



Strasbourg, 20 November 2009

T-PD-BUR (2009) RAP 19 PROV

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

19th meeting of the Bureau

Strasbourg, 18-20 November 2009

DRAFT ABRIDGED REPORT

1. The Bureau of the Consultative Committee of Convention 108 (T-PD) held its 19th meeting from 18 to 20 November 2009 at the Council of Europe in Strasbourg. The list of participants and the meeting agenda are reproduced in Appendices I and II to this report respectively.
2. The Bureau took note of the information provided by Mr Jörg POLAKIEWICZ, Head of the Legislative Reform Department, concerning the latest developments since the meeting in June 2009. The Secretariat had participated in the International Conference of Data Protection and Privacy Commissioners held in Madrid from 3 to 6 November 2009, at which the draft recommendation on profiling had been presented by Mr Jörg POLAKIEWICZ during the session on on-line advertising.

Stock had been taken of the negotiations on the revision of the Convention on Mutual Administrative Assistance in Tax Matters (no. 127). The Secretariat and the T-PD expert, Mr Karel Neuwirt, had attended the meeting of the Ad hoc Committee for the revision of the said Convention in Paris on 22 and 23 November 2009. Mr Neuwirt's report is reproduced in Appendix III.
3. The members of the Bureau had held an exchange of views with the representatives of the OECD Secretariat, and discussed data protection in the context of the revision of the Convention on Mutual Administrative Assistance in Tax Matters (no. 127) (see Appendix IV).
4. On 18 November 2009 the Bureau had held consultations with the representatives of various associations and groups regarding the draft Recommendation on the protection of personal data used for profiling. The list of participants who had submitted their comments, and the comments themselves, could be consulted on website www.coe.int/dataprotection. The report of these consultations would also be published on this website.

5. The T-PD Bureau continued the fifth reading of the draft recommendation on the protection of personal data used in the framework of profiling. The Bureau considered the comments submitted by the contracting parties, observers, associations and private groups, and in particular the comments on the scope of the draft recommendation expressing regrets that the scope had been limited to the private sector during the fourth revision. An amendment had been proposed to take these comments into account.
6. The Bureau decided to continue the fifth reading of the draft recommendation at its next meeting in the light of the comments submitted for the fourth revision, and therefore not to make the draft public, as the fifth lecture had not yet been completed.
7. The Bureau appointed Mr Jean-Philippe Walter (Switzerland) member of the Bureau of the T-PD responsible for questions relating to the organisation of the legal expert report on national legislation regarding personal data protection in the framework of requests for accession from Council of Europe non-member states.
8. The Bureau held an exchange of views on the celebration of the 30th anniversary of Convention 108. A proposal was put forward for a multilateral encounter on data protection geared to taking stock of past activities and considering future prospects. This initiative might be taken in close co-operation with one or more national data protection bodies, as well as non-governmental organisations active in this field. The Bureau decided to continue discussing and detailing the organisation of the celebrations.
9. The Bureau decided to hold its 20th meeting from 2 to 4 March 2010.

APPENDIX I

LIST of PARTICIPANTS

BUREAU MEMBERS

AUSTRIA

Eva Souhrada-Kirchmayer, [*First Vice-Chair of the T-PD*], Head of the data protection division, Federal Chancellery

CZECH REPUBLIC

Hana Štěpánková, Head of the Press Department, Spokeswoman, Office for Personal Data Protection

ITALY

Alessandra Pierucci, Civil Servant at the Italian Data Protection Authority, Garante per la Protezione dei Dati Personali
Excused / excusée

Clizia D'Agata, Substitute representative of Ms. Alessandra Pierucci / Représentant remplaçante de Mme Alessandra Pierucci, Service for Community and International Matters of the Italian Data Protection Authority, Garante per la Protezione dei Dati Personali

PORTUGAL

Joao Pedro Cabral, [*Chair of the T-PD*], Directorate General of Justice Policy, Ministry of Justice,

ROMANIA

George Grigore, Department of European Integration, and International Affairs - Romanian DPA

SWITZERLAND

Jean-Philippe Walter, [*Second Vice-Chair of the T-PD*], Préposé fédéral à la protection des données et à la transparence (PFPDT), Chancellerie fédérale

UNITED KINGDOM

Kevin Fraser, Head of EU Data Protection Policy, Ministry of Justice

MEMBERS OF THE T-PD

SLOVAKIA

Veronika Žuffová–Kunčová, LL.M, Foreign Relations Department, Personal Data Protection Office of the SR

SCIENTIFIC EXPERTS

Jean-Marc Dinant, Docteur in informatique, Maître de conférence à l'Université de Namur

COMMISSION OF THE EUROPEAN COMMUNITIES

Excused / excusé

OBSERVERS

FRENCH-SPEAKING ASSOCIATION OF PERSONAL DATA PROTECTION AUTHORITIES (AFAPDP)

Olivier Matter, CNIL, Secrétariat Général de l'AFAPDP

INTERNATIONAL CHAMBER OF COMMERCE (ICC)

Cedric Burton, avocat, Hunton & Williams

SECRETARIAT

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Véronica Burkhardt, Trainee

Hélène Labbouz, Trainee

INTERPRETERS

Boux Sylvie
Kieffer Nadine
Neuschwander Maryline

APPENDIX II

DRAFT AGENDA

1. OPENING OF THE MEETING

2. ADOPTION OF THE AGENDA

3. STATEMENT BY THE SECRETARIAT

- Abridged report 18th
T-PD-BUR
New Abridged report of the 18th meeting of the T-PD-BUR (Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [ETS No. 108]), (6-7 July 2009)

4. CONSULTATION WITH REPRESENTATIVES OF THE PRIVATE SECTOR ON THE DRAFT RECOMMENDATION ON PROFILING

- T-PD-BUR (2009) 08
New Comments of private stakeholders on the draft recommendation on the protection of individuals with regard to automatic processing of personal data in the framework of profiling

Agenda

List of participants

5. PROFILING

Required action: the Bureau will continue its examination of the draft text on personal data protection with regard to the process of profiling, in view of the contributions received.

- T-PD (2008) 01 Study on the application of Convention 108 to the profiling mechanisms
- T-PD (2009) 06
New Table containing the draft recommendation on the protection of individuals with regard to automatic processing of personal data in the framework of profiling as resulting from the 25th Plenary meeting (2-4 September 2009)
- T-PD-BUR (2009) 02 Rev 4
New Draft recommendation on the protection of individuals with regard to automatic processing of personal data in the framework of profiling as resulting from the 25th Plenary meeting (2-4 September 2009)

- T-PD-BUR (2009) 07
New Comments on the draft recommendation on the protection of individuals with regard to automatic processing of personal data in the framework of profiling

6. CURRENT ISSUES

Reflexion for the preparation of the Celebration of Data Protection Day in 2011.

7. DATE OF THE NEXT BUREAU MEETINGS OF THE T-PD IN 2010

APPENDIX III

REPORT OF DR KAREL NEUWIRT, DATA PROTECTION COMMISSIONER

MEETING OF THE AD HOC COMMITTEE FOR THE REVISION OF THE CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS (CAHTAX)

Joint meeting with the Co-ordinating body of the Organisation for Economic Co-operation and Development (OECD), Paris, 22-23 October 2009

Head of the CoE Delegation:	Jörg Polakiewicz
Delegates :	Edo Korljan Lucy Ancelin Elise Cornu

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The T-PD representative:	Karel Neuwirt
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The Convention on mutual administrative assistance in tax matters (no. ETS 127) was opened for signature on 25 January 1988 and came into force on 1st April 1995. The Convention ratified by 23 CoE Member States and the U.S. (OECD Member State).

The Convention deals with the cooperation between countries to exchange tax information relate to both, legal and natural entities.

It's no doubt that also personal data (on natural persons) is a subject of cross-border transferring between countries. The aim of the revision is to provide some simplification procedures to allow the Convention to be accedes not only CoE Members States but also the OECD Member States, as well as to open it to global accession.

The T-PD representative commented the Convention's text from data protection point of view. It's no any provision stipulated application of data protection principles in current text. Missing this, it creates serious application problems for those countries which have ratified Convention 108.

It's no rules for protection of personal data in the applicant state; which means the Convention doesn't require that the applicant state should protect personal data in adequate level as is in the requested state. As example, the transfer data from the C108's country to the country which has no relevant data protection legal system is allowed without restrictions or without special requirements.

The T-PD representative commented this failure and required to insert some sentence(s) to improve quality of protection of personal data. The CAHTAX members reacted that tax information (which is subject of transfer between Parties) is protection by "tax secrecy" regime which is sufficient warranty against any affect to personal data. The CAHTAX members are sure that the "tax secrecy" and "bank secrecy" is top level protection of any kind of information, incl. personal data. The T-PD representative has objected this opinion and requires adequate sentence regarding personal data protection.

The T-PD representative has a view that a lack of data protection provisions is due to long time from the date of adoption of the Convention (1988). The CAHTAX members didn't take into mind that important progress in data protection field had been done since that date. Unfortunately, this meeting loosed a good opportunity to amend the Convention in such a way which rapidly modernise the text.

Following updates were debated:

I.

The seventh indent of the Preamble to the Convention shall be deleted and replaced by the following:

“Convinced therefore that States should carry out measures or supply information, having regard to the necessity of protecting the confidentiality of information, and taking account of international instruments for the protection of privacy and flows of personal data;”

(accepted)

II.

Article 21 (Protection of persons and limits to the obligation to provide assistance) of the Convention shall be deleted and replaced by the following:

“Article 21 (Protection of persons and limits to the obligation to provide assistance)

1. Nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State.
2. Except in the case of Article 14, the provisions of this Convention shall not be construed so as to impose on the requested State the obligation:
 - (a) to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the applicant State;
 - (b) to carry out measures which would be contrary to public policy (ordre public);
 - (c) to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant State or its administrative practice;
 - (d) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public);
 - (e) to provide administrative assistance if and insofar as it considers the taxation in the applicant State to be contrary to generally accepted taxation principles or to the provisions of a convention for the avoidance of double taxation, or of any other convention which the requested State has concluded with the applicant State;
 - (f) to provide administrative assistance for the purpose of administering or enforcing a provision of the tax law of the applicant State, or any requirement connected therewith, which discriminates against a national of the requested State as compared with a national of the applicant State in the same circumstances;
 - (g) to provide administrative assistance if the applicant State has not pursued all reasonable measures available under its laws or administrative practice,

except where recourse to such measures would give rise to disproportionate difficulty;

- (h) to provide assistance in recovery in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the applicant State.

(accepted)

III.

Paragraphs 1 and 2 of Article 22 (Secrecy) shall be deleted and replaced with the following:

“1. Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic laws of that Party [and in accordance with internationally recognised data protection standards].

Note: The coloured text is a proposal. The members states are asked to send their position on that by 3rd November. The number representatives already have sent their positive position. But Poland, Norway and Canada objected this text.

Several countries agree with this text but someone objected. As example is the position of Canada (send by email on 2nd November):

Canada's objection is follow:

1. Art VI - We are not comfortable with the inclusion of language referencing "internationally recognised data protection standards" as it is not clear to us that there is one internationally recognized standard. Our preference would be to include a discussion of the issue in the explanatory report.

Note: It's unbelievable that some representatives from European countries (incl. the EU MS, Poland) consider that "fiscal secret" is enough robust to protect and secure personal data and, in particular, that such secret is wider than data protection rules.

This position stated Poland and Norway. It's sure that these representatives have not notion on legal framework of data protection.

See Polish position to Article 22:

"Taking into account that the Convention provides in Art. 22 par. 1 for securing and protection of information received from other competent authorities in the same manner as information obtained under the domestic laws of that Party, it is obvious that such information are secured by the rules of the fiscal secret. Such a protection is wider than those resulting from the rules of data protection. Because of this the words in brackets seems to be needless.

It is also to be underlined, that taking into account lack of the unified international data protection standards, referring to this set of rules in the amending Convention should raise significant practical problems."

IV.

Explanatory Report will be also amended. In particular, the explanation what is mean “internationally recognised data protection standards” will be added. New version of the Explanatory Report was distributed on 31st November.

The T-PD representative recommended the following text to be added to the ER:

“All Parties of this Convention should develop and ensure compliance with data protection and security safeguards, such as laws and regulations, industry standards and guidelines, and private contractual arrangements that impose data protection requirements, including, if appropriate, initiating investigation and enforcement actions against those who violate laws and principles governing data protection and data security”.

This proposed text has been modified (wording modification didn’t change the meaning) into new option. Modified text was adopted by majority participants. Following the CoE had been asking to explain also the meaning of words “*Internationally recognised data protection standards*”. The chair of the meeting refused explanatory sentence in which “Convention 108” will be explicitly mentioned.

Following the meeting the CoE Secretariat has send an email to participants which explained what Data Protection standards is:

“Dear participants of the OECD-CoE joint meeting,

As promised, please find attached our message concerning article 22. At the end of the meeting, it was agreed that the Council of Europe would send you a short note indicating what internationally recognised data protection standards in our opinion are.

The key data protection standards imply inter alia that data has to be processed fairly and lawfully, and has to be adequate, relevant and accurate. On the other hand, it should not be excessive, and not kept longer than necessary. Moreover, appropriate security measures have to be granted to protect it, as improper disclosure control (or its complete absence) can cause problems. By way of example, if information on someone's bank accounts is not protected, such a person could become the victim of fraud. Obviously, the above list is not exhaustive.

In our opinion, there is a need re-iterate that there exist various international standards in this area, not binding to all OECD and CoE Member States, and the developments in this respect require that states be reminded of them. By way of example, Asian countries are not expected to be bound by European standards, but they need to take into account relevant international standards (in their case, Asia-Pacific and UN standards in this domain).

The need to be reminded of those standards is accentuated by the wording of Paragraph 6 of the 1988 Convention's explanatory report, which indicates that "taxpayers have especially the right to respect for their privacy....." and wording of Paragraph 187 "...that the rights and safeguards of persons under national laws and administrative practices are not reduced in any way by the Convention".

We hope this clarifies why such standards, although mentioned very vaguely, need to be mentioned in the text of the Convention, and apologise for delay.

Best regards,

CoE Secretariat

Unfortunately, neither proposed text nor explanatory notes were inserted into new version of the Explanatory Report (distributed for CAHTAX's members comment and adoption on 30 October).

In a new version of the ER distributed on 30 October, following text is used:

1. Respect for the confidentiality of information is a corollary of the powers of tax authorities and is necessary to protect the legitimate interests of taxpayers. Mutual assistance between tax administrations is therefore feasible only if each administration is assured that the other administration will treat with proper confidence the information which it obtains in the course of their co-operation. In order to ensure that the information provided by the supplying State is adequately protected from the latter's point of view, the article provides that information obtained under the provisions of the Convention shall be treated as secret ***and protected*** in the receiving State in the same manner as information obtained under its domestic laws. ***The Convention was amended in 2010 to make it clear that, as already mentioned in the preamble to the Convention, the Parties shall take into account the necessity of protecting the confidentiality of information, taking account of the applicable international instruments and standards for the protection of privacy and flows of personal data.***

(not adopted yet)

Conclusions:

1- The text of the Convention doesn't distinguish exactly information relates to natural or legal persons. Whole text of the Convention as well as the ER take into consideration mostly principles of confidentiality and secrecy applied to legal person's information.

2- In the definitions' article (no.3) is defined a term "nationals" as follow:

the term "nationals" in relation to a Party means:

- i all individuals possessing the nationality of that Party, and*
- ii all legal persons, partnerships, associations and other entities deriving their status as such from the laws in force in that Party.*

But it must be noted that this term is not used in farther text of the Convention. Confidentiality regime may be sufficient for legal person's information but is deficient for natural person's data. Number examples provided with Explanatory Report are valid for legal person's information but insufficient for personal data of human being.

3- It must be say that the OECD chair board didn't accept even minimum explanatory text relates to protection of personal data.

4- Both the text of the Convention and its Explanatory Report are insufficient from data protection point of view; Data protection and security in both texts assumed that the term “*protection of confidentiality*” is adequate for any level of data protection and security.

5- One of reason for which a lack of interest to amend both texts in appropriate manner is that CAHTAX members are not well oriented in that issue and they have no enough time debate it because of the time pressure of adoption procedures.

6- It was difficult persuade the CAHTAX’s members on the importance that data protection principles should be exactly mentioned in core text as well as in the ER.

7- The T-PD representative expressed his doubt that the Convention may create a problem to be ratified by those CoE’s Member States which are Party of Convention 108 and its Additional Protocol (as well as for those which are under Directive 95/46/EC regime). The reason is that in accordance with Article 2(1) of Additional Protocol the personal data may be transferred to a recipient country which is not subject to the jurisdiction of a Party to the Convention 108 only if recipient country provides adequate level of protection of data.

The T-PD representative had proposed the contractual agreement regime to be applied in particular if the recipient is the OECD member country outside of Europe¹. The Additional Protocol allows some exemptions from Article 2(1) but current text of Convention 127 doesn’t provide any relevant presumptions for application of these exemptions.

8- It must be further debated how to ensure an assistance of data protection expert(s) (T-PD, Commissioner, etc.) since early beginning of the work for such CoE’s documents.

9- The T-PD representative recommends debating these notes within the T-PD and adopting some relevant conclusions for farther manners of cooperation with those who works for important CoE’s documents which also deal with personal data.

Dr Karel Neuwirt

N.B. These comments and notes relate to the status on 3rd November.

¹ OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxemburg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

APPENDIX IV

MEETING OF THE T-PD BUREAU AND THE OECD SECRETARIAT

Background

At the 1066th meeting of the Committee of Ministers held on 23 September 2009, the terms of references of the Ad Hoc Committee (CAHTAX) for the revision of the Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127) were approved. As a part of the revision process and during the meeting held in Paris (22 – 23 October 2009) the CAHTAX drafted the Protocol amending the Convention No. 127.

The T-PD pointed out the need to comply with the privacy and personal data protection principles when exchanging the information as regulated by the Convention 127 since the proposed wording of Article 22 refers only to the protection of the information according to the law of requested State. In this context the new wording for the Article 22 was proposed. This proposal was added to the agenda of the GR-J meeting which took place on 19 November 2009.

On 18 November 2009, the representatives of the OECD Secretariat, Mr Pascal.SAINT-AMANS and Mr RUSSO Raffaele, exchanged their views with T-PD Bureau members and discussed the issue of data protection in the context of the revision to the Convention 127.

The OECD Secretariat made clear that the amendments proposed would not result in the weakening of the data protection standards for individuals within jurisdiction of States who ratified Convention 108 since the proposed amendments provide necessary safeguards - namely the Article 21.1 stipulates that "Nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested state" and that Article 21.2.a provides that "... The provisions of this Convention shall not be construed so as to impose on the requested state the obligation to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the applicant state". So, as long as the Convention 108 or/and its Additional Protocol (Article 2) have been implemented by a State into domestic law, that domestic law will still be applied, in conformity with Convention 127. Necessary safeguard is provided in Article 22.4 which does not allow for further transfer to any country of the information transferred from a Party to the Convention 108 to a third Party.

For these reason the OECD Secretariat mentioned that it would be easier and more effective to insert language in the explanatory report rather than in the Convention 127, clarifying that the reference to the domestic laws stated in Article 21 refers namely to applicable data protection laws. In addition, the explanatory report to Article 28.5 can specify that confidentiality and data protection standards will be taken into particular account when deciding whether to open the Convention to third Parties – non member states of the OECD and CoE.

The T-PD Bureau underlined that its main concerns is to provide the individual subject to a jurisdiction of Party to Convention 108 with necessary safeguards in third states where the data could be transferred. As to the current wording of Article 22 (1), the T-PD agreed that the requirement of adequacy can be guaranteed by other means which shall not go beyond what is needed for purposes of ensuring an adequate level. They also recognise that the limitation provided in Article 22 § 4 can constitute a necessary safeguard to avoid the further transfer of information. However, the Bureau maintains that the express reference should be done in the Convention to data protection principles or to standards arising from international commitments in the field of personal data protection. The mere reference to the domestic law in Article 21 with the point added to the explanatory memorandum would not be a suitable solution as far as the concept of "laws" is unclear and, due to the particularity of State's constitutional systems, cannot reflect all possible problems which can arise from the implementation of international commitments in domestic law.

The T-PD maintains its position that the reference to data protection principles should appear in the text of the Convention and proposed a new wording of Article 22 (1):

Article 22 (1)

"Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party, and in accordance with the safeguards required to ensure the necessary level of protection of personal data under the domestic law of the supplying Party"