



Strasbourg, 20 November 2013

T-PD(2013)02

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

Compilation of opinions

DG I – Human Rights and Rule of Law

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I. OPINION ON THE PRELIMINARY DRAFT CONVENTION AGAINST MANIPULATION OF SPORTS EVENTS

1. The Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD-BUR) has examined the preliminary draft Convention against manipulation of sports events¹ prepared by the drafting group set up under the Governing Board of the Enlarged Partial Agreement on Sport (EPAS) and its compatibility with Council of Europe standards on data protection, in particular with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, hereafter “Convention 108”) and its additional protocol on supervisory authorities and transborder data flows (ETS No. 181, hereafter the “additional protocol”).

2. This examination follows the request for comments and the discussions which the EPAS Secretariat and the Drafting Group held with the T-PD Bureau.

3. The T-PD Bureau wishes to congratulate EPAS on this major initiative to promote better protection of private life and personal data through the introduction of mechanisms to combat the manipulation of sports events. In particular, it welcomes the fact that thanks to its geographical scope in terms of data transfers, the convention is destined to become an important instrument in this area.

4. The T-PD Bureau very much appreciates the opportunity to make observations on this text and would like to present the following comments and suggestions for making the draft more compatible with Council of Europe standards in the field of data protection. The T-PD Bureau further invites the Drafting Group to submit a finalised version of the draft Convention at a later date in order to allow the T-PD to formalise its opinion.

General observations

5. Combating the manipulation of sports events relies on international co-operation, in which all the relevant parties need to be involved. The processing of personal data (which covers the collection, registration, modification, exchange, etc.) forms the vital basis of this co-operation. In this regard, the T-PD Bureau supports the goals pursued by EPAS in creating a system of co-operation and data exchange that takes account of the need for data protection. Such a mechanism will help both to improve the effectiveness of co-operation between stakeholders and to ensure greater protection in terms of how personal data are used.

6. The T-PD Bureau proposes that specific reference be made in a° of Article 2 to data protection, which has acquired an autonomous meaning over the last thirty years and which is important given the data exchanges introduced via this mechanism.

Proposal: in a) of Article 2, add the words “and in particular of private life and personal data”.

¹ Decision CM/Del/Dec/1145/8.1 of the Committee of Ministers of the Council of Europe of 13 June 2012, following Resolution No. 1 adopted by the 12th Council of Europe Conference of Ministers responsible for Sport. Draft Convention: document EPAS (2012)57rev.

7. The T-PD Bureau welcomes the fact that this preliminary draft convention gives a prominent place to data protection by creating a specific article (Article 3) to reiterate the need to apply data protection principles irrespective of how information is collected and exchanged.

8. The T-PD Bureau would nevertheless point out that there are data protection risks attached to generating large flows of information. In effect, a greater number of data will be shared, and shared more widely, thereby creating a risk that more data than are necessary for the purposes pursued will be used, or that they will be kept for longer than necessary.

9. The security of the systems and exchanges implemented can also be a tricky issue because the overall mechanism is only as secure as the lowest level of security adopted by the stakeholders. Some thought will need to be given therefore to developing common minimum security rules, whatever the form of the exchanges.

10. The T-PD Bureau notes that the key challenges involved in regulating exchanges of information relating to the fight against manipulation of sports events are firstly to preserve the consistency of the mechanism as a whole whilst relying on a wide variety of stakeholders and secondly, to balance flexibility with a formal legal framework.

11. The system of exchanges envisaged is intended for international use. There are, however, major legal and administrative differences between the stakeholders so it is important to have a mechanism that is capable of reconciling these differences, not least in terms of data protection. **Data subjects, furthermore, must feel confident that their data will be adequately protected whoever is receiving the transfer. It is important, therefore, that the operations involving data collection, processing and exchange be clearly defined when designing the mechanism.**

12. The purposes pursued through action to combat the manipulation of sports are numerous and are not confined to specific areas. The new instrument allows information to be exchanged very widely for purposes that include administrative co-operation, consumer protection, ensuring the protection of minors, combating fraud and money laundering, tackling identity theft and other forms of cybercrime, safeguarding the security of gambling equipment and the integrity of sports and combating match-fixing. To that end, it provides for exchanges between a wide variety of stakeholders: regulatory authorities, public authorities, on-line betting operators and sports organisations in the broad sense, national, federal and international; as a result, it is difficult to specify the different functionalities of the data exchange mechanisms envisaged. **It is important therefore to clearly define the safeguards in terms of data protection.**

13. The T-PD Bureau accepts that flexibility is needed when combating the manipulation of sports events **and that this preliminary draft convention must be able to adapt to the current realities of multiple players as well as to future developments. That should not lead, however, to a lack of clarity either in the functionalities of the mechanism or in terms of personal data protection.** That is why it is proposed that the drafters go further than simply reiterating the requirement to apply the principles of data protection, as set out in Article 3, and flesh out the preliminary draft with more detail. Specific consideration should also be given to the technical arrangements (introduction of computer platforms) and the co-operation procedures that are to be put in place to facilitate data exchange (e.g. setting-up of liaison committees).

Proposal: in Article 3, add the following so as to make specific reference to the relevant data protection principles and the scope of these principles in the mechanism.

“The Parties shall adopt such legislative and other measures as may be necessary to guarantee that betting operators, sports organisations and any other stakeholder covered by this Convention are taking the measures required in order to ensure that any processing (collection, exchange, modification, etc.) of personal data, irrespective of the nature of such processing, is in accordance with the principles of lawfulness, adequacy, relevance and accuracy, and also of data security.”

“The Parties shall encourage the stakeholders to ensure that the data exchanged, whilst ensuring the pursuit of the stated purposes of the exchange, are reduced to the necessary minimum.”

On the object and scope of the preliminary draft convention

14. The T-PD Bureau notes the concern expressed in this draft to create a mechanism that has two main aims: firstly, to introduce, at domestic level, the legal means needed to combat the manipulation of sports events and secondly, to create conditions for effective and sustainable co-operation between various stakeholders (Art. 1).

15. Such co-operation, however, relies on a large number of stakeholders: regulatory authorities, public authorities, national, federal and international sports organisations, on-line betting operators, etc. whose legal status and methods of operating vary. The way in which data transfers are regulated also varies depending on the type of operator and ranges from legislation in the case of regulatory authorities (Article 13) to “self-regulatory rules” for betting operators (Article 14-3) and “mechanisms” for national sports organisations (Article 9-6).

16. The methods by which data are exchanged are numerous and range from alerts to informal or spontaneous exchanges, co-operation agreements and the development of channels for sharing information.

17. In this regard, the T-PD Bureau welcomes EPAS’s determination to set up a system of enhanced co-operation and collaboration (Articles 5 and 16) that will allow effective co-ordination of all the stakeholders. It proposes, however, that this goal be reinforced by envisaging, for example, the creation of national or even European and international ‘consultation’ committees to provide opportunities for dialogue, encounters and sharing information. These committees would help to harmonise stakeholders’ operative methods, contribute to the identification of personal data which are necessary, exchange data in a secure manner and disseminate a common data protection culture.

18. It further recommends that the data sharing arrangements be clarified. The preliminary draft convention envisages several such arrangements, involving different responsible parties (Articles 13 and 19, etc.). The T-PD Bureau recommends that attention be given to these various arrangements to ensure that they are legally and, above all, technically consistent. The fact that data are being shared in various places means there is a risk of proliferation in terms of the information and data collected and processed.

The stakeholders: role and obligations

19. The T-PD Bureau welcomes the move to clarify the role and obligations of each stakeholder involved in the fight against manipulation of sports events. It recommends, however, that certain aspects be beefed up with regard to data protection. The T-PD Bureau wishes to point out that each stakeholder is responsible for the data processing operations and exchanges carried out by it and that, in this respect, it must ensure that the principles of data protection are applied from the time the data are collected.

Proposal

Expand on Articles 13-3g, 9-6 and 13-6 to make it clear that stakeholders must introduce the necessary measures to ensure that any data collection and/or processing operations carried out in the fight against manipulation of sports events are made in accordance with the rules on data protection.

20. In Article 18-5, the T-PD Bureau wonders about the link between the focal point responsible for collecting and centralising information provided by sports organisations and betting operators referred to in this article and information sharing by regulatory authorities.

21. The T-PD Bureau wonders which authority is responsible for the preservation of data referred to in Article 16-4.

Data subjects

22. The T-PD Bureau notes that the definition of “athletes” in Article 4 is very wide, especially considering that this definition will serve as a basis for the kind of data that can be collected. Attention should be paid to the use of such broad concepts as “anyone taking part in the activities” and “support personnel”. Also, what is meant by “officials”?

Data collected and exchanged

23. The T-PD Bureau notes that, pursuant to Article 5 of Convention 108 on the quality of data, care must be taken to ensure that the data being processed are “adequate, relevant and not excessive in relation to the purposes for which they are stored”.

24. The T-PD Bureau wishes in particular to draw EPAS’s attention to Article 5-3) which states that the partners must ensure that the exchange of information is sufficient to allow the application of sanctions.

Such exchanges must also comply with the rules on proportionality, adequacy and lawfulness, as set out in Article 5 of Convention 108, and must not result in mass transfers of data which have no direct connection with the designated purpose.

Proposal

It is proposed that mention be made in Article 5 of the idea that the stakeholders might consider jointly determining the type of data required to satisfy the designated purposes.

Length of time for which data are stored

25. Under Article 5 of Convention 108, data are to be preserved for no longer than is required for the purpose for which those data are stored. The T-PD Bureau notes, however, that no article in the draft convention, including those on information sharing (Articles 13, 19) makes any reference to the length of time for which the data collected and processed are to be stored. The fact is, however, that this is a basic rule in terms of data protection, providing a safeguard for the data subjects and also for the user, who can thus be sure that the data obtained is reliable. The T-PD Bureau wishes to stress that rules must be adopted to set storage times appropriate to the purposes pursued (Art. 18-5, Article 16-4 in particular).

26. Period for which alerts are retained. Alerts are one of the means of communication between stakeholders in case of suspicion or contentious situations. Consideration should be given to setting specific time-limits for the retention of these alerts.

27. The T-PD Bureau has some doubts about the preservation of computer data referred to in 4) of Article 16. It suggests that additions be made to this article, in order to indicate the authority responsible for such preservation, the type of data collected, the length of time for which they are to be stored and the purpose pursued.

Security aspects

28. The proposed mechanism is based on the collection and exchange of information, and the reliability and integrity of that information needs to be ensured. Given the sensitive nature of the data collected and exchanged, the T-PD Bureau wishes to emphasise the importance of meeting the requirements of Article 7 of Convention 108 and of ensuring the security of the mechanism as a whole by introducing, for example, strict rules on access to data, rules on identifying the persons to whom data are to be transferred and rules on the traceability of exchanges. Ensuring the security of the exchanges is also in keeping with the goal of co-ordinating the various stakeholders stipulated in the draft convention.

Proposal

It is proposed to add a new Article on data security after Article 3.

This new article could provide:

- firstly that the various stakeholders shall adopt at their respective levels the technical measures required to ensure the security of the data collected and the processing operations, particularly in the case of informal or spontaneous exchanges;
- secondly, on a more general level, that the Parties shall encourage the introduction of arrangements for co-ordinating their actions and ensuring data exchanges that respect the need for data protection.

Such technical arrangements may take the form, for example, of common secure platforms placed under the responsibility of a designated authority, enabling data to be collected, centralised and

transferred securely, or of consultation committees encompassing the various players involved and which would provide opportunities for sharing good practice, dialogue and exchanging information. Their introduction would be accompanied by the use of secure means of communication such as encrypted messaging.

Proposed wording:

“Each Party shall invite the various stakeholders to implement the technical means required to ensure the security of the data exchanged and to guarantee their reliability and integrity as well as the availability and integrity of the systems and identification of their users.

Each Party shall encourage the introduction of technical arrangements or consultation committees for ensuring data exchanges between all the stakeholders”.

29. The introduction of platforms for exchanges or technical arrangements for sharing information will need to be examined in a preliminary risk assessment.

Rights of data subjects

30. The T-PD Bureau would point out that, under Article 8 of Convention 108, data subjects must be informed of the existence of any data processing operations relating to them. When implementing this principle, account must be taken of the specific nature of the exchanges carried out, in particular the need to ensure that the stakeholders are not seriously hindered in the performance of their tasks.

31. Data subjects should be able to obtain access to their data provided that the exercise of this right does not interfere with the performance of the stakeholders' tasks.

Data exchanges with third countries

32. With its international reach, the fight against manipulation of sports events naturally relies on exchanges with third countries. The preliminary draft convention aims to promote international co-operation and dialogue with third countries and the competent international authorities in the field of sport.

The unusually sensitive nature of the data exchanged, however, demands that safeguards be put in place to ensure the integrity of the exchanges carried out. If exchange platforms are implemented, therefore, third-party access to these platforms needs to be regulated through specific contractual clauses.

To conclude, the T-PD Bureau welcomes EPAS's initiative to promote the centralisation and sharing of information in the fight against manipulation of sports events. It supports the aim of making data protection a prominent feature of the preliminary draft convention against manipulation of sports events. It recommends:

- reiterating the responsibility of each stakeholder in the collection and processing of data and in the application of the principles of data protection as set forth in Council of Europe Convention 108;

- inviting States to adopt legislative measures or any other measure which is necessary to ensure the consideration of data protection principles at all stages of the processing of personal data;
- that provision be made for the introduction of vital security measures to ensure the reliability and integrity of the systems used to carry out the exchanges and of the data, especially in the case of spontaneous or informal exchanges;
- that care be taken to specify who is to receive the information and to remind them of their responsibility with regard to the processing of personal data;
- that efforts be made to build co-operation between all the stakeholders through the setting-up of consultation committees;
- that care be taken to ensure that exchanges with third countries are covered by the necessary and appropriate legal instruments.

II. OPINION FURTHER TO A DH-BIO REQUEST CONCERNING THE ON-GOING REVISION OF RECOMMENDATION (2006) 4 ON RESEARCH ON BIOLOGICAL MATERIALS OF HUMAN ORIGIN

1. At its meeting of 28-30 May 2013, the Committee on Bioethics (DH-BIO) decided to consult the Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (T-PD) with regard to two provisions contained in the preliminary draft of the revised Recommendation (2006) 4 on research on biological materials of human origin .

2. The Consultative Committee (T-PD) has examined the proposed provisions of Recommendation (2006)4 and its compatibility with Council of Europe standards on data protection, in particular with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, hereafter “Convention 108”).

Article 3 on identifiability of biological materials

3. In relation to Article 3 the TP-D was asked to consider whether the notion of non-identifiability was valid and, consequently, whether the distinction made in Article 3 between ‘identifiable’ and ‘non-identifiable’ biological materials remained relevant.

4. Article 2 of Convention 108 defines “Personal data” as any information relating to an identified or identifiable individual. Identifiable individual means a person who can be identified without unreasonable time or efforts. The notion of ‘identifiable’ does not only refer to the individual’s civil identity as such but also to what may allow to individualise or single out and thus allow to treat differently, one person among others.

5. Where an individual is no more identifiable, data are said to be anonymous and are not covered by Convention 108. Data that appear to be anonymous (unaccompanied by any obvious identification data) may nevertheless lead to an indirect identification with the piecing together of informative data (example of deidentification of DNA Samples). This is the case where for example, alone or through the combination of physical, physiological, genetic, mental, economic, cultural or social data it is possible for the controller, or any legitimate or illegitimate actor, to identify the person concerned (in particular when the data was made publicly available).

6. When data are made anonymous, necessary means, including technical ones, should be put in place to avoid re-identification of individuals and preserve anonymisation. The anonymity of data should be regularly re-evaluated in time as in light of the fast pace of technological development, what could at a point in time be considered ‘unreasonable’ could after some time be considerably facilitated by technology and enable identification with reasonable ease.

Conclusion

7. In light of the above, the T-PD considers that the issue raised deserves further reflection. Indeed, due to the rapid advances in technology, it is difficult to ensure that data which have been anonymised will no longer allow a re-identification of the data subjects if they are combined with other data and therefore additional safeguards should be put in place.

8. It recommends to all stakeholders to promote suitable measures to guard against any possibility that the anonymous data may result in the re-identification of the data subjects. Separation of identifiers and data relating to the identity of the persons could be an appropriate security measure

to introduce, as well as other technical and organisational measures to prevent any unauthorised person from having access to the data and to provide traceability of access and use of the data.

Article 23 on Transborder data flows

9. Acknowledging the general data protection principle that transborder flows of personal data can only occur if in the recipient state an appropriate level of protection is guaranteed, the DH-Bio Committee suggested to introduce the provision that, where an appropriate level of protection is not guaranteed by domestic law, the transfer of biological materials and/or associated data can still occur on the basis of safeguards provided in a bilateral contract between the sender and the recipient of the biological material and/or associated data.

10. The T-PD was asked to consider the admissibility of such provision, as well as to provide some clarification with regard to the exact meaning of the notion of 'enforceable instruments' as referred to in article 12(3)b of the modernised Convention 108 .

11. The notion of 'enforceable instruments' will be clarified in the Explanatory Report of modernised Convention 108 but aims at referring to the fact that relevant instruments need to be complied with, and that the non-voluntary compliance with the legal instrument may result in action from an authority entrusted with the task of enforcing the instrument in question or, if no longer possible, imposing as consequence a penalty as well as, eventually the duty to indemnify those eventually harmed by non-compliance.

12. As provided in the draft explanatory report of the modernised Convention 108, the following elements should be considered in relation to the notion of "appropriate level of data protection":

- An appropriate level of data protection can be ensured provided that the persons involved in the transfer (legal as well as natural persons) provide sufficient guarantees, such as approved standardised safeguards binding both the controller who transfers data and the recipient who is not subject to the jurisdiction of a Party. The adoption of common approved standardised safeguards should be sought.
- The level of protection should be assessed on a case-by-case basis for each transfer or category of transfers. Various elements of the transfer should be examined such as, in particular: the type of data; the purposes and duration of processing for which the data are transferred; the respect of the rule of law by the country of final destination; the general and sectoral rules of law applicable in the State or organisation in question; and the professional and security rules which apply there.
- The assessment as to whether there is an appropriate level of protection must take into account the principles of the Convention, the extent to which they are met in the recipient State or organisation – in so far as they are relevant for the specific case of transfer – and how the data subject is able to defend his or her interests where there is non-compliance.

Conclusion

15. The T-PD supports the provisions, as it was proposed by the Committee on Bioethics and invites the Committee to review these provisions after the adoption of the amending protocol to Convention 108.

APPENDIX

At its last meeting (28-30 May 2013), the Committee on Bioethics (DH-BIO) decided to consult the Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (T-PD) with regard to two provisions contained in the preliminary draft of the revised Recommendation (2006) 4 on research on biological materials of human origin.

(1) Article 3 – Identifiability of biological materials

Biological materials referred to in Article 2 may be identifiable or non-identifiable:

i. Identifiable biological materials are those biological materials which, alone or in combination with associated data, allow the identification of the persons from whom the materials have been removed, either directly or through the use of a code.

In the latter case, hereafter referred to as “coded materials”, the user of the biological materials may have direct access to the code or, alternatively the code may be under the control of a third party.

ii. Non-identifiable biological materials, hereafter referred to as “anonymised materials”, are those biological materials which, alone or in combination with [associated] data, do not allow, with reasonable efforts, the identification of the persons from whom the materials have been removed.

Question with regard to Article 3:

During the discussion concerns were raised about the continuing validity of the distinction between ‘identifiable’ and ‘non-identifiable’ biological materials. It was pointed out that – due to rapid advances in genomic technology, use of increasing amounts of associated data, increased linking of databases and increased exchange of data – the possibility to re-identify biological materials that were considered non-identifiable/anonymised has significantly increased and that, as a result, non-identifiability of biological materials may possibly no longer be guaranteed. The Committee would like to know whether the TP-D still considers the notion of non-identifiability valid and, consequently, whether the distinction made in Article 3 between ‘identifiable’ and ‘non-identifiable’ biological materials remains relevant.

(2) Article 23 – Transborder flows

1. Biological materials and associated data should only be transferred to another state if an appropriate level of protection is ensured by the law of that state or by legally binding and enforceable instruments adopted and implemented by the persons involved in the transfer.

2. The transfer of the biological materials and/or associated data should be done under appropriate safety conditions.

3. A documented agreement between the sender of the biological material and/or associated data, on the one hand, and the recipient, on the other, should be signed. Appropriate consent or authorisation, including, where appropriate, any relevant restriction established by the person concerned, should be included in the agreement.

Question with regard to Article 23:

Acknowledging the general data protection principle that transborder flows of personal data can only occur if in the recipient state an appropriate level of protection is guaranteed, the Committee discussed the possibility to introduce the provision that, where an appropriate level of protection is not guaranteed by the law of that state, the transfer of biological materials and/or associated data can still occur on the basis of safeguards provided in a bilateral contract between the sender and the recipient of the biological material and/or associated data. The Committee would like the opinion of the T-PD with regard to the admissibility of such provision. Taking into account that Article 3, paragraph 1 has been redrafted along the lines of the proposals for modernisation of Convention No. 108, contained in document T-PD(2012)4Rev4 as adopted by the T-PD at its 29th Plenary meeting, it would also be important for our Committee to obtain some clarification with regard to the exact meaning of the notion of ‘enforceable instruments’ as referred to in paragraph 1.