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

**(T-PD)**

**INFORMATION ELEMENTS ON THE EVALUATION  
AND FOLLOW-UP MECHANISM**

DG I – Human Rights and Rule of Law

## 1. Introduction

The follow-up of the implementation of Convention 108<sup>1</sup> was a priority topic for the Consultative Committee of the Convention (T-PD) which accordingly included this question in its “*Work programme for 2009 and beyond*”. The Committee of Ministers of the Council of Europe welcomed the adoption of this work programme at its 1079<sup>th</sup> meeting on 10 March 2010 and, in this connection, encouraged the Consultative Committee to start preparing, in accordance with the priorities set out in the work programme, a draft additional protocol to Convention 108.

The Consultative Committee worked for almost two years on modernising Convention 108, putting forward proposed changes to the provisions of the Convention. These proposals were adopted in 3<sup>rd</sup> reading at the Committee’s 29<sup>th</sup> plenary meeting of 27 - 30 November 2012. In the context of the modernisation process, new functions have been assigned to the Convention Committee (the current Consultative Committee) in order to strengthen its powers in the field of evaluation and follow-up, which may be exercised in respect of candidates for accession to the Convention and existing Parties (see the corresponding proposed provisions in Appendix I).

Accordingly, the Convention Committee will have two new functions:

- To evaluate a candidate for accession in terms of the guaranteed level of protection and its conformity with the Convention;
- To follow-up the implementation of the Convention by a Party to the Convention.

The information provided in this document is based on these new provisions, set out in the proposals for modernising Convention 108, and to a large extent on the report<sup>2</sup> written by the scientific expert in 2011, providing food for thought about the modalities and mechanisms which would be appropriate to develop for the purposes of evaluating and following-up the implementation of the Convention.

In addition, it should be pointed out that in his proposed priorities for 2011, the Secretary General put forward the idea of taking stock of the situation of the Council of Europe’s conventions, through a critical review of the relevance of those conventions. It was understood that this exercise would provide “the basis for decisions on follow-up, including measures to increase the visibility and the number of parties to relevant conventions.” The points made in this document are in keeping with this approach (see the information document in question<sup>3</sup> and the relevant decision of the Committee of Ministers of 10/04/2013).

## 2. Why an evaluation and follow-up mechanism?

The purpose of an evaluation activity is to identify the level of protection reached by a candidate for accession and its compliance with the Convention, in order to facilitate objective verification prior to the deposit of the instruments of ratification or to the approval necessity of the Committee of Ministers for accession.

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<sup>1</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) of 1981

<sup>2</sup> 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 No. 108) and its Additional Protocol, Marie GEORGES

<sup>3</sup> Information document SG/Inf(2012)12 – Report on the review of Council of Europe conventions, 16 May 2012.

To that end, the evaluation must take into account all the elements necessary for achieving the objective of the Convention (to ensure the protection of persons with respect to their personal data and thereby make possible the free movement of information between the Parties, in accordance with the provisions of the Convention).

In Convention 108, as modernised, the requirement of a comprehensive data protection legislation, which must make provision for a supervisory authority, is a precondition to the deposit of the instruments of ratification of the Convention with the Council of Europe Secretariat. This requirement is quite exceptional and ties in with the need to guarantee the effectiveness of the legislative reforms in the field.

It may be the case however, that such a legislative requirement is not complied with prior to ratification, which is particularly harmful in view of the Convention's objective of guaranteeing a harmonised level of protection and promoting the free flow of data. It is thus necessary to evaluate the level of protection prior to ratification or accession, in order to ensure that all new Parties satisfy their commitments.

With regard to the follow-up mechanism, the large number and increasing speed of developments in information and communication technologies (ICTs) and their uses, and consequently the processing of personal data and their deployment, with their advantages and also their possible associated risks for rights and freedoms, should lead to a strengthening of this mechanism in order to ensure, in terms of both time and space, protection of individuals' rights and freedoms and democratic sustainability in light of political, legal, technical, social and economic developments. In particular, the magnitude of current and future technological innovations is virtually infinite on the human time-scale. In addition, there are innovations in design methods, including participatory design, new procedures for use, the emergence of new or alternative economic models (for example, social networks), and new international divisions of labour, involvement of multiple specialist standardisation bodies in ITU, IETF, W3C networks or in generalist and sectorial applications (ISO, ICAO, WHO, etc.).

It is suggested that consideration be given to whether it would be appropriate to establish a procedure and periodic evaluation methods similar to those proposed for the verification prior to ratification or accession (chapter 7).

The Convention Committee should also periodically learn lessons from these evaluations, in particular in order to draft new standards. Lastly, the consequences of a non-compliance evaluation of a Party to the Convention, member or non-member of the Council of Europe should be examined (chapter 8).

In a nutshell, the objective is to ensure the credibility of Convention 108 and to establish a genuine zone of harmonised protection, guaranteeing that data flows between Parties occur among states offering an appropriate level of protection.

### **3. Main aspects of the evaluation and follow-up procedure**

The procedure:

- must be transparent, effective and geared towards "assisting" Parties to the Convention and candidates for accession; it is therefore suggested that the standard documents adopted for the purpose of gathering information (questionnaires) will be made public in the same way as the opinions and recommendations made;

- will focus on facilitation; the Committee will offer advice and help the Parties and candidates for accession to overcome any difficulties in implementing the Convention;
- [will take due account of the specific nature of each Party (e.g. federal system in place)];
- will be proactive (pursuant to article 4 of the Convention the Party commits to contribute actively to its evaluation).

#### **4. Functions and composition of the Convention Committee**

The role of the Committee is to provide advice and assistance to the Parties to the Convention to help them comply with their obligations deriving from Convention 108 and, more generally, to facilitate, promote, monitor and ensure its implementation.

The Committee is comprised of representatives of each Contracting Party to Convention 108 (or in their absence, the deputy representatives), appointed in accordance with the provisions of Article 18.2 of the Convention.

According to the rules of procedure of the Convention Committee, its Bureau is responsible for preparing draft opinions and the Committee may decide to set up working groups, specifying their composition and terms of reference.

#### ***Working group***

In order to carry out the evaluations and follow-up, it is suggested that a specific working group be set up in the Convention Committee, composed of six members and a president appointed for three years, one-third of members being renewed each year (after the initial period of three years), in order to ensure some stability in its methods and practice. Its composition should also respect a geographical balance and institutional origin (representatives of governments and supervisory authorities). When the country of a member of the working group is being examined, the said member shall be replaced for the evaluation process of that country, to ensure that the process is delivered in an impartial manner.

The working group will be in charge of the following tasks and functions:

- Producing the model questionnaire and monitoring its development
- Evaluating the replies
- Drafting the pre-reports of evaluation or follow-up (as the case may be)
- Organising and participating to the field visit (when relevant)
- Drafting the final report: with recommendations and conclusions

The pre and final reports should be submitted for approval to the Convention Committee during its Plenary meeting or by written procedure.

#### **5. The Conventions Committee's method**

The Convention Committee shall prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of data protection of the candidate for accession (Article 19.e) and shall periodically review the implementation of this Convention by the Parties in accordance with the provisions of Article 4.3 and decide upon measures to take where a Party is not in compliance with the Convention (Article 19.h).

All Contracting Parties will be evaluated. For impartiality reasons, it is suggested to proceed by alphabetical order (see table in Appendix II).

The Convention Committee will have two cumulative methods to evaluate a candidate for accession and follow-up the implementation by a Contracting Party:

- questionnaires, in all cases and
- field visits, when necessary

For flexibility reasons, field visits could be carried out either by the working group, either by an expert appointed by the Committee.

The model questionnaire shall be prepared by the working group based on the standards defined in chapter 6 here below and should be identical for all Contracting Parties.

It is furthermore suggested to include all follow-up and evaluation activities in the biannual working programme of the Convention Committee.

## **6. Evaluation and follow-up standards and information gathering**

Evaluation and follow-up shall be based on three aspects: the data protection *national law* in force in the Contracting Party or candidate for accession, as well as other relevant laws; the supervisory authority (the data protection authority –“DPA”); and other remedies available to the data subject.

It should be specified that the notion of ‘law’ in the Convention also encompasses regulations, administrative guidelines, codes of good practice or professional conduct and also, according to the legal system of the Party, the case law.

With regard to the legislation in force and its effectiveness, particular emphasis will be placed on examination of the provisions of Articles 4, 5 6, 7, 7bis, 8, 8bis, 9, 10, 11 and 12 of the modernised Convention 108.

Exceptions of Article 9 shall be under scrutiny, in terms of proportionality and for assessing the necessity to derogate from such a right.

With regard to the supervisory authority (DPA), the Committee will examine the implementation of the provisions of the current proposed version of Article 12bis of the modernised Convention 108 and more specifically, the question of its independence, structure, powers, budget and the role of the authority.

It is suggested to include in the evaluation questionnaire a part of questions on the implementation of the Convention’s provisions and another part gathering information on:

- *The main features of the development of ICTs* in the Contracting Party or the candidate for accession, to evaluate the context and the nature of measures taken in respect of data protection and the possible difficulties in implementation. This concerns, for example, information on areas of competence or activities particular to the field of innovation, the level and progression of investments, production and expenses by large sectors of public and private activities (including imports and exports in the field of information technology), the

number and progression of internet and mobile telephone users by age bracket, indications on policies and current or anticipated technology development programmes.

- The constitutional, institutional, legislative, regulatory and case-law framework of both general and specific relevance to data protection, including where this is sector-related or concerns international commitments.
- The specific institutional framework of data protection relating to the supervisory authority, its independence, its powers, and the main activities already carried out or those planned to be carried out;
- The existence of awareness-raising and training programmes on the right to data protection and its implementation.

## **7. The evaluation and follow-up procedure**

It should be stressed that final reports, as well as any observations made by the Party concerned or candidate for accession will be made public following transmission.

Furthermore, the procedure described here below should be set out in the *Rules of Procedure* of the Convention Committee.

### **a. Evaluation procedure of a Party to the Convention**

It should involve the following steps (see also the diagrams in Appendix III):

**Step 1:** the questionnaire will be sent to the Contracting Party with a three-month deadline to respond. Replies should be collected from the Contracting Party concerned which, according to the Convention, is required to make an active contribution to this exercise. Replies will be additionally completed by comments made by observers to the Convention Committee and by competent NGOs as well as independent experts.

**Step 2:** the Secretariat will receive the replies and may require additional information if necessary within four weeks.

**Step 3:** the working group will check the information gathered and will assess the level of compliance (full or partial) with Convention 108 and will then produce a draft report (pre-report) for submission to the Convention Committee. The draft report should suggest whether field visit is necessary to gather missing information. It is furthermore suggested that the following points should be included in the pre-report:

- a general description of the legislation, case-law and any other relevant documentation, including statistics, and a summary of best practices regarding implementation of the Convention;
- an overview of the problems encountered in the implementation of the Convention and the negative effects of any declaration made in accordance with the Convention;
- conclusions comprising recommendations on the measures to be taken to improve the practical implementation of the Convention.

**Step 4:** the pre-report will be presented to the Contracting Party and its observations (replies being public) on the conclusions and recommendations will be gathered. A draft opinion will be sent in advance to the Party concerned, which will have the opportunity to comment on the draft

and clarify any misunderstanding prior to its transmission to the Convention Committee for examination and adoption.

**Step 5:** the final report will be drafted and will include conclusions and recommendations, indicating whether the Contracting Party is in compliance with the provisions of Convention 108. In case of **compliance**, the process will be completed.

**Step 6:** in case of **non-compliance**, a dialogue will be engaged with the Contracting Party and a co-operation process will be initiated to provide assistance to the Party to comply. A series of measures will be taken as indicated in chapter 8 hereafter.

#### ***b. Evaluation process of a candidate for accession***

It shall follow the same steps previously described, with the exception of the step 6.

In its final report (step 5) the Convention Committee will prepare a compliance opinion for **transmission to the Committee of Ministers** which will examine the application for accession (see appendix IV). It should be noted that this procedure will also apply to member states of the organisation, prior to the ratification of the Convention.

For the evaluation of a candidate for accession, this process should be achieved as rapidly as possible in order to enable the candidate to rapidly initiate improvements if necessary, and co-operation where appropriate.

### **8. Measures in the event of non-compliance**

In accordance with the provisions in the proposed version of Article 19.h and 19.i of the modernised Convention 108, the Convention Committee shall decide upon measures to take where a Party is not in compliance with the Convention and shall facilitate, where necessary, the friendly settlement of all difficulties related to the application of this Convention.

In the event of a finding of non-compliance, the Committee's initial objective will be to assist the Party concerned or the candidate for accession and its competent authorities, to comply with its commitments under the Convention, taking due account of the causes, nature, level and frequency of non-compliance.

These measures will be of an incentive and progressive nature:

- the Committee may offer advice and, if necessary, help provide assistance from experts; this assistance could take the form of recommendations on the interpretation of legal texts or on technical or administrative methodology;
- depending on the case in question, the Committee may invite and/or assist the Party or candidate for accession to draw up an action plan to achieve compliance within a timeframe agreed between the Committee and the Party or candidate for accession concerned;
- the Committee may ask the Party or candidate for accession concerned to submit reports on its efforts to comply with its (future) obligations, in accordance with Article 4.3 of the Convention;

In case none of these measures enable to achieve the expected results and where the Party still does not satisfy its commitments under the Convention, other measures could be taken, i.e.:

- The Committee of Ministers will be duly informed about the lack of compliance
- The measures laid down in article 60 of the Vienna Convention on the Law of Treaties of 1969 could apply (e.g. possibility of other Parties of suspending the operation of the treaty in respect of the defaulting state).

#### **9. Secretariat of the Convention Committee**

The Secretary General shall place at the disposal of the Convention Committee the necessary staff, including the Secretary of the Committee. The Secretariat will provide the Committee with the administrative services it may require, and will be responsible for co-ordinating the meetings of the working group. It will also forward the questionnaires to the Contracting Parties concerned, compile the replies received and request further information if the replies are lacking in detail, without prejudice to the right of the Working Group to request additional information.

#### **10. Financing the evaluation and follow-up activities**

The budget of the Convention 108 evaluation and follow-up activities will be calculated according to the procedure ultimately adopted: the composition of the evaluation group, the number of evaluations carried out each year, its work programme for follow-up, etc.

The Convention Committee budget will cover the cost of the Committee's evaluation and follow-up activities, such as the per-diem and travel costs in order to attend meetings or for field visits, but will not pay any fees to the members of the working group. To reduce costs, the working groups could hold some meetings using conference calls/video-conferences over the internet.

It should also be noted that in accordance with the provisions in the proposed version of Article 18.4 of the modernised Convention 108, any Party which is not a member of the Council of Europe shall contribute to the funding of the activities of the Convention Committee according to the modalities established by the Committee of Ministers in agreement with that Party.

## APPENDIX I

### Convention for the Protection of Individuals with Regard to the Processing of Personal Data (abstract)<sup>4</sup>

#### Article 4 – Duties of the Parties

- 1 Each Party shall take the necessary measures in its domestic law to give effect to the provisions set out in this Convention and ensure their effective application.
- 2 These measures shall be taken by each Party prior to ratification or accession to this Convention.
- 3 Each Party undertakes to allow the Convention Committee provided for in Chapter V to evaluate the observance of its engagements and to contribute actively to this evaluation, notably by submitting reports on the measures it has taken and which give effect to the provisions of the present Convention.

#### Article 19 – Functions of the committee

The Convention Committee:

- e shall prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of data protection of the candidate for accession;
- f may, at the request of a State or an international organisation or on its own initiative, evaluate whether the level of data protection the former provides is in compliance with the provisions of this Convention;
- h shall periodically review the implementation of this Convention by the Parties in accordance with the provisions of Article 4.3 and decide upon measures to take where a Party is not in compliance with the Convention;
- i shall facilitate, where necessary, the friendly settlement of all difficulties related to the application of this Convention.

#### Article 20 – Procedure

5. Subject to the provisions of this Convention, the Convention Committee shall draw up its own Rules of Procedure and establish in particular the procedures of evaluation set out in Article 4.3 and of examination of the level of protection provided for in Article 19, on the basis of objective criteria.

#### Article 23 – Accession by non-member States and international organisations

- 1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consulting the Parties to the Convention and obtaining their unanimous agreement and in light of the opinion prepared by the Convention Committee in accordance with Article 19.e, invite any State not a member of the Council of Europe or an international organisation to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

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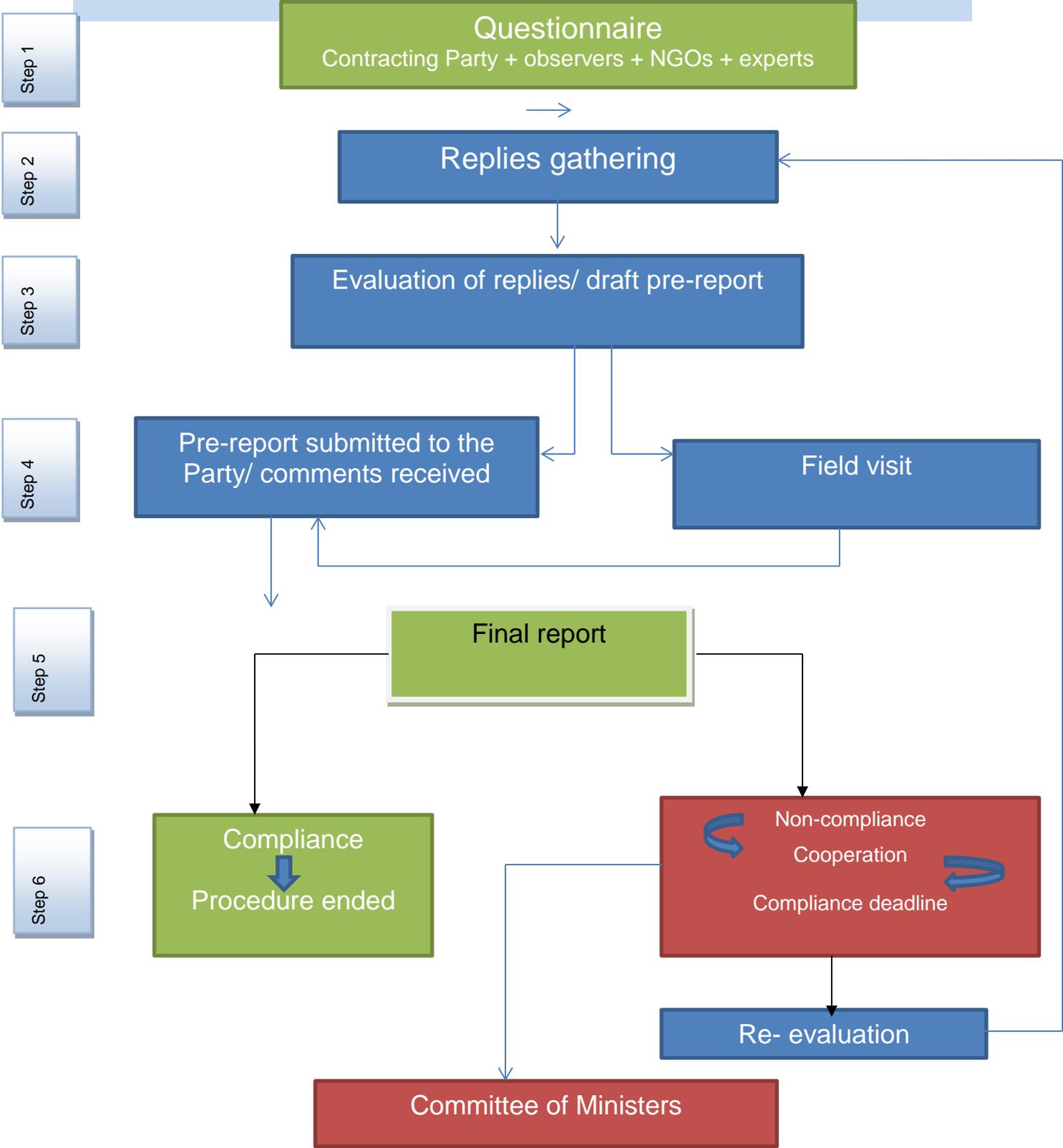
<sup>4</sup> Proposals on the modernisation of Convention 108 adopted by the Consultative Committee at its 29th plenary meeting of 27 – 30 November 2012

**APPENDIX II**

List of Parties to Convention 108/ Liste des Parties à la Convention 108

<i>States</i>	<i>Signature</i>	<i>Ratification</i>	<i>Entry into force</i>
Albania	9/6/2004	14/2/2005	1/6/2005
Andorra	31/5/2007	6/5/2008	1/9/2008
Armenia	8/4/2011	9/5/2012	1/9/2012
Austria	28/1/1981	30/3/1988	1/7/1988
Azerbaijan	3/5/2010	3/5/2010	1/9/2010
Belgium	7/5/1982	28/5/1993	1/9/1993
Bosnia and Herzegovina	2/3/2004	31/3/2006	1/7/2006
Bulgaria	2/6/1998	18/9/2002	1/1/2003
Croatia	5/6/2003	21/6/2005	1/10/2005
Cyprus	25/7/1986	21/2/2002	1/6/2002
Czech Republic	8/9/2000	9/7/2001	1/11/2001
Denmark	28/1/1981	23/10/1989	1/2/1990
Estonia	24/1/2000	14/11/2001	1/3/2002
Finland	10/4/1991	2/12/1991	1/4/1992
France	28/1/1981	24/3/1983	1/10/1985
Georgia	21/11/2001	14/12/2005	1/4/2006
Germany	28/1/1981	19/6/1985	1/10/1985
Greece	17/2/1983	11/8/1995	1/12/1995
Hungary	13/5/1993	8/10/1997	1/2/1998
Iceland	27/9/1982	25/3/1991	1/7/1991
Ireland	18/12/1986	25/4/1990	1/8/1990
Italy	2/2/1983	29/3/1997	1/7/1997
Latvia	31/10/2000	30/5/2001	1/9/2001
Liechtenstein	2/3/2004	11/5/2004	1/9/2004
Lithuania	11/2/2000	1/6/2001	1/10/2001
Luxembourg	28/1/1981	10/2/1988	1/6/1988
Malta	15/1/2003	28/2/2003	1/6/2003
Moldova	4/5/1998	28/2/2008	1/6/2008
Monaco	1/10/2008	24/12/2008	1/4/2009
Montenegro	6/9/2005	6/9/2005	6/6/2006
Netherlands	21/1/1988	24/8/1993	1/12/1993
Norway	13/3/1981	20/2/1984	1/10/1985
Poland	21/4/1999	23/5/2002	1/9/2002
Portugal	14/5/1981	2/9/1993	1/1/1994
Romania	18/3/1997	27/2/2002	1/6/2002
Russia	7/11/2001	15/5/2013	1/9/2013
Serbia	6/9/2005	6/9/2005	1/1/2006
Slovakia	14/4/2000	13/9/2000	1/1/2001
Slovenia	23/11/1993	27/5/1994	1/9/1994
Spain	28/1/1982	31/1/1984	1/10/1985
Sweden	28/1/1981	29/9/1982	1/10/1985
Switzerland	2/10/1997	2/10/1997	1/2/1998
The former Yugoslav Republic of Macedonia	24/3/2006	24/3/2006	1/7/2006
Ukraine	29/8/2005	30/9/2010	1/1/2011
United Kingdom	14/5/1981	26/8/1987	1/12/1987
Uruguay		10/4/2013	1/8/2013

**APPENDIX III**  
**Follow-up mechanism**  
**Diagram**



**APPENDIX IV**  
**Evaluation mechanism of a candidate for accession**  
Diagram

