



Strasbourg, 24 February 2012

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

REPORT

26th T-PD Bureau Meeting

Strasbourg, from 6 to 8 February 2012

1. The Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [ETS No. 108] (hereinafter Convention 108) held its 26th meeting from 6 to 8 February 2012 at the Council of Europe in Strasbourg. The list of participants and the agenda appear in Appendices I and II.

Opening of the meeting and statement by the Secretariat

2. The Chair, Mr Walter (Switzerland), opened the meeting and stressed that the main issue of the meeting would be the modernisation of Convention 108.

3. The participants took note of the information given by Mr Jörg Polakiewicz, Head of the Human Rights Policy and Development Department, who drew attention to the reform of the EU data protection legal framework which is carried out in parallel with the modernisation process of Convention 108. In particular, he referred to the joint statement made at the World Economic Forum in Davos (27 January 2012) by the Council of Europe Secretary General Thorbjørn Jagland and the European Commission Vice-President Viviane Reding who underlined the importance of hyper-connectivity going hand in hand with the protection of privacy on line and recalled that the protection of personal data is a fundamental right.

4. He also reported the different events which took place during the sixth edition of the Data Protection Day, in particular the session organised by the Council of Europe in Brussels, in the framework of the International Conference on Computers, Privacy and Data Protection

(CPDP – Brussels, 25-27 January 2012), enabling a multistakeholder consultation on the proposals of modification of Convention 108. He thanked the UK Chairmanship of the Committee of Ministers for its active participation in this session and the Polish authorities for organising a pre-event to the Data Protection Day in Brussels giving relevance to Convention 108 and its modernisation process.

5. Mr Polakiewicz welcomed the new Data Protection Commissioner, Ms Eva Souhrada-Kirchmayer, who was elected by the T-PD at its last Plenary (29 November – 2 December 2011), and the European Association for the Defense of Human Rights (AEDH) in its first participation after having been granted observer status at the last Plenary.

6. He also gave additional information regarding wider issues related to Council of Europe activities, in particular the visit of the UK Prime Minister Mr David Cameron during the 23-27 January 2012 Parliamentary Assembly session and the election of the new Council of Europe Commissioner for Human Rights, Mr Nils Muižnieks.

7. The Secretariat announced the call for secondment of national experts in the Data Protection Secretariat, already disseminated among Permanent Representations and T-PD delegations and underlined the deadline for presenting applications (24 February 2012).

Adoption of the agenda

8. The Bureau adopted the agenda, as shown in Appendix II.

Modernisation of Convention 108

9. The Chair opened the discussion on the Modernisation of Convention 108 on the basis of the document (T-PD-BUR(2012)01) elaborated further to the 27th Plenary of the T-PD and containing proposals of amendments to the Convention.

10. The Bureau examined the draft and noted the following orientations which will be further developed in a new draft for further consultation and, ultimately, submission to the T-PD plenary in June for adoption.

Preamble

A new recital should consider the need to balance the protection of personal data not only with freedom of expression but also with other fundamental rights and freedoms.

Article 1 – object and purpose

It is agreed to use the term “jurisdiction” instead of “territory”.

Article 2 - definitions

The definition of personal data should be kept as it is, but in the Explanatory Report further

explanations will be considered in order to clarify the concept of “identifiable” individual (see in particular Recommendation (2010)13 on profiling stating that an individual is not considered identifiable if identification requires unreasonable time or effort).

Article 3 - scope

This provision should state that each Party undertakes to apply the Convention to data processing carried out by any “controller” (instead of “public authority, or natural or legal person”) subject to its jurisdiction as well as to data processing that manifests a sufficient connection with this Party.

Examples of data processing having a sufficient connection with the Party should be added in the Explanatory Report.

The personal or household exemption should be kept but, contrary to what was proposed in the draft, no reference should be made to data processing carried out through a service provider.

As part of the existing provisions of the Convention regarding its scope of application are irrelevant in the modernised version (automated files), the provisions on possible declarations will be deleted (a reference to the possibility to extend the scope of the Convention’s principles to legal persons will be made in the Explanatory Report).

Article 4 – duties of the Parties

For the time being, no amendments are proposed to this article.

Article 5 – quality of data and legitimacy of data processing

A redrafting of this provision is required. It should refer to the need to reflect a fair balance between the public or private interests, rights and freedoms “at stake” (instead of “concerned”) thereby reflecting ECHR language.

In respect of paragraph 2 the question of withdrawal of consent was raised. Such a reference will be included in the Explanatory Report together with details concerning the effects of such a withdrawal.

Paragraph 3 should be redrafted to better reflect its intention - namely to cover all the different criteria enumerated by Article 7 of Directive 95/46 - and not only the “legitimate interest” provided for by Article 7 (f) of the Directive.

Article 6 – special categories of data

The title of the Article should be reviewed to put the emphasis on the processing instead of the data itself.

Concerns regarding the new formulation of the provision on sensitive data are raised as it may narrow the protection originally granted to those data and create inconsistencies with the EU framework which still refers to data “revealing” racial origin, political opinion, etc.

It is proposed that an amended text be prepared to better stress that the appropriate safeguards apply to all sensitive data.

The Bureau also decides to delete the words “arbitrary” before “discrimination” and proposes to merge the two sentences of Article 6 in one single paragraph.

No objections are raised regarding the inclusion of genetic and biometric data in Article 6 and the terms will be further explained in the Explanatory Report.

Article 7 – data security

In paragraph 2 the expression “security violations” is not sufficiently clear and should be reformulated (e.g. “violation of data security”).

Paragraph 2 may be kept as it is without explicitly referring to the obligation to notify data breaches to data subjects (in addition to the notification to supervisory authorities). The Explanatory Report will specify that Parties may decide to include such obligation in their domestic law.

Article 7 should also specify that the notification should be made without delay.

In the French version the word “annoncer” should be replaced by “notifier”.

Paragraph 3 should be deleted.

Article 7 bis – transparency of processing

Paragraph 2 should be deleted.

Exceptions should be included in respect of the controller's obligation to provide data subjects with information about the processing (transparency) as it is in Article 11 paragraph 2 of Directive 95/46.

Article 8 – additional safeguards for the data subject

The title “Additional safeguards” should be reworded as it no longer corresponds to the actual sequence of articles.

The word “enabled” should be replaced by “entitled”.

Point e) should be redrafted for clarification. It would probably deserve an autonomous paragraph or should be referred to in the Preamble. The word “expose” should be replaced by “express”.

In f) the words “as the case may be” should be deleted and the word “communication” should be replaced by “access”.

Article 8 bis – additional measures for the controller

A new version of this provision will be proposed in order to take account of the comments made during the meeting, having in mind the conclusions that will be drawn within the EU, in particular with regard to the need to:

- introduce flexibility to avoid excessive burdens on small/medium companies (e.g. referring to “appropriate measures” may be better than “additional measures”);
- clarify whether the obligations stated by a), b) and c) are all applicable to both controllers and processors;
- clarify whether a), b), and c) are examples (as the wording “in particular” may suggest) or binding obligations that must all be respected.

Article 9 – exceptions and restrictions

There is agreement on the rationale of this provision which is intended to give a general set of

exceptions and restrictions and avoid exceptions/restriction in single articles. However, paragraphs 1 and 2 should be redrafted in light of several comments made by participants.

In particular, it is noted with concern that the actual drafting would allow full derogations in crucial sectors (e.g. police) to Article 5 which lays down the fundamental principles of legitimacy of the data processing and quality of data.

The Article should also consider the exceptions that were inserted in Article 7 bis on transparency (e.g. Article 9 paragraph 1 should be redrafted accordingly).

It is proposed that in Article 9 paragraph 2 the expression “monetary interests” be replaced by “important economic and financial interests”.

More reflexions are needed with regard to exemptions to data processing for statistical purposes as well as in the field of journalism (Article 9 paragraph 3 should be redrafted accordingly).

Article 10 – sanctions and remedies

Article 11 – extended protection

For the time being, no amendments are proposed to these articles.

Article 12 – transborder data flows

The proposed provision avoids the use of the traditional term “transfer” and opts for a more modern terminology: “disclosure or making available of data”. It has to be further discussed whether it would be advisable to either keep the text in line with the traditional terminology (transfer) which is still used in international standards as well as at EU level, or to have a more modern approach on the topic, as also suggested by the outcomes of the consultation on the modernisation process of Convention 108.

Some delegations express concern about the length and complexity of the proposed drafting which may even represent an obstacle for third parties willing to accede to the Convention.

Further discussion is about whether data processing on the Internet may or may not lead to data transfers.

It is suggested to move the reference to a particular task of the Consultative Committee to Chapter V.

It is suggested to add a new sentence in paragraph 7 to include the possibility that the data transfer is provided by a treaty (together with appropriate safeguards).

The issue regarding who should be competent for the adequacy finding is also raised.

It is agreed that a more thorough analysis is needed in respect of the provisions on procedural aspects of the adequacy finding, in particular with regard to the notification which should be made to the Consultative Committee by the Party invoking the clause under paragraph 3 c.

Mr Kuner (International Chamber of Commerce) presents his draft proposal on data transfers. He explains that in his draft he relied on the discussion which is currently going on at EU level. He underlines the need that the modernisation process of the Convention is in line with EU regulation, although it should be borne in mind that Convention 108, by its nature, should not be as detailed as the EU regulation.

The possibility to derogate on the basis of legitimate interest should be narrowed.

The Secretariat underlines that some proposals may have repercussions on the role of the T-PD which would no longer have a merely consultative competence. The issue has to be considered carefully in order to put in place the appropriate mechanisms, to ensure that the political role of the Committee of Ministers is preserved, that there are no conflicts with the EU framework and to encourage the accession of third parties by avoiding solutions which would undermine the open nature of the Convention.

It is proposed that a set of new provisions be drafted merging proposals made by M. Kuner and other aspects of the examined draft.

Article 12 bis – supervisory authorities

It is clarified that paragraph 3, stating that supervisory authorities “shall not be subject to instructions”, is connected with the concept of independence of DPAs. There is no doubt that DPAs are generally subject to applicable laws. The provision simply refers to those instructions which may alter the independence of the supervisory authority.

It is decided that a reference to the advisory role of data protection authorities be added in the Explanatory Report and that paragraph 4 be redrafted in order to underline that it is up to each Party to provide the supervisory authorities with necessary resources.

It is agreed that according to paragraph 6 the cooperation among supervisory authorities is intended to be compulsory.

Most delegations agreed that paragraph 7 (“the supervisory authority may form a conference”) has an added value in facilitating cooperation which should be maintained in the text.

Article 13 – co-operation between Parties

paragraph 2 a) should be redrafted in order to avoid a repetition with Article 12 bis paragraph 1.

Article 14 – assistance to data subjects resident abroad

The article no longer deserves an autonomous provision and could be merged in another appropriate article.

Article 15 – safeguards concerning assistance rendered by designated authorities

Article 16 – refusal of requests for assistance

Article 17 – costs and procedures of assistance

For the time being, no amendments are proposed to these articles.

Article 18 – composition of the committee

For the time being paragraph 3 will be redrafted to provide that the Consultative Committee may invite an observer to be represented at a given meeting, by a decision taken “by two thirds” of its members (instead of the proposed absolute majority). The provision may then be open to further discussion.

Article 19 – functions of the committee

The Article should be redrafted in order to allow the Consultative Committee to give opinions on request, not only by a Party but also by other bodies (e.g. DPAs, organisations).
The reference to Article 12 should be deleted.
Article 19 e) needs a more positive redrafting.

Article 20 - procedure

For the time being, no amendments are proposed to this article.

Article 21 – amendments

In paragraph 8 the reference to paragraphs 4 and 5 should be checked.

Article 22 – entry into force

For the time being, no amendments are proposed to this article.

Article 23 – accession by non-member States or international organisations

This article needs a more accurate analysis in order to be sure that its formulation, by referring to accession of international organisations, includes the EU.

Article 24 – territorial clause

Article 25 – reservations

Article 26 - denunciation

Article 27 - notifications

For the time being, no amendments are proposed to these articles.

Opinions of the T-PD Bureau

11. The T-PD Bureau took note of document T-PD (2012)01 enclosing the Opinion of the T-PD on Recommendation (1984)2011 of the Council of Europe's Parliamentary Assembly on "the protection of privacy and personal data on the internet and online media" adopted at the 27th Plenary meeting.

Work programme of the T-PD

12. The T-PD Bureau took note of the Work programme of the T-PD for 2012 and 2013 (T-PD(2012)WP) and held an exchange of views on the priorities of the Committee, highlighting that work on biometric data and nano-technologies could be initiated this year by a consultant.

13. Concern was expressed on the fact that data protection is now dealt with by the Steering Committee on Media and Information Society (CDMSI), whereas data protection requires the expertise of representatives of Ministries of Justice.

Data Protection Commissioner

14. The participation of the Data Protection Commissioner, Ms Eva Souhrada-Kirchmayer, in the Bureau meeting was welcomed and it was recalled that the T-PD rules of procedure provide for the regular participation of the Commissioner in the work of the Committee.

15. The Bureau underlined the importance of keeping a strong relationship between the T-PD and the Commissioner and wished that adequate resources be provided for the Commissioner to efficiently carry out her mandate.

16. The Bureau also recalled that the T-PD adopted proposals for a revised draft Regulation outlining a data protection system for personal data files in the Council of Europe, and that it would be advisable to make Ms Souhrada-Kirchmayer aware of these proposals although they are not yet adopted.

17. The Secretariat raised the attention of the Bureau to PACE Resolution 1836(2011) on "The impact of the Lisbon Treaty on the Council of Europe" which encourages the European Union to enhance consultations with the Council of Europe Commissioner for Human Rights, and invites the Council of Europe Data Protection Commissioner and the European Data Protection Supervisor to reinforce their mutual cooperation.

Rules of procedure of the T-PD

18. The T-PD Bureau took note of the Rules of procedure of the T-PD (T-PD(2012)Rules) as amended during the 27th Plenary meeting.

Data Protection Day 2012

19. The Bureau took note of the compilation document prepared by the Secretariat on the basis of the information sent by countries and organisations (DPD(2012)compilation_Mos). The importance and the widening of the scope of that celebration was underlined and the need for a more coordinated approach in the coming editions (common theme, common actions, etc.) was discussed.

20. Information was provided concerning the session organised in Brussels by the Council of Europe in the framework of the CPDP Conference.

Work of other international organisations and institutions

21. The T-PD Bureau took note of the information provided by the Secretariat concerning cooperation with the OECD and work currently carried-out by its volunteers group.

Other Issues

22. It was agreed that an informal drafting group would be working on the draft recommendation on the protection of personal data used for employment purposes and that the starting point would be to propose a new structure of the text, which will then be developed by the group on the basis of the existing draft and related comments.

Next Meetings

23. The Bureau confirmed that its 27th meeting would take place from 16 to 18 April 2012 in Paris and the Plenary meeting from 19 to 22 June in Strasbourg.

24. The 28th meeting of the Bureau will take place from 28 to 30 November 2012 in Strasbourg.

APPENDIX I

List of participants

MEMBERS OF THE BUREAU / MEMBRES DU BUREAU

CZECH REPUBLIC/RÉPUBLIQUE TCHÈQUE

Hana Štěpánková, [*First Vice-chair*], Head of the Press Department, Spokeswoman, Office for Personal Data Protection

FRANCE

Catherine Pozzo-di-Borgo, [*Seconde Vice-présidente*], Commissaire du Gouvernement adjoint auprès de la CNIL, Secrétariat Général du gouvernement

LUXEMBOURG

Gérard Lommel, Président, Commission Nationale pour la protection des données (CNPD),

PORTUGAL

João Pedro Cabral, Legal Adviser, Directorate General of Justice Policy, Ministry of Justice

SERBIA/SERBIE

Nevena Ružić, Commissioner for Information of Public Importance and Personal Data Protection, Head of Office

SWEDEN/SUEDE

David Törngren, Legal Adviser, Ministry of Justice

SWITZERLAND/SUISSE

Jean-Philippe Walter, [*Président*], Préposé fédéral à la protection des données et à la transparence (PFPDT), Chancellerie fédérale

COUNCIL OF EUROPE DATA PROTECTION COMMISSIONER / COMMISSAIRE A LA PROTECTION DES DONNEES DU CONSEIL DE L'EUROPE

Eva Souhrada-Kirchmayer

MEMBERS OF THE T-PD / MEMBRES DU T-PD

BELGIUM / BELGIQUE

Valérie Verbruggen, Conseiller Juridique, Commission de la protection de la vie privée

GERMANY / ALLEMAGNE

Claudia Thomas, Desk Officer Data Protection Unit, Bundesministerium des Innern, Ref. V II

UNITED KINGDOM / ROYAUME-UNI

William Wormell, EU and International Data Protection Policy, Ministry of Justice

OBSERVERS / OBSERVATEURS

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

Alexander Germogenov, Deputy Director of Department for creation and development of information society, Ministry of Mass Communications of the Russian Federation

Alexander Gorovenko, Head of Information Security Section, Department of Information Society Creation and Development, Ministry of Telecommunication and Mass Communications of the Russian Federation

Konstantin Kosorukov, Deputy for Legal Affairs to the Permanent Representative of the Russian Federation at the Council of Europe

ASSOCIATION EUROPEENNE POUR LA DEFENSE DES DROITS DE L'HOMME / EUROPEAN ASSOCIATION FOR THE DEFENSE OF HUMAN RIGHTS (AEDH)

Marise Artiguelong, Déléguée, AEDH

EUROPEAN COMMISSION / COMMISSION EUROPEENNE

Katerina Dimitrakopoulou, Directorate C: fundamental rights and Union citizenship, Unit C3 Data Protection

FRENCH-SPEAKING ASSOCIATION OF PERSONAL DATA PROTECTION AUTHORITIES / ASSOCIATION FRANCOPHONE DES AUTORITÉS DE PROTECTION DES DONNÉES PERSONNELLES (AFAPDP)

Floriane Leclercq, Chargée de mission, Commission nationale de l'informatique et des libertés

INTERNATIONAL CHAMBER OF COMMERCE (ICC) / CHAMBRE DE COMMERCE INTERNATIONALE (CCI)

Christopher Kuner, Special Advisor on Data Protection, Privacy and E-business issues, Hunton & Williams

INTERNATIONAL CONFERENCE OF DATA PROTECTION AND PRIVACY COMMISSIONERS / CONFERENCE INTERNATIONALE DES COMMISSAIRES A LA PROTECTION DES DONNEES ET DE LA VIE PRIVEE

Anton Battesti, Chargé des relations institutionnelles, Service des affaires européennes et internationales, Commission Nationale de l'Informatique et des Libertés

EUROPEAN DATA PROTECTION SUPERVISOR (EDPS) / LE CONTRÔLEUR EUROPEEN DE LA PROTECTION DES DONNÉES (CEPD)

Jaroslav Lotarski, Administrator/Legal Officer, Office of the European Data Protection Supervisor

SCIENTIFIC EXPERTS / EXPERTS SCIENTIFIQUES

Cécile de Terwangne, Professeure à la Faculté de Droit, Directrice de recherche au CRIDS (Centre de Recherches Informatique, Droit et Société), Facultés Universitaires Notre-Dame de la Paix (FUNDP),

Jean-Philippe Moïny, Chercheur au CRIDS (Centre de Recherches Informatique, Droit et Société), Doctorant FNRS, Facultés Universitaires Notre-Dame de la Paix (FUNDP)

SECRETARIAT

Direction Générale I – Droits de l’Homme et Etat de droit/ Directorate General I – Human Rights and rule of law

Direction de la Société de l’Information et de la lutte contre la criminalité / Information Society and Action against Crime Directorate

Jan Kleijssen, Director/Directeur

Unité de Protection des données / Data Protection Unit

Sophie Kwasny, Secretary of the T-PD / Secrétaire du T-PD

Alessandra Pierucci, Administrator / Administrateur

Corinne Gavrilovic, Assistant / Assistante

Direction des droits de l’Homme / Human Rights Directorate

Jörg Polakiewicz, Head of the Human Rights Policy and Development Department

INTERPRETERS / INTERPRETES

Julia Tanner

Christopher Tyczka

Bettina Ludewig

Nicolas Guittoneau

APPENDIX II

AGENDA

1. OPENING OF THE MEETING

- T-PD-BUR(2011)RAP25 Report of the 25th meeting of the Bureau of the Consultative Committee (10-12 October 2011)
- T-PD(2011)RAP27Abr Abridged Report of the 27th Plenary meeting of the Consultative Committee (29 November-2 December 2011)

2. ADOPTION OF THE AGENDA

3. STATEMENT BY THE **SECRETARIAT**

- Mr Jan Kleijssen, Director of Information Society and Action against crime

4. MODERNISATION OF CONVENTION 108

- Ms Cécile de Terwangne, Professor Law Faculty, Namur University (FUNDP), CRID Research Director: the proposals for modification of the Convention.
- Mr Christopher Kuner, International Chamber of Commerce: provisions relating to transborder flows of personal data.
- T-PD-BUR(2012)01 Modernisation of Convention 108 : new proposals
- T-PD-BUR(2011)19 Modernisation of Convention 108 : 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(2011)15 Modalities for the amendment of Council of Europe treaties
- 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)25 Secretariat Comments on the strengthening of the Convention's follow up mechanism

5. OPINIONS

Finalised and transmitted opinions

- T-PD(2012)01 Compilation of Opinions

6. WORK PROGRAMME OF THE T-PD

- T-PD(2012)WP Work programme for the T-PD for 2012 and beyond

7. DATA PROTECTION COMMISSIONER

8. RULES OF PROCEDURE OF THE T-PD

- T-PD(2012)Rules Rules of procedure of the T-PD

9. DATA PROTECTION DAY 2012

10. WORK OF OTHER INTERNATIONAL ORGANISATIONS AND INSTITUTIONS

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

11. OTHER ISSUES

- Draft recommendation on the protection of personal data used for employment purposes

12. NEXT MEETINGS