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BUREAU OF THE CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA [ETS No. 108]

Secretariat Comments on the strengthening of the Convention's follow-up mechanism

DG I - Human Rights and Rule of Law

The replies to the consultation indicate that the Consultative Committee's functions and powers should be reinforced. A strengthening of the convention's follow-up mechanism will be essential for the establishment of the convention as a global standard.

In the context of the modernisation process, Marie Georges has made a series of concrete and ambitious proposals in her "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" (T-PD-BUR(2010)13rev).

The following functions can be distinguished:

- monitoring functions, which may be exercised in respect of countries wishing to accede to the convention and those that are already parties to it;
- standard-setting functions: the conventional committee acts as an international forum to discuss emerging issues and agree on common approaches to new challenges for privacy, in particular resulting from the development of ICTs, developing guidelines and recommendations applicable to specific sectors such as insurance, social security, medical data or police;
- investigation and dispute settlement functions: Marie Georges proposes that the committee may be seized to consider questions of compliance of transnational nature and to enter into a dialogue with the public or private entities allegedly violating the convention's principles. Instead of spontaneous and fragmented reactions by some data protection authorities only, the committee would provide a forum to investigate the facts, hear the public or private parties concerned and formulate opinions and recommendations. This would ensure an objective and truly collective approach associating governments and data protection authorities.

Example: February 2010 launching of Google buzz automatically attributing a list of contacts ("friends") to users including persons with whom they had regular email exchanges. In April 2010, nine data protection authorities reacted through a collective letter to Google (Alex Türk – La vie privée en péril - pp 134-138).

Question: to what extent do we need to amend convention 108 to put the committee in a position to exercise those functions?

In other words, to what extent could the committee already carry out those functions, or at least some of them, provided it was given the necessary financial and human resources? Important questions because modifying the committee's functions would require amendments to the convention which, unlike new principles, would in principle have to be agreed upon by all existing parties to convention.

Monitoring functions

As regards monitoring of compliance a distinction must be made between candidates for accession and parties to the convention.

Convention 108 does not provide for any particular role of the committee during the accession procedure. It is the Committee of Ministers which invites non-member states to accede and enjoys a certain discretion as regards the procedure. Nothing prevents it from consulting the consultative committee whether a candidate country has taken "the necessary measures in its domestic law to give effect to the basic principles for data protection" (article 4). Indeed, when confronted in 2011 with the first request for accession by a non-European country, Uruguay, the Committee of

Ministers considered an opinion by the T-PD which concluded that this country's legislation complied with the basic principles of convention 108.[1]

The regular assessment of compliance by states that are already parties to convention 108 on the other hand would appear to go beyond the rather limited functions of the consultative committee under convention 108. A formal amendment to convention 108 would, however, not be the only possible option to entrust the committee with genuine monitoring tasks. The modalities and procedure of a regular post-ratification assessment of compliance could also be laid down in a separate legal instrument, such as a Committee of Ministers' resolution. Non-member states would accept the application of this resolution upon accession to convention 108. This option presents several advantages. It avoids the cumbersome procedure of a treaty amendment. A Committee of Ministers resolution is a flexible instrument which can be amended more easily in the light of experience made with the compliance assessment procedure. Finally, the resolution could foresee a specific role for supervisory authorities in the procedure, as suggested by Marie Georges in her report.

Standard-setting functions

Article 19.*d* provides that the committee adopts "opinions" on "any question concerning the application of this convention". In the already well-established practice of the committee this covers also "recommendations addressed to the parties" and "guidelines". What is their legal status?

It is obvious that they cannot have the same degree of compulsiveness as the original convention. This does not mean, however, that such opinions and recommendations are devoid of any legal effect. In accordance with the rules of the 1969 Vienna Convention on the Law of Treaties, they may deploy legal effects in at least two ways:

- as "subsequent agreements between the Parties regarding the interpretation of the treaty or the application of its provisions" (Article 31 (3) (a) of the Vienna Convention on the Law of Treaties);
- as "recommendations" to the Parties to follow or to abstain from a specific course of action. Such recommendations may, if they are effectively implemented, be regarded as evidence of a "subsequent practice in the application of the treaty" which may establish an agreement of the Parties regarding its interpretation (Article 31 (3) (b) of the Vienna Convention on the Law of Treaties).

Under international law, duly authorised representatives of the Parties are entitled to adopt agreements on interpretation without requiring the approval of their respective Parliaments as long as the contents of the treaty are not modified. Agreements regarding the interpretation of a treaty which have been adopted after the treaty's entry into force constitute an "authoritative interpretation" by the parties and are as such part of the context of the treaty for the purposes of its interpretation.[2] It follows that states, which become parties to this treaty subsequently to such an agreement will also be bound by its terms.

In practice, recommendations or resolutions of treaty bodies will only exceptionally qualify as an "agreements on interpretation." At least the following conditions must be fulfilled:

- the provisions of the treaty which are interpreted must be clearly identified;
- the resolution must use a clear and unambiguous wording which shows the intention to go beyond a mere recommendation (the present tense or terms such as "shall" should be used instead of vague formulations such as "should" or "as far as possible");

[1] Document T-PD(2011)08rev

[2] R.G. Wetzel/D. Rauschning, *The Vienna Convention on the Law of Treaties. Travaux Préparatoires* (1978), 253.

- the text must contain an “interpretation” of the original provisions of the convention, which is regarded as binding, not a mere recommendation to the Parties to follow a certain course of action when applying the convention.

The need for interpretation arises in particular when there is uncertainty or disagreement over the meaning of the terms used in a treaty. In interpreting a treaty, due effect must be given not only to its express provisions but also to the underlying implications which lend coherence and meaning to the express provisions. Since treaty provisions often fix general and basic standards, interpretation may go so far as to determine whether cases not explicitly mentioned in the text of the convention fall within its scope. For convention 108, a good example is the definition of “personal data”, which requires further clarification in the light of new technological developments, e.g. does an IP address constitute personal data?

In most cases, opinions and recommendations, including those adopted by the Committee of Ministers, do not use a wording that implies the intention to adopt an agreement regarding the interpretation of the relevant convention. Though referring to certain provisions of the conventions, the recommendations simply invite to follow a commonly agreed approach or course of action with regard to a particular subject. Without having formally the binding effect of conventions, the adoption of such texts by duly authorised representatives constitutes nevertheless a joint expression of opinion by the parties, which lends them considerable weight. The parties commit themselves in good faith to implement the terms of a recommendation. If, having regard to compelling reasons of public policy, a party decides to disregard the recommendations, it should at least explain the reasons for its decision.

Recommendations qualify as evidence of a “subsequent practice in the application of the treaty” which may establish an agreement of the parties regarding its interpretation (Article 31 (3) (b) of the VCLT), in particular if they are effectively implemented.

Investigation and dispute settlement functions

Such new functions of the committee would require a new legal basis, either through an amendment of convention 108 or, as explained above for the post-ratification monitoring procedure, through adoption of a Committee of Ministers resolution.

How can an adequate and sustainable financing of the activities of the Consultative Committee be ensured?

At their 1106th meeting (16 February 2011), the Ministers' Deputies marked their agreement with the outline priorities for the Organisation’s programme of activities (2012-2013) as presented in document SG/Inf(2011)4 final, highlighting data protection amongst the future priorities. This should ensure sufficient funding for the modernisation process itself, but not necessarily for the long-term functioning of a committee with significantly increased functions, a composition expanding well beyond Europe as well as an associated network of supervisory authorities and an observatory of innovations relating to ICTs, as suggested in Marie Georges’ report.

Possible options for an adequate and sustainable financing, which could complement financing under the ordinary budget of the Council of Europe:

- Joint programmes with the EU, voluntary contributions by interested states, which may be particularly suitable to finance assistance and cooperation activities;
- Contributions by supervisory authorities could notably finance the activities and secretariat of the network of supervisory authorities. Synergy effects could probably be enhanced and costs reduced if this network could be merged with the already existing Global Privacy Enforcement Network (GPEN);

– It would seem only natural that the private sector, including professional associations such as the IAPP, as a major beneficiary of a more forseeable, stable and privacy compliant international legal framework would also be associated to its financing. Different options may be considered, ranging from purely voluntary contributions through some kind of certification scheme, which would be financed by the participating companies.

As regards the legal framework, an enlarged partial agreement could be set up within the Council of Europe which would allow the participation of non-member states on an equal footing. The Venice Commission and GRECO are examples of such agreements which have been set up successfully with the participation of non-member states.