <p>a that it will not apply this Convention to certain categories of automated personal data files, a list of which will be deposited. In this list it shall not include, however, categories of automated data files subject under its domestic law to data protection provisions. Consequently, it shall amend this list by a new declaration whenever additional categories of automated personal data files are subjected to data protection provisions under its domestic law;</p> | <p>delete</p> |
| <p>b that it will also apply this Convention to information relating to groups of persons, associations, foundations, companies, corporations and any other bodies consisting directly or indirectly of individuals, whether or not such bodies possess legal personality;</p> | <p>delete</p> |
| <p>c that it will also apply this Convention to personal data files which are not processed automatically.</p> | <p>delete</p> |
| <p>3 Any State which has extended the scope of this Convention by any of the declarations provided for in sub-paragraph 2.b or c above may give notice in the said declaration that such extensions shall apply only to certain categories of personal data files, a list of which will be deposited.</p> | <p>delete</p> |
| <p>4 Any Party which has excluded certain categories of automated personal data files by a declaration provided for in sub-paragraph 2.a above may not claim the application of this Convention to such categories by a Party which has not excluded them.</p> | <p>delete</p> |
| <p>5 Likewise, a Party which has not made one or other of the extensions provided for in sub-paragraphs 2b and c above may not claim the application of this Convention on these points with respect to a Party which has made such extensions.</p> | <p>delete</p> |

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| <p>6 The declarations provided for in paragraph 2 above shall take effect from the moment of the entry into force of the Convention with regard to the State which has made them if they have been made at the time of signature or deposit of its instrument of ratification, acceptance, approval or accession, or three months after their receipt by the Secretary General of the Council of Europe if they have been made at any later time. These declarations may be withdrawn, in whole or in part, by a notification addressed to the Secretary General of the Council of Europe. Such withdrawals shall take effect three months after the date of receipt of such notification.</p> | <p>delete</p> |
| <p>Chapter II – Basic principles for data protection</p> | <p>Chapter II – Basic principles for data protection</p> |
| <p>Article 4 – Duties of the Parties</p> | <p>Article 4 – Duties of the Parties</p> |
| <p>1 Each Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this chapter.</p> | <p>unchanged</p> |
| <p>2 These measures shall be taken at the latest at the time of entry into force of this Convention in respect of that Party.</p> | <p>unchanged</p> |
| <p>Article 5 – Quality of data</p> | <p>Article 5 – Legitimacy of data processing and quality of data</p> |
| | <p>1 Data processing shall be proportionate in relation to the purpose pursued and reflect a fair balance between the public or private interests, rights and freedoms at stake.</p> <p><i>The Explanatory Report will underline that data processing must be proportionate, that is to say, appropriate in relation to the legitimate aims pursued, necessary in the sense that there are no other appropriate and less intrusive measures with regard to the interests, rights and freedoms of data subjects or society, and it should not lead to a disproportionate interference with these interests, rights and freedoms in relation to the benefits expected from the controller.</i></p> |

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| | <p>2 Each Party shall provide that data processing can be carried out only if:</p> <p>a. the data subject has freely given his/her specific and informed consent, or</p> <p>b. it is provided for by domestic law for an overriding legitimate interest or is necessary to comply with legal obligations or contractual obligations binding the data subject;</p> <p><i>The Explanatory Report will explain the meaning of overriding legitimate interest (including by taking the examples of Section 7 of the Directive 95/46/CE) and that consent may be withdrawn.</i></p> |
| Personal data undergoing automatic processing shall be: | 3 Personal data undergoing automatic -processing shall be : |
| a obtained and processed fairly and lawfully; | a obtained and processed fairly and lawfully; |
| b stored for specified and legitimate purposes and not used in a way incompatible with those purposes; | b collected for explicit , specified and legitimate purposes and not processed in a way incompatible with those purposes unless the data subject has given his/her explicit consent or it is provided for by domestic law ; |
| | <i>The Explanatory Report will give examples of compatible purposes (statistics, historical or scientific research purposes that are a priori compatible provided that other safeguards exist and that the processing is not the ground for a decision to be taken concerning the data subject).</i> |
| c adequate, relevant and not excessive in relation to the purposes for which they are stored; | c adequate, relevant and not excessive in relation to the purposes for which they are processed ; |
| d accurate and, where necessary, kept up to date; | d accurate and, where necessary, kept up to date; |
| e preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. | 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 – Special categories of data | Article 6 – Processing of sensitive data |

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| <p>Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.</p> | <p>Personal data may not be processed for the racial origin, political opinions or religious or other beliefs that they reveal. Nor may genetic data, data concerning health or sexual life, biometric data, personal data relating to criminal convictions, as well as personal data recognised by a Party as presenting a serious risk to the rights and interests of the data subject, in particular a risk of unlawful discrimination, be processed.</p> <p>Such data may nevertheless be processed where domestic law provides appropriate safeguards.</p> <p><i>The Explanatory Report will explain that “serious risk” includes injury to dignity or to physical integrity, “genetic data” means all data concerning the hereditary characteristics of an individual or characteristics acquired during early prenatal development, “biometric data” means all data concerning the physical, biological or physiological characteristics of an individual that allow his/her unique identification.</i></p> |
| <p>Article 7 – Data security</p> | <p>Article 7 – Data security</p> |
| <p>Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.</p> | <p>1 Every Party shall provide that the controller, and, where appropriate the processor, takes the appropriate security measures against accidental or unauthorised destruction, or accidental loss, as well as against unauthorised access, alteration or dissemination of personal data processed.</p> <p>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 any violation of data security which may seriously interfere with the right to the protection of personal data.</p> <p><i>The Explanatory Report will add that the controller should also notify the data subjects in case of serious risks.</i></p> |
| | <p>Article 7bis – Transparency of processing</p> |

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| | <p>1. Each Party shall provide that every controller must ensure the transparency of data processing and in particular provide data subjects with information concerning at least his/her identity and habitual residence or main establishment, the purposes of the processing carried out by him/her, the recipients of the personal data, the preservation period and the means of exercising the rights set forth in Article 8, as well as any other information necessary to ensure a fair data processing.</p> <p>2. The controller shall nonetheless not be required to provide such information where this proves to be impossible or involves disproportionate efforts. <i>The Explanatory Report will specify when the information should be given and that “any other information necessary to ensure a fair data processing” notably includes information on transfers to other countries. The collection of personal data includes both direct and indirect collection. The information regarding the recipients may also refer to categories of recipients.</i></p> |
| <p>Article 8 – Additional safeguards for the data subject</p> | <p>Article 8 – Rights of the data subject</p> |
| <p>Any person shall be enabled:</p> | <p>Any person shall be entitled on request:</p> |
| <p>a to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file;</p> | <p>deleted</p> |
| <p>b to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form;</p> | <p>a to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him/her are being processed or not, the communication of such data in an intelligible form and all available information on the origin of the data and any other information that the controller is required to provide to ensure the transparency of processing in accordance with Article 7bis;</p> <p>b to obtain knowledge of the logic involved in the data processing in the case of an automated decision; <i>The Explanatory Report will explain that the knowledge of the logic involved in the processing cannot be detrimental to legally protected secrets.</i></p> |

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| <p>c to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this Convention;</p> | <p>unchanged</p> |
| <p>d to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with.</p> | <p>See f below</p> |
| | <p>d to object at any time and for overriding legitimate reasons to processing of personal data concerning him/her;</p> |
| | <p>e not to be subject to a decision significantly affecting him/her or producing legal effects concerning him/her, based solely on the grounds of an automated processing of data without having the right to express his/her views;</p> |
| | <p>f to have a remedy if a request for confirmation or, communication, rectification, erasure, or an objection, as referred to in this article are not complied with.</p> |
| | <p>g to benefit, whatever his/her residence, from the assistance of a supervisory authority within the meaning of Article 12 bis, in exercising the rights provided by this Convention.</p> <p><i>The Explanatory report will add that when the person resides in the territory of another Party, he/she shall be given the option of submitting the request through the intermediary of the authority designated by that Party. The request for assistance shall contain all the necessary particulars, relating inter alia to: the name, address and any other relevant particulars identifying the person making the request, the processing to which the request pertains, or its controller, the purpose of the request.</i></p> |
| | <p>Article 8bis – Additional measures for the controller</p> |

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| | <p>Each Party shall provide that the controller is responsible for ensuring respect for the right to the protection of personal data from the initial design stage of the processing operations and for taking all appropriate measures – including when delegating to a processor – to observe the domestic legal provisions giving effect to the principles and obligations of this Convention.</p> <p>The controller, where applicable the processor, shall carry out a data protection risk analysis before carrying out a processing which may present specific risks for the data subjects.</p> <p>The controller must design data processing operations in such a way as to minimise the risk of interference with the right to the protection of personal data.</p> <p>The controller shall establish internal mechanisms to verify and demonstrate to the data subjects and to the supervisory authorities provided for in Article 12 bis of this Convention the compliance of the data processing for which he/she is responsible with the applicable law.</p> <p><i>The Explanatory Report will specify that one of the possible measures could consist of the designation of a ‘data protection officers’ entrusted with the means necessary to the fulfilment of its mission and designation of which the supervisory authority has been informed. They can be internal or external to the controller.</i></p> <p><i>The Explanatory Report will also specify that Parties may adjust these requirements on the basis of company size, volume of data processed, risks involved, etc.</i></p> |
| Article 9 – Exceptions and restrictions | Article 9 – Exceptions and restrictions |

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| <p>1 No exception to the provisions of Articles 5, 6 and 8 of this Convention shall be allowed except within the limits defined in this article.</p> | <p>1 No exception to the provisions of this Convention shall be allowed, except to the provisions of Articles 5.3 , 6, 7.2, 7bis and 8 when such derogation is provided for by law and constitutes a necessary measure in a democratic society to:</p> <p><i>The Explanatory Memorandum will specify that a measure shall be considered as “necessary in a democratic society” to pursue a legitimate aim if it meets a “pressing social need” and, especially, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it appear “relevant and sufficient”.</i></p> |
| <p>2 Derogation from the provisions of Articles 5, 6 and 8 of this Convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:</p> | <p>delete</p> |
| <p>a protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences;</p> | <p>a protect State security, public security, the economic and financial interests of the State or the prevention and suppression of criminal offences;</p> <p><i>The Explanatory Report will clarify by means of examples the scope of the provision, referring to the confidentiality of communications and business or commercial secrecy and other legally protected secrets.</i></p> |
| <p>b protecting the data subject or the rights and freedoms of others.</p> | <p>b protect the data subject or the rights and freedoms of others, notably freedom of expression and information.</p> <p><i>The Explanatory Report will specify that this provision concerns data processing carried out solely for communicating information to the public, ideas or opinions of general interest, or for literary or artistic expression.</i></p> |
| | <p>2 Derogations from the provisions of Article 12 may be provided by law when such derogations are necessary measures to protect freedom of expression and information.</p> |

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| 3 Restrictions on the exercise of the rights specified in Article 8, paragraphs b, c and d, may be provided by law with respect to automated personal data files used for statistics or for scientific research purposes when there is obviously no risk of an infringement of the privacy of the data subjects. | 3 Restrictions on the exercise of the rights specified in Articles 6, 7bis and 8 may be provided by law with respect to personal -data processing for [statistical purposes or for] the purposes of scientific research, when there is obviously no risk of an infringement of the rights and freedoms of the data subjects. |
| Article 10 – Sanctions and remedies | Article 10 – Sanctions and remedies |
| Each Party undertakes to establish appropriate sanctions and remedies for violations of provisions of domestic law giving effect to the basic principles for data protection set out in this chapter | unchanged |
| Article 11 Extended protection | 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. | unchanged |
| Chapter III – Transborder data flows | Chapter III – Transborder data flows |
| Article 12 – Transborder flows of personal data and domestic law | Article 12 |
| 1 The following provisions shall apply to the transfer across national borders, by whatever medium, of personal data undergoing automatic processing or collected with a view to their being automatically processed. | 1 Each Party shall ensure the free flow of personal data. Personal data may be communicated or made accessible to a recipient who is not subject to its jurisdiction, on the condition that the law applicable to this recipient ensures, with respect to the Convention, an adequate level of protection of data subjects. |

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| <p>2 A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data going to the territory of another Party.</p> | <p>2 When the recipient is subject to the jurisdiction of a Party to the Convention, the law applicable to this recipient is presumed to provide an adequate level of protection and a Party shall not, for the sole purpose of data protection, prohibit or subject to special authorisation the disclosure or making available of data.</p> <p>However, the presumption of adequacy of protection shall not operate when the Party to which the recipient is subject has not implemented some or all of the rights and obligations enshrined in the Convention. The Party invoking this clause shall notify its intention to the Consultative Committee provided for in Chapter V justifying the reason for lack of implementation of the Convention. The Party to which the recipient is subject has the opportunity to present its views before the Consultative Committee. Paragraph 3b is applicable to the situation presently described.</p> |
| <p>3 Nevertheless, each Party shall be entitled to derogate from the provisions of paragraph 2:</p> | <p>3 When the recipient is not subject to the jurisdiction of a Party to the Convention, an adequate level of protection can be ensured by:</p> <ul style="list-style-type: none"> a) the domestic legislation of that State or that organisation, in particular by applicable international treaties, or b) standardised or ad hoc legal measures, such as contract clauses, internal rules or similar measures that are binding, effective and capable of effective remedies, implemented by the person who discloses or makes personal data accessible and by the recipient, provided that the national authorities of the Party to which the recipient is subject can only access the data in accordance with the rules ensuring, under the Convention, an adequate protection of the data subjects, [or if this is not the case that the recipient implements all relevant legal remedies, likely to contribute to the protection of the data subjects]. <p>The competent supervisory authority within the meaning of Article 12 bis of the Convention shall be informed of the measures implemented and may request that the person who discloses or makes data available, or the recipient, demonstrate the quality and effectiveness of actions taken. This authority may suspend, prohibit or subject to condition the disclosure or making available of data.</p> |

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| <p>a insofar as its legislation includes specific regulations for certain categories of personal data or of automated personal data files, because of the nature of those data or those files, except where the regulations of the other Party provide an equivalent protection;</p> | <p>4. Notwithstanding paragraphs 2 and 3 , each Party may provide that the disclosure or making available of data may take place without the law applicable to the recipient ensuring, for the purposes of this Convention, an adequate level of protection of data subjects, if: a) the data subject has given his/her consent, after being informed of risks due to the absence of appropriate safeguards, or b) the specific interests of the data subject require it in the particular case, or c) legitimate interests, in particular important public interests, prevail.</p> |
| <p>b when the transfer is made from its territory to the territory of a non Contracting State through the intermediary of the territory of another Party, in order to avoid such transfers resulting in circumvention of the legislation of the Party referred to at the beginning of this paragraph.</p> <p>and a Party shall not, for the sole purpose of data protection, prohibit or subject to special authorisation the disclosure or making available</p> | <p>delete</p> |
| | <p>Alternative proposal</p> |
| | <p>1 Each Party shall ensure the free flow of personal data. Personal data can be communicated or made accessible to any recipient if [the provisions of the Convention are complied with and] :</p> <ul style="list-style-type: none"> - the recipient is subject to the jurisdiction of a Party to this Convention, subject to the conditions of paragraph 2; - the law applicable to this recipient ensures, with respect to the Convention, an adequate level of protection of data subjects, subject to the conditions of paragraph 3; - one of the conditions of paragraph 4 is fulfilled. <p>2 When the recipient is subject to the jurisdiction of a Party to the Convention, the law applicable to this recipient is presumed to provide an adequate level of protection and a Party shall not, for the sole purpose of data protection, prohibit or subject to special authorisation the disclosure or making available of data, as referred to in paragraph 1.</p> |

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| | <p>However, the presumption of adequacy of protection shall not apply when the Party to which the recipient is subject has not implemented in law some or all of the rights and obligations enshrined in the Convention, or does not effectively observe such rights and obligations in practice. The Party invoking this clause shall notify its intention to the Consultative Committee provided for in Chapter V justifying the reason for lack of implementation of the Convention. The Party to which the recipient is subject has the opportunity to present its views before the Consultative Committee.</p> |
| | <p>3 When the recipient is not subject to the jurisdiction of a Party to the Convention, personal data can be communicated or made accessible to a recipient that has adduced appropriate safeguards with respect to the protection of personal data and when measures for ensuring effective implementation of the protection have been taken (such as contractual clauses, legally-binding internal privacy rules, or other similar measures, or in application of the domestic legislation of that State or that organisation, in particular in respect of applicable international treaties), and can demonstrate such measures, and their effectiveness, on request from the competent supervisory authority.</p> |
| | <p>4. When the recipient is not subject to the jurisdiction of a Party to the Convention, personal data can be communicated or made accessible to a recipient if one of the following derogations applies:</p> <p>a) the data subject has given his/her consent, after being informed of risks due to the absence of appropriate safeguards, or b) the specific interests of the data subject require it in the particular case, or c) legitimate interests, in particular important public interests, prevail.</p> |
| <p>Article 2 – Transborder flows of personal data to a recipient which is not subject to the jurisdiction of a Party to the Convention (Additional Protocol)</p> | <p><i>(Article 12 above replaces the old Article 12 and Article 2 of the Additional Protocol)</i></p> |

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| 1 Each Party shall provide for the transfer of personal data to a recipient that is subject to the jurisdiction of a State or organisation that is not Party to the Convention only if that State or organisation ensures an adequate level of protection for the intended data transfer | |
| 2 By way of derogation from paragraph 1 of Article 2 of this Protocol, each Party may allow for the transfer of personal data : | |
| a if domestic law provides for it because of : | |
| – specific interests of the data subject, or | |
| – legitimate prevailing interests, especially important public interests, or | |
| b if safeguards, which can in particular result from contractual clauses, are provided by the controller responsible for the transfer and are found adequate by the competent authorities according to domestic law. | |
| | 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 stated in Chapters II and III of the Convention and in this Protocol. | 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. a. To this end, the said authorities shall have, in particular, powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of domestic law giving effect to the principles mentioned in paragraph 1 of Article 1 of this Protocol. | 2 a To this end, the said authorities shall have, in particular, powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of domestic law giving effect to the principles of this Convention . <i>The Explanatory report will note that the powers of intervention should notably concern data processing which presents particular risks for fundamental rights and freedoms.</i> |

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| b. Each supervisory authority shall hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms with regard to the processing of personal data within its competence. | b Each supervisory authority shall hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms with regard to the data processing of personal data within its competence. |
| 3. The supervisory authorities shall exercise their functions in complete independence. | 3 The supervisory authorities shall accomplish their duties and exercise their powers in complete independence. Their members and staff shall neither seek nor be subject to instructions of anyone. |
| | 4 Each Party shall ensure that the supervisory authorities have adequate human, technical and financial resources and infrastructure necessary to accomplish their duties and exercise their powers effectively. |
| 4. Decisions of the supervisory authorities, which give rise to complaints, may be appealed against through the courts. | 5 Decisions of the supervisory authorities, which give rise to complaints, shall be subject to effective remedies. |
| 5. In accordance with the provisions of Chapter IV, and without prejudice to the provisions of Article 13 of the Convention, the supervisory authorities shall co-operate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information. | 6. 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 explicitly agreed to; |
| | b coordinating their investigations or interventions or conducting joint actions; |
| | c providing information on their law and administrative practice in data protection. |
| | 7 In order to organise their co-operation and to perform the duties set forth in the preceding paragraph, the supervisory authorities of the Parties may form a conference. |
| Chapter IV – Mutual assistance | Chapter IV – Mutual assistance |

| Article 13 – Co-operation between Parties | Article 13 – Co-operation between Parties |
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| 1 The Parties agree to render each other mutual assistance in order to implement this Convention. | unchanged |
| 2 For that purpose: | unchanged |
| a each Party shall designate one or more authorities, the name and address of each of which it shall communicate to the Secretary General of the Council of Europe; | 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 authority shall specify in its communication referred to in the previous subparagraph the competence of each authority. | b each Party which has designated more than one supervisory authority shall specify in its communication referred to in the previous subparagraph the competence of each authority . |
| 3 An authority designated by a Party shall at the request of an authority designated by another Party: | Incorporated into Article 12bis |
| a furnish information on its law and administrative practice in the field of data protection; | |
| b take, in conformity with its domestic law and for the sole purpose of protection of privacy, all appropriate measures for furnishing factual information relating to specific automatic processing carried out in its territory, with the exception however of the personal data being processed. | |
| Article 14 – Assistance to data subjects resident abroad | Article 14 – Assistance to data subjects resident abroad |
| 1 Each Party shall assist any person resident abroad to exercise the rights conferred by its domestic law giving effect to the principles set out in Article 8 of this Convention. | delete |
| 2 When such a person resides in the territory of another Party he shall be given the option of submitting his request through the intermediary of the authority designated by that Party. | delete |
| 3 The request for assistance shall contain all the necessary particulars, relating inter alia to: | delete |

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| a the name, address and any other relevant particulars identifying the person making the request; | delete |
| b the automated personal data file to which the request pertains, or its controller; | delete |
| c the purpose of the request. | delete |
| Article 15 – Safeguards concerning assistance rendered by designated authorities. | Article 15 – Safeguards concerning assistance rendered by designated supervisory authorities |
| 1 An 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. | A supervisory authority |
| 2 Each Party shall see to it that the persons belonging to or acting on behalf of the designated authority shall be bound by appropriate obligations of secrecy or confidentiality with regard to that information. | on behalf of the designated supervisory authority.. |
| 3 In no case may a designated authority be allowed to make under Article 14, paragraph 2, a request for assistance on behalf of a data subject resident abroad, of its own accord and without the express consent of the person concerned. | .. supervisory authority... Modify/delete reference to Article 14 |
| Article 16 – Refusal of requests for assistance | Article 16 – Refusal of requests for assistance |
| A designated authority to which a request for assistance is addressed under Articles 13 or 14 of this Convention may not refuse to comply with it unless: | ... supervisory authority... Modify/delete reference to Article 14 |
| a the request is not compatible with the powers in the field of data protection of the authorities responsible for replying; | unchanged |
| b the request does not comply with the provisions of this Convention; | unchanged |

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| c compliance with the request would be incompatible with the sovereignty, security or public policy (ordre public) of the Party by which it was designated, or with the rights and fundamental freedoms of persons under the jurisdiction of that Party. | unchanged |
| Article 17 – Costs and procedures of assistance | 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 abroad 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 authority making the request for assistance. | ...supervisory authority... Modify/delete reference to Article 14 |
| 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. | unchanged |
| 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. | unchanged |
| Chapter V – Consultative Committee. | Chapter V – Consultative Committee |
| Article 18 – Composition of the committee | Article 18 – Composition of the committee |
| 1 A Consultative Committee shall be set up after the entry into force of this Convention. | unchanged |
| 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. | unchanged |
| 3. The Consultative Committee may, by unanimous decision, invite any non-member State of the Council of Europe which is not a Party to the Convention to be represented by an observer at a given meeting | 3 The Consultative Committee may, by a decision taken by a majority of two-thirds of its representatives [voting] [entitled to vote] , invite an observer to be represented at its meetings. |
| Article 19 – Functions of the committee | Article 19 – Functions of the committee |

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| The Consultative Committee: | The Consultative Committee: |
| a may make proposals with a view to facilitating or improving the application of the Convention; | 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; | unchanged |
| 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; | unchanged |
| d may, at the request of a Party, express an opinion on any question concerning the application of this Convention | d may, at the request of a Party, express an opinion on any question concerning the interpretation or application of this Convention; |
| | e prepares, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of data protection of the State or international organisation concerned; |
| | f may, at the request of a State or an international organisation, evaluate whether the rules of its domestic law ensure an adequate level of protection for the purposes of this Convention; |
| | g may, at the request of a Party, prepare an opinion on the legal standards set out in Article 12, in particular to assess whether these standards offer sufficient guarantees to ensure an adequate level of protection for the purposes of this Convention; |
| | h may develop models of standardised legal measures referred to in Article 12; |
| | i periodically reviews the implementation of this Convention by the Parties. |
| Article 20 – Procedure | Article 20 – Procedure |
| 1 The Consultative 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 every two years and in any case when one-third of the representatives of the Parties request its convocation. | unchanged |

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| 2 | A majority of representatives of the Parties shall constitute a quorum for a meeting of the Consultative Committee. | unchanged |
| 3 | After each of its meetings, the Consultative 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. | unchanged |
| 4 | Subject to the provisions of this Convention, the Consultative Committee shall draw up its own Rules of Procedure. | unchanged |
| Chapter VI – Amendments | | Chapter VI – Amendments |
| Article 21 – 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 Consultative Committee. | unchanged |
| 2 | Any proposal for amendment shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe and to every non-member State which has acceded to or has been invited to accede to this Convention in accordance with the provisions of Article 23. | 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 and to every non-member State which has acceded to or 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 Consultative Committee, which shall submit to the Committee of Ministers its opinion on that proposed amendment. | unchanged |
| 4 | The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the Consultative Committee and may approve the amendment. | unchanged |
| 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. | unchanged |

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| <p>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.</p> | <p>unchanged</p> |
| | <p>7. However, the Committee of Ministers may, after consulting the Consultative 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 provisions set forth in paragraphs 6 or 7, a State or international organisation cannot express their consent to be bound by the Convention without accepting at the same time the amendment.</p> |
| <p>Chapter VII – Final clauses</p> | <p>Chapter VII – Final clauses</p> |
| <p>Article 22 – Entry into force</p> | <p>Article 22 – Entry into force</p> |
| <p>1 This Convention shall be open for signature by the member States of the Council of Europe. 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.</p> | <p>unchanged</p> |
| <p>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.</p> | <p>unchanged</p> |

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| <p>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.</p> | <p>unchanged</p> |
| <p>Article 23 – Accession by non-member States</p> | <p>Article 23 – Accession by non-member States or international organisations</p> |
| <p>1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council of Europe 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.</p> | <p>After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, in light of the opinion prepared by the Consultative Committee according to Article 19.e invite any State not a member of the Council of Europe or any 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 unanimity of the votes of the representatives of the Contracting States entitled to sit on the Committee of Ministers. This decision shall be taken after having obtained the unanimous agreement of the Parties to the Convention.</p> |
| <p>2 In respect of any acceding State, 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.</p> | <p>unchanged</p> |
| <p>Article 24 – Territorial clause</p> | <p>Article 24 – Territorial clause</p> |
| <p>1 Any State 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 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.</p> | <p>Unchanged unchanged</p> |

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| 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. | unchanged |
| Article 25 – Reservations | Article 25 – Reservations |
| No reservation may be made in respect of the provisions of this Convention. | unchanged |
| Article 26 – Denunciation | 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. | unchanged |
| 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. | unchanged |
| Article 27 – Notifications | Article 27 – Notifications |
| The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of: | The Secretary General of the Council of Europe shall notify the member States of the Council and any Party to this Convention: |
| a any signature; | unchanged |
| b the deposit of any instrument of ratification, acceptance, approval or accession; | unchanged |
| c any date of entry into force of this Convention in accordance with Articles 22, 23 and 24; | unchanged |
| d any other act, notification or communication relating to this Convention. | unchanged |