



Strasbourg, 30 September 2013

T-PD-BUR(2013)02rev3

**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 108¹ was a priority issue 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 encouraged in 2010 the Consultative Committee to start preparing a draft additional protocol to Convention 108, in accordance with the priorities set out in the work programme.

The T-PD worked intensively on the modernisation of Convention 108 in 2011 and 2012 and reached consensus on the modernisation proposals which were adopted at third reading by the Committee at its 29th 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 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 inspired to a large extent from the report² 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. The expert's report examined these modalities and mechanisms in terms of promoting a double virtuous circle in time and space, able to ensure the sustainable protection of the fundamental rights and freedoms of individuals with regard to the automatic processing of personal data at global level.

In addition, it should be pointed out that the Secretary General in his proposed priorities for 2011, promoted 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 elements developed in this document are building on this approach (see information document³ and relevant decision of the Committee of Ministers of 10/04/2013).

2. Why an evaluation and follow-up mechanism?

The purpose of an evaluation process is to identify the level of protection reached by a candidate for accession⁴ and its compliance with the Convention. The purpose is to facilitate the impartial verification, prior to the deposit of the instruments of ratification to the Secretary General or more precisely prior to the decision taken by the Committee of Ministers, inviting a candidate to accede to the Convention.

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

² 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

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

⁴ A candidate for accession could be a state but also an international organisation

Prior to acceding to Convention 108, the candidate for accession has to take the necessary measures to ensure that its domestic law allows the Convention to be implemented. Article 4 of the modernised⁵ Convention provides that: "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.*"

To that end, the evaluation must take into account all elements necessary for achieving the objective of the Convention, namely: a comprehensive data protection legislation (providing for the general principles applicable to any sector, possibly supplemented by other special laws, including regarding transfer of data to a state non-party to the Convention) and an independent supervisory authority (composition, statute, activities).

Such requirement relates directly to the need of guaranteeing the effectiveness of the legislative reforms in the field.

In view of the Convention's objective of assuring a harmonised level of protection and thus promoting the free flow of data, it is necessary to assess the level of protection prior to ratification or accession, in order to guarantee that all new Parties satisfy their commitments.

With regard to the follow-up process, the main objective is to monitor the implementation of the Convention by a Party and to ensure that the latter complies with its commitments. Under the Convention, a contracting Party undertakes to allow the Convention Committee to evaluate the observance of its engagements and to contribute actively to the evaluation. In the event of non-compliance the Convention Committee shall decide upon measures to take and shall facilitate, where necessary, the friendly settlement of all difficulties related to the application of the Convention.

Indeed, 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.).

The Convention Committee should learn lessons from these evaluations, in particular in order to draft new standards.

In a nutshell, the objective is to ensure the credibility of Convention 108 and to establish genuine dynamic 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:

⁵ Corresponds to the modernisation proposals adopted by the Consultative Committee at its 29th plenary meeting of 27-30 November 2012.

- must be transparent, effective and impartial; it is therefore suggested that the standard documents adopted for gathering information on the convention principles and their effective implementation (evaluation questionnaires) will be made public in the same way as the opinions and recommendations made;
- will focus on facilitation and assistance to Parties to the Convention; the Committee will offer advice and help the Parties and candidates for accession to overcome any difficulties in implementing the Convention;
- 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 effective implementation.

The Committee is composed 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. The Committee may also 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 working group be set up in the Convention's 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 working group member is being reviewed, 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), after hearing all stakeholders
- Organising and participating to the field visit (when relevant)
- Drafting the final report: with recommendations and conclusions

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

Subject to budget availability, the Committee shall decide to set up more than one working group, in such a way as to make the evaluation and follow-up procedures as effective as possible. Those working groups will be composed and will operate the same manner as described previously.

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 review the implementation of the 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). Alternatively the alphabetical order could be combined with other more "substantial" criteria. Such criteria could be the date of the Party's accession, declarations made and the ECHR cases involving that Party.

The Convention Committee shall use two methods to assess a candidate for accession and follow-up the implementation by a Contracting Party, which may be combined:

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

The model questionnaire shall be prepared by the working group based on the standards defined in chapter 6 here below and should be identical to all Contracting Parties. The modalities of the field visits are dealt with in chapter 7.

It is furthermore suggested that all follow-up and evaluation activities shall be provided in the biannual working programme of the Convention Committee.

6. Evaluation and follow-up criteria and information gathering

Evaluation and follow-up criteria shall be based on three aspects:

- data protection national law in force, as well as other relevant laws;
- supervisory authority;
- and remedies available to the data subject.

It should be specified that the notion of 'law' in the Convention encompasses not only the legislation in force on data protection but also regulations, administrative guidelines, codes of good practice or professional conduct and the case law, if such approach is provided by the legal system of the Party.

With regard to the legislation in force and its effectiveness, should go under scrutiny provisions of Articles 2, 4, 5, 6, 7, 7bis, 8, 8bis, 9, 10, 11, 12 and 12bis of the modernised Convention 108.

Exceptions of Article 9 shall be examined, in terms of proportionality and for assessing the necessity of measures taken in order to derogate from such rights.

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

It is suggested that the evaluation questionnaire should focus on the implementation of the Convention's provisions (legal framework of both specific and general relevance to data protection, institutional framework and supervisory authority), as well as to gather 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, including the bilateral and multilateral agreements in force which have an impact on data protection;
- *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 underlined that final reports, as well as any observations made by the Party concerned or candidate for accession will be made public following transmission.

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

a. Follow-up procedure of a Party to the Convention

The evaluation activity should involve the following steps (see also the diagrams in Appendix III):

Step 1: the follow-up questionnaire will be sent to the Contracting Party with a three-month time limit to respond. Under the Convention, the Contracting Party concerned 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 require additional information, if necessary, within four weeks.

Step 3: the working group will check the information gathered and request additional information if necessary. This evaluation will be based on the standards defined under chapter 6 and should not exceed a three-months period. After this audit, the working group will produce a draft report (pre-report) within a two-month period, suggesting whether a field visit⁶ is necessary to gather missing information.

⁶ For the modalities of the field visits refer to page 8

In order to acquire an overall vision of the national situation 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 draft report will be submitted 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, within a two-month period. The pre-report will be adjusted if necessary, to encounter comments and observations of the Party concerned. It will be then submitted again to the Contracting Party and to the Convention Committee for examination and adoption either during its Plenary meeting (if the Plenary is held two months after transmission of the pre-report) or by written procedure.

Step 5: Based on the conclusions of the Convention Committee, the final report will be drafted within six-weeks, providing recommendations if necessary and indicating whether the Contracting Party is in compliance with the provisions of Convention 108 and recommendations when needed. The final report will be submitted to the country concerned and to the Committee of Ministers. 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 in reaching compliance. A series of measures will be taken as discussed under chapter 8 and a timeframe to comply with the report's recommendations will be imposed to the Contracting Party. Such timing should take into consideration the nature of the recommendations, as well as the complexity of their implementation.

b. Evaluation process of a candidate for accession

The evaluation process of a candidate for accession shall follow the same steps as previously described, with exception of step 6.

Instead of the final report (step 5), the Convention Committee will prepare a compliance opinion within a six-weeks period, based on the assessment described under steps 1 to 4. It will then submit the compliance opinion **to the Committee of Ministers** which will examine the application for accession (see appendix IV).

The opinion will indicate whether the candidate for accession is in a position to be invited to accede or not and will provide conclusions and recommendations if necessary, on the measures to be taken to allow a better compliance of national framework with Convention 108.

If the Conventional Committee delivers a negative opinion, the candidate for accession will be offered assistance for complying with its obligations, such as legal advice or cooperation projects (for more details see chapter 8).

This evaluation process should be achieved as rapidly as possible in order to enable the candidate to initiate improvements and co-operation programmes, where appropriate.

It should be noted that this procedure will also apply to member states of the Council of Europe, prior to the ratification of Convention 108.

c. Modalities of the visits

Where the information gathered under step 3 does not appear to be adequate to assess with accuracy the level of compliance with the convention principles and their effective implementation, the working group may suggest organising a field visit.

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

The purpose of the visit will be the collection of information and clarifications on unsubstantial and short replies delivered by the Contracting Party in the evaluation questionnaire. At the same time, the working group or the expert carrying the visit will endeavour to provide an overall vision of the national situation in order to ensure that the respect for the Convention's principles is actual and effective.

This field work will be carried out with the support of the supervisory authority and competent NGOs.

8. Measures in the event of non-compliance

In accordance with the provisions of Article 19.h and 19.i of the modernised Convention 108, the Convention Committee shall decide upon measures to be taken 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 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 and the nature, 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;
- as the case may be, 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. This action plan could fall under the cooperation projects⁷ of the Council of Europe, entirely financed by it or co-financed with other donators (such as the EU);
- 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;

If none of these measures enable to achieve the expected results within the timeframe agreed 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

⁷ Strategic programming and resource mobilisation project of the Council of Europe

- The measures laid down in article 60 of the Vienna Convention on the Law of Treaties of 1969 could apply (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 secure the Convention Committee with the necessary staff, including a 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 Convention 108 evaluation and follow-up activities will be calculated according to the procedure ultimately adopted: composition of the evaluation group, number of evaluations carried out each year, number of follow-up activities scheduled in the biannual programme, planned and effective period of follow-up activities and scheduled number of field visits (cost depending on their duration as well).

The Convention Committee budget will cover the cost of the Committee's evaluation and follow-up activities, such as 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 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.

Furthermore, the Committee of Ministers decided on 10 April 2013 (Deputies' 1168th meeting) that any Contracting Party to a Council of Europe convention which is not a member of the Council of Europe shall be invited to make a financial contribution to the said convention in keeping with the arrangements laid down in the resolution⁸ when it participates as of right in the follow-up mechanism of the convention.

⁸ Resolution [CM/Res\(2013\)7](#) concerning financial arrangements for the participation of non-member States in Council of Europe conventions.

APPENDIX I

Convention for the Protection of Individuals with Regard to the Processing of Personal Data (abstract)⁹

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.

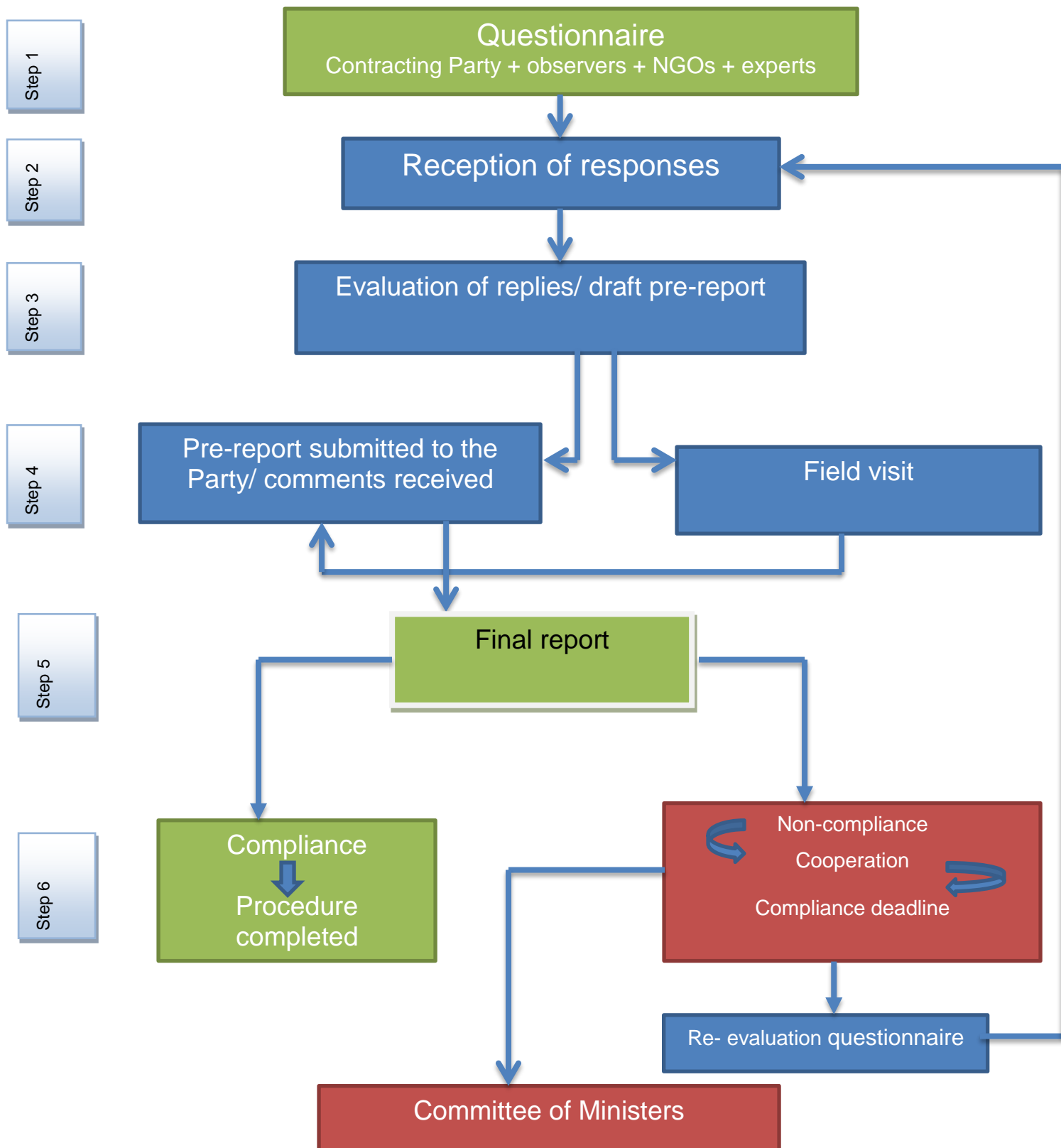
⁹ Proposals on the modernisation of Convention 108 adopted by the Consultative Committee at its 29th plenary meeting of 27 – 30 November 2012

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

