

Strasbourg, 7 July 2011

T-PD-BUR (2011) RAP 24 EN

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

REPORT

24th T-PD Bureau Meeting

Strasbourg, 28-30 June 2011

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 24th meeting from 28 to 30 June 2011 at the Council of Europe in Strasbourg. The list of participants and the agenda appear in Appendices I and II.

Opening of the meeting and statement by the Secretariat

2. The Chair, Mr Jean-Philippe Walter (Switzerland), opened the meeting and explained that two main issues would be focussed upon: the modernisation of Convention 108 and the revision of Recommendation (89) 2 on the protection of personal data used for employment purposes.
3. The participants took note of the information provided by Mr Jörg Polakiewicz, Head of the Human Rights Development Department, concerning the reform of the Organisation, which had made data protection one of the priorities for its 2012-13 biennial programme. Apart from a restructuring of the intergovernmental sector, the reform had implications for the organisation of the Secretariat General, which will be modified as of 1 October 2011.
4. He also drew attention to the success of the Conference on "Internet Freedom - From principles to global treaty law?", held on 18 and 19 April in Strasbourg, the 4th European Dialogue on Internet Governance, organised on 30 and 31 May in Belgrade, and the International Data Protection Conference, held on 16 and 17 June in Budapest under the Hungarian Presidency of the Council of the European Union.
5. He announced that another international conference on data protection would take place on 21 September 2011 in Warsaw, under the Polish Presidency of the Council of the European Union.

6. Lastly, concerning Convention 108, he announced that Armenia had recently signed the Convention, Uruguay had submitted an accession request, which was currently being examined by the Committee of Ministers and the Russian Federation intended to ratify the Convention in the near future.

Adoption of the agenda

7. The Bureau adopted the agenda, as shown in Appendix II.

Modernisation of Convention 108

8. The Chair referred to the positive results of the public consultation launched on 28 January 2011, on the basis of which the scientific experts had prepared a summary report. In the light of this report and the general lines of the replies, an informal document had been drawn up to guide the Bureau's discussions on the questions raised by the modernisation of Convention 108. The document follows the structure of the Convention, article by article.
9. On the basis of the informal document, the Bureau examined the questions of substance to be addressed in the context of the modernisation exercise and adopted initial positions on a number of matters, so as to permit the preparation of a working document for the next Plenary meeting, which would record the directions taken by the discussions held. The Bureau will pursue the elaboration of this document at its next meeting.
10. Mr Richard Thomas made a presentation to the Bureau on "A new approach to international transfers" in the context of transborder data flows, based on the concept of self-regulation and the introduction of certification mechanisms.
11. The Bureau noted the following preliminary orientations which will be further developed after its next meeting:

General remarks

The general and pragmatic nature of the Convention's provisions is to be maintained, with more detailed sectoral texts by way of recommendations of the Committee of Ministers of the Council of Europe.

The need for consistency and compatibility with the legal framework of the European Union clearly emerges from the replies received during the consultation.

The wish to maintain technologically neutral provisions is heavily emphasised.

Finally, the Convention's potential, as a universal standard and its open character were emphasised.

Preamble

An essential balance to strike involves the freedom of expression, which takes on another dimension with the Internet: the various fundamental rights have to be reconciled (to be examined in the explanatory report, with a possible reference to the principle of the public's right of access to administrative documents).

Article 1 – Object and purpose

It is proposed to uphold the right to data protection and to refer to the concept of “jurisdiction” instead of “territory”:

Article 2 – Definitions

"Personal data": this definition should not be changed (NB: crucial to ensure consistency with EU) 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 : ‘An individual is not considered “identifiable” if identification requires unreasonable time or effort’).

"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.

"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 furthermore be made in the explanatory report to ‘making available’ under ‘dissemination’.

“Controller of the file”: notion to be revised and possibly to be replaced by “controller: (consistency with EU) with a reference to the various levels of responsibility.

New definitions, such as ‘processor’, ‘service provider’, ‘recipient’ or “manufacturer of technical equipment” should be incorporated if specific obligations are foreseen for them.

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 appears necessary to include an exception for household data processing (social networks, blogs etc. which require specific attention).

In respect of manual processing, even if rare, it could be covered in particular to counter the risk of bypassing the conventional obligations.

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

The quality of the ‘necessary measures’ should be scrutinised *a priori* by the Committee in the framework of transborder flows provisions, in order to ensure that the conditions for the free flow of data are met.

Article 5 – Quality of data

This article should be revised in order to expressly incorporate the principle of proportionality and where necessary to highlight the grounds for a processing to be legitimate.

It was decided to deal with the introduction of new principles (“accountability”, “privacy by design” i.e. the obligation to apply the principles of protection as from the designing stage) at a later stage.

Article 6 – Special categories of data

The present definition should be retained while adding new illustrations to the explanatory report underlining the functional aspect (data may become sensitive according to the purpose of the processing considered); this aspect could also be inserted in the article itself.

Article 7 – Data security

Security should apply to data as well as to its processing. The obligation to report security breaches should be introduced, but it is underlined that such an obligation should not become trivial (it should only concern breaches related to a certain volume of data). The question related to recipients (individuals, data protection authorities) and the conditions (how and when) of this notification requires examination.

Article 8 – Additional safeguards for 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.

With regard to the right to oblivion which is difficult to implement while being known in legal systems, it is proposed to elaborate further the explanatory report in order to underline the link between the relevant provisions of the Convention (article 5.e – length of time of data storage, and article 8.c – right of rectification or erasure of data).

Article 9 – Exceptions and restrictions

For the time being, no amendments are proposed to this article.

Article 10 – Sanctions and remedies

It is decided not to set out in further details this article and to entrust to the Parties the provision of sanctions and available remedies. With regard to the powers of the supervisory authorities, it is underlined that they should be reinforced (ex officio action, intervention before the courts for existing proceedings).

Article 12 – Transborder data flows

This key question will have to be further examined, as a flexibility between the free flow of data and effective protection needs to be found. The co-existence of provisions on transborder data flows in both the Convention and article 2 of the additional Protocol (transfer of data to States which are not Parties) will have to be revised (item to discuss at the next Bureau meeting on the basis of concrete proposals) and the current provisions need to be examined with a view to agreeing on a new approach which would amend both the Convention and the Protocol.

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

To be discussed during the next Bureau meeting.

Articles 18, 19 and 20 – Consultative Committee

A strengthening of the Consultative Committee's functions and powers should be foreseen.

Article 1 of the Additional Protocol

It appears desirable to improve co-operation between authorities, particularly in order to provide for joint investigations. The authorities' powers of action require harmonisation and clarification (notably to permit to strengthen the ex post supervision), and the criteria of independence should be specified. It is requested that provision be made for mutual recognition of the decisions and the measures taken by the authorities.

12. Lastly, the question of the legal form which the modernisation of the Convention will take was addressed. The Secretariat presented a document on the conditions of amendment of Council of Europe treaties and explanations were provided by Ms Elise Cornu of the Treaty Office. The nature of the instrument amending the Convention (protocol, amendments) should be determined in the light of the changes to be made and taking into account the importance to promote the accession of non member States of the Council of Europe to the existing Convention. The Bureau noted that at this stage it is premature to opt for one solution rather than another.

Recommendation No. R (89)2 of 18 January 1989 on the protection of personal data used for employment purposes

13. The Bureau examined the latest version of the draft revised Recommendation (89)2 on the protection of personal data used for employment purposes, as amended following the last Bureau meeting and introduced new changes in order to finalise the draft.
14. The Bureau decided to transmit the draft revised Recommendation to the T-PD delegations for consultation, as well as to the Steering Committee on Bioethics (CDBI), the European Committee on legal co-operation (CDJC) and to the European Committee on Social Rights for any comments by 16 September 2011.
15. The revised draft Recommendation will be on the agenda of the Committee's next Plenary meeting.

Opinions of the T-PD Bureau

Draft instruments prepared by the Committee of Experts on New Media (MC-NM)

16. The Bureau examined the draft opinions of the TP-D on the texts prepared by the MC-NM on social networks and search engines, as prepared by the Secretariat on the basis of comments received from several delegations.

17. The respective drafts will be sent to the TP-D delegations for final approval before forwarding them to the MC-NM Secretariat.

Uruguay's accession request

18. The Secretariat informed the Bureau of the examination on 30 June 2011 by the Rapporteur Group on legal co-operation (GR-J) and by the Committee of Ministers on 6 July 2011 of Uruguay's accession request, underlining that the relevant opinion of the TP-D was forwarded to the Committee of Ministers for information.

Recommendation 1960 (2011) of the Parliamentary Assembly of the Council of Europe

19. The Bureau examined and finalised its draft opinion related to Recommendation 1960(2011) of the Parliamentary Assembly on the need for a global consideration of the human rights implications of biometrics and asked the Secretariat to transmit it to the Committee of Ministers' Secretariat, by the agreed deadline.

Report by the Codexter on "False identity information as a challenge to immigration authorities"

20. The Bureau examined the revised draft opinion on the report by Codexter, finalised it and asked the Secretariat to forward it to Codexter's Secretariat.

Other issues

Work of other international organisations and institutions

- Organisation for Economic Co-operation and Development (OECD)

21. Mr Michael Donohue referred to the excellent co-operation between the Council of Europe and the OECD and informed the Bureau of the work done by his organisation in the data protection sphere. This work included, *inter alia*, research on the economic value of personal data, an assessment of the implementation of the 2007 Recommendation on cross-border co-operation in the enforcement of laws protecting privacy and a review of the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, adopted over 30 years ago.
22. The Bureau also finalised its opinion on the review of the OECD guidelines.

Participation by T-PD members in other committees and fora as well as other events and conferences

23. The Bureau took note of the participation of the Representative of the TP-D in the work of the Group of experts on the predictivity, genetic tests and insurance, as well as of the opinion requested by the CDBI on the draft consultation document on predictivity, genetic tests and insurance.
24. The Bureau decided to submit the draft consultation document on predictivity, genetic tests and insurance to the Delegations for information and to ask for possible comments by 9 September 2011.
25. The Bureau took note of the information concerning the participation of the Committee's Secretariat in several events (see paragraph 4 *infra*, EuroDIG and the International Conference of Budapest) as well as of the preparation of forthcoming contributions (in particular to the

International Conference of Warsaw, the Internet Governance Forum in Nairobi and the 33rd International Conference of the Commissioners on data and privacy protection).

Observers, experts and international institutions and organisations

- Observers:

26. Mr Danny Weitzner informed the Bureau of the most recent developments in the USA in the data protection field, notably the White Paper on this issue currently being drawn up by the White House. The American model, which sought to reconcile the dynamics of innovation and respect for individual rights, would make use of codes and involve the establishment of a privacy protection office at federal level within the Department of Commerce. This office would be responsible for working with the parties concerned (in particular the Federal Trade Commission) regarding privacy protection issues. He underlined the importance for the United States of America to guarantee global interoperability between national systems, to promote mutual recognition and to bring down barriers to the free flow of data.

- Institutions and International organisations:

27. With regard to the request of the European Association for the Defense of Human Rights (AEDH), the Bureau took note of the positive responses to the written consultation of the Delegations and thus confirmed the invitation made to the AEDH to participate in the work of the Committee in the future.

28. The Secretariat informed the Bureau of possible admission criteria for future requests, which will be detailed in an information document to be submitted to the Plenary meeting.

29. A Representative of the Permanent Mission of Mexico to the Council of Europe informed the Bureau on the 33rd International Conference of the Commissioners on data and privacy protection which will be held in Mexico City from 31 October to 4 November 2011. The organisers invited the interested persons to attend this Conference. Another point of information concerned the examination by the Mexican authorities of a possible accession of Mexico to Convention 108.

Dates of the next meetings

30. The Bureau confirmed that the 25th meeting would take place from 10 to 12 October 2011 and the Plenary meeting from 29 November to 2 December 2011.

Appendix I – List of participants

MEMBERS OF THE BUREAU

CZECH REPUBLIC

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

ITALY

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

LUXEMBOURG

Gérard Lommel, Président, Commission Nationale pour la protection des données (CNPD),

PORTUGAL

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

SPAIN/ESPAGNE

José Leandro Núñez García, Advisor on International Affairs, Agencia Espanola de Proteccion de Datas

SWEDEN/SUEDE

David Törngren, Legal Adviser, Ministry of Justice, Justitie Departementet

SWITZERLAND/SUISSE

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

MEMBERS OF THE T-PD

GERMANY

Claudia Thomas, Desk Officer Data Protection Unit, Bundesministerium des Innern

RUSSIAN FEDERATION

Vladimir Tararov, Head of Section of the Interministerial Committee on the affairs of the Council of Europe, Department of European Cooperation, Ministry of Foreign Affairs of the Russian Federation

Konstantin Kosorukov, Deputy to the Permanent Representative of Russian Federation

UNITED KINGDOM

Kate Egner, Policy Advisor, EU & International Data Protection Policy, Ministry of Justice

OBSERVERS

EUROPEAN COMMISSION

Liene Balta, Policy Officer in Data Protection Unit of DG JUSTICE

FRENCH-SPEAKING ASSOCIATION OF PERSONAL DATA PROTECTION AUTHORITIES

Olivier Matter, Legal adviser at the Department of European and International Affairs, Commission nationale de l'informatique et des libertés

INTERNATIONAL CHAMBER OF COMMERCE (ICC)

Christopher Kuner, Special Advisor on Data Protection, Privacy and E-business issues, Hunton & Williams

INTERNATIONAL CONFERENCE OF DATA PROTECTION AND PRIVACY COMMISSIONERS

Olivier Matter, Legal adviser at the Department of European and International Affairs, Commission nationale de l'informatique et des libertés

INTERPOL

Florence Audubert, Juriste Principale, Secrétaire de la Commission de Contrôle des Fichiers d'INTERPOL

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

Michael Donohue, Division Information, Informatique et Communications

U.S.A.

Danny Weitzner, Deputy Chief Technology Officer for Internet Policy, Office of Science and Technology Policy-Executive, Executive Office of the President

Molly Rapaport, Intern, Strasbourg State Department, American Consulate General

OTHER PARTICIPANTS

PERMANENT REPRESENTATION OF MEXICO TO THE COUNCIL OF EUROPE

Andrea Barbosa, Attachée

OFFICE OF THE EUROPEAN DATA PROTECTION SUPERVISOR (EDPS)

Anne-Christine Lacoste, Conseiller juridique

SCIENTIFIC EXPERTS

Giovanni Buttarelli, Assistant European Data Protection Supervisor

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](#))

Jean-Philippe Moiny, Chercheur au CRIDS (Centre de Recherches Informatique, Droit et Société), Doctorant FNRS, Facultés Universitaires Notre-Dame de la Paix ([FUNDP](#))

Richard Thomas, Global Strategy Advisor, Centre for Information Policy Leadership - Hunton & Williams

SECRETARIAT

**DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS /
DIRECTION GENERALE DES DROITS DE L'HOMME ET DES AFFAIRES JURIDIQUES**

Directorate of Standard-Setting / Direction des activités normatives

Human Rights Development Department / Service du développement des droits de l'Homme

Jörg Polakiewicz, Head of Department / Chef de Service

***Information society, media and data protection Division /
Division de la société de l'information, des médias et de la protection des données***

Jan Malinowski, Head of Division / Chef de Division

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

Elvana Thaçi, Administrator / Administrateur

Corinne Gavrilovic, Assistant / Assistante

Delphine Cabalion, Assistant / Assistante

André Augand, Study Visitor / Visiteur d'études

**DIRECTORATE OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW /
DIRECTION DU CONSEIL JURIDIQUE ET DU DROIT INTERNATIONAL PUBLIC**

Legal advice department and treaty office / Service du conseil juridique et bureau des traités

Elise Cornu, Administrator / Administrateur

INTERPRETERS / INTERPRETES

**Angela Brewer
Rémy Jain
Jean-Pierre Ringler**

Appendix II – Agenda

Strasbourg, 28 June 2011

T-PD-BUR 24 (2011) OJ

BUREAU OF THE CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA [ETS No. 108] (T-PD-BUR)

24th meeting, Strasbourg, Agora, room G05

28 June 2011 – 9.30 am

30 June 2011 – 5.00 pm

AGENDA

1. OPENING OF THE MEETING

- [T-PD-BUR \(2011\)](#) Report of the 23rd meeting of Bureau of the Consultative Committee (22-24 March 2011)
[RAP 23](#)

2. ADOPTION OF THE AGENDA

3. STATEMENT BY THE SECRETARIAT

- M. Jörg Polakiewicz, Head of Human Rights Development Department

4. MODERNISATION OF CONVENTION 108

Required action: the Bureau will consider the report on the consultation on the modernisation of Convention 108 and will consider proposals to make to the Consultative Committee.

- Ms Cécile de Terwangne, Professeur à la Faculté de Droit, Directrice de recherche au CRIDS, Université de Namur (FUNDP): Presentation of the report on the modernisation of Convention 108 for the protection of individuals with regard to automatic processing of personal data
- Mr Richard Thomas, Global Strategy Advisor, Centre for Information Policy Leadership, Hunton & Williams: [Presentation of transborder data flows: A new approach to international transfers](#)
- Ms Elise Cornu, Administrator, Treaty Office: Implications under treaty' law

- [T-PD-BUR \(2011\) 10](#)
New Report on the consultation on the modernisation of Convention 108 for the protection of individuals with regard to automatic processing of personal data
- [T-PD-BUR \(2011\) 01](#) Compilation of comments received on the consultation on the modernisation of Convention 108
- [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 No 108) resulting from technological developments
- [T-PD BUR \(2011\) 15](#)
New Modalities for the amendment of Council of Europe treaties

5. RECOMMENDATION REGULATING THE USE OF PERSONAL DATA USED FOR EMPLOYMENT PURPOSES

Required action: the Bureau will finalise the draft revised Recommendation in view of its transmission to delegations for comments.

- Mr Giovanni Buttarelli, Assistant European Data Protection Supervisor, Brussels: Presentation of the draft Recommendation regulating the use of personal data used for employment purposes
- [T-PD BUR \(2011\) C](#) Draft Recommendation regulating the use of personal data used for employment purposes
prov
New
- [T-PD-BUR \(2010\) 1](#) Report on Recommendation No. R(89) 2 of 18 January 1989 regulating the use of personal data used for employment purposes
rev
- [T-PD BUR \(2011\) C](#) Compilation of comments received from the T-PD on the report on Recommendation No. R(89) 2 of 18 January 1989 regulating the use of personal data used for employment purposes
rev
- [T-PD BUR \(2011\) 09](#) Compilation of relevant national legislation in personal data protection used for employment purposes
New

6. OPINION

Required action: the Bureau will examine the requests for opinions and the corresponding documents and will finalise the drafts or take note of the information provided.

6.1 DRAFT INSTRUMENTS PREPARED BY THE MC-NM

- [T-PD BUR \(2011\) 12](#) Compilation of comments received from the T-PD members on the draft opinions texts prepared by the Committee of Experts on New Media (MC-NM) on social networking and for search engine providers.
New

- [prov](#)
New [T-PD BUR \(2011\) 05](#) Draft opinion of the T-PD Bureau on the draft texts prepared by the Committee of Experts on New Media (MC-NM) on social networking
- [rev](#)
New [T-PD BUR \(2011\) 11](#) Compilation of comments received from the T-PD Bureau on the draft texts prepared by the Committee of Experts on New Media (MC-NM) on social networking and for search engine providers
- [003_en](#) [MC-NM \(2010\)](#) Draft Recommendation on measures to protect and promote respect for human rights with regard to social networking services
- [008_en](#) [MC-NM \(2010\)](#) Proposal for draft guidelines for social networking providers
- [prov](#)
New [T-PD BUR \(2011\) 06](#) Draft opinion of the T-PD Bureau on the draft texts prepared by the Committee of Experts on New Media (MC-NM) for search engine providers
- [004_en](#) [MC-NM \(2010\)](#) Draft Recommendation to Member states on the protection of human rights with regard to search engines
- [009_en](#) [MC-NM \(2010\)](#) Proposal for draft guidelines for search engine providers

6.2 URUGUAY'S ACCESSION REQUEST

- **New** [T-PD BUR \(2011\) 08](#) Opinion on Uruguay's request to be invited to accede to Convention 108 and its additional Protocol

6.3 RECOMMENDATION (1960) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

- [prov](#)
New T-PD BUR (2011) 13 Draft opinion of the T-PD Bureau on the Recommendation (1960) of the Council of Europe Parliamentary Assembly on the need for a global consideration of the human rights implications of biometrics

6.4 REPORT OF THE CODEXTER ON "FALSE IDENTITY INFORMATION AS A CHALLENGE TO IMMIGRATION AUTHORITIES"

- [03](#)
New T-PD-BUR (2011) Opinion of the T-PD Bureau on the CODEXTER report on "false identity information as a challenge to immigration authorities"

7. OTHER ISSUES

A. Reports of other international organisations and institutions

- **New** prov T-PD BUR (2011) 14 Reply of the T-PD Bureau to the questionnaire for reviewing the OECD guidelines governing the protection of privacy and transborder flows of personal data

B. Participation of T-PD members in other committees and *fora* as well as other events and conferences

- **New** [T-PD \(2011\) 16 prov](#) Compilation of reports of T-PD representatives in other committees and *fora* as well as other events and conferences

C. Observers, Experts and international Institutions and Organisations: definition of admission criteria

8. DATES OF THE NEXT MEETINGS

ORDER OF BUSINESS

	28 June 2011	29 June 2011	30 June 2011
09.30	Items 1, 2, 3 and 4	4 and 5	4 and 6
12.30/13.00	Lunch	Lunch	Lunch
14.00/14.30	4	5	7 and 8