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

(Convention 108)

DRAFT OPINION ON THE COMPATIBILITY OF THE ICDPPC ARRANGEMENT (INCLUDING ITS SCHEDULE) WITH CONVENTION 108+

Directorate General of Human Rights and Rule of Law

1. In October 2014, at its 36th International Conference in Mauritius, the International Conference of Data Protection and Privacy Commissioners (ICDPPC) adopted a Resolution on Co-operation which sought to encourage and facilitate cross-border co-operation between data protection authorities, including by sharing information, in particular confidential and/or personal information, in law enforcement investigations and activities, based on the "Global Cross Border Enforcement Co-operation Arrangement".

2. In 2015, at the 37th International Conference in Amsterdam, some delegations highlighted a contradiction between the Arrangement and the provisions of Convention 108, and the requirement of an appropriate level of protection ensured by non-member states or organisations for EU member states and Parties to the Additional Protocol to Convention 108, as a reason preventing them from signing this Arrangement. Following the discussions at the 37th ICDPPC, the opinion of the Consultative Committee of Convention 108 was sought and the Committee commissioned an expert to analyse the compatibility of the Arrangement with the relevant provisions of Convention 108 (see document T-PD-BUR(2016)4 written by Dariusz Kloza).

3. In 2016, at the 38th International Conference in Marrakech, the ICDPPC adopted a follow-up resolution on international enforcement co-operation, which focused on providing support to Conference members by developing key principles for national legislation in relation to such co-operation frameworks. The group of experts established for the implementation of this resolution was instructed to propose measures to improve the effectiveness of cross-border co-operation in the short or long term.

4. Lastly, at the 39th International Conference held in Hong Kong, the group of experts presented a comprehensive report including a new follow-up resolution "on exploring future options for International Enforcement Co-operation". The amended Arrangement contains specific provisions on confidentiality, privacy and data protection principles with regard to the sharing of personal data (Sections 6, 7 and Schedule I providing minimum safeguards for the possible sharing of personal data) and now allows for an opt-out for transfers of personal data.

5. Schedule I to the amended Arrangement is intended to regulate specifically the exchange of personal data and meets the conditions laid down in Article 7 of the Arrangement governing the transmission of personal data by laying down a number of minimum criteria to be met.

6. In the course of its work, the group of experts highlighted the need to verify with the competent bodies of the Council of Europe whether the amended Arrangement (including its Schedule I which the signatory Parties undertake to comply with) constituted a sufficient guarantee for the worldwide cross-border transmission of personal data (between authorities of States Parties to the Convention and authorities of countries not bound by the Convention).

7. The Committee once again wishes to highlight the fact that Convention 108 (in its amended or non-amended form) is not the sole legal basis for cross-border co-operation for the majority of authorities in States Parties to this Convention and that, as this is a convention which is not directly applicable, in the absence of any legal provisions in the internal order of the countries concerned authorising such co-operation, the authorities cannot rely on the Convention as the sole legal basis for such co-operation. It is therefore the law applicable in each country that must be examined.

8. The Committee points out that the compatibility of the Arrangement with the Convention arises only in relation to the exchange of personal data and that many cases of co-operation do not involve any such exchange and should therefore not pose any difficulties, especially as co-operation between authorities is today of even more vital importance than ever before..

9. The amending protocol has a chapter dealing specifically with co-operation and mutual assistance between the authorities of countries bound by Convention 108+. The aim of this chapter is to reinforce co-operation by requiring Parties to render mutual assistance, and provide the appropriate legal basis for a framework of co-operation and exchange of information for investigations and enforcement. Chapter V of the modernised Convention 108 includes a requirement to designate the relevant authorities and deals specifically with forms of co-operation: "*The Parties agree to co-operate and render each other mutual assistance in order to implement this Convention."*

10. Article 17 deals with forms of co-operation and stipulates the following:

    "1. *The supervisory authorities shall co-operate with one another to the extent necessary for the performance of their duties and exercise of their powers, in particular by:*

    a providing mutual assistance by exchanging relevant and useful information and co-operating with each other under the condition that, as regards the protection of personal data, all the rules and safeguards of this Convention are complied with;

    b. co-ordinating their investigations or interventions, or conducting joint actions;

    c. providing information and documentation on their law and administrative practice relating to data protection.

    2. The information referred to in paragraph 1 shall not include personal data undergoing processing unless such data are essential for co-operation, or where the data subject concerned has given explicit, specific, free and informed consent to its provision."

11. It is therefore stipulated that the exchange of personal data in matters of co-operation between authorities may take place only in cases of necessity or where the data subject has given his or her consent.

12. Moreover, the explanatory report to the modernised convention states (in paragraph 141) that:

    "As far as personal data is concerned, it can be exchanged only if its provision is essential for the co-operation, i.e. if without its provision the co-operation would be rendered ineffective, or if the "data subject concerned has given explicit, specific, free and informed consent". In any case, the transfer of personal data must comply with the provisions of the Convention, and in particular Chapter II (see also Article 20 providing for the grounds for refusal)."

13. It should be noted that under Article 20 of the modernised Convention a request for mutual assistance or co-operation may be refused if the request was incompatible with the powers of the authority requested, if the request was not in compliance with the provisions of the Convention or if "*compliance with the request would be incompatible with the sovereignty, national security or public order of the Party by which it was designated, or with the rights and fundamental freedoms of individuals under the jurisdiction of that Party."*

14. Finally, it should be stressed that the amending protocol provides for specific arrangements regarding cross-border flows of personal data which must be complied with in the context of co-operation and mutual assistance between authorities. These arrangements, while providing appropriate protection to individuals, make for a flexible approach to ensure the free flow of information.

15. Article 14.2 of the modernised Convention provides that "*When the recipient is subject to the jurisdiction of a State or international organisation which is not Party to this Convention, the transfer of personal data may only take place where an* ***appropriate level of protection*** *based on the provisions of this Convention is secured"*.

16. Article 14.3 further stipulates that "*An appropriate level of protection can be secured by:*

a. the law of that State or international organisation, including the applicable international treaties or agreements; or
b. ad hoc or approved standardised safeguards provided by legally binding and enforceable instruments adopted and implemented by the persons involved in the transfer and further processing".

17. In the light of the above, the Committee stresses the importance, for each authority wishing to sign the Arrangement, of clearly establishing the legal nature of this instrument (legally binding and enforceable?) and the capacity of each authority to make such a commitment, and of ensuring that the conditions set out in Section 7 and Schedule I of the Arrangement fully meet the requirements of the modernised Convention 108, in particular with regard to the articles in Chapter I of the Convention which contains the general provisions and establishes the basic principles of data protection. In conclusion, the Committee acknowledges the importance of the work carried out by the ICDPPC and welcomes the inclusion of the Convention's normative framework in its work, and reiterates its willingness to contribute to the discussions aimed at promoting the work of the authorities.