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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)**

28th plenary meeting

Strasbourg, 19-22 June 2012

REPORT

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I. OPENING OF THE MEETING

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 the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [ETS No. 108] (hereunder referred to as "Convention 108"), held its 28th meeting at the Council of Europe in Strasbourg, from 19 to 22 June 2012.
2. The plenary meeting was opened by Mr Jean-Philippe Walter (Switzerland), Chair of the T-PD.
3. The list of participants is appended to this report (Appendix I).

II. ADOPTION OF THE AGENDA

4. The agenda, as adopted by the T-PD, is appended to this report (Appendix II), accompanied by a list of documents relating to each of the items discussed.

III. STATEMENT BY THE SECRETARIAT

5. Mr Jan Kleijssen said that this plenary meeting, like the previous one, was mainly devoted to the modernisation of Convention 108, which is the main priority at the present time; he referred to the latest meeting between the Secretary General of the Organisation and the T-PD, at which the Secretary General had emphasised that maintaining the specific character of Convention 108 was one of the Council of Europe's priorities, which, moreover, was in line with a far more wide-ranging reform of the Organisation which he was currently conducting, in order to adapt it to the challenges of the 21st century.
6. While stating that data protection was one of today's most challenging issues, Mr Jan Kleijssen pointed out that this work was being done in the context of the terms of reference formally given to the T-PD by the Committee of Ministers instructing it to work on modernising Convention 108.
7. Mr Jan Kleijssen requested that delegations kindly excuse the Secretariat for the late submission of documents. Furthermore, he said that members of the T-PD had the opportunity to discuss in depth the proposals before them and to make the necessary adjustments.
8. He also pointed out that, on 15 November 2010, the Deputy Secretary General had addressed the Bureau of the T-PD at its 22nd meeting, offering encouragement for its work and expressing the belief that it would successfully "produce a comprehensive, workable privacy framework that is efficient, consistent, flexible, robust and transparent".

9. Mr Jan Kleijssen said that the submitted proposals for modernisation perfectly reflected this objective, inter alia through the wish to ensure that Convention 108 remained a horizontal instrument applying to both the public and private sectors, to avoid, by pragmatic means, producing proposals that were too detailed, making universal acceptance of them difficult, to strengthen the monitoring mechanism of this Convention for more effective protection, to maintain consistency with other legal frameworks, something which was particularly crucial to 27 of the States Parties to Convention 108, to put forward innovative and flexible solutions, especially where transborder data flows were concerned, and, lastly, to preserve the robust and transparent nature of the Convention.

10. Mr Jan Kleijssen also drew attention to the transparent and inclusive nature of the working methods of the T-PD, which had, on various occasions, demonstrated great openness and consulted widely on the modernisation proposals.

11. He reminded members that an initial series of proposals had been submitted to the T-PD in December 2011. Following thorough consultations and discussions with all the interested stakeholders, these proposals had been revised in the light of the T-PD's comments and the outcome of other consultations. New proposals were now before the T-PD for discussion by the delegations.

12. Mr Jan Kleijssen also said that a clear task had been set for the T-PD, for which each and every participant was invited to make constructive proposals addressing the issues at stake and taking the debate forward.

13. He said that data flows knew no boundaries and that the work of the T-PD entailed openness and inclusion; he was satisfied to note the presence at the meeting of participants from various Council of Europe member states and from other regions of the world and of representatives of other fora and international organisations, as well as relevant partners and stakeholders.

14. Mr Jan Kleijssen also reported on major developments since the previous plenary meeting, including the press release of 25 January 2012 on the package of data protection measures proposed by the European Commission, particularly the Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free flow of such data (hereunder referred to as the Proposal for a Regulation) and the Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (hereunder referred to as the Proposal for a Directive). A joint statement by Vice-President of the Commission, Ms

Viviane Reding, and the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, had also been issued during the World Economic Forum in Davos, on the occasion of Data Protection Day. They had emphasised that "Hyper-connectivity should go hand-in-hand with the protection of privacy online. The protection of personal data is a fundamental right. Information technology offers huge economic and social potential, which will be fully realised if citizens trust that their personal information online is protected."

15. Mr Jan Kleijssen added that this joint appeal for greater protection for individuals should be reflected in the relations between the European Union and the Council of Europe: greater protection could be achieved in Europe, while greater harmonisation and an agreement on core principles should be achieved at global level, through Convention 108.

16. He also mentioned the adoption on 15 March 2012 by the Committee of Ministers of a Council of Europe Strategy on Internet Governance 2012-2015, which set out a coherent vision for a sustainable approach to the Internet. Its action line 3 was devoted to strengthening privacy and data protection. Mr Jan Kleijssen stated in this context that the members of the T-PD were key contributors to the successful delivery of the objectives of this strategy, and more specifically of its aforesaid action line 3.

17. He also reported that various events had taken place since the previous plenary meeting, including the Octopus Conference (Strasbourg, 6-8 June 2012), a major event on cybercrime which had been held for the seventh time and had been attended by over 250 participants from all around the world. The close relationship between cybercrime and data protection, particularly where transborder access to data flows by law enforcement authorities was concerned, had been emphasised during the Conference, and the work of the T-PD had been presented to participants. Mr Jan Kleijssen also mentioned the fifth holding of Eurodig, in Stockholm (14-15 June 2012), which had been attended by approximately 500 participants. A plenary session had been dedicated to privacy, on the theme of "Online privacy: one size fits all", considering, inter alia, the need for global standards and a broader approach to data protection, complementing a regional approach, and the potential of Convention 108 in this respect had been clearly acknowledged.

18. Lastly, Mr Jan Kleijssen reported on some changes which had taken place within the Secretariat. Ms Szilvia Simond had succeeded to Ms Corinne Gavrilovic, which work had been welcomed, and there had been a new arrival to strengthen the Data Protection Unit, namely Mr Nicolas Wevelsiep, who had previously worked for the Council of Europe on various subjects, including data protection, at the time of the CJ-PD.

IV. MODERNISATION OF CONVENTION 108

19. Ms Luisella Pavan-Woolfe, Head of the European Union delegation to the Council of Europe, reported on the work in progress at the European Union level, and more specifically the discussions on the Proposal for a Regulation and the Proposal for a Directive.

20. She also pointed to the convergence of views between the Council of Europe and European Union and the need to guarantee a high level of data protection and not to impose inconsistent obligations on member states of the European Union which would be incompatible with their commitments under European legislation. In this context, it was crucial to take account of the way in which Convention 108, which was binding on the 27 European Union member States, dovetailed with the European Union's procedure for ensuring compliance with harmonised standards. Modernisation of the Convention should therefore take account of this issue.

21. In view of the fact that the current discussions within the European Union, pursued by detailed analysis by member States, a slowing down of the work of the T-PD seemed desirable. Ms Luisella Pavan-Woolfe also emphasised the importance of ensuring consistency between the Council of Europe standards and the European Union's legal framework, as confirmed by Mr José Manuel Barroso, President of the European Commission, who just confirmed the European Union's intention to co-operate with the Council of Europe and a wish for this work to represent added value for European Union member states.

20. The Chair of the T-PD, Mr Jean-Philippe Walter, emphasised that the intention expressed by the European Union to reach the same objective, namely the strengthening of data protection, was central and the technical obstacles which arose should be overcome.

21. The Chair pointed out that, at the previous plenary meeting, the T-PD had continued its work on modernising Convention 108, and that the Bureau had subsequently, in a transparent manner, consulted the delegations of the States Parties to the Convention, as well as private-sector stakeholders and representatives of civil society. It was now time for the T-PD to give a second reading to the proposals for modernisation of Convention 108.

The Preamble

22. Several positions were expressed in favour of the addition to the Preamble of access to public documents, in the same way as it had been mentioned in the previous drafts, but also in the Convention, in connection with the right to data protection, which would make it possible to guarantee consistency with Directive 95/46/EC on the

protection of individuals with regard to the processing of personal data and on the free movement of such data (hereunder referred to as Directive 95/46/EC), and with the Proposal for a Regulation.

23. Diverging opinions were also expressed about the inclusion in the Preamble of the right to check one's own data, as it appeared in the modernisation proposals. Whereas the supporters of this proposal considered that control of information was an important aspect of data protection, that this right, furthermore, derived from the right to privacy and that, consequently, the link with the European Convention on Human Rights was fully justified, others, in contrast, took the view that this inclusion might be confusing, giving the impression that a new right was being established.

24. It was also pointed out that, at the previous plenary meeting, it had been suggested that the role of the explanatory report be highlighted, through explicit mention of it in the Preamble, but, following verification with the Council of Europe Treaty Office, this possibility had not been retained.

25. The T-PD decided to revise the wording of the Preamble in order to reconcile the diverging approaches.

Article 1

26. It was pointed out that the concept of "jurisdiction" which appeared in the European Convention on Human Rights, as well as in the Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows [ETS No.181] (hereafter referred to as the "Additional Protocol"), was a concept of public international law which depended on States' practice and was justified in that it offered greater adaptability and flexibility in the face of new technologies and the applicable law, while preserving a high degree of legal certainty. Some positions were also expressed in favour of retention of the current wording of Article 1, the view being taken that the proposals for modernisation did not make it possible to establish a clear relationship between data protection and privacy, as in the Preamble.

27. It was also proposed, in connection with Article 3, that responsibility for processing not be limited to the controller within the State's jurisdiction, but be extended to the processor, while care was taken to distinguish the concepts of applicable law, processing of personal data in a non-member State and jurisdiction.

28. The Committee confirmed the opportunity to replace the term "territoriality" by the term "jurisdiction" and to revise the wording of Article 1 in connection with the Preamble.

Article 2

29. It was proposed to add to the explanatory report an explicit reference to the controller and to the means used to identify a person. It was also proposed that it be specified that this individualisation could be done through a reference to the person him or herself, but also in relation to a terminal (computer, mobile telephone, etc), particularly drawing on the wording of the "International Standards on the Protection of Privacy with regard to the processing of Personal Data", which were welcomed by the 31st International Conference of Data Protection and Privacy Commissioners (Madrid, 4-6 December 2009).

30. It was further noted that this definition could also cover the personal data of deceased persons. A reference in this respect could be included in the explanatory report.

31. The T-PD decided, in respect of the definition of "personal data", to include the additional details below in the explanatory report.

32. It also confirmed the deletion of the definition of "automated data file".

33. Where the definition of "data processing" was concerned, the modernisation proposal was intended to cover all kinds of processing, automated or not.

34. It was proposed, in this respect, to include every kind of "structure", adding further details in the explanatory report, to make explicit provision for processing operations carried out with the assistance of non-automated process, and to add detail to the list of possible operations.

35. The T-PD approved the modernisation proposal in respect of the definition of "data processing", as well as the definitions of "controller", "recipient" and "processor".

Article 3

36. It was proposed, as for Article 1, the connection with which should be emphasised, not to confine this article to the controller, but to add the concept of "processor".

37. Taking into account the importance of social networks, it was also proposed to include a reference to them in this regard. Others held the contrasting opinion that such a detail should appear only in the explanatory report, in order to maintain the technologically neutral nature of the Convention while maintaining a degree of consistency with the text of Directive 95/46/EC.

38. It was noted that the voluntary or involuntary nature of processing, with reference to the case-law of the Court of Justice of the European Union (Lindqvist judgment of 6 November 2003, case C-101/01), should also appear in the explanatory report, as

should services and products offered in the context of domestic activities, and the fact that this exception did not apply to the controller or the processor.

39. The T-PD was in favour of the modernisation proposals relating to Article 3, paragraphs 1 and 1bis.

40. Where Article 3, paragraph 1ter, was concerned, the modernisation proposal related to the possibility of an extension of the Convention to legal persons.

41. Some delegations proposed maintaining the possible extension of the scope of the Convention to legal persons, either in this article or in Article 11. Other delegations, in contrast, preferred this aspect to be dealt with in the explanatory report.

42. It was also proposed that account be taken of the discussion on Article 9 where the protection of national security and the prevention of criminal offences were concerned.

43. The T-PD decided to drop the proposed addition of Article 3, paragraph 1ter, and to refer to this matter only in the explanatory report.

Article 4

44. It was noted that this provision, which was intended to make monitoring possible (advance and regular monitoring of States' compliance with their commitments) should be read in conjunction with Articles 18, 19 and 22. It was proposed that this article be read in conjunction with Article 20, paragraph 5, and that it be specified, in this article, that this monitoring was conducted on the basis of objective criteria and in accordance with a fair and transparent procedure.

45. Where paragraph 3 was concerned, it was also suggested to take inspiration from the International Covenant on Civil and Political Rights adopted by the UN on 16 December 1966 (Articles 40 and 41).

Article 5

46. It was pointed out that the modernisation proposal relating to paragraph 1 was intended to make it possible to apply the principle of proportionality, not only with regard to data, as was currently the case, but also to data processing and in relation to the purpose pursued.

47. It was proposed that the wording of paragraph 1 be clarified in order to show, on the one hand, the right to protection of personal data, and, on the other hand, the protection of other rights, and also to specify that this principle of proportionality applied at every stage of a processing operation.

48. The T-PD supported this modernisation proposal and requested the inclusion in the explanatory report of additional information.

49. It was pointed out in relation to paragraph 2 that the modernisation proposal was intended to introduce the legitimate reasons for processing, namely explicit consent, a legitimate interest provided for by law or a legal and contractual obligation as a condition for processing of the data.

50. Where consent was concerned, diverging opinions were expressed as to the conditions which should be met for it to be valid. While some opinions supported the modernisation proposal, others, in contrast, held that it was too specific. It was also proposed to adopt the concept of "unambiguous" consent which already appeared in Directive 95/46/EC (Article 7, paragraph a).

51. It was also noted that it was important to specify, in the explanatory report, that this did not prejudge the issue of withdrawal of consent and its consequences, to be distinguished from the right to object.

52. The T-PD decided to use a more general form of wording for paragraph 2a and explicit consent. It also decided to add further details in the explanatory report.

53. It was suggested, in relation to paragraph 2b, that the wording be revised to make it more general, without listing specific reasons, inter alia by using the same wording as Directive 95/46/EC (Article 7, paragraph c).

54. Other proposals, in contrast, had the aim of restructuring both the article and the legitimate reasons for the processing of data.

55. It was also noted that not all legitimate interests were necessarily provided for by law, and that a balance needed to be found here between legitimate interests and legal obligations in the wording of letter b.

56. The T-PD decided to revise the structure of this article and the wording of the conditions for data processing, while maintaining a balance between legitimate interests and legal obligations.

57. It was pointed out, in respect of paragraph 3, that the modernisation proposals were particularly intended to strengthen the requirements relating to the purposes of data processing and to introduce the principle of the minimisation of data.

58. The T-PD supported the modernisation proposals relating to this paragraph, while asking for the principle of the minimisation of data to be less rigidly defined.

Article 6

59. In order to ensure a degree of consistency with the provisions of Directive 95/46/EC (Article 8), it was proposed that it be specified that this provision was without prejudice to the relevant *acquis communautaire*.

60. Other proposals were intended either to return to the current wording of Article 6 of the Convention, in order to preserve a more general wording and not to make a distinction between sensitive data and potentially sensitive data, or, in contrast, to add to the text of the modernisation proposal.

61. It was noted that certain categories of data mentioned in this article, such as health data, were not always sensitive, which was why it was suggested that a contextual approach be taken by allowing the processing in specific and strict conditions of the data categories mentioned.

62. Other delegations were in favour of a "closed" list where sensitive data were concerned.

63. Where the exceptions to the prohibition of the processing of sensitive data (paragraph 2) were concerned, it was proposed that a reference to the rights of the data subject be introduced.

64. It was also proposed that details about genetic data be added to the explanatory report.

65. The T-PD decided to revise the drafting of Article 6 on the basis of the current wording of Convention 108 and of the proposal for a "closed" list, in order to maintain a degree of consistency with Article 8 of Directive 95/46/EC.

Article 7

66. It was noted that the obligation incumbent on the controller was broader than just guaranteeing the security of the processing, and that this should be emphasised both in the content and in the title of this article.

67. It was also noted that the concept of "dissemination" did not encompass that of "disclosure", which was associated with the possibility of an accident. It was therefore proposed to add a reference to the concept of "disclosure".

68. It was also proposed that the explanatory report specify the conditions in which the controller was required to notify any violation of personal data.

69. The T-PD was in favour of the modernisation proposal relating to this article.

Article 7bis

70. It was noted that information was in practice supplied not only to individual recipients, but also potentially to categories of recipients. It was proposed that a reference be made to this in paragraph 1.

71. Where paragraph 2 was concerned, it was proposed to refer, in the same way as Directive 95/46/EC, to a hypothetical situation in which the law provided that the controller was not required to supply such information. It was also proposed, as an alternative, that further details on this subject be added to the explanatory report, but that cases in which the data subject already had information should also be considered.

72. It was also proposed that the reference to the preservation period on the list of information to be supplied by the controller be deleted and be mentioned only in the explanatory report, and, on the other hand, to include in the draft article a reference to the data processing operations carried out, an important element of the transparency of processing.

Article 8

73. It was proposed not to restrict Article 8 to the possibility of the right of access alone and to give more detail of the right to obtain knowledge of the reasoning for processing, in order to draw on Directive 95/46/EC (Article 12, paragraph a) and on Recommendation CM/Rec(2010)13 of the Committee of Ministers to member States on the protection of individuals with regard to automatic processing of personal data in the context of profiling.

74. It was also suggested, where the right to object was concerned, that the time at which it was possible to assert that right, and the consequences thereof, be specified, particularly by reference to Directive 95/46/EC, but also that its scope be clarified through the grounds for processing, in order to ensure consistency with Directive 95/46/EC. It was also proposed, as an alternative, that an exception in domestic law (legal exception) be added.

75. It was also noted that the right to object had to be read in conjunction with the right to remedy provided for by letter e, which was connected with it.

76. Where the explanatory report was concerned, it was proposed that further details be added to it relating inter alia to the scope of the assistance provided by the national supervisory authorities, to the absence of legitimate interest in the sphere of direct marketing and to the limits of the right to object, particularly in view of legal exceptions or compliance with other rights and freedoms. A connection with Article 9 should be established on this last point.

77. With the exception of letters e and f, the T-PD decided to revise the wording of Article 8.

Article 8bis

78. It was pointed out that the modernisation proposal was intended to add to the obligations incumbent on the controller, particularly in respect of the prevention of data processing risks, in order to reduce the risks of violations of the right to protection of the data subject's data.

79. Some delegations wished paragraphs 1 and 2, or even the whole article, to be deleted, taking the view that an excessive administrative burden might be imposed on States Parties and on the controller, particularly for those countries where the great majority of the economy was made up of small and medium-sized businesses. In this respect, it seemed difficult to require processors to analyse the risks. Such an analysis was more a matter for IT system creators or designers.

80. A general proposal was made to reconsider whether the wording of this article should relate to States Parties directly.

81. Paragraphs 5 and 6, deemed highly important, gave rise to the greatest amount of discussion. It was proposed either to delete paragraph 5 or to redraft it, because it was considered to be inadequate where the controller's obligations were concerned and in respect of the Privacy by Design principle. Where paragraph 6 was concerned, it was noted that the risk analysis criterion was more important than that of size. It was also proposed that it be made compulsory and that the reference to the processor be deleted.

82. It was noted that a number of details should be given in the explanatory report, inter alia where risk analysis was concerned, as should some examples, particularly in respect of the implementation of the Privacy by Design principle and its relationship with the Privacy by Default principle, in conjunction with the proposal for a regulation.

83. The T-PD approved paragraph 1, including part of paragraph 4, which was also adopted, as were paragraphs 3 and 6, whereas it was decided to reconsider the wording of paragraph 5, and paragraph 2 was deleted.

Article 9

84. It was noted that Article 9, paragraph 1, should not include exceptions, or therefore references, to either the principle of the prohibition of the processing of sensitive data (Article 6) or the principle of lawfulness and proportionality (Article 5, paragraph 3), which would enable consistency to be guaranteed with Directive 95/46/EC (Article 13).

85. Other opinions, in contrast, emphasised that any subsequent processing necessary in pursuance of a law would be compatible with Article 9, paragraph 1, and that the purposes should be examined on a case-by-case basis. Consequently, the deletion of the reference to Article 5, paragraph 3 would make Convention 108 stricter than the Directive.

86. In this context it was also noted that each processing operation was subject to the principles of proportionality and the minimisation of data set out in Article 5, paragraph 3, letter c.

87. The T-PD decided to revise the drafting of the exception set out in Article 9, paragraph 1.

88. It was noted that it was important to ensure consistency with Directive 95/46/EC, but that it was equally important to distinguish the vocabulary used in a European framework from that used internationally, and to draw as well on the European Convention on Human Rights.

89. The Chair pointed to the objective, mentioned in Article 9, paragraph 2, of being able to derogate from the Convention for statistical or scientific processing. It was stated that Article 6 already provided appropriate safeguards, whereas Article 13, paragraph 2, of Directive 95/46/EC provided for appropriate legal safeguards, in conjunction with the criterion of the risk of violation of privacy.

90. The T-PD decided to delete from Article 9, paragraph 2 the reference to Article 6.

91. It was pointed out that no changes had been proposed in respect of Articles 10 and 11 of Convention 108.

Article 12

92. The Chair pointed out that, at the outset, the modernisation proposal was intended to bring the provisions of the Additional Protocol into Convention 108 and to take as a basis the requirement for an adequate level of protection, vis-à-vis non-member states, while retaining the presumption of adequacy which existed for States Parties to Convention 108.

93. The importance of the presumption of adequacy was emphasised. However, it was also noted that detailed thought needed to be given to a number of points before this provision was finalised.

94. It was important firstly to clarify, particularly in the explanatory report, possible automatic referral to the Conventional Committee, its role, particularly in evaluating whether a state was in a position to ratify Convention 108, determining the level of protection required, the scope of the evaluation procedure, which was not currently required for accession to Convention 108, and the consequences of that procedure, particularly of a negative evaluation, by reference to Article 12, paragraph 2, and Article 19, letter i.

95. It was also specified in this respect that, while certain states had, initially, been able to comply with Convention 108, developments in European legislation meant that they might no longer be able to comply with their obligations, particularly where the new States Parties were concerned, and free movement might well no longer be guaranteed. In order to correct this mechanism, advance monitoring (reflected in Article 4) and regular monitoring of the implementation of Convention 108 had been proposed. It was in this context that the question arose of giving the T-PD the power to issue binding opinions. It was also important to emphasise that a link between the European Union provisions and those of the Council of Europe was necessary, and that the introduction of a monitoring mechanism was intended to create a relationship of trust between the member states of the European Union, Article 12 of Convention 108 going hand-in-hand with Article 19.

96. It was also noted that derogations which States Parties could raise in order to protect the freedom of expression and information referred to in paragraph 6 complemented the "law of that State" or the "standardised or ad hoc legal measures" mentioned in paragraph 2, letters a and b. It was pointed out in this context that paragraph 6 had, at the outset, been included in Article 9, but given the fact that such derogations were not justified from the viewpoint of that article, this paragraph 6 had subsequently been included in Article 12 in relation to the media. The example of the Lindqvist case-law of the Court of Justice of the European Union relating to Internet publication and justification, as well as to the question of derogations, was revealing in this respect. It was stated, where the communication and making available of information were concerned, that national derogations should not prove disproportionate either, in the framework of Article 12, paragraph 4, and could not be used to allow large-scale or repetitive data transfers. Further details in this respect might be given in the explanatory report. On this subject, it was also emphasised that this paragraph 4 had two meanings: more important was the protection of freedom of expression in a globalised world, rather than the classification of flows.

97. Another question lay in the concepts used by Convention 108 and Directive 95/46/EC, and in their consistency. It was noted that a distinction had to be made between the different scenarios, and, since certain states were not members of the Council of Europe or Parties to Convention 108, the question was raised of whether the concept of "equivalent effect" or "equivalent" was more meaningful than the term "adequate". In order to maintain consistency between Convention 108 and the Directive, the question of interaction between the two regimes was raised by the deletion of the term "territory" from Convention 108, whereas this term did appear in Directive 95/46/EC, in connection with cross-border data flows (Article 13). That might cause a problem if the recipient's location was not known, especially as each state interpreted the scope of its own jurisdiction.

98. It was also pointed out that the general nature of Convention 108 provided an opportunity to make accession to the Convention attractive for non-member states, and that account should be taken of this in its content, particularly vis-à-vis the Additional Protocol, the provisions of which were more detailed. It was also stated, in this context, that although consistency between the European Union and the Council of Europe was important, there was nevertheless quite a difference with the inadequacy envisaged by the provisions of the directive, completed by the work of the Article 29 Working Party, in respect of the question of the relationship between the different states, Parties and non-Parties. Indeed, the problem envisaged was different, in so far as the objective of Convention 108 was for all the Parties, including those states which were not members of the European Union or the Council of Europe, to be able to adopt an equivalent level of protection, so that there were no disparities. The difficulty was that of reflecting these two approaches in the text of the Convention.

99. It was also emphasised that, while the Additional Protocol was the starting point for analysis, it could only relate to one part of the problem, namely the transfer of flows between States Parties and non-member states. But the nub of the problem was transfers between States Parties to Convention 108, for which the question of a possible extension of the evaluation procedure was raised.

100. The question of the adequate level of protection was particularly pertinent, in paragraph 3, letters a and b, in relation to transfers of data flows to international organisations, such as United Nations agencies. Similarly, emphasis needed to be placed on the intervention and room for manoeuvre of national supervisory authorities, responsible for ensuring that data protection was assured, in the presence of ad hoc measures. In this context, it was noted that those authorities should be informed of flow movements and of standardised legal measures, which presupposed the allocation of additional resources. It was also noted that the possibility for the supervisory authority to

suspend the communication of data was covered in both paragraph 3 and paragraph 5, which could give rise to a degree of confusion.

101. In the absence of a consensus on the modernisation proposals submitted for discussion, particularly in view of the terminology to be used in relation to the adequate level of protection, and the possible role of the T-PD if it was required to supervise implementation of Convention 108 by the States Parties, examination of this question would be resumed in the light of a new proposed text.

Article 12bis

102. It was pointed out that the modernisation proposal was intended to highlight the awareness-raising duties of the supervisory authorities, and the strengthening of their independence.

103. The importance, for those authorities, of keeping abreast of technological developments was emphasised. However, it was noted that they could not bear sole responsibility for awareness-raising. It was noted that this was incumbent first and foremost on the States Parties. It was also important to specify, in the explanatory report, at what stage the supervisory authorities could intervene, particularly in respect of the processing of data presenting risks, and that they should be consulted by controllers. Whenever an authority wished to draft general recommendations, it could decide to consult stakeholders.

104. Since Article 10 of Convention 108 already provided for judicial and non-judicial sanctions, it was proposed to strengthen the modernisation proposal relating to paragraph 2, letter c, particularly to ensure consistency with the proposal for a regulation in respect of the strengthening of sanctions, or even to provide for referral, in accordance with national constitutional rules, to the competent authorities, particularly judicial authorities. Details of this should be added to the explanatory report. Other delegations wondered about the faculty for the supervisory authorities to impose administrative sanctions, which could give rise to a conflict of laws in certain States Parties to Convention 108. Further details could be included in the explanatory report, also in order to illustrate the differences between models of supervisory authorities.

105. Where the question of the independence of the supervisory authorities was concerned, it was proposed that emphasis be placed on the latter's autonomy, a concept reflected in the proposal for a regulation (Article 47). Other delegations, in contrast, pointed out that the concept of "independence" which already appeared in the wording of the modernisation proposal (paragraph 4) was broader and already encompassed the concept of autonomy.

106. Particular importance was also attached to the promotion of co-operation between supervisory authorities in general, and in the more specific case of particular procedures or when exchanges of information or of data took place. This question also arose in the framework of the opening of Convention 108 to non-member states. It was proposed to mention in the explanatory report that this did not adversely affect existing co-operation instruments in the civil and criminal spheres.

107. The T-PD approved Article 12bis, paragraphs 1 to 6, as well as paragraph 9. It also decided to supplement the explanatory report with the help of the comments made and to review the wording of paragraphs 7 and 8.

Articles 13 to 17

108. The T-PD decided to adopt Article 13.

109. In the absence of comments, the T-PD was in favour of the modernisation proposals relating to Articles 14 to 17.

Article 18

110. The modernisation proposal provided for an alternative: a majority of two-thirds of the representatives voting or a majority of two-thirds of the representatives entitled to vote.

111. A vote was taken. The proposal relating to the majority of two-thirds of the representatives entitled to vote was adopted.

112. It was noted that some details of the T-PD's expectations of observers, particularly in respect of paragraph 2, should appear in the explanatory report.

113. The T-PD approved Article 18, taking account of the results of the voting on paragraph 3 and of the details to be given in the explanatory report on paragraph 4.

Article 19

114. It was pointed out that, in order to align the text with practice, the aim of the modernisation proposal relating to letter d was for the opinion to relate not only to the interpretation, but also to the application of Convention 108.

115. It was underlined that Article 19 was to be revised in conjunction with Articles 4 and 12, particularly in respect of the powers of the T-PD, the binding nature of its decisions and the rules on procedures, so as to envisage a mechanism ensuring legal certainty at the end of fair and transparent procedures. It was also noted that the discussion on

cross-border data flows and the possibility of a negative evaluation by the T-PD, in conjunction with Article 12, paragraph 2, should be taken into account, as should the need to ensure consistency with the contractual clauses for which, for example, Article 12, paragraph 3 provided and coordination with the European Commission and the instruments which already existed within the European Union.

116. It was emphasised that the opinion of the T-PD to which Article 19, letter d referred concerned only those non-member states invited to accede to Convention 108, as had already been the case for Uruguay, whereas Article 4, paragraph 3, in contrast, related to application measures taken by the States Parties in order to implement Convention 108, which the T-PD should have power to evaluate.

117. The question of possible coordination between the T-PD's decision and the political decision of the Committee of Ministers was also raised, particularly vis-à-vis the accession procedure for non-member states. A distinction should also be made between two different stages, namely the invitation to accede and effective accession, which was subject to a more thorough evaluation which could, where applicable, give rise to co-operation between the Council of Europe and certain states. On this point, it was emphasised that a transparent and public method was necessary.

118. It was noted that the wording of the modernisation proposal relating to letter j on the subject of friendly settlements was not sufficiently detailed, in that it did not envisage the different possible scenarios. Other opinions expressed, in contrast, were that the Committee should confine itself to a role of intermediary in the context of friendly settlements of disputes, without binding authority being given to it, as other mechanisms of this type already existed in international law (including the Vienna Convention). It was proposed that additional explanations on this subject be added to the explanatory report.

119. The T-PD decided to revise the wording of Article 19, particularly letters d to i, in the light of Article 12 in particular. The proposed amendments to letters a and j submitted to the T-PD, however, were approved.

Article 20

120. The modernisation proposal was essentially intended to specify the rules connected with the right to vote and to provide for the holding of at least one meeting each year.

121. The T-PD decided to re-examine this article, particularly paragraphs 1, 3 and 5 thereof, particularly in conjunction with Article 19.

Article 21

122. It was pointed out, with reference to the position of the Treaty Office, that this article would not prevent the possibility of automatic entry into force of an amending Protocol, a procedure already used at the Council of Europe. The question was raised of whether a state which had already signed Convention 108 could ratify it in its original version or would, in contrast, have to ratify it with the amendments. It was noted that the same scenario should be envisaged for non-member states wishing to accede to Convention 108.

123. The "disconnection clause" should be verified.

Article 23

124. It was pointed out that the modernisation proposal related specifically to the possibility for the T-PD to rule on the accession of a non-member state to Convention 108.

125. It was proposed that a broader wording be adopted, particularly where paragraph 3 was concerned, in order to preserve the open nature of Convention 108. It should be possible to envisage not only the accession of the European Union, but also that of other international or supranational organisations.

126. The T-PD decided to adopt paragraphs 1 and 2. The modernisation proposal relating to paragraph 3, on the other hand, was not adopted.

Article 24

127. It was pointed out that the aim of the modernisation proposal was to include a reference to the European Union in this article.

128. The T-PD approved the modernisation proposals.

Article 27

129. It was pointed out that the aim of the modernisation proposal was to refer not just to Council of Europe member states, but to any Party to Convention 108.

130. The T-PD approved the modernisation proposal.

Conclusion

131. The Chair noted that the discussions on the modernisation proposals had again given rise to too many uncertainties, particularly relating to Articles 4, in conjunction with Articles 12 and 19, and to Article 6, to be able to finalise all the proposals for modernisation of Convention 108. The T-PD instructed its Bureau to review these proposals in the light of the exchanges and comments, with a view to their examination at the 29th plenary meeting (27 to 30 November 2012). The Secretariat advised delegations of the relevant comments of the European Committee on Legal Co-operation.

V. DATA PROTECTION USED FOR EMPLOYMENT PURPOSES

132. The T-PD took note of the information provided on the work on revising the 1989 Recommendation with a view to having a new version available for the next meeting of the Bureau in September. This version would subsequently be sent to the CDCJ.

VI. DATA PROTECTION AND POLICE

133. The T-PD took note of the information provided by the Secretariat and invited Mr Cannataci to finalise his report on the implementation of Recommendation (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector, so that this could be examined at the next plenary meeting of the T-PD.

VII. OVERVIEW OF DATA PROTECTION ACTIVITIES SINCE THE LAST PLENARY MEETING

134. The T-PD took note of the participation of its members and of the Secretariat in various recent and forthcoming events, and of the information provided.

VIII. DATA PROTECTION DAY

135. The T-PD took note of the information provided about the 2012 Day and the Day to be held in 2013.

136. Ms Catherine Pozzo di Borgo (France) reported on her participation in the Data Protection Day in Brussels on 27 January 2012, in the framework of the 5th International Conference on “Computers, Privacy and Data Protection”, where the Council of Europe held a panel on “Modernising Convention 108 in the face of the IT revolution.” In this context, a general presentation of the ongoing work and of the main issues discussed in the T-PD had been made.

IX. MAJOR DEVELOPMENT IN THE DATA PROTECTION FIELD SINCE THE 27TH MEETING OF THE T-PD (29 NOVEMBER-2 DECEMBER 2011)

137. All delegations were given the opportunity to take the floor, and the T-PD noted the information provided by each.

138. It was noted that the problem of databases on pupils concerned several countries and had been illustrated by some examples. The recent judgment on Google Street View delivered by the Federal Supreme Court of Switzerland on 31 May 2012 was also discussed.

139. It was proposed that, at forthcoming meetings, such opportunities for all delegations to take the floor could also entail a specific theme on which States Parties' progress would be observed. The T-PD in this context invited its Bureau to examine the advisability of identifying a specific theme for exchanges of information at forthcoming plenary meetings.

140. The T-PD took note of the contribution of Mr Luiz Costa on data protection in Brazil, and of his presentation of a report ("A brief analysis of data protection law in Brazil").

X. WORK PROGRAMME

141. The T-PD confirmed the main lines of its work programme and instructed its Bureau to ensure implementation thereof and to examine further lines of action.

XI. CO-OPERATION WITH OTHER COUNCIL OF EUROPE BODIES

142. The T-PD took note of the information provided in the context of its co-operation with other Council of Europe bodies, and particularly of the work done within the Office of the Commissioner for Human Rights, presented by Mr Victor Munteanu, and of the presentation by Mr Pierre Masson on sport-related conventions, which could give rise to new co-operation, particularly with a view to strengthening the application of Convention 108 in the States Parties.

XII. OPINIONS

143. The T-PD examined the draft opinions which were submitted.

144. On the subject of the draft opinions on the proposal for a regulation and proposal for a directive, the Secretariat pointed to the context in which these opinions had been prepared.

145. It was noted that in-depth consideration of these texts was needed and, in view of the scope of such opinions, the Secretariat was asked to obtain a formal request of opinion.

146. It was emphasised in any case that it was necessary to pass on the values of Convention 108 and of the current modernisation proposals.

147. The T-PD instructed its Secretariat, once official referral to the T-PD had been confirmed, to revise these two draft opinions with a view to finalisation by written procedure.

148. On the subject of the draft opinion on the draft Committee of Ministers declaration on risks to fundamental rights stemming from digital tracking and other surveillance technologies, the Secretariat also pointed to the context in which this text had been prepared and to the main points of the draft.

149. The need to make arrangements in respect of digital tracking and other surveillance technologies was emphasised, as was the importance of the principles of proportionality and purpose. It was also suggested that the scope of this draft declaration be clarified.

150. The T-PD adopted its opinion on the draft Committee of Ministers declaration on risks to fundamental rights stemming from digital tracking and other surveillance technologies, and instructed the Secretariat to forward this to the Steering Committee on Media and Information Society (CDMSI) by the set deadline.

XIII. STATE OF SIGNATURES, RATIFICATIONS AND ACCESSIONS

151. The T-PD took note of the information provided in the context of the state of signatures, ratifications and accessions, welcoming the arrival of a 44th Party (Armenia) to Convention 108.

XIV. OBSERVERS

152. The T-PD took note of the contribution of Mr Michael Donohue on the subject of the revision of the Guidelines on the Protection of Privacy adopted by the OECD, and also of his invitation to share information about contact points in order to make these available to the Global Privacy Enforcement Network (GPEN).

153. The T-PD also took note, from the information provided by Ms Floriane Leclercq of the holding by the “Association Francophone des Autorités de Protection des Données Personnelles” (AFAPDP), in Monaco on 22 and 23 November 2012, of the 6th Francophone conference of personal data protection commissioners.

XV. DATA PROTECTION COMMISSIONER

154. The T-PD took note of the information provided by the Council of Europe Data Protection Commissioner.

155. The T-PD called on the Secretary General of the Council of Europe to modernise its regulations on data protection, to bring these up to the level of those which existed in the Organisation's member states and to raise greater awareness of this subject among Council of Europe staff.

XVI. CONTACT POINTS AND NATIONAL INFORMATION

156. The T-PD instructed its Secretariat to contact delegations in order to enable national information on the website to be updated, together with information about contact points, taking note in this context of the invitation issued by the OECD representative to enable better exchange of information.

XVII. NEXT MEETINGS

157. The T-PD took note of the dates of the 29th plenary meeting (27-30 November 2012, in Strasbourg) and of the dates of its Bureau meeting (27-28 September 2012, in Strasbourg).

XVIII. ELECTIONS

158. In pursuance of Article 10 of its Rules of Procedure, the T-PD elected Mr Jean-Philippe Walter (Switzerland) Chair for a new term of office, Ms Hana Štěpánková (Czech Republic) 1st Vice-Chair and Ms Catherine Pozzo di Borgo (France) 2nd Vice-Chair, also for a new term of office, and the following four Bureau members: Mr Gérard Lommel (Luxembourg, re-election), Ms Alessandra Pierucci (Italy), Mr Agustin Puente Escobar (Spain) and Ms Nevena Ruzic (Serbia, re-election).

XIX. OTHER BUSINESS

159. The T-PD also took note of the information presented by the Secretariat on the adoption of the Convention regulating the use of the International Commission on Civil Status Platform for international communication of civil-status data by electronic means. The explanatory report to this Convention refers to the Convention 108 and its principles.

ANNEXE I - LISTE DES PARTICIPANTS



Strasbourg, le 22 juin 2012

**CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF
INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA
[ETS 108]**

**COMITE CONSULTATIF DE LA CONVENTION POUR LA PROTECTION DES
PERSONNES A L'EGARD DU TRAITEMENT AUTOMATISE DES DONNEES A
CARACTERE PERSONNEL [STE 108]
(T-PD)**

28th meeting / 28^{ème} réunion
Strasbourg, 19 – 22 juin/June 2012
Palais – salle 2

LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

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ANNEXE II - AGENDA

Strasbourg, 15 juin 2012



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

'12) OJ_en

T-PD 28 (2012) OJ_en

CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA [ETS No. 108] (T-PD)

28th Plenary meeting

19 June 2012 (9.30 a.m.)
22 June 2012 (5 p.m.)

Strasbourg, Palais, Room 2

AGENDA

I. OPENING OF THE MEETING

II. ADOPTION OF THE AGENDA

III. STATEMENT BY THE SECRETARIAT

MR JAN KLEIJSSSEN, DIRECTOR, INFORMATION SOCIETY AND ACTION AGAINST CRIME

- [T-PD \(2011\) RAP27 Abr](#) Abridged Report of the 27th Plenary meeting of the T-PD (29 November – 2 December 2011)
- [T-PD-BUR _____ \(2012\) RAP26](#) Report of the 26th meeting of the Bureau of the T-PD (6-8 February 2012)
- [T-PD-BUR _____ \(2012\) RAP27](#) Report of the 27th meeting of the Bureau of the T-PD (16-18 April 2012)

- [T-PD\(2012\) Rules](#) T-PD's rules of procedure

IV. MODERNISATION OF CONVENTION 108

Required action: The T-PD will consider in second reading the proposals of modernisation of Convention 108 with a view to their approval and transmission to the Committee of Ministers.

- [T-PD\(2012\)04Mos](#) Final document on the modernisation of Convention 108 *(to be issued after replies by Delegations have been received)*
- [T-PD-BUR\(2012\)01Rev2](#) Modernisation of Convention 108 : new proposals
- [T-PD-BUR\(2012\)03Mos](#) Compilation of the comments received on the modernisation of Convention 108
- [T-PD-BUR\(2012\)01Rev](#) Modernisation of Convention 108 : new proposals
- [T-PD-BUR\(2011\)01mosRev6](#) "Consultation concerning the modernisation of Convention 108: results"
- [T-PD-BUR\(2010\)09](#) Report on the lacunae of the Convention for the protection of individuals with regard to automatic processing of personal data (ETS 108) resulting from technological developments
- [T-PD-BUR\(2010\)13rev](#) 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 108) and its Additional Protocol
- [T-PD-BUR\(2011\)15](#) Modalities for the amendment of Council of Europe treaties
- [T-PD-BUR\(2011\)25](#) Secretariat Comments on the strengthening of the Convention's follow up mechanism

- Ms Cécile de Terwangne, Professor Law Faculty, Namur University (FUNDP), CRIDS Research Director
- Mr Jean-Philippe Moïny, CRIDS Researcher, Namur University (FUNDP)
- Ms Marie Georges, Scientific Expert: modalities and mechanisms for assessing implementation of Convention 108

V. DATA PROTECTION USED FOR EMPLOYMENT PURPOSES

Required action: The Committee will take note of the information provided on the revision work of the 1989 Recommendation.

- [T-PD-BUR\(2010\)11FIN](#) Study on Recommendation (89)2 on the protection of personal data used for employment purposes and to suggest proposals for the revision of the above-mentioned Recommendation by Mr Giovanni Buttarelli.
- [Recommendation \(89\)2](#)

VI. DATA PROTECTION AND POLICE

Required action: The Committee will take note of the information provided by the Secretariat.

- [Recommendation \(87\)15](#) of the Committee of Ministers to the member States on regulating the use of personal data in the police sector

“Recommendation (87)15 – Twenty-five years down the line: Preliminary Report “**(restricted)**”

VII. OVERVIEW OF DATA PROTECTION ACTIVITIES SINCE THE LAST PLENARY MEETING

Required action: the T-PD members will take note of the participation of the T-PD members and the Secretariat in various events and of the information provided.

- [T-PD-BUR\(2012\)02Mos](#) Compilation of reports of T-PD representatives in other committees and fora as well as other events and conferences

EVENTS AND CONFERENCES 2012

- WASHINGTON – **EU CONFERENCE** – 19 MARCH
- LUXEMBOURG – **EUROPEAN DPA CONFERENCE** (3 – 4 MAY)
- SKOPJE – **INTERNATIONAL CONFERENCE** (30-31 MAY)
- STOCKHOLM – **EURODIG** (14 – 15 JUNE)
- STRASBOURG – **OCTOPUS CONFERENCE** (6-8 JUNE)

FORTHCOMING:

- PUNTA DEL ESTE – 34TH INTERNATIONAL CONFERENCE OF DATA PROTECTION AND PRIVACY COMMISSIONERS (23 – 26 OCTOBER)
- BAKU – INTERNET GOVERNANCE FORUM (IGF) (6 – 9 NOVEMBER)

VIII. DATA PROTECTION DAY

Required action: The Committee will take note of the information provided.

- [DPD \(2012\) Compilation](#) Compilation of the participation forms received for the 2012 Data Protection Day
- [T-PD-BUR\(2012\)02Mos](#) Compilation of reports of T-PD representatives in other committees and fora as well as other events and conferences

IX. MAJOR DEVELOPMENTS IN THE DATA PROTECTION FIELD SINCE THE 27TH MEETING OF THE T-PD (29 Nov. – 2 DEC. 2011)

Required action: The Committee will take note of the information provided and will have an exchange of views on those issues.

- [T-PD\(2012\)02Mos](#)
[T-PD\(2012\)02Mos Add](#) Information on the recent developments at national level in the data protection field
- [International Focus](#)
[A brief analysis of Data Protection Law in Brazil by Luiz Costa](#) Brazil

X. WORK PROGRAMME

- [T-PD \(2012\) WP](#) Work programme for the T-PD for 2012 and 2013

XI. COOPERATION WITH OTHER COUNCIL OF EUROPE BODIES

Required action: The Committee will take note of the information provided.

- Steering Committee on Media and Information Society (CDMSI)
- European Committee on Legal Cooperation (CDCJ)
- Council of Europe Parliamentary Assembly (PACE)
- Enlarged Partial Agreement on Sport (EPAS) – Sport Conventions Division
Link to the document [“Data protection issues in anti-doping”](#)
- Committee on Bioethics (DH – Bio)

XII. OPINIONS

Required action: The Committee will take note of the finalised opinions and will consider the draft opinions submitted.

- [T-PD\(2012\)01](#) Compilation of opinions
- Draft opinion on the proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- Draft opinion on the proposal of a Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, and the free movement of such data.
- Draft opinion on the Draft Committee of Ministers Declaration on risks to fundamental rights stemming from digital tracking and other surveillance technologies.
[Link to the Draft Declaration](#)
- Consultation on "[Internet of things](#)"

XIII. STATE OF SIGNATURES, RATIFICATIONS AND ACCESSION

Required action: The Committee will take note of the information provided.

- [Overview Convention 108](#)
- [Overview additional Protocol](#)

XIV. OBSERVERS

Required action: Note will be taken on the information provided by the Observers.

XV. DATA PROTECTION COMMISSIONER

Required action: The Committee will take note of the information provided.

- Secretary General's Regulation

XVI. CONTACT POINTS AND NATIONAL INFORMATION

XVII. NEXT MEETINGS

Required action: The Committee will take note of the proposed dates for the next meetings of the Bureau of the T-PD and of the Plenary meeting in 2013.

XVIII. ELECTIONS

- [T-PD\(2012\)03](#) Memorandum concerning elections for the T-PD

XIX. OTHER BUSINESS

- International Commission on Civil Status