

Ministers' Deputies

CM Documents

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10 Legal Questions

10.3 Consultative Committee of the Convention for the Protection of Individuals with regards to Automatic Processing of Personal Data [ETS No. 108] (T-PD)

Abridged report of the 19th plenary meeting (Strasbourg, 26-28 November 2003)

1. The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD), established under Article 18 of that Convention (ETS No. 108, hereinafter "Convention 108"), held its 19th meeting from 24 to 26 November 2003, with Mr Jean-Philippe WALTER (Switzerland) in the Chair.
2. Under Article 20, para. 3 of Convention 108, "after each of its meetings, the Consultative Committee shall submit to the Committee of Ministers of the Council of Europe a report on its work and on the functioning of the Convention". The present report is accordingly addressed to the Committee of Ministers, which is invited to take note of it as a whole.¹
3. The following report covers the period from 11 October 2002 to 26 November 2003. The agenda, as adopted by the T-PD, is contained in Appendix I.
4. With regards to its future activities, the T-PD decided to give priority to:
 - a. Continuation of the work done by the Project Group on Data Protection (CJ-PD) – which, due to a lack of financial resources, is not able to carry on its activities (see also paragraph 6.a below) - with a view to the preparation of guiding principles on the protection of personal data in the form of biometric data. This is to be the main priority of the T-PD, the aim being to adopt these principles in 2004;

¹ The Committee of Ministers decided, at its 506th meeting (January 1994), "that in future the reports of Conventional Committees and the following other bodies will not be automatically placed on their agenda, unless action by the Committee of Ministers is required or unless a delegation so requests ...".

b. The work on application of the data protection principles to the Internet was also considered a priority and will be carried out in parallel with the work on biometric data in 2004; the T-PD decided to commission a scientific expert to draft a study on this topic. This study should include a technical first part, describing the Internet technologies, and a legal second part, aimed at assessing the risks posed by the Internet and its technologies to the data protection principles and concepts. The expert should then, on the basis of this risk assessment, provide answers to questions related to the appropriateness and applicability of data protection principles in the context of the Internet;

c. The T-PD also decided to start drafting a Guide for data subjects but agreed that this activity could probably not be carried out in 2004. If the proposal by the Czech Republic to organise a multilateral seminar on this subject is retained in the Council of Europe Budget for 2004, the T-PD will want to use the results of the seminar to start work on this subject, depending on the time available;

d. The T-PD agreed to keep the subject of transborder data flows permanently on the agenda of its meetings and those of its Bureau in order to be able, if need be, to take any action required in view of current developments.

5. The T-PD then examined a draft opinion on the appropriate guarantees that ought to be provided by States which do not provide an adequate level of data protection and yet nevertheless require transfers of data to their territory the T-PD-GR, prompted by the case of the APIS/PNR data demanded by the United States customs from European airline companies.

Before starting the discussion on the draft opinion, the T-PD held an exchange of views on the problem of the transfer of passengers' data and of possible action by the T-PD. Some delegations favoured the adoption of an opinion, because it would be possible to outline practice which could become general. The Additional Protocol to Convention 108 regarding supervisory authorities and transborder data flows does not provide a satisfactory answer to this problem. In particular, the exemptions of Article 2.2.a only cover specific and exceptional transfers. They cannot cover regular transfers, without the risk of rendering null and void the principle of Article 2.1 under which the transfer of personal data to a recipient subjected to the jurisdiction of a State or an organization which is not a party to the Convention can only be carried out if that State or organization ensures an adequate level of protection for the transfer in question. Moreover, Article 2.2.a does not cover the transfer of personal data based on a legal obligation of a third State to the data controller. The important public interest referred to in Article 2.2.a must be provided for in the domestic law of the exporter of the data and consequently be an important public interest for the State where the exporter of the data resides.

Other delegations questioned the relevance of the draft opinion and the timing of its adoption, particularly with regard to the negotiations under way between the European Commission and the United States authorities. The idea was also put forward that the problem is rather a conflict of laws, which has the effect of extraterritorial application of the law and the notion of public interest of a third State, than a simple problem of personal data protection.

In these circumstances, the T-PD, while agreeing to recognize that the transfer of passengers' data poses a serious problem in view of the European data protection rules, could not reach consensus on the scope of the draft opinion and on whether it should be adopted before or after conclusion of the negotiations between the European Commission and the United States authorities. The T-PD therefore closed discussion on the draft opinion and agreed to take up the question again at its next meeting.

6.a. The T-PD continues examination of its future structures and working methods. It took note of the fact that, following budgetary restrictions, it had been decided to accelerate the merger between the two Council of Europe data protection committees. The CJ-PD will consequently no longer meet in 2004 and the T-PD will henceforth assume the CJ-PD's functions (see also paragraph 4 above). The T-PD referred in particular to the draft guidelines on the protection of personal data in the form of biometric data, started by the CJ-PD, which the T-PD would take up in 2004 with a view to their adoption. The T-PD requested the Secretariat to study the means to enable conclusion of this activity, and the means to enable the participation and payment of the expenses of those States not parties to Convention 108 which were full members of CJ-PD. The T-PD underlined the desirability of the same States that had taken part in the beginning of the work on the guidelines to attend at the conclusion. The T-PD also asked the Secretariat to examine the possibility of guaranteeing participation of the States not parties to Convention 108, particularly with a view to enabling them to familiarise themselves with data protection problems and to profit from the experience and assistance of the States parties in the process leading to ratification.

6.b. The T-PD then adopted a draft partial amendment of its Internal Rules of Procedure, subject to Article 10bis paragraph 3, which should be re-examined at the next meeting in the light of the opinion of the Legal Adviser. The final version of the partial amendment of the Internal Rules of Procedure appears in Appendix II to this report.

7. The T-PD elected its officials as follows:

- Mrs Charlotte-Marie PITRAT (France) was elected Chair of the T-PD for a two-year period, starting on 28 November 2003;
- Mr Karel NEUWIRT (Czech Republic), former Vice-Chair of the CJ-PD, was elected first Vice-Chair of the T-PD for a two-year period, starting on 28 November 2003;
- Mr João Pedro CABRAL (Portugal), former member of the CJ-PD-GC, was elected second Vice-Chair of the T-PD for a two-year period, starting on 28 November 2003;
- Mrs Vaida LINARTAITE (Lithuania), Mr Luis AGUILERA RUIZ (Spain) and Mr Graham SUTTON (United Kingdom), former members of the T-PD-GR, who confirmed their availability, were elected members of the Bureau for a two-year period, starting on 28 November 2003.

8. In accordance with Article 1 of the Appendix to the Secretary General's Regulation of 17 April 1989 instituting a data protection system for personal data files at the Council of Europe, the T-PD elected the Data Protection Commissioner of the Council of Europe from a list of three candidates by secret vote. Ms Waltraut KOTSCHY (Austria), outgoing Commissioner, was re-elected by an absolute majority of the votes on the first ballot for a three-year term starting on 28 November 2003.

9. The T-PD decided, subject to adoption of the budget for 2004 by the Committee of Ministers, to hold its 20th plenary meeting from 28 to 30 June 2004 and took note of the dates of its Bureau's forthcoming meetings on 17-19 February and 14-16 April 2004.

APPENDIX I**AGENDA**

- I. Opening of the meeting**
- II. Adoption of the agenda**
- III. Communication by the Secretariat:**
- IV. Exchange of views on major developments in the field of data protection since the 18th meeting of the T-PD (9-11 October 2002)**
- V. Examination of issues related to the application and interpretation of Convention ETS n°108, namely:**
 - Rights of data subjects*
 - Application of the principles of Convention ETS No. 108 to new technological developments*
 - Transborder data flows*
 - Exceptions and restrictions contained in Article 9 of Convention ETS No. 108*
 - Application of data protection principles to the Internet*
- VI. Regular bulk transfers of personal data to a third state not guaranteeing an adequate level of protection**
- VII. Examination of the principal conclusions of the regional seminar on data protection on “challenges and problems faced by the newly-established data protection supervisory authorities” (Madrid, Spain, 12-13 December 2002)**
- VIII. Future structures and working methods of the committees of the Council of Europe in the field of data protection**
- IX. Election of the Chair, first Vice-Chair and one member of the T-PD**
- X. Election of the Data Protection Commissioner of the Council of Europe**
- XI. Other business**
 - Proposal for a regional seminar*
 - World Summit on Information Society*
 - Data protection and the fight against terrorism*
- XII. Date of the 20th meeting of the T-PD: 28-30 June 2004**

APPENDIX II

PARTIAL AMENDMENT OF RULES OF PROCEDURE OF THE CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA

In order to take account of discussion in the CJ-PD and the T-PD with regard to the future organisation of data protection in the Council of Europe, the internal rules of procedure of the T-PD must be adapted by the introduction of provisions concerning the competences of the committee and its drafting or co-ordination group, as well as its decision-making procedure. The following three articles are proposed for insertion in the rules of procedure:

Article 9 bis

Functions and competences

The Committee shall exercise the functions set out in Articles 19 and 20 of Convention ETS No. 108. In particular, the Committee

1. shall elect a Chair and two Vice-Chairs and the other members of the Bureau following the requirements set out in Articles 10 bis and 10 ter;
2. shall adopt the terms of reference of the Bureau;
3. shall adopt the work programme and determine priorities;
4. shall decide on the establishment of working parties, on their composition and on their terms of reference;
5. shall draw up draft legal instruments² with a view to their adoption by the Committee of Ministers,
6. shall adopt opinions and reports

Article 10 bis

Membership, functions and competences of the Bureau

1. The Committee shall establish a Bureau to prepare the meetings of the T-PD and in particular:
 - to prepare preliminary draft legal instruments;²
 - to draft opinions and reports;
 - to prepare the programme of activities;
 - to propose, with a view to their appointment by the Secretariat, experts for specific terms of reference;
 - to carry out the activities conferred on it by the Committee;
- f. to report back to the Committee on its activities.
2. The Bureau shall be composed of the Chair and two Vice-Chairs of the Committee, together with four elected members. The outgoing Chair may remain a member *de jure* of the Bureau for two years and the other members shall be elected from among the representatives on the Committee for a period of two years. The members shall be eligible for re-election.

² Namely Conventions or agreements and Recommendations.

3. The Bureau shall exercise the powers of the Committee when it is expressly authorised to do so by the Committee or when a situation of urgency precludes waiting for the next meeting of the Committee. In any case, before taking a decision, the Bureau shall consult the members of the committee and take account of their observations. **In situations of urgency, the Secretariat shall, in consultation with the Chair, inform the Committee of the decision the Bureau wishes to take. If 10 members of the Committee so request within a short time, the Committee shall take the decision, either in plenary meeting or by written procedure.** When the Bureau exercises the powers of the Committee, its decisions shall be taken by consensus. Where there is disagreement, it shall submit the decision to the Committee.

Article 10 ter *Procedure*

1. The texts within the meaning of Article 9 bis e. and f., submitted for the approval of the Committee shall be prepared by the Bureau. As a general rule they shall be subject to two readings by the Committee. A text may exceptionally be subject to a third reading if two-thirds of the representatives present at the second reading so request. During the second and third readings only those amendments presented in writing at least one month before the plenary meeting shall be debated.

2. As a general rule the Bureau shall adopt the texts it submits to the Committee by consensus. Where there is disagreement, the texts shall be adopted by a simple majority. The minority may present its point of view to the Committee in writing if it informs the Bureau beforehand. Once a text has been adopted, it shall be presented to the Committee by a rapporteur appointed by the Bureau.

3. All proposals by the Bureau shall be sent to the members of the committee, who shall have four weeks in which to send their observations to the Secretariat who shall forward them to all members of the Committee.

4. Where documents are sent by electronic mail, the Secretariat shall take the necessary measures to ensure that the electronic mail messages have reached the members of the Committee.