

Strasbourg, 16 March 2010

T-PD-BUR (2010) RAP 20

**CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION
OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA
[ETS 108] (T PD)**

20th meeting of the Bureau

Strasbourg, 2-4 March 2010

DRAFT ABRIDGED REPORT

1. The Bureau of the Consultative Committee of Convention for the protection of individuals with regard to automatic processing of personal data [ETS 108] (hereinafter Convention 108) (T-PD) held its 20th meeting from 2 to 4 March 2010 at the Council of Europe in Strasbourg. The list of participants and the meeting agenda are reproduced in Appendices I and II to this report respectively.

New observer – the United States of America

2. The Chair, Mr João Pedro CABRAL and Mr Jan KLEIJSSSEN, Director of Standard-setting welcomed the United States of America as a new observer to the T-PD.

Statement by the Secretariat

3. The Bureau took note of the information provided by Mr Jan Kleijssen.
 - The Rapporteur Group on Legal Co-operation (GR-J) of the Ministers Deputies held on 23 February 2010 examined the report of the 25th plenary meeting of the T-PD and heard the presentation by Mr Kevin FRASER, T-PD Bureau member on the future work of the Committee. The report was transmitted to the Committee of Ministers who will examine it during its 1079th meeting on 10 March 2010.
 - It was underlined that the Secretariat is exploring several possibilities to provide the T-PD work with further support and to promote Convention 108 worldwide. Concerning the on-going work of the T-PD, it was underlined that if the draft recommendation on profiling, that is currently being prepared in co-operation with the CDCJ, is adopted, it would be the first legal document dealing with this particular subject.

- Regarding the revision of the Convention on Mutual Administrative assistance in tax matters (ETS n° 127), the Secretariat informed the T-PD Bureau that the text of the Amending Protocol to Convention n° 127 was already adopted by the OECD and was undergoing the adoption procedure within the Council of Europe. Particular reference was made to the fact that the OECD Secretariat had appreciated the valuable input made by the T-PD in the context of the revision process which had allowed common understanding of data protection principles to be reached among all stakeholders involved.
 - Regarding co-operation with the European Union, the Bureau was informed that a number of meetings had already taken place, and more were planned, between the Council of Europe and the EU to discuss, in particular, the implementation of the Stockholm programme and its emphasis on the Convention 108.
 - On 26-27 November 2010 the 30th Council of Europe Conference of Ministers of Justice will take place in Istanbul, Turkey. It is expected that the Ministers may also address questions concerning data protection, in which case the participation of a member of the T-PD will be ensured. The theme will be communicated to all members of the T-PD once it has been approved by the Committee of Ministers during its 1079th meeting on 10 March 2010.
4. Following Mr Kleijssen's statement, the Bureau had an exchange of views. In particular, the Chair underlined that the growing importance of data protection issues would lead to the need to hold more meetings of the Bureau and an additional plenary meeting would be important to ensure. It was underlined that the Council of Europe needed to continue the promotion of personal data protection which has always been one of its core values. Alternative working methods were envisaged such as work with existing networks (French-Speaking Association of Personal Data Protection Authorities, Ibero-American Data Protection Network, the European and International Conference of Data Protection and Privacy Commissioners), with academic working in the field and the private sector. Support from the EU should also be sought.
 5. Ms Regina JENSDOTTIR, Head of the Public and Private Law Division, informed the Bureau about the steps which have been taken by the Secretariat in order to find the necessary funding to organise the Conference celebrating the 30th anniversary of Convention 108 in 2011 and other awareness-raising activities.

Future work of the T-PD

6. In accordance with its work programme adopted during the last plenary session, the T-PD decided to launch four preliminary expert studies concerning points 1.1, 1.4, 2.1 and 2.2 of the work programme of the T-PD.

Participation of the T-PD members in other committees

7. The Bureau took note of and approved the following nominations:
 - Ms Rita VAITKEVICIENE, Deputy Director of the State Data Protection Inspectorate of the Republic of Lithuania member of the T-PD, will represent the T-PD in the Group of Specialists on Predictivity, Genetic Testing and Insurance;
 - Mr José Leandro Núñez GARCÍA, Spanish Data Protection Agency, will represent the T-PD in the CAHAMA Expert Group on anti-doping and data protection.

Updates from other international organisations

8. The representative of the OECD informed the Bureau about a joint ICCP-WPISP Roundtable “30 Year After: the Impact of the OECD Privacy Guidelines” conference which will be held on 10 March 2010 in Paris. She also informed the Bureau about the 30th Anniversary Conference which is scheduled to take place in Jerusalem on 25 and 26 October 2010 and during which the impact of technology on the global data flow will be discussed. A further event will be organised by the OECD in December to discuss the economic value of personal data.
9. The representative of the European Union informed the Bureau that on 5 February 2010, the Commission adopted the model of contractual clauses for the transfer of personal data to third countries. He also informed the Bureau that the Commission launched the revision of the Directive 95/46/EC of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The first draft is expected to be released in the course of 2010.

Profiling

10. The T-PD Bureau continued the fifth reading of the draft recommendation on the protection of personal data used in the framework of profiling as from point 4.7 (data quality). The Chair reminded the Bureau that during the last meeting in November 2009 the Bureau had decided to extend the scope of application of the recommendation in order to cover a larger number of situations where profiling is used, thus allowing better protection of individuals. Since the 19th Bureau meeting, new comments by France and the Steering Committee on Legal Co-operation (CDCJ) have been received. It was decided to examine the comments as of point 4.7 in the draft recommendation during the present Bureau meeting and to examine the comments prior to point 4.7 at the next Bureau meeting in April. The text of the draft recommendation resulting from the meeting discussion will be sent for comments to the T-PD representatives and observers. The comments received will be examined during the plenary meeting from 1 to 3 June with a view to adopting the draft recommendation by the T-PD.
11. The Bureau examined the draft explanatory memorandum. The Secretariat and experts were given the task of completing the draft text taking into account remarks made during the present meeting. The new draft explanatory memorandum will shortly be sent to contracting parties and observers for comments.

Working methods of the T-PD

12. The Bureau discussed the current internal rules and instructed the Secretariat to prepare a proposal with amendments aiming at improving the T-PD and T-PD Bureau working methods.

Consultation questionnaire

13. The Bureau discussed and adopted a reply to the questionnaire on for the consultation on the future European Union (EU) - United States of America (US) international agreement on personal data protection and information sharing for law enforcement purposes (Appendix III).

Dates for the next Bureau meeting

14. The Bureau decided to hold its 21st meeting from 13 to 15 April 2010.

APPENDIX I

LIST OF PARTICIPANTS

MEMBERS OF THE BUREAU

AUSTRIA/AUTRICHE

Eva Souhrada-Kirchmayer, [*First Vice-Chair of the T-PD*], Head of the data protection division, Federal Chancellery

CZECH REPUBLIC/RÉPUBLIQUE TCHÈQUE

Hana Štěpánková, Head of the Press Department, Spokeswoman, Office for Personal Data Protection

ITALY/ITALIE

Alessandra Pierucci, Civil Servant at the Italian Data Protection Authority, Garante per la Protezione dei Dati Personali
Excused / excusée

Clizia D'Agata, Substitute representative of Ms. Alessandra Pierucci / Représentant remplaçante de Mme Alessandra Pierucci, Service for Community and International Matters of the Italian Data Protection Authority, Garante per la Protezione dei Dati Personali

PORTUGAL

João Pedro Cabral, [Chair of the T-PD], Directorate General of Justice Policy, Ministry of Justice

ROMANIA/ROUMANIE

George Grigore, Department of European Integration, and International Affairs - Romanian DPA

SWITZERLAND/SUISSE

Jean-Philippe Walter, [*Second Vice-Chair of the T-PD*], Préposé fédéral à la protection des données et à la transparence (PFPDT), Chancellerie fédérale

UNITED KINGDOM/ROYAUME-UNI

Kevin Fraser, Head of EU Data Protection Policy, Ministry of Justice

MEMBERS OF THE T-PD

GERMANY/ALLEMAGNE

Claudia Thomas, Ministry of the Interior, Division V II 4 Data Protection Law

MONTENEGRO

Zora Ćizmović, Ministry of Interior Affairs and Public Administration of Montenegro

SLOVAKIA/SLOVAQUIE

Veronika Žuffová–Kunčová, LL.M, Foreign Relations Department, Personal Data Protection Office of the SR

SCIENTIFIC EXPERTS

Jean-Marc Dinant, Docteur in informatique, Maître de conférence à l'Université de Namur

Yves Poulet, Directeur du CRID (Centre de Recherches Informatique et Droit, Faculté de Droit

COMMISSION OF THE EUROPEAN COMMUNITIES

José Manuel de Frutos Gómez, Directorate General Justice, Freedom and Security, Data Protection Unit

OBSERVERS

FRENCH-SPEAKING ASSOCIATION OF PERSONAL DATA PROTECTION AUTHORITIES (AFAPDP) / ASSOCIATION FRANCOPHONE DES AUTORITÉS DE PROTECTION DES DONNÉES PERSONNELLES

Olivier Matter, CNIL, Secrétariat Général de l'AFAPDP

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) / ORGANISATION DE COOPERATION ET DE DEVELOPPEMENT ECONOMIQUES (OCDE)

Barbara Bucknell (OECD), Information security, privacy, and consumer policy, OECD, DSTI, ICCP

UNITED STATES OF AMERICA / ETATS-UNIS D'AMERIQUE

John Kropf, Deputy Chief Privacy Officer, The Privacy Office, U.S. Department of Homeland Security,

SECRETARIAT

Directorate General of Human Rights and Legal Affairs / Direction Générale des droits de l'Homme et des affaires juridiques

Directorate of Standard-Setting / Direction des activités normatives

Jan Kleijssen, Director / Directeur
Tel. : +33 3 88 41 21 16, jan.kleijssen@coe.int

Law reform Department / Département des Réformes législatives

Jörg Polakiewicz, Head of the Department / Chef du Service
Tel. : +33 3 88 41 2919, Jorg.polakiewicz@coe.int

Public and private law Division / Division du droit public et privé

Regina Jensdottir, Head of the Division / Chef de la Division
Tel. : +33 2 88 41 2225, regina.jensdottir@coe.int

Kateryna Gayevska, Secretary of the TPD-BUREAU / Secrétaire du T-PD-BUREAU ;
Tel. : +33 3 88 41 2127, kateryna.gayevska@coe.int

Sophie Kwasny, Co-Secretary of the CDCJ / Co-Secrétaire du CDCJ
Tel. : +33 3 90 21 43 39, sophie.kwasny@coe.int

Lucy Ancelin, Assistant / Assistante
Tel.: +33 3 88 41 2204, lucy.ancelin@coe.int

Christiane Weltzer, Assistant / Assistante
Tel. : +33 3 90 21 4530, Fax : +33 3 90 21 56 48, christiane.weltzer@coe.int

INTERPRETERS

Katia Di Stefano
Nadine Kieffer
Didier Jungling

APPENDIX II
DRAFT AGENDA

1. OPENING OF THE MEETING

2. ADOPTION OF THE AGENDA

3. STATEMENT BY THE SECRETARIAT

- Abridged report 19th
T-PD-BUR
New Abridged report of the 19th meeting of the T-PD-BUR (Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [ETS No. 108]), (18-20 November 2009)

4. PROFILING

Required action: the Bureau will continue the examination of the 5th revision of the draft recommendation on personal data protection with regard to the process of profiling, in the light of contributions received and will discuss the text of the draft explanatory memorandum

- T-PD (2008) 01 Study on the application of Convention 108 to the profiling mechanisms
- T-PD-BUR (2009) 02 Rev 5
New Draft recommendation on the protection of individuals with regard to automatic processing of personal data in the framework of profiling as resulting from the 19th T-PD Bureau meeting (18-20 November 2009)
- T-PD-BUR (2010) 01 Mos
• T-PD-BUR (2010) 01 Eng
New Comments on the draft recommendation on the protection of individuals with regard to automatic processing of personal data in the framework of profiling (T-PD and CDCJ comments' compilation)
- CDCJ (2010) 7 Mos
New Comments received from the CDCJ delegation on the draft recommendation on the protection of individuals with regard to automatic processing of personal data in the framework of profiling
- T-PD-BUR (2010) 02
New Draft explanatory memorandum on the draft recommendation on the protection of individuals with regard to automatic processing of personal data in the framework of profiling

5. UPDATES FROM OTHER INTERNATIONAL ORGANISATIONS

6. OTHER ISSUES:

A. Revision of the Convention on Mutual Administrative Assistance in Tax Matters (ETS N° 127)

Required action: the Bureau will take note of the latest developments in the revision process

B. Meeting with the Rapporteur Group (GR-J) on 23.02.2010

Required action: the Bureau will take note of participation of Mr Kevin Fraser in the GR-J meeting on 23 February 2010

- DD(2010)92
New Intervention by Mr Kevin Fraser, member of the Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

C. Consultation on the future European Union (EU) - United States of America (US) international agreement on personal data protection and information sharing for law enforcement purposes

Required action: the Bureau will examine the draft reply to be sent to the EU Commission

- T-PD- BUR (2010) 03
New Draft reply of the T-PD Bureau on the consultation questionnaire

D. Participation of the T-PD members in other committees

Required action: the Bureau will take note of the nominations proposed by the Chair for the Group of Specialists on Predictivity, Genetic Testing and Insurance and for the CAHAMA Working Party

E. Future work of the T-PD

Required action: the Bureau will be requested to discuss experts' studies concerning the additional protocol and the revision of the recommendations on "police" and on "employment"

- T-PD (2009) 03 WP Working programme for the T-PD for 2009 and beyond

F. Working methods of the T-PD and the request for observer status

Required action: the Bureau will discuss the procedure to follow when dealing with requests for observer status with the T-PD submitted by non member states of the Council of Europe

- T-PD(2008) 03 fin Internal rules of procedure

7. DATE OF THE NEXT MEETINGS OF THE BUREAU OF THE T-PD-BUR IN 2010

APPENDIX III

REPLY TO THE QUESTIONNAIRE FOR THE CONSULTATION ON THE FUTURE EUROPEAN UNION (EU) - UNITED STATES OF AMERICA (US) INTERNATIONAL AGREEMENT ON PERSONAL DATA PROTECTION AND INFORMATION SHARING FOR LAW ENFORCEMENT PURPOSES

adopted by the T-PD Bureau at the 20th Bureau meeting (2-4 March 2010)

Privacy and data protection have always been at the core of the Council of Europe's values and this has resulted in the drafting of legally binding instruments aimed at ensuring their efficient protection – the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS. N° 005), the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS. n° 108) and its Additional Protocol (ETS n° 1 81). Today the Convention 108 is a benchmark for 41 states in Europe and offers protection to nearly 800 million people over the whole European continent.

The Convention 108 has a global vocation as it is open to the accession of non member states of the Council of Europe. It also complements other leading Council of Europe instruments such as the Cybercrime Convention which has been already ratified by the United States of America (USA). Another example of this global vocation is the fact that the USA was recently granted observer status to the Consultative Committee of Convention 108 (T-PD).

The Convention's Consultative Committee is a body that is empowered to make proposals to facilitate the application of the Convention and is also contributing to standard-setting work in the field of protection of personal data.

The Bureau of the Consultative Committee of Convention 108 welcomes the initiative of the European Union (EU)/United States of America (USA) international agreement on personal data protection provided that such an agreement establishes legally binding principles which will guarantee data protection levels which are at least equivalent to those of Convention 108 and its additional protocol.

The T-PD Bureau is conscious that the objectives set up by the Stockholm programme for the areas of freedom, security and justice cannot be achieved without efficient transatlantic cooperation. It takes note of already existing EU/USA agreements covering several domains as well as the EU-US Joint Statement on "Enhancing transatlantic cooperation in the area of Justice, Freedom and Security". In the light of the above-mentioned, it would like to emphasise that should the USA accede to Convention 108 the negotiation of diverse agreements would certainly be avoided or be easier and the global nature of the right to privacy and personal data protection would be enhanced and harmonised further.

Convention 108 entered into force in 1985. However, the nature of its principles and their technologically neutral phrasing means it is fully relevant and adapted to current realities and to different regional situations. The Stockholm programme calls for worldwide promotion of the principles set out in the Convention, which the T-PD welcomed.

It is against this background that the Bureau of the T-PD would like to present its comments on the future EU/US international agreement.

1. Purpose

The proposed legally binding international agreement on personal data protection that is intended to be the object of negotiations between the USA and the EU shall provide standards which are at least equivalent to those set up at European level (e.g. Convention 108 and its Additional Protocol). The agreement addresses several issues; however, its main output shall be to establish a common core of legally enforceable data protection standards which shall be then accompanied by effective implementation measures.

2. Scope of the agreement

2.1. Material scope

The agreement should cover personal data protection when information is transferred that pertains to police co-operation and judicial co-operation in criminal matters.

2.2. Personal scope

The agreement must, in principle, not include the transfer of personal data between private and public parties. If so, the agreement shall stipulate that the transfer is only allowed if it has proved to be necessary and proportionate for a specific purpose, to be decided on a case by case basis and covered by high data protection safeguards laid down in an additional specific agreement.

3. Nature of the agreement:

Reciprocity should be granted when the data is necessary. Moreover, reciprocity can increase the effectiveness of both systems in the areas covered by the agreement and can lead to the equivalent and reciprocal application of privacy and personal data protection laws. By doing so, a number of conflicts of law and jurisdictions should be avoided. However, such reciprocity is only possible if an adequate level of protection is granted. Accession by the USA to Convention 108 and its additional protocol would give the necessary legal background to achieve an adequate level of protection.

Reciprocity shall also concern the possibility of redress. As the European Data Protection Supervisor underlined “it should be ensured that European citizens have an adequate means of redress when data related to them are being processed in the United States ..., but equally that the European Union and its Member States give equivalent rights to US-citizens”¹.

4. Data Protection Principles

4.1 Accountability

An accountability requirement concerning the respect of data protection standards needs to be outlined in the agreement. The principle of accountability should be respected by public entities processing personal data, particularly in the field of law enforcement to compensate for the lack of transparency.

The scope of such a principle should be defined by establishing, for instance, a data controller obligation to be accountable for complying with data protection laws. Thus, the data controller will have, for instance, to adopt internal policies consistent with the law, develop mechanisms to put data protection policies into effect, have systems for internal, ongoing supervision and carrying out internal reviews (audits) and external verifications (reviews, certification). A joint review mechanism and the (joint) supervision by independent data protection authorities are mechanisms which positively contribute to accountability. These mechanisms must be available at the same level to all parties to the agreement.

¹ Opinion of the European Data Protection Supervisor on the final report by the EU-US High Level Contact Group on information sharing and privacy and personal data protection, 11 November 2008.

4.2. Individual Access

The agreement should include provisions for a set of individuals' rights, in particular the right of access to data which has been collected concerning him or her regardless of nationality or place of residence. It should also include the right to oppose the collection or processing of one's own data, the right to rectify it, the right to delete it and the right to redress. The provisions should be enforceable before the competent court or tribunal. They should be given direct effect or be transposed into domestic law.

The agreement should provide for indirect verification through an independent authority, when the right of access is restricted for legitimate or justified reasons. However, indirect verification should only be used as a last resort. Moreover, the restriction to access should always constitute a necessary measure and be proportionate to the legitimate aim pursued.

4.3. Single contact points

The question on whether or not to have a single contact point in the US or in the EU can be assessed in the course of negotiations and in the context of possible EU/national options. If an option for several contact points is chosen, it should be reinforced by greater transparency and information of data subjects. As in the case of the Schengen agreement, data subjects should know exactly who is responsible for access, the checking process or the assistance.

The modalities for transparency and assistance to data subjects by US and EU data protection supervisory authorities shall be spelled out in the agreement.

4.4. Judicial redress

Effective judicial redress before an independent court or a tribunal in the US should be available for data subjects. The agreement shall set up conditions and modalities allowing the effective exercise of the right to judicial redress for European citizens who shall be informed about their rights of access, rectification and erasure without being discriminated against vis-à-vis US citizens.

5. Any other comment

- The agreement shall also regulate the onward transfer of personal data to third countries. The transfer to third countries should only be possible if those countries have also an adequate level of data protection. The onward transfer should in principle be possible with the agreement of the supplying state respecting the purpose for which the data were originally transmitted. In the case of a transfer to third countries the supplying European authority shall be informed at the very least. It is preferable to also introduce a principle to inform the data subject.
- "Law enforcement purposes" should be defined by reference to the parties' internal law. In this case, European citizens could be granted a narrower definition.
- The basic principles of data protection shall be reflected in the agreement and it shall have clear rules concerning the retention of data.
- The principle of data minimisation should be added.
- Compensation of data subjects for damage resulting from the unlawful processing of personal data.

- The agreement should cover the areas regulated by existing agreements touching upon transfers of data between EU and USA. These agreements shall be adapted accordingly.
- The agreement should establish minimum standards which should be built upon by specific bilateral or multilateral agreements regulating the specific transfer of specific data for specific purposes, the preconditions for a transfer, deadlines for the storage of data, specific data security measures, if necessary, etc.
- The agreement shall provide rules for co-operation between the European and US Data Protection Authorities.
- The agreement shall make provisions for its revision, suspension or/and termination.