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

(T-PD)

**OPINION
on the implications for data protection of mechanisms for automatic inter-state
exchanges of data for administrative and tax purposes**

The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD) has considered the principles inherent in mechanisms for automatic inter-state exchanges of personal data for administrative and tax purposes proposed by the Organisation for Economic Co-operation and Development (OECD) in the light of the Council of Europe's data protection standards.

The T-PD firstly emphasises that, while the automatic exchange of information is legitimately regarded as an essential tool in combating fraud and tax evasion, any such exchanges must fully respect the rule of law and human rights, in particular the rights to privacy and personal data protection¹. Automatic data exchanges must not under any circumstances weaken the rules governing the protection of personal data, as enshrined in the European Convention on Human Rights and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. The T-PD therefore believes that it is vital that specific safeguards be adopted so as to ensure full respect for individuals' fundamental rights when the relevant state policies are implemented.

The automatic inter-state exchanges of personal data for administrative and tax purposes can result in discriminatory measures being taken against individuals (e.g. being denied important services by private parties). In structuring such exchanges, parties should take measures to minimise the risk of discriminatory measures being taken against individuals as much as possible.

The T-PD believes that automated processing carried out in connection with automatic inter-state exchanges of personal data for administrative and tax purposes should rely on a clear legal basis, foreseeable, and should be necessary to achieve the public interest pursued, as provided for by Article 8 of the European Convention on Human Rights and its interpretation by the European Court of Human Rights' in its case law, while the competent authorities should determine which legal instrument they are taking as their basis for the processing.

In this respect, the conventions and the appropriate agreements concluded for the purpose of organising the data exchanges should be drafted clearly and unambiguously, and give exact definitions of their scope, the terms used, the purposes for which data are collected and may be validly used, the concrete categories of persons concerned, an exhaustive list of the data processed and exchanged, a designation of the national authority authorised to obtain and process the data, the rules governing the retention of data by the requesting authority, the frequency with which information is communicated and the practical arrangements for automatic exchange, the rules governing the transmission of the data to other institutions within the destination country or abroad, as well as remedies available to the persons whose data is being processed.

Where the requesting country is governed by specific rules related to personal data protection, the T-PD also stresses that the reference to those rules and to the supervisory authority to which the requesting party is subject should be explicitly mentioned in the convention or agreement. The reference to the fulfilment of relevant regional instruments applicable by the requesting country, be they legally binding or not, could also be consistent with this approach.

¹ See the OECD "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data", which were updated in 2013

- **The purpose of processing**

Article 5 b) of Convention 108 foresees that personal data must be used for specified and legitimate purpose(s) and that they must not be used in a way incompatible with such purpose(s). In order to fulfil the overarching principles of necessity and proportionality, the T-T-PD believes that data should only be exchanged when necessary, for the specified and legitimate purpose(s). Furthermore, data gathered and exchanged should not be subsequently used in other processing carried out for purposes not provided for in the legal instrument governing the automatic exchange and under the limitations and procedures foreseen by the administrative, criminal and criminal procedural law of the transmitting authority.

- **Definition of the persons concerned**

A precise definition of the persons concerned is particularly important in order to avoid bulk collection and transfer of personal data. The T-T-PD therefore believes that it is necessary to refer expressly in the legal instruments to the taxes and levies covered in their scope, which ultimately determine the categories of persons concerned.

In this regard, the T-T-PD furthermore underlines that the reasons justifying the processing of a specific category of persons concerned (i.e. for reasons of legal arrangements on avoiding double taxation and the prevention of fiscal evasion) should also be mentioned in the legal instruments.

- **Rights of the persons concerned**

The T-T-PD recalls that any restriction to individuals' fundamental rights should be prescribed by law, be duly justified and subject to tightly controlled conditions and guarantees, including the possibility to seek judicial or administrative redress.

In particular, limitations to the data subjects' rights provided for by Article 8 of Convention 108 (such as the right of information and the right of access) should only take place by way of an exception and provided that it is necessary in view of the public task pursued (for instance in the case of the investigation of tax infringements or criminal offences related to those).

- **Quality of data**

The T-T-PD points out that, under Article 5 c) of Convention 108 concerning the quality of data, it must be ensured that the data processed are "*adequate, relevant and not excessive in relation to the purposes for which they are stored*". It also points out that exchanges must respect the principles of lawfulness, fairness and proportionality of the processing set out in Article 5 of Convention 108, which not only refers to the categories of persons whose data are being exchanged but also to the extent of the information covered by the agreement.

The T-T-PD furthermore underlines the importance of providing standard models with a view to securing the effective protection of individuals through a standardised approach, and with comprehensive lists, of the information exchanged between the competent authorities.

- **Retention of data**

The T-PD points out that, under Article 5 e) of Convention 108, the data must be *“preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored”*.

It is in that regard particularly important that a retention period (limited period of time, duly justified, during which the requesting authority will keep the data) be indicated by the requesting authority. This period should ideally not exceed the retention period provided for in the law of the transmitting authority, in particular where the national law of that authority provides for the prescription of tax obligations or corresponding offences.

- **Transborder data flows**

The T-PD recommends that the States Parties to the Convention ensure, prior to implementing the relevant automated processing, that automatic inter-state exchanges of personal data may validly take place in compliance with their domestic legislation, taking due account of the legislation of the destination country or countries, particularly as regards the possibility of subsequent re-use of the data for purposes other than those originally intended.

Moreover, provisions specifically relating to international transfers should be incorporated in the legal instrument governing the automatic exchange in question, which should also take into account the principle of proportionality, especially to avoid the mass transfer of personal and sensitive information to countries without an appropriate level of protection. Specific attention should be given in the legal instrument to the fact that there can be no onward transfers by the requesting authority to another authority set in a third country unless the transmitting authority has authorised it.

The legal instrument should also cover the guarantees and rights of the data subject, as well as the remedies available and information relating to the independent supervision entrusted to the data protection authority.

- **Security**

The T-PD notes that the security of the exchanges and the systems is a vital aspect which requires adequate technical and organisational measures to be adopted so as to ensure both the reliability and integrity of the data and the relevant processing and also the confidentiality thereof. It underlines the importance of meeting the requirements of Article 7 of Convention 108 and ensuring the security of the entire system by laying down strict rules on encryption of data, access to data, identification of the persons to whom the data are transferred and rules on the full traceability of the exchanges, in particular through the implementation of access logs.