



Strasbourg, 11 October 2012

T-PD-BUR(2012)RAP28_en

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

REPORT

28th T-PD Bureau Meeting

Strasbourg, 27-28 September 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 28th meeting on 27 and 28 September 2012 at the Council of Europe in Strasbourg. The list of participants and the agenda appear in Appendices I and II respectively.

Opening of the meeting and adoption of the agenda

2. The plenary meeting was opened by the Chair, Jean-Philippe Walter (Switzerland).

3. The Bureau adopted the agenda, as set out in Appendix II.

Statement by the secretariat

4. Participants took note of the information presented by Jan Kleijssen about the progress made in modernising Convention 108, and reminding them of the aims of the process.

5. Mr Kleijssen also reported on major developments since the last plenary meeting, including notably the first meeting, on 13 and 14 September 2012, of the Committee of Experts on Rights of Internet Users (MS-DUI), which was called upon, under the supervision of the Steering Committee on Media and Information Society (CDMSI), to contribute to the implementation of the Council of Europe Internet Governance Strategy 2012-2015 by considering the application of existing Council of Europe standards on human rights and fundamental freedoms regarding the Internet.

6. Mr Kleijssen also mentioned the Council of Europe's participation in various upcoming events, such as the Budapest conference on cyberspace (4-5 October 2012), and the Internet Governance Forum (IGF) (Baku, 6-9 November 2012), where the Council of Europe was staging a series of events, including a workshop on profiling entitled "*Who is following me: tracking the trackers.*" He also mentioned the Council of Europe Conference of Ministers responsible for Media and Information Society, to be held in Belgrade in October 2013.

7. Referring to the work of the Council of Europe's Commissioner for Data Protection, Mr Kleijssen explained that all the administrative entities had been asked to provide a list of the personal data processing operations carried out and that this information would shortly be sent to the Commissioner.

8. Lastly, Mr Kleijssen mentioned a change that had occurred in the secretariat and the welcome arrival, in the Data Protection Unit, of Maria Michaelidou, on secondment from the Cypriot data protection agency. He wished to thank the Cypriot authorities for making this secondment possible.

9. The secretariat reported on its participation in the first meeting of the Committee of Experts on Rights of Internet Users (MS-DUI), which was tasked with producing a compendium of human rights for internet users. The various areas of agreement that had emerged were presented, in particular with regard to the educational role and practical scope of the compendium, its intended recipients, namely users but also private-sector actors and governments, and the fact that the rights enshrined in the European Convention on Human Rights should provide the basis for developing the compendium.

10. The secretariat further reported on the visit to the Council of Europe by John Fahey, President of the World Anti-Doping Agency, on 11 September 2012, and his meeting with the secretariat, during which the issue of consent had been addressed in the light of 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 (hereinafter the Proposal for a Regulation). The secretariat also pointed out that this meeting had provided an opportunity to promote Convention 108, to draw attention to the current modernisation efforts and to offer assistance, especially in the current review phase of the World Anti-Doping Code.

Modernisation of Convention 108

11. The Chair of the T-PD said substantial headway had been made since the 28th plenary meeting of the T-PD, as part of the modernisation process. He also referred to what was felt to have been a fruitful and constructive joint meeting with the European Commission (Brussels, 7 September 2012), underlining the Commission's support for this process and the policy of openness to third countries, while at the same time mentioning the lack of recognition for the free movement of data flows between States Parties prescribed by Convention 108 in the light of 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 (hereinafter Directive 95/46/EC).

12. The Chair opened the discussions on the modernisation of Convention 108, on the basis of document T-PD(2012)04REV, which had been prepared in the wake of the 28th T-PD plenary meeting and contained proposals for amendments to the Convention.

13. The Bureau examined the draft and noted the following pointers, which would be developed further in a revised version of the proposals for modernisation, and also of the Explanatory Report, after the Bureau meeting. These revised versions would be sent to the delegations in mid-October, so that they could send formal proposals for amendments to the secretariat within one month.

Preamble

14. The T-PD Bureau subscribed to the new proposals for modernisation.

Article 1

15. It was pointed out that the use of the term “privacy”, a concept for which there was no universally agreed-upon definition, might cause confusion with regard to human rights and that, even though privacy and data protection were related, the two concepts should be kept separate in order to reflect developments in the right to data protection as a free-standing right.

16. An addition needed to be made to the ER with regard to the right to control one’s own data, the introduction of which was designed to ensure a correct understanding of the notion of privacy.

Article 2

17. The T-PD Bureau subscribed to the new proposal for modernisation.

Article 3

18. It was proposed that, in the ER, the terms “outside the personal sphere” be clarified and that, in the Convention itself, the criterion of intention and the voluntary or involuntary (accidental) nature of the publication of personal data outside the personal sphere be used.

19. In view of the growth of new technologies, the risks engendered by them and the resultant need for protection, it was also proposed that, in the Convention itself, the terms in brackets be retained and these brackets removed for clarity’s sake.

20. The T-PD Bureau decided to keep the text in brackets, as some delegations felt that such an exception, in the Convention itself, might cause uncertainty about the application of the Convention, in terms of responsibility, in particular with regard to the use of social networks, and to add the term “intentionally”. The Bureau further decided to return to this item at the 29th plenary meeting (27-30 November 2012).

Article 4

21. It was proposed that the rules of procedure be elaborated further with regard to the powers of the Committee, its methods of evaluation and in particular the possibility of submitting alternative reports as part of the Convention monitoring process.

Article 5

22. It was agreed to provide examples in the ER and to make it clear that the requirement for proportionality must be respected at all stages of the processing.

23. On the subject of consent, differing views were expressed about the requirements to be met in order for consent to be valid. Whereas some delegations wanted the term “explicit” to be reinserted in place of the term “non-ambiguous”, in particular to allow for the possibility of withdrawal of consent, others, on the contrary, wished to keep this wording, arguing that the term “explicit” implied an active expression of will and that obtaining consent could be problematic at times, especially on the internet. It was also noted that a distinction should be made between these two terms.

24. It was further proposed that paragraph 2, point b, be subdivided into three possible scenarios, so as to cover performance of a contract, existence of an overriding legitimate interest and compliance with legal obligations binding the data controller. Additional explanations, accompanied by examples, would, in that case, need to be included in the ER with regard to these different scenarios, as well as the issue of contractual clauses today, so as to distinguish between that which was necessary for the performance of the contract and that which was complementary, but required consent.

25. In the absence of consensus on paragraph 2, the T-PD Bureau proposed that the term “explicit” be reinserted and that this item be discussed further at the 29th plenary meeting.

Article 6

26. It was suggested that the order of the two paragraphs be switched, so as to provide for the possibility of high-risk processing of this kind in the presence of additional appropriate safeguards in paragraph 1, and that further details be provided in the ER, with reference being made, for example, to impact studies or

the kind of legal frameworks that might be called upon to deal with such processing, followed by examples of data regarded as sensitive.

27. The T-PD Bureau decided to review the wording of this article accordingly.

Article 7

28. It was important to make it clear, in the ER, what the threshold of severity for notifying national supervisory authorities and data subjects was.

Article 7bis

29. It was noted that further information about the data preservation period would appear in the ER.

30. The T-PD Bureau approved the new proposal for modernisation.

Article 8

31. It was noted, with regard to the interaction between right of access and duty to ensure transparency, with reference to Article 7bis, paragraph 1, that the controller, under 8.c, was required to communicate the requested information to the data subject.

Article 8bis

32. Paragraph 4 should be reworded to make it more flexible. The question of whether to retain the term “entities” was also raised, as was its possible replacement by the term “controller”.

Article 9

33. A third paragraph should be added here, to take account of the discussions on Article 12, paragraph 7, and in particular the need to protect freedom of expression.

34. It was suggested that paragraph 2 be reworded, in the interest of consistency with Directive 95/46/EC, by including a reference to the existence of appropriate guarantees provided for by domestic law

35. An addition should also be made to the ER in order to further clarify what was meant by the terms “public safety” and “prevention”.

Article 10

36. The T-PD Bureau approved the new proposal for modernisation.

Article 11

37. No changes were proposed for the time being.

Article 12

38. Article 12 should be reworded in order to avoid any value judgements and/or contradictions. It was also proposed, in order to highlight the flexible nature of the rules on adequate protection and for the sake of clarity vis-à-vis third countries, that more neutral terms than “more stringent” and “appropriate” be adopted in paragraphs 2, 3 and 4. It was suggested for example that the former be replaced by the term “harmonised” in paragraph 2, and also in paragraph 4.

39. It was further noted that paragraph 5 would need to be reviewed in the light of the Bureau’s decision on Article 5, paragraph 2, with regard to the conditions to be met in order for consent to be valid. In addition, the ER could be elaborated further, with regard to paragraph 5, so as to make it clear that the derogations provided for under this provision must not be used to allow mass or repeated transfers of personal data.

40. It was also agreed to review the wording of paragraph 6 with regard to the powers of national supervisory authorities, in particular the range of measures that they might be called upon to take vis-à-vis any disclosure of data.

41. Lastly, the exception relating to protection of freedom of expression would be reproduced in Article 9.

Article 12bis

42. An addition would need to be made to the ER in order to make it clear that the tasks of the national supervisory authorities mentioned in this provision were not exhaustive, notably with reference to the adoption of “approved standardised legal measures or ad hoc legal measures” referred to in Article 12, paragraph 4,

and that they could be carried out in co-operation with other authorities. With regard to the possible adoption of such measures, mention of this power should be made in Article 12bis.

43. It was suggested that the order of the paragraphs of this provision be reviewed so that the most significant powers were mentioned at the outset.

44. Further details should be included in the ER with reference to paragraph 6 in order to show that administrative decisions could be challenged if they had legal effects on data subjects, and also with regard to paragraphs 7 and 8, so as to make it clear that co-operation between national supervisory authorities took place mainly through relations between States Parties to Convention 108.

Articles 13 to 17

45. No changes were proposed for the time being.

Article 18

46. The T-PD Bureau approved the new proposal for modernisation.

Article 19

47. The ER would need to be elaborated further in connection with 19.d, in order to refer to the case-law of various authorities regarding the interpretation of Convention 108, and also in connection with 19.f, in order to make it clear that states which were not parties to Convention 108 could also ask the T-PD to evaluate their domestic law provisions.

48. Additional clarification could also be provided in the ER with reference to 19.h, notably in the event of a serious violation of Convention 108, and also in the Convention itself, in order to clarify the measures that could be taken by the T-PD in such an event.

Article 20

49. It was agreed to review the wording of paragraph 5.

Article 21

50. The new proposal for modernisation designed to enable the European Union to accede to Convention 108 by simplifying the formalities was reproduced in Article 22.

Article 22

51. The T-PD Bureau approved the new proposal for modernisation.

Article 23

52. The T-PD Bureau approved the new proposal for modernisation.

Articles 24 to 27

53. No changes were proposed in the case of these articles.

Opinions

54. The T-PD Bureau examined the draft opinion (document T-PD(2012)09) on the request from the Kingdom of Morocco to be invited to accede to Convention 108.

55. The secretariat began by noting Morocco's political will to accede to several Council of Europe conventions, as part of a wider strategy to step up co-operation.

56. The Chair pointed out that examining such requests required more time than was available to the Committee, particularly as in this particular case, not all the information on the country's data protection regime was available, making it difficult to answer some of the questions raised by a reading of the relevant legislation.

57. The fact that there had been no request to accede to 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] (hereinafter "the Additional Protocol") was underlined and would be highlighted in the opinion submitted to the delegations.

58. It was also proposed that Morocco be invited to apply for observer status with the Consultative Committee.

59. The Chair said that the draft opinion would be revised in the light of the discussions, before being sent to the delegations, which would have fifteen days within which to comment.

Observers

60. The T-PD Bureau took note of the information presented, and in particular the reminder of the deadline for replying to the request for observer status from the Internet Society (ISOC) and South Korea's data protection authority.

Events and data protection activities as well as work of other international organisations and institutions: overview

61. The T-PD Bureau took note of the information presented by the secretariat.

62. The move by the European Union Agency of Fundamental Rights, in co-operation with the Council of Europe and the European Court of Human Rights, to contract a consultant to develop a handbook on European data protection law was welcomed.

Other issues

63. The T-PD Bureau took note of the information provided by the secretariat concerning a request from one of the constituent assemblies of ICANN (Internet Corporation for Assigned Names and Numbers), which had also been dealt with by the Article 29 Group and related to the possible data protection implications of various planned changes to the "Registrar Accreditation Agreement" (RAA). The Chair would respond to the request, endorsing the position of the Article 29 Group and echoing its concerns.

64. The T-PD Bureau also took note, in an initial exchange of views, of the revised draft recommendation on the protection of personal data used for employment purposes.

65. In this connection, it was proposed *inter alia* that a distinction be made between general principles and specific types of processing.

66. It was pointed out that special attention should also be given, when drafting the recommendation, to the positive impact of technologies, and in particular to their use for the benefit of employees, as well as to the impossibility of laying down binding rules for States Parties in a recommendation.

67. The Chair said that the text would be revised in the light of the discussions and would appear on the agenda for the next T-PD plenary meeting.

Forthcoming meetings

68. The T-PD Bureau took note of the draft agenda for the 29th plenary meeting of the T-PD.

69. With regard to the item on major developments in the field of data protection, the T-PD Bureau decided to hold an exchange of views on Google's services, a subject on which the delegations would be asked to share their respective experiences.

70. To conclude, the secretariat explained that the dates of the forthcoming meetings would be announced at the plenary.

