



Strasbourg, 30 May 2012

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

DRAFT REPORT

27th T-PD Bureau Meeting

Paris, 16 -18 April 2012

1. The Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [ETS No. 108] (hereinafter Convention 108) held its 27th meeting from 16 to 18 April 2012 at the Council of Europe in Paris. The list of participants and the agenda appear respectively in Appendices I and II.

Opening of the meeting and statement by the Secretariat

2. The Chair, Mr Walter (Switzerland), opened the meeting and stressed that the main focus of the meeting would be the modernisation of Convention 108.

3. The Secretariat informed the participants of the adoption by the Committee of Ministers on 4 April 2012 of Recommendation CM/Rec(2012)3 on the protection of human rights with regard to search engines and Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services, which both reflect the opinions prepared by the T-PD in 2011 on the related drafts.

4. Information was also given regarding the first meeting of the new Steering Committee on Media and Information Society (CDMSI – Strasbourg, from 27 to 30 March 2012) which was attended by Ms Catherine Pozzo di Borgo as representative of the T-PD.

5. The Secretariat informed the participants of the departure of Ms Corinne Gavrilovic from the T-PD Secretariat. The Chair warmly thanked Ms Gavrilovic for her excellent work and

support to the T-PD activities.

Adoption of the agenda

6. The Bureau adopted the agenda, as shown in Appendix II and with the addition under item 7 “other issues” of another point regarding the draft agenda of the 28th Plenary meeting of the T-PD.

Modernisation of Convention 108

7. The T-PD Bureau discussed the proposals of modification of Convention 108 (contained in the document T-PD-BUR(2012)01Rev) in particular in light of the comments further to the last round of consultation which was concluded on 30 March 2012 (T-PD-BUR(2012)03Mos).

8. The Bureau examined the draft and noted the following orientations which will be further developed in a revised version of the draft proposals of modernisation further to the Bureau meeting.

General comments

The Explanatory Report (hereinafter referred to as “ER”) will be playing an important role in terms of interpretation and practical implementation of the provisions of the Convention. Such a role deserves to be highlighted, possibly through a specific mention in the preamble of the Convention or in the decision of the Committee of Ministers that will adopt the proposals of modernisation.

Title of the Convention

It is proposed that the word “automatic” be deleted as logical outcome of the changes brought to the scope of the Convention, which will refer to all “processing of personal data”.

Preamble

A sentence should be added to emphasise the open and global nature of Convention 108.

Recital 2

The reference to “dignity” is put before “fundamental rights and freedoms” as, for example, in the European Charter of fundamental rights.

A reference to the “diversification” of processing and exchange of personal data is added.

The ER should clarify the notion of the “right to control one's own data”. A reference should be also made to the “portability of personal data”, a concept which however goes further than the right to control one's own data.

Recital 3:

The expression “data protection” is replaced by “right to the protection of personal data”. It should be stressed that this right is to be considered in relation to its function in society and

balanced with other fundamental rights, in compliance with the principle of proportionality.

Article 1

The concept of “jurisdiction” is preferred to “territoriality” as already thoroughly discussed in previous meetings.

Article 2

2.a The ER will provide for clarifications concerning the definitions, in particular with regard to the concept of “identifiability” and taking inspiration from previous standards of the Council of Europe, notably Recommendation (2010) 13 on profiling and Recommendation (97)18 on statistics. Consistency with the draft EU Regulation must be ensured.

2.b is redrafted to reflect the idea that manual processing is relevant for the application of the Convention if it enables an “easy” search of a specific subject. The ER will clarify that processing does not only refer to the individualisation of a determined individual but also to other kinds of classifications which allow to search persons with the same characteristics (e.g. profession, age, etc.).

2e The definition of “recipient” would need further clarification – possibly in the ER – in order to avoid confusion with other actors of the processing, as controllers.

Due to the fact that the definitions of biometric and genetic data are still subject to evolution, it is preferred not to include their definitions in the text of the Convention but rather in the ER.

Article 3

3.1 There is a need to clarify that the Convention has a large field of scope covering all sectors (private and public). The possible reference - in the text of Article 3 (instead of ER) - to the possibility for the parties to extend the scope of data protection to persons or groups of persons other than individuals will be considered by the Plenary.

3.1 bis The ER will provide examples of data made accessible to persons outside the personal or household sphere.

Article 4

4.1 The provision should be strengthened in particular by referring to the fact that each Party has to take the necessary measures in its domestic law to give effect to all relevant provisions of the Convention (and not only to the basic principles set out in Chapter II of the Convention).

4.2 It should be clear that such provisions are included in domestic legislation before the ratification or accession of the Party to the Convention. This would allow the Committee provided for by Chapter V (hereinafter referred to as “Committee”) to exercise its assessment.

Article 5

5.1 The word “legitimate” is added before “purpose”.

5.2a A reference to the fact that data subject’s consent must be “explicit” will be added and submitted to the Plenary’s decision. The withdrawal of consent will be addressed in the ER.

5.2b The ER should specify the two different legal basis for data processing, namely “legal” or “contractual” obligations.

5.3b The provision should end after the words “in a way incompatible with those purposes”.

5.3c A new drafting will be proposed to underline that the personal data processed should be restricted to the strict minimum required.

Article 6

A new draft will be presented to the Plenary to take into account the discussions concerning, in particular, the fact that biometric data should remain in the list of data deserving the special protection given by Article 6 because - for their inherent characteristics - they are more subject to abuses. Nevertheless, it was pointed out that these data – as in the case of photographs - do not always raise significant risks for the individual. It is proposed that the reference to “criminal convictions” be extended to include offences as well as security measures. A reference to union membership was also proposed.

Article 7

7.1 The second part of the paragraph should be redrafted as follows: “... security measures *against the alteration, the loss or the destruction – accidental or unauthorised – as well as against unauthorised access and dissemination*”.

The ER will specify that such measures should be adapted to the nature of and the risks for the personal data processed.

7.2 Subject to some formal amendments, the provision is kept as it is.

Article 7 bis

7bis.1 The words “at least” are deleted. The information to be given to the data subject should also cover the nature of the data processed. It should be referred to the establishment instead of the ‘main’ establishment.

The ER will clarify when information must be given and specify that such information may also refer to the obligatory or voluntary nature of providing the requested data.

Article 8 (The numbering below follows the version dated 27 April 2012)

The title is kept as it is now (“Rights of the data subject”).

8.a (former 8 e) should be put at a higher rank in the list of rights. The provision will be redrafted in a more neutral way in order to cover more than the negative legal effects of a decision.

8.b The word “overriding” is deleted. The ER will deal with the practical implementation of this provision. It will also clarify that the right to object is not an absolute right and will consider the relation between such right and the withdrawal of consent, and the consequences on the activities on personal data carried out by the controller before the objection.

8.c The ER will clarify that the intelligible character of the communication of data requested by the data subject refers to both the content and the form of communication.

8.d The word “logic” is replaced by “reasoning”.

Finally, the ER will provide clarifications regarding the right to be forgotten which will not be explicitly mentioned in the text of the Convention.

Article 8bis

The title of that Article should refer to “obligations” instead of “additional measures” and should not only concern the controller.

8bis.1st paragraph The ER will specify that this provision is not aimed at placing an excessive burden on data controllers, who should not in principle be deemed responsible for the design of technologies, while at the same time acknowledging their margin of appreciation (and consequent responsibility) in the way the technology is used. The words “including when delegating to a processor” is replaced by “where applicable data processor”.

8bis, 2nd paragraph The provision should refer to the analysis of the impact of the processing on fundamental freedoms and rights rather than “risk analysis“. The ER will emphasise that such analysis should be proportioned to the risks presented and will provide appropriate examples.

8bis1, 3rd paragraph This obligation should be referred also to data processor - where applicable.

A new paragraph will be drafted and submitted to the Plenary reflecting the idea that products and services for the processing of personal data should be configured in a way that ensures the respect of data protection principles (privacy by design / privacy by default).

The numbering of paragraphs should be introduced.

Article 9

The provision on the derogations on transborder data flows should be moved to Article 12 and the derogations should refer to principles rather than specific provisions.

The ER should specify that derogations provided by national authorities should also respect the principles of proportionality and subsidiarity.

Article 10

The article should be redrafted in order to reflect that appropriate sanctions and remedies are provided with regard to violations of domestic law giving effect to all the provisions of Convention 108 (and not only to the basic principles of Chapter II).

It must be clarified that remedies can be both jurisdictional and non-jurisdictional.

The ER will specify that the provided sanctions can be of different nature, included criminal.

Article 12

Article 12 should be redrafted in accordance with the observations made by the participants

during the meeting, concerning in particular the mechanism provided for a Party invoking that another party has not implemented Convention 108. Attention should be paid to the level of data protection of the domestic legislation and to the fact that an appropriate reaction should be possible where adequacy is not observed.

12.3a The words “or agreements” are added to “international treaties”.

12.4a should specify that consent must be “freely given, specific and explicit”.

12.4c should specify that the “important public interests” must respond to the criteria provided for by Article 9.

Article 12 bis:

Consensus was reached on the fact that adequate financial resources are crucial to ensure independence of supervisory authorities. However, it is agreed that the Convention should not explicitly provide for their autonomy in budget.

A new paragraph should be added to specify that the competence of the supervisory authorities is not extended to supervision on processing operations of judicial bodies acting in their judicial capacity.

12bis.2a A new formulation will better specify the powers of supervisory authorities in particular by taking account of their power to impose sanctions, and their awareness raising mission.

12bis.2b In order to grant a certain margin of appreciation to the supervisory authorities in selecting their interventions (with positive impact on the effectiveness of their work), the English wording “each supervisory authority *shall hear claims* lodged by any person” will be aligned to the French version “Chaque autorité de contrôle *peut être saisie* par toute personne d’une demande”.

12bis.3 The word “staff” is deleted. The ER will clarify the meaning of “instructions” to avoid too broad and unrealistic consequences.

Article 13

The ER will clarify that the co-operation between Parties has not been weakened by the new drafting of Article 13 which has been mostly incorporated in 12 bis.

Article 15

In the redrafting it will be considered whether the expression “appropriate safeguards” is adequate.

Article 18

18.2 The ER will specify that the designated representatives should possess the necessary expertise and experience.

18.3 The Plenary will decide whether a majority of two-thirds of its representatives (voting or entitled to vote) is appropriate for the granting of the observer status.

Article 19

The name of the Committee should be modified to reflect the additional competences - other than consultative – that will be conferred to it by the new drafting of this Article. The provision should include the assessment made by the Committee on parties' compliance with the provisions of the Convention. Political guidance will be sought from the Committee of Ministers regarding the role and competences of the Committee, in light of the budgetary impact of such competences. It is agreed that the Consultative Committee should propose in its proposals of modernisation of the Convention what it considers the best solution, and that the political decision will be made taking into account the ambitious future of the Convention and the related necessary means.

Indeed, the availability of sufficient budgetary resources is crucial to ensure the effectiveness of the Committee's work. In this regard the Secretariat will give further consideration to budget implications and needs for the accomplishment of the Committee's tasks at an ulterior stage of the modernisation work.

19.e and i The ER will provide for clarifications on the procedures and criteria (e.g. fairness and objectivity) of the Committee's opinions on any new accession.

A specific reference to Article 4.3 will be introduced in order to enable the Committee to assess compliance of the Parties to the engagements undertaken.

Article 20

20.1 should be amended to provide at least one meeting of the Committee per year.

Article 22

The reference to 'international organisations' will be changed to directly refer to the European Union.

Article 23

The proposal will continue to include a reference to the opinion of the Committee foreseen under Article 19.e but no change should be made to the the original wording of the end of the sentence as the proposed formulation, which was meant to clarify the procedure, is misinterpretation.

The Bureau agreed that a revised version of the draft proposals, reflecting the discussions and points agreed exchanges during the meeting, would soon be circulated among T-PD delegations and appropriate Council of Europe Committees (notably the CDMSI, the European Committee on Legal Co-operation (CDCJ) and the Committee on Bioethics (DH-BIO) to give them the possibility to submit their proposals of amendments before 25 May, in order to enable the circulation of the compilation of those proposals early June, with a view to its full consideration by the Plenary.

Opinions of the T-PD Bureau

9. The T-PD Bureau took note of document T-PD (2012)01 enclosing the Opinion of the T-PD on Recommendation (1984)2011 of the Council of Europe's Parliamentary Assembly on "the

protection of privacy and personal data on the internet and online media” adopted at the 27th Plenary meeting.

10. The Secretariat informed the Bureau that the CDMSI is currently preparing a draft Declaration of the Committee of Ministers on risks to fundamental rights stemming from digital tracking and other surveillance technologies and that should the CDMSI decide to pursue this work (currently submitted to a written round of comments), the draft Declaration would be submitted to the T-PD for opinion.

Work of other international organisations and institutions

11. The secretariat informed in particular the participants of the work of the OECD Working Party on Information Security and Privacy (WPISP) and its related Volunteer Group.

12. Ms Catherine Pozzo di Borgo reported on her participation as T-PD representative in the Data Protection Day, in particular the session organised by the Council of Europe in Brussels, in the framework of the International Conference on Computers, Privacy and Data Protection 2 (CPDP – Brussels, 25-27 January 2012), enabling a multistakeholder consultation on the proposals of modification of Convention 108. She also reported on the presentation she made to the CDMSI concerning the work of the Consultative Committee, in particular with regard to the modernisation of Convention 108.

Other Issues

13. The Secretariat presented the draft agenda of the 28th Plenary meeting of the T-PD (Strasbourg, 19-22 June 2012). It also informed the participants about the review process of Recommendation (89) 2 on the protection of personal data in the employment sector. As agreed in the last Bureau meeting, the informal working group has started preparing a new structure of the text. It is proposed that the informal working group finalises the revised draft, in view of the next Bureau meeting in November.

Next Meetings

14. The Bureau confirmed that the Plenary meeting of the T-PD will take place from 19 to 22 June in Strasbourg and that the 28th meeting of the Bureau will take place from 28 to 30 November 2012 in Strasbourg.

APPENDIX I

List of participants

MEMBERS OF THE BUREAU / MEMBRES DU BUREAU

CZECH REPUBLIC/RÉPUBLIQUE TCHÈQUE

Hana Štěpánková, [*First Vice-chair*], Head of the Press Department, Spokeswoman, Office for Personal Data Protection

FRANCE

Catherine Pozzo-di-Borgo, [*Seconde Vice-présidente*], Commissaire du Gouvernement adjoint auprès de la CNIL, Secrétariat Général du gouvernement

PORTUGAL

João Pedro Cabral, Legal Adviser, Directorate General of Justice Policy, Ministry of Justice

SERBIA/SERBIE

Nevena Ružić, Head of Office, Commissioner for Information of Public Importance and Personal Data Protection

SWITZERLAND/SUISSE

Jean-Philippe Walter, [*Président*], Préposé fédéral à la protection des données et à la transparence (PFPDT), Chancellerie fédérale

MEMBERS OF THE T-PD / MEMBRES DU T-PD

GERMANY / ALLEMAGNE

Claudia Thomas, Desk Officer Data Protection Unit, Bundesministerium des Innern, Ref. V II

ITALY / ITALIE

Mario Guglielmetti, Service for EU and International matters, Garante per la Protezione dei Dati Personali

MONTENEGRO

Bojan Obrenovic, Director of the Personal Data Protection Agency
Radenko Lacmanovic, Agency for personal data protection
Raznatovic Ana, Traducteur

THE NETHERLANDS / PAYS-BAS

Anne-Marije Fontein-Bijnsorp, Senior International Officer, Dutch Data protection Authority

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

Alexander Germogenov, Deputy Director of Department for creation and development of information society, Ministry of Telecommunication and Mass Communications

Alexander Gorovenko, Head of Information Security Section, Department of Information Society Creation and Development, Ministry of Telecommunication and Mass Communications

Konstantin Kosorukov, Deputy for Legal Affairs to the Permanent Representative of the Russian Federation at the Council of Europe

UNITED KINGDOM / ROYAUME-UNI

William Wormell, EU and International Data Protection Policy, Ministry of Justice

OBSERVERS / OBSERVATEURS

ASSOCIATION EUROPEENNE POUR LA DEFENSE DES DROITS DE L'HOMME / EUROPEAN ASSOCIATION FOR THE DEFENSE OF HUMAN RIGHTS (AEDH)

Marise Artiguelong, Déléguée, AEDH

EUROPEAN COMMISSION / COMMISSION EUROPEENNE

Katerina Dimitrakopoulou, Directorate C: fundamental rights and Union citizenship, Unit C3 Data Protection

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

Floriane Leclercq, Chargée de mission, Commission nationale de l'informatique et des libertés

INTERNATIONAL CHAMBER OF COMMERCE (ICC) / CHAMBRE DE COMMERCE INTERNATIONALE (CCI)

Christopher Kuner, Special Advisor on Data Protection

INTERNATIONAL CONFERENCE OF DATA PROTECTION AND PRIVACY COMMISSIONERS / CONFERENCE INTERNATIONALE DES COMMISSAIRES A LA PROTECTION DES DONNEES ET DE LA VIE PRIVEE

Anton Battesti, Chargé des relations institutionnelles, Service des affaires européennes et internationales, Commission Nationale de l'informatique et des Libertés

INTERPOL

Caroline Goemans Dorny, Counsel, I.C.P.O – INTERPOL

EUROPEAN DATA PROTECTION SUPERVISOR (EDPS) / LE CONTRÔLEUR EUROPEEN DE LA PROTECTION DES DONNÉES (CEPD)

Anne-Christine Lacoste, Bureau du contrôleur Européen de la protection des données

SCIENTIFIC EXPERTS / EXPERTS SCIENTIFIQUES

Cécile de Terwangne, Professeur à la Faculté de Droit, Directrice de recherche au CRIDS (Centre de Recherches Informatique, Droit et Société), Facultés Universitaires Notre-Dame de la Paix (FUNDP)

SECRETARIAT

Direction Générale I – Droits de l’Homme et Etat de droit/ Directorate General I – Human Rights and rule of law

Direction des droits de l’Homme / Human Rights Directorate

Jörg Polakiewicz, Head of the Human Rights Policy and Development Department

Direction de la Société de l’Information et de la lutte contre la criminalité / Information Society and Action against Crime Directorate

Service des Médias, de la Société de l’Information, de la protection des données et de la Cybercriminalité / Media, Information Society, Data protection and Cybercrime Department

Protection des données et Cybercriminalité / Data Protection and Cybercrime

Alexander Seger, Head of Division

Sophie Kwasny, Secretary of the T-PD / Secrétaire du T-PD

Alessandra Pierucci, Administrator / Administrateur

INTERPRETERS / INTERPRETES

Isabel Ann FREEMAN

Léa OUEDRAOGO

Claudine PIERSON

APPENDIX II

AGENDA

1. OPENING OF THE MEETING

- T-PD-BUR(2011)RAP26 Report of the 26th meeting of the Bureau of the Consultative Committee (from 6 to 8 February 2012)
- T-PD(2012)WP Work programme of the T-PD
- T-PD(2011)RAP27Abr Abridged Report of the 27th Plenary meeting of the Consultative Committee (29 November-2 December 2011)
- T-PD-BUR(2011)RAP25 Report of the 25th meeting of the Bureau of the Consultative Committee (from 10 to 12 October 2011)

2. ADOPTION OF THE AGENDA

3. STATEMENT BY THE SECRETARIAT

4. MODERNISATION OF CONVENTION 108

- Ms Cécile de Terwangne, Professor Law Faculty, Namur University (FUNDP), CRID Research Director: the proposals for modification of the Convention.
- Mr Jean-Philippe Moiny, CRID Researcher, Namur University (FUNDP).
- T-PD-BUR(2012)01Rev
New document Modernisation of Convention 108: new proposals
- T-PD-BUR(2012)03Mos
New document Compilation of comments received
- T-PD-BUR(2012)01 Modernisation of Convention 108: new proposals
- T-PD-BUR(2011)19 Modernisation of Convention 108 : proposals
- T-PD-BUR(2011)01mosRev6 “Consultation concerning the modernisation of Convention 108: results”
- T-PD-BUR(2010)09 Report on the lacunae of the Convention for the protection of individuals with regard to automatic processing of personal data (ETS 108) resulting from technological developments
- T-PD-BUR(2011)15 Modalities for the amendment of Council of Europe treaties

- T-PD-BUR(2010)13rev Report on the modalities and mechanisms for assessing implementation of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108) and its Additional Protocol
- T-PD-BUR(2011)25 Secretariat Comments on the strengthening of the Convention's follow up mechanism

5. OPINIONS

Finalised and transmitted opinions

- T-PD(2012)01 Compilation of Opinions

6. WORK OF OTHER INTERNATIONAL ORGANISATIONS AND INSTITUTIONS

- T-PD-BUR(2012)02Mos *New document* Compilation of reports of T-PD representatives in other committees and fora as well as other events and conferences

7. OTHER ISSUES

- Draft recommendation on the protection of personal data used for employment purposes
- Draft agenda of the 28th Plenary meeting of the T-PD (19-22 June 2012)