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**THE 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 OF SENEGAL

Introduction

On 2 April 2015 the Secretary General of the Council of Europe received a letter from the Minister of Foreign Affairs and Senegalese Abroad expressing the wish of the Republic of Senegal to accede to the Convention for the protection of individuals with regard to automatic processing of personal data (hereafter “Convention 108”) and to its Additional Protocol regarding supervisory authorities and transborder data flows.

The Consultative Committee of Convention 108 (T-PD) recalls that, in 2008, it invited the Committee of Ministers to take note of its recommendation to allow non-member States with data protection legislation in accordance with Convention 108 to accede to this Convention. The Ministers' deputies took note of this recommendation and agreed to examine any accession request in light of this 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). In accordance with Article 3.1 of the Additional Protocol, the provisions of Articles 1 and 2 of the Protocol shall be regarded by the Parties as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Having examined the Constitution and relevant law (Law N 2008-12 concerning the personal data protection, as it has been amended on 25 January 2008 – hereafter “the Data Protection Act”) of the Republic of Senegal, the T-PD notes the following:

1. Object and purposes (Article 1 of Convention 108):

The Data Protection Act defines under Article 1 the purpose and aim of the law: the protection of the individuals' privacy, which is “susceptible to be endangered by the collection, the processing, the transmission, the storage and the use of personal data”. While the Constitution of the Republic of Senegal does not explicitly state a “right to privacy”, the Data Protection Act deals with the purpose of the law as well as its aim to ensure the respect for fundamental rights and freedoms of the individuals.

Article 1 of the Data Protection Act is considered to be in line with the purpose of the provisions of Article 1 of Convention 108, which is to ensure the “respect for individuals' rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of personal data relating to him (“data protection”)”.

2. Definitions

a) Personal data (Article 2.a of Convention 108):

The Data Protection Act defines in Article 4.6 “personal data” as “any information relating to a natural person identified or directly or indirectly identifiable, in reference to a number of identification or in reference to one or several elements, pertaining to his or her physical, physiological, genetic, psychic, cultural, social or economic identity”.

This definition is more detailed than the wording of Convention 108 and fully corresponds to the definition provided for in Article 2.a of Convention 108.

b) Special categories of data (Article 6 of Convention 108):

The Data Protection Act defines in Article 4.8 “sensitive data” as “personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life”. Article 4.9 furthermore defines health data. Beyond that, the Data Protection Act particularly mentions genetic data within the list of special categories.

The definitions of special categories of data are in line with Article 6 of Convention 108.

c) Processing (Article 2.c of Convention 108):

Article 4.19 in conjunction with Article 2 of the Data Protection Act defines the processing of personal data. The definition of processing within the Data Protection Act corresponds to the definition of Article 2.c of Convention 108. The Data Protection Act furthermore adds a number of operations to the open-ended list of Convention 108, such as interconnection and encryption.

d) Controller (Article 2.d of Convention 108):

The definition of the controller is provided for by Article 2.15 of the Data Protection Act. It means “the natural or legal person, public or private, any other organism or association which, alone or jointly with others, decides to collect and to process personal data and determines the purposes”. This definition reflects the notion of the “controller of the file” contained in Article 2.d of Convention 108.

3. Scope of the data protection regime (Article 3 of Convention 108):

The Data Protection Act has a comprehensive scope laid out in Article 2 which applies to any processing and collection of data by a natural or legal person, public or private, automated or not, when the data is intended to form part of a filing system. Furthermore, the Data Protection Act also provides for the application of the Data Protection Act to personal data processing operated by controllers established in Senegal or elsewhere, where Senegalese law is applied,

as well as personal data processing operated by controllers who use “means of processing” on the territory of Senegal for their personal data processing.

The scope of the Data Protection Act (Article 2) corresponds with the criteria on which the scope of Convention 108 was established.

4. Quality of data (Article 5 of Convention 108):

Articles 33 to 39 of the Data Protection Act give effect to the fundamental principles of data protection such as the limitation of purposes, quality, lawfulness and fairness, proportionality, accuracy of data and limited time of preservation. The data controller must request consent from the data subject in order to fulfill the criteria for legitimacy of the data processing (Article 33) and other legal grounds for the processing are listed. Furthermore, the data is to be processed in a lawful, fair and not fraudulent way (Article 34), only for “specified, explicit and legitimate purposes” and proportional - adequate, relevant and not excessive - in relation to the legitimate purposes (Article 35). A data preservation period, which is linked to the achievement of the original purpose, is laid out. In general, the principles within Articles 33 to 39 of the Data Protection Act comply with the provisions of Convention 108. An exception exists for the collection of “historical, statistical or research” data “under the law” (Article 35 in conjunction with Article 72). Concerning this exclusion, it is recommended that specific legislation covering those types of processing be clarified or enacted, if such is not the case.

5. Special categories of data (Article 6 of Convention 108):

Articles 40 and 41 of the Data Protection Act include the basic principle of prohibiting the processing of sensitive data unless there are appropriate safeguards in place. These safeguards, as well as the safeguards provided for “the processing of data relating to offenses, criminal convictions or security measures” (Article 42) and “health data” (Article 43), are seen to be appropriate and consistent with the provisions of Convention 108.

6. Data security (Article 7 of Convention 108):

In accordance with Article 38 in conjunction with Article 71 of the Data Protection Act the data controller (and the processor according to Article 39) must implement appropriate technical and organisational measures to protect personal data against accidental or unauthorised destruction, accidental loss, unauthorised access, alteration (see also Article 74) or dissemination, as provided for in Article 7 of Convention 108.

7. Right of information (Article 8.a of Convention 108):

The Data Protection Act lays down the general obligation to inform the data subject of the processing (Articles 58 to 61). The following information must be provided to the data subject (Article 58):

“1) The identity of the controller and, where appropriate, his representative;

- 2) The purpose or purposes of the processing for which the data are intended;
- 3) Categories of data concerned;
- 4) The recipients or categories of recipients to whom the data might be disclosed;
- 5) Knowing if the answer to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply;
- 6) Being able to ask not to be included in the file;
- 7) The existence of a right of access to data relating to and correction of data;
- 8) The duration of preservation of data;
- 9) If necessary, transfer of personal data envisaged abroad.”

Additionally, where the personal data is not collected from the data subject, the information needs to “be transmitted to the person at the time of data recording or, if their communication is envisaged, at the latest during the first communication” (Article 59). This is being reinforced by the principle of transparency (Article 37) and complies with the requirements of Convention 108.

8. Additional safeguards for the data subject (Articles 8.b to 8.d of Convention 108):

The Data Protection Act provides the right to object (Article 68), the right of access (Articles 62 to 67), the right to rectification and deletion (Articles 69 to 71).

a) The right of access:

The Data Protection Act provides that “any person proving his identity has the right to request, in writing, regardless of the medium” the data controller to provide information, such as the processing, type of data, origin, recipients and the transfer of the personal data (Article 62).

b) The right to object:

According to Article 68 of the Data Protection Act, “any individual has the right to object, for legitimate reasons that” his or her personal data are being processed, except “if the processing meets a legal requirement”. The data subject can also object to the communication of his or her data to third parties.

c) The right of rectification and deletion:

Article 69 of the Data Protection Act requires that the data must be, “as appropriate, rectified, completed, updated, deleted or locked” when the data “is inaccurate, incomplete, equivocal, or whose collection, use, disclosure or storage is prohibited”.

The T-PD notes that a number of elements could be clarified: 1) criteria for deciding on the fee for exercising the right of access; 2) the current amount of the fee if any, in order to evaluate if it meets the criteria laid down in Convention 108 “without excessive expense”; 3) if that fee is reimbursed to the data subject in case of inaccurate data, or of unlawful processing 4) the “compensation” in case of denying access based on a confidentiality duty laid down by law.

Overall the additional safeguards correspond to the requirements of Convention 108.

9. Exceptions and restrictions (Article 9 of Convention 108):

The Data Protection Act does not foresee any blanket exceptions and provides for limited exceptions and restrictions (Article 2.5).

Exemption based on legal obligations or in connection with legal proceedings: the Data Protection Act provides for safeguards regarding the processing of health data (Article 43) as well as the right to information (Article 60). They are detailed, appropriate and consistent with the provisions of Convention 108 (Article 9). For instance, exceptions to the right of information in cases the data is processed on behalf of “the state” and for “the security interests of the state, defense, public safety or the object the enforcement of criminal convictions or security measures” (Article 60.1), “the prevention, investigation, detection and prosecution of any offense” (Article 60.2) and “important economic or financial interest of the state, including in, monetary budget areas, customs and taxation” (Article 60.3). Such limitations need to be necessary for the specific purpose of the data processing. This corresponds with the principles laid out in Article 9 of Convention 108.

Exemption on the conciliation of privacy with freedom of speech: the Data Protection Act provides for restrictions focused on the data processing for “purposes of journalism, research or artistic or literary expression” (Articles 45 and 46). The T-PD notes that the reconciliation of the right to privacy and data protection with the freedom of expression needs to be adapted. The protection of an individual who is not a professional journalist should also be included in order to meet the principle of necessity in a democratic society for the freedom of expression (9.2.b of Convention 108).

10. Sanctions and remedies (Article 10 of Convention 108):

The Criminal Code (Decree N 2008-721 of 30 June 2008 concerning law enforcement N 2008-12 of 25 January 2008 concerning the personal data protection) lays down the penalties in case of violation of the provisions of the Data Protection Act (Article 431-8 to 431-31). These are maintained by the cybercrime law (Law N 2008-11 of 25 January 2008 concerning the cybercrime).

11. Transborder data flows (Article 12 of Convention 108 and Article 2 of its Additional Protocol):

The Data Protection Act provides under Article 49 for an “adequate level of protection of privacy, freedom and fundamental rights of individuals with regard to the processing of” the personal data which is transferred to a third country. The Commissioner of Personal Data “must first verify that the controller provides an adequate level of protection”, which is assessed in the light of the Data Protection Act as well as “the characteristics of the processing, such as its purpose, duration and the nature, origin and destination of the processed data”. These criteria are rather similar to the criteria set forth in the Additional Protocol of Convention 108.

12. Supervisory authority (Article 1 of the Additional Protocol):

The Data Protection Act provides for a supervisory authority named “Committee of Personal Data (CPD)” (Articles 5 to 16). This Committee is an independent authority which sets its rules and code of ethics (Article 5). It authorises its expenses and budget, which is part of the state budget, under subsequent control of the Court of Auditors. In principle, the status, conditions and criteria of the setting of the CPD and its workings as well as its duties and powers correspond with the principles laid down in the Additional Protocol.

Additional considerations

It is worth noting that:

- The Data Protection Act emphasises the relationship between the Information Communications Technologies (ICTs) and freedoms, underlining that ICTs should not affect fundamental freedoms;
- There are a number of complementary definitions, notably: code of conduct, consent, interconnection of data, direct marketing, electronic communications;
- The scope of application of the Data Protection Act excludes the “data processing carried out by an individual in the exclusive setting of personal or household activity” in case the data is not passed to third parties or disseminated (Article 3.1). Also, “temporary copies made in the course of technical transfer activities and providing access to a digital network for the automatic, intermediate and transitory data and the sole purpose of allowing other recipients of the service the best access possible to the transmitted information” (Article 3.2) are excluded from its scope;
- There are additional obligations for the controller regarding “anyone using electronic communications network” (Article 61).

Conclusion

In the light of the above, the T-PD considers that the Data Protection Act of Senegal meets in general the principles giving effect to Convention 108 and to its Additional Protocol and recommends to the Committee of Ministers to invite the Republic of Senegal to accede to both instruments.