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

(T-PD)

OPINION ON THE REQUEST FOR ACCESSION BY BURKINA FASO

Introduction

On 17 November 2016, the Secretary General of the Council of Europe received a letter dated 4 October 2016 informing him of Burkina Faso's wish to accede to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter "Convention 108") and its Additional Protocol regarding supervisory authorities and transborder data flows.

The Consultative Committee of Convention 108 recalled that in 2008 it brought attention of the Committee of Ministers to its recommendation to invite non-member states with data protection legislation in compliance with Convention 108 to accede to the Convention. The Ministers' Deputies took note of this recommendation and agreed to examine every accession request in the light of that recommendation (1031st meeting, 2 July 2008).

Opinion

In accordance with Article 4 of Convention 108, each Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in the Convention (Chapter II). Pursuant to Article 3.1 of the Additional Protocol, the Parties shall regard the provisions of Articles 1 and 2 of the Protocol as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Having examined¹ Law No. 010-2004 / AN on the protection of personal data (hereinafter "the Law"²) and taken note of the constitution of Burkina Faso, in particular Article 6 guaranteeing the right to respect for private life, the Committee notes the following:

1. Object and purpose (Article 1 of Convention 108)

The purpose of the Law is set out in Article 1, namely "*to protect, within Burkina Faso, the rights of all individuals in connection with the processing of personal data, irrespective of the type or method of processing, or the identity of the data controller*". This statement complies with the purpose set forth in the provisions of Article 1 of Convention 108; Article 60 further states that "*with effect from the promulgation of this Law, all data processing must comply with the provisions of this Law*" and Article 62 states that "*this Law, which repeals all previous provisions stipulating otherwise, shall be implemented as a national law*".

2. Definitions

The Law sets out the definitions of "personal data", "data processing", "controller" and "recipient" (Articles 2.a, 2.b, 2.d, 2.e of Convention 108) in Articles 2, 3, 4.1 and 4.2 respectively. The "data subject" is defined in Article 4.3 ("*the identifiable person to whom the personal data relate*").

A. Personal data (Article 2.a of the Convention)

Article 2 of the Law defines "personal data" as "*any information which enables, either directly or indirectly, the identification of physical persons, in particular by means of a reference to an identification number or to several particular elements which are specific to their physical, psychological, mental, economic, cultural or social identity*". This definition, which is more detailed than the one given in Convention 108, complies with the definition given in Article 2.a of the Convention.

¹ The Committee has taken note of the Supplementary Act A/SA 1/01/10 on personal data protection within the Economic Community of West African States (ECOWAS) but was not in a position to base its analysis on this Act as the corresponding publication in the official journal of Burkina Faso was not available.

² There is no English official translation of the Law and quotations of the Law in this document as proposed by the Secretariat for reference purposes cannot lead to any form of liability.

B. Processing (Article 2.c of the Convention)

Article 3 of the Law defines “the processing of personal data” as “*any operation or set of operations performed, whether by automated processes or not, by a natural or legal person and applied to personal data, such as the collection, recording, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or interconnection, locking, erasure or destruction*”. This definition corresponds to the one given in Article 2.b of Convention 108.

C. Controller (Article 2.d of the Convention)

Article 4.1 of the Law defines the “controller” as “*the natural or legal person, public or private, with the authority to decide to create personal data*”. It would be helpful to expand this definition so as not to restrict classification as controller to the sole criterion of “creation”, and to include the other aspects referred to in Article 2.d of Convention 108 which also makes a reference to the one who is competent “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”.

3. Scope of the data protection regime (Article 3 of the Convention)

Article 1 of the Law states that it protects persons with regard to the processing of data “*whoever or whichever is the controller*” (that is from the public or private sector). Furthermore, Article 4.1 refers controllers in the public or private sector. Finally, Article 18 deals specifically with processing in the public sector. This scope corresponds to the scope set out in Article 3 of Convention 108 but an explicit mention of it in the Law would be welcome.

In addition, Article 8 provides that the law shall apply “*to automated or non-automated processing of personal data, contained or destined to be included in files whose controller is located on the territory of Burkina Faso or, where not located in said territory, uses processing equipment located on the territory of Burkina Faso, with the exclusion of data used solely for transit purposes.*”

Furthermore, the provisions of Articles 12, 13, 15, 18, 19, 22 and 25 of the Law on the collection, recording and storage of personal data apply to non-automated or mechanised files other than those whose use concerns strictly private matters (Article 57); for these files, the criminal provisions of the Law shall also apply (Article 55).

The Committee is of the opinion that the partial exemption foreseen in Article 10 for “*data processing for the purpose of research in the health field*” (no prior information of the data subject but favourable opinion of the Authority) and the complete exemption foreseen in Article 11 of the Law for “*data processing for the purpose of individual therapeutic or medical treatment of patients*” should be re-examined so that such processing also benefit from the protection guaranteed by the provisions of the Law.

In addition, the Committee questions the articulation between the complete exemption from the scope of the Law of the “*data processing for the purpose of individual therapeutic or medical treatment of patients*” (Article 11) and the provisions of Article 17 (second paragraph) on data subjects’ indirect access to medical data and the provisions of Article 20 on the prohibition of processing of sensitive data – including health data – without the consent of the data subject, except in the case foreseen in Article 21 of the Law (the last hyphen allows the data processing carried out “*for the purpose of preventive medicine, medical diagnosis and administration of treatment and of the therapy*” if carried out by persons bound by medical secrecy).

4. Quality of data (Article 5 of the Convention)

Articles 5, 12 and 14 contain fundamental data protection principles. The consent of the data subjects must be obtained for the processing of personal data, except where otherwise provided by law (Article 5), as in the circumstances laid down in Article 21. It should be noted that the Law does not define the criteria applicable to the 'consent'. The personal data controller must process the data in a fair, lawful and non-fraudulent manner (Article 12). The processing of data must be for "*specific, explicit and legitimate*" purposes; *data must be appropriate, relevant and not excessive in respect of the purposes for which they are collected and then processed; the period of storage must not exceed that necessary for the purposes for which the data are collected and processed; beyond that period, they may not be stored in nominate form except for processing for historical, statistical or research purposes*" (Article 14). The provisions of Articles 5, 12 and 14 are in conformity with those of Article 5 of Convention 108.

One could raise the issue of whether it would be better to refer to the fact that the data subject is identifiable rather than to the "nominate" form of the data stored.

Finally, the principle of the accuracy of personal data should be expressly mentioned (Article 17.3 foresees the right of the data subject to request correction or rectification of his/her personal data but the Law does not lay down the basic principle of accuracy of personal data).

5. Special categories of data (Article 6 of the Convention)

Article 20 of the Law refers to "sensitive data", namely "*personal data relating to health ... or which indicate racial or ethnic origin, political or philosophical opinions, religious beliefs, trade union membership or morals*". Data relating to offences are specifically mentioned in Article 22. To the exception of an absence of explicit reference to 'sexual life', the special categories of data listed in the Law are in conformity with Article 6 of Convention 108.

Article 20 of the Law contains the fundamental principle of the prohibition of the processing of "sensitive data", except where provided for by law together with the appropriate safeguards. Accordingly, personal data relating to offences, convictions and security measures may be processed only by the courts and public authorities in the exercise of their lawful duties, by legal entities performing a public service, with the approval of the supervisory authority, and by officers of the court for the sole purpose of the performance of their duties (Article 22). The specific nature of the processing of personal health data is addressed in Articles 10, 11, 17.2, 17.3, 21 sixth indent, 23 (which stipulates that disclosure or commercial use of personal health data is prohibited) and 56 of the Law. In these provisions, the Law complies with Article 6 of Convention 108.

6. Data security (Article 7 of the Convention)

Article 15 of the Law provides that "*the controller must apply all appropriate technical or organisational measures to ensure the security of data and in particular protect data from accidental or unlawful destruction, accidental loss, alteration, dissemination or unauthorised access*". This provision complies with Article 7.1 of Convention 108.

7. Additional safeguards for the data subject (Article 8.a to 8.d of the Convention)

"*The controller must inform the data subject of the purpose of the processing, the recipients of the data, the mandatory or optional nature of responding to the questions asked and any consequences of failure to respond*" (Article 13.1). The Committee welcomes the right provided for in Article 6 for any individual "[...] to learn of and challenge the information and reasoning used in the processing, whether automated or not, the results of which are detrimental to him or her". The provisions of the Law comply with Article 8.a of Convention 108.

Data subjects have the right to be informed of the data stored regarding them, without excessive delay or expense (Article 17.1). Regarding medical data, Article 17.2 which prescribes the systematic exercise of the right of access in an indirect manner, by the intermediary of a doctor, could be softened with a view to limiting this indirect access to certain situations only.

Article 17.3 provides for a right of rectification “*if the data are shown to be incomplete or inaccurate, the data subjects may ask for them to be rectified*”. Article 16 second paragraph refers to a right of objection (“*data subjects have the right to object, on legitimate grounds, to the processing of personal data relating to them*”). The provisions of the Law comply with Articles 8.b to 8.d of Convention 108.

8. Exceptions, restrictions (Article 9 of the Convention)

The Law provides for limited exceptions and restrictions. A limitation of the rights of the data subject is set out in Article 17.4 with regard to “*processing relating to the security of the State, defence and public safety*” with indirect exercise of these rights through the intermediary of the Supervisory Authority. Moreover, the Law provides that certain provisions are not applicable to processing carried out by the press if they would result in a limitation of the exercise of freedom of expression (Article 25). The provisions of the Law comply with Article 9 of Convention 108.

9. Sanctions and remedies (Articles 8.d and 10 of the Convention)

Parts III (Article 37) and IV (Articles 46 to 54) of the Law provide for several sanctions which vary from one month to 5 years of imprisonment and from 200 000 to 500 000 CFA francs.

Furthermore the Supervisory Authority can according to Article 37.d issue warnings to concerned parties or refer to the public prosecutor the offenses it becomes aware of. Individuals can file a complaint to the Supervisory Authority (Article 37.f) or in court. In case of a negative opinion of the Supervisory Authority on a proposed data processing to be carried out for the benefit of the State, the data controller according to Article 19 can bring a dispute to the Council of State. In general all decisions of the Supervisory Authority can be appealed.

These provisions comply with Article 10 of Convention 108.

10. Transborder flows of personal data (Article 12 of the Convention and Article 2 of the Additional Protocol)

Article 24 provides that personal data which have been subject to automated processing governed by Article 19 (private sector) may be transmitted between Burkina Faso and a foreign state only where the protection provided for by the Law is ensured, except in exceptional circumstances (notion which would need to be defined in light of the practice of the Supervisory Authority in the field) and where transmission is authorised by decree issued following the prior approval of the Supervisory Authority. The Committee recommends that the provisions of Article 24 be reconsidered in order to better regulate transborder data flows.

Regarding transborder data flows for public sector processing, Article 18 is to be applied, which also provides for the prior approval of the Supervisory Authority.

11. Supervisory Authority (Article 1 of the Additional Protocol)

The Law provides for the establishment of a Supervisory Authority, entitled “Information Technology and Freedoms Commission”, referred to in Part II and Articles 10, 17.4, 18, 19, 22 second indent, 24.2, 52, 56.1 and 59 of the Law. The Commission is an independent administrative authority, whose establishment, membership, status of members, budget, large competences (*a priori* powers as well as investigative powers),

publicity of data processing carried out and annual report are set out in Articles 26, 27, 28 to 34, 35 and 36, 37 to 43, 44, 45 respectively. The Commission comprises a panel of nine members appointed by the Council of Ministers, after elections or designations by their peers in different bodies or associations to which they belong, to ensure the independence of the Supervisory Authority. The members cannot be members of the government or responsible of a private company. Furthermore they swear an oath of independence and of impartiality.

These provisions comply with Article 1 of the Additional Protocol to Convention 108.

It should furthermore be noted that the Commission was established in December 2007 and can present the following outline of activity (as of 2008):

DESIGNATION	NUMBER
NUMBER OF STRUCTURES WHOSE FILES HAVE BEEN DEALT WITH	61 STRUCTURES
REQUESTS FOR ADVICE	50 CASES
NORMAL DECLARATIONS	144 FILES
APPROVALS OF TRANSFERS	45 FILES
REQUESTS FOR OPINION	14 FILES
COMPLAINTS	40 FORMAL COMPLAINTS HANDLED

Additional comments

The provisions of the Law do not apply to *“temporary copies made in the context of technical operations of transmission and access provision to a digital network for the purpose of automatic, intermediate and transitory retention of data and with the sole aim of allowing other recipients of the service to benefit from the best possible access to the information”* (Article 9). The Committee underlines that such an exemption is only permissible if personal data are stored for a very short period of time and if the temporary copies are deleted once the transfer is completed.

The Committee commends the provisions of Article 7: *“No court decision involving an assessment of an individual’s behaviour may be based solely on the automated processing of information intended to define the profile or personality of the data subject or to assess certain aspects of his or her personality.*

No administrative or private decision involving an assessment of an individual’s behaviour may be based solely on the automated processing of information intended to define the profile or personality of the data subject”.

Conclusion

In the light of the above, the Committee considers that the Law on data protection of Burkina Faso, while deserving adjustments in line with the comments of this Opinion, generally *satisfies* the rules of Convention 108 and its Additional Protocol. Accordingly, the Consultative Committee, on the basis of the analysis of the applicable data protection legislation is of the opinion that the request from Burkina Faso to be invited to accede to Convention 108 and its Additional Protocol should be given a favourable response.