

DPCOM Report 2018-2020

# **Activity Report of the Data Protection Commissioner**

**July 2018 – October 2020**

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## *Foreword*

Since the emergence of the Internet, smart phones and connected objects, our societies have become increasingly interlinked and interdependent. All kinds of human activity can lead to our personal data being processed to either our benefit or our detriment. Such processing, albeit often legitimate, can involve risks of infringing human rights and fundamental freedoms, including our rights to privacy, integrity and dignity, and can also lead to discrimination. These risks are compounded by the development of artificial intelligence, the use of biometrics and the emergence of intrusive new technology, including for surveillance purposes, such as facial recognition and profiling techniques based on big data processing. As can be seen from the covid-19 crisis, respect for human rights and fundamental freedoms can clash with disease control measures. Without heightened vigilance, this crisis could result in disproportionate restrictions and excessive surveillance going well beyond legitimate public health objectives. The right to personal data protection is more relevant than ever, as a core right for the efficient functioning of democratic societies, and it has become all the more essential in the digital age. This right is an indispensable foundation for safeguarding human rights and fundamental freedoms when processing personal data.

In today's digital societies the Council of Europe has a key role in ensuring respect for human rights, the rule of law and democracy. As concerns data protection, this role is embodied in the Convention for the Protection of Individuals with regard to Processing of Personal Data, now known as "Convention 108+", following the adoption of an amending protocol on 18 May 2018. The Convention is universal in scope and is intended to become the global standard for personal data protection. Achieving this goal will depend on the work of the Consultative Committee of the Convention, on the Secretariat's commitment and on the Data Protection Commissioner's support. The Commissioner's role is now no longer confined to ensuring that the standards are applied inside the organisation, but, as in the case of his joint statements with the Chair of the Consultative Committee of Convention 108, during the covid-19 crisis or following the "Schermes II" judgment of the Court of Justice of the European Union and its impact on Convention 108+, he must also be an external voice, speaking out on the major issues raised by respect for the right to data protection.

The Council of Europe's key role in this field and its credibility require that the Organisation be perceived as a model not just outside, but also inside, and that it adopt without delay its new data protection regulation, which must be fully in line with Convention 108+. The Council of Europe must also strengthen and develop a "data protection" culture among its staff. The appointment of a Data Protection Officer is therefore an important step which can promote better understanding and acceptance of the requirements necessary for respecting this fundamental right. The new regulation will also make it possible to strengthen the Commissioner's role and responsibilities and to provide him with the resources and means needed to accomplish his tasks.

The future of the right to data protection will inevitably entail a reinforcement of the legal instruments and of practices, and from that standpoint the Commissioner's role is more vital than ever.

## 1 Introduction

The terms of reference of the Data Protection Commissioner of the Council of Europe are set out in the Secretary General's Regulation of 17 April 1989 instituting a system of data protection for personal data files at the Council of Europe.<sup>1</sup>

The Data Protection Commissioner is elected by the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Data ("Convention 108"). The Consultative Committee elects the Data Protection Commissioner from a list of names drawn up by the Secretary General of the Council of Europe.<sup>2</sup> To be eligible the candidates must be independent and have experience and knowledge of the issues raised by data protection.<sup>3</sup>

The term of office of the Data Protection Commissioner is three years and may be renewed once.<sup>4</sup>

The operational costs of the Data Protection Commissioner are borne by the budget of the Organisation.<sup>5</sup>

In addition to ensuring respect for the data protection principles set out in the Secretary General's Regulation of 17 April 1989 instituting a system of data protection for personal data files at the Council of Europe, the Data Protection Commissioner has the following functions:<sup>6</sup>

- Investigating complaints from staff arising out of the implementation of the Regulation, after completion of the complaints procedure laid down in Article 59 of the Staff Regulations;
- Formulating opinions at the request of the Secretary General on any matter relating to the implementation of the Regulation;
- Bringing to the attention of the Secretary General any proposals for improvement of the system of data protection.

The Commissioner is also called upon to participate in the work of the Consultative Committee of Convention 108 and in meetings of bodies external to the Council of Europe, such as the Global Privacy Assembly<sup>7</sup> (GPA) and the European Conference of Data Protection Authorities.

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<sup>1</sup><https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168073dc0c>

<sup>2</sup> Article 2 of the Appendix to the Secretary General's Regulation of 17 April 1989..

<sup>3</sup> Article 18 of the Convention *for the Protection of Individuals with regard to Automatic Processing of Personal Data* and Article 1 of the Secretary General's Regulation of 17 April 1989 *instituting a system of data protection for personal data files*.

<sup>4</sup> Article 3, *Ibid*.

<sup>5</sup> Article 4, *Ibid*.

<sup>6</sup> Article 6, *Ibid*.

<sup>7</sup> Previously known as the International Conference of Data Protection and Privacy Commissioners.

In the performance of his functions, the Data Protection Commissioner is assured of co-operation from the Secretariat General.<sup>8</sup>

The Data Protection Commissioner may at all times make recommendations to the Secretary General.<sup>9</sup>

Mr Jean Philippe Walter, the current Commissioner, was elected at the 36th plenary meeting of the Consultative Committee of Convention 108 (Strasbourg, 19-21 June 2018) and this report covers the activities carried out during his term of office.

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<sup>8</sup> Article 7, Ibid.

<sup>9</sup> Article 8, Ibid.

## 2 Physical presence at the Organisation's headquarters and representation

### 2.1 Visits to the Council of Europe

During the activity period covered the Data Protection Commissioner undertook several working visits to the Council of Europe and, in this context, was able to meet staff members at their request and to speak with managers of various sectors, engaging in a fruitful dialogue with representatives from many administrative entities as well as with several staff members involved in the processing of personal data by the Organisation. He also interviewed a number of persons in connection with his assessment of complaints addressed to him.<sup>10</sup>

In view of the health situation in 2020, the Commissioner also held exchanges and collaborated with the Chair of the Consultative Committee of Convention 108, and they published two joint statements on the right to data protection in the context of the Covid-19 pandemic<sup>11</sup> and on digital contact tracing, pointing out the applicable data protection principles.<sup>12</sup>

On 7 September 2020 the Commissioner and the Chair of the Consultative Committee also published a joint statement<sup>13</sup> on protecting individuals in the context of international data flows, which referred in particular to the consequences of the judgment handed down on 16 July 2020 by the Court of Justice of the European Union in the so-called "Schrems II" case,<sup>14</sup> concerning the need for democratic and effective oversight of intelligence services.

Since the beginning of the covid-19 pandemic, the Commissioner has been unable to travel to Strasbourg, but he has been in regular contact with the Secretariat General and has replied remotely to several requests for opinions. He also issued one recommendation.

### 2.2 Participation in external events

The Commissioner is regularly invited to participate in seminars and conferences, either to present the Organisation's internal framework or to speak about the modernisation of Convention 108 and the work of the Consultative Committee (on data protection and artificial intelligence, digital identity, facial recognition, etc.).

In addition to contributing to side events held by the Council of Europe during meetings of the Consultative Committee, the Commissioner took part in and spoke at the following events:

- the Data Protection Days on 28 January 2019 and 2020 held jointly by the University of Lausanne, the Thinkdata platform and the Federal Data Protection and Information

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<sup>10</sup> Dates of the working visits: 14 September 2018, 22 and 23 November 2018, 19 December 2018, 22 February 2019, 14 and 15 May 2019, 26 November 2019.

<sup>11</sup> <https://www.coe.int/en/web/data-protection/statement-by-alessandra-pierucci-and-jean-philippe-walter>

<sup>12</sup> <https://rm.coe.int/covid19-joint-statement-2-28-april-2-fr/16809e3fd7>

<sup>13</sup> <https://rm.coe.int/declaration-conjointe-schrems-ii-finale/16809f79cb>

<sup>14</sup> <http://curia.europa.eu/juris/document/document.jsf?docid=228677&doclang=EN>

- Commissioner (Switzerland);<sup>15</sup>
- Workshops with international organisations held jointly by the OECD and the European Data Protection Supervisor (EDPS), on 17 and 18 June 2019;<sup>16</sup>
- Summer school at Aix-en-Provence, 11 July 2019;<sup>17</sup>
- Conference on children's rights in Geneva, 10 October 2019;<sup>18</sup>
- Colloquy held by the Senate and the French delegation to the Parliamentary Assembly of the Council of Europe, Paris, 14 November 2019;<sup>19</sup>
- Colloquy held by the University of Neuchâtel on the right to digital integrity, 21 February 2020;<sup>20</sup>
- 40th and 41st International Conference of Data Protection and Privacy Commissioners (ICDPPC);<sup>21</sup>
- UniDem Med regional seminar entitled "Towards a public service closer to citizens", held by videoconference, 13-15 October 2020.<sup>22</sup>

Moreover, the Commissioner has, on several occasions, accepted interviews by print and broadcasting media on topical issues, in particular regarding Convention 108+, digital identity, the tracing of individuals and covid-19.

### 3 Advice and recommendations to Council of Europe entities

The Commissioner was asked to issue opinions and recommendations regarding respect for the right to personal data protection in relation to different fields of activity or different technologies, as outlined below per department/entity concerned.

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<sup>15</sup> In 2019, on "*Protection des données, quo vadis*" ("What's the future of data Protection?"), where the Commissioner's speech focused on the state of play and what to expect in future, in particular the contribution of Convention 108+ in the current context.

In 2020, "*Le rôle des autorités de protection des données*" ("The role of data protection authorities") <https://rm.coe.int/14e-journee-de-la-pdd-jph/168099b31f>

<sup>16</sup> The workshop enables data protection officers from the various participating international organisations to hold exchanges on their practices and to discuss topical issues, such as sub-contracting and related contracts. The Commissioner chaired a working session on the data protection rules developed in the different organisations.

<sup>17</sup> Conference on artificial intelligence and the judiciary. On this occasion, the Commissioner presented the Council of Europe's work in the field of data protection, in particular Convention 108+ as well as the Consultative Committee's work.

<sup>18</sup> The theme was "*30 ans de Droits de l'Enfant*" ("30 years of children's rights") and the Commissioner spoke about "Children's right to protection of their data in a digital world, the Council of Europe's perspective".

<sup>19</sup> On "*Les droits de l'Homme et la démocratie à l'ère numérique*" ("Human Rights and Democracy in the Digital Age"); the Commissioner spoke on the theme "Citizens' digital rights, a new frontier for human rights and the Council of Europe's action?" ("*Droits numériques des citoyens, nouvelle frontière des droits de l'Homme et de l'action du Conseil de l'Europe ?*").

<sup>20</sup> The topic of the colloquy was the right to digital integrity. It addressed the issue whether the right to digital integrity should be recognised, dealt with from the angles of civil, constitutional and criminal law, and of freedom of expression and data protection. The Commissioner's speech was entitled "*Le droit à l'intégrité numérique, une nécessité du point de vue du droit à la protection des données ?*" ("Is the right to digital integrity a necessity from the point of view of the right to data protection?").

<sup>21</sup> <https://rm.coe.int/j-ph-walter-presentation-side-event-at-40th-icdppc/16808e876d>

<sup>22</sup> During this seminar held by the Council of Europe for senior administrative officials, the Commissioner presented Convention 108+ and the work of the Consultative Committee.

### 3.1 Directorate of General Services

The Commissioner received a request concerning the proportionality of information gathered in connection with the issuance of long-term badges and concluded, in view of the security objective and the guarantees put in place (restricted access to personal data), that the practice of the department concerned complied with the applicable principles, while stressing the importance of providing complete and transparent information to the persons concerned.

In relation to videosurveillance, the Commissioner was consulted on the arrangements for informing people about the use of videosurveillance systems through notices displayed on the Council of Europe's premises. He stated that these notices should specify the legal basis for the systems' use and recapitulate the rights of the data subjects as well as the procedure to be followed in order to exercise a right of access.

The use of biometric authentication technology to control access to Council of Europe premises was studied by the Commissioner. He issued a recommendation to the Safety and Security Department (which was not behind the initiative to install such a system) whereby he underlined the sensitive nature of such data. Processing such data involves a significant risk of breaching the right to privacy, and in particular of violating human dignity or a likelihood that discrimination will occur, and he therefore stated that before envisaging the collection and use of such data, a restrictive and prudent approach should be adopted, entailing full respect for the principles of necessity and proportionality with the legitimate aim being sought. The Commissioner recommended abandoning the use of biometrics to control access to the Council of Europe premises concerned, stressing that to achieve the legitimate goal of ensuring security, other less invasive methods were available. He also noted that the biometric system used lacked a legal basis in the form of an explicit legal instrument governing the processing of biometric data. Lastly, he asked that all data collected while using the biometric system, including the templates, be erased.

Lastly, the Commissioner noted that equipment had been installed in some meeting rooms (a multimedia image and sound system used for purposes other than security, the responsibility of ITEM rather than of the Directorate of General Services) which did not record data and was to be used for the distance monitoring of meeting rooms and the provision of remote assistance.

### 3.2 Directorate of Human Resources

The Commissioner was involved in the revision of the privacy and confidentiality policy of the remote testing platform (TestReach) to bring it into line with data protection principles, in particular by ensuring greater transparency and improved information for data subjects.

Regarding the transmission of data to the Bas-Rhin Sickness Insurance Fund (CPAM) as part of the measures to combat the spread of the covid-19 epidemic (contact tracing), the Commissioner issued a recommendation to the Directorate of Human Resources in which he advised that, in connection with such a request by the CPAM and in the absence of a sufficiently clear legal basis, the Social Insurance and Pensions Unit (SIPU) obtain the consent of the data subjects, as a legal basis for transmitting the relevant information. He moreover



stressed the need to clearly and completely inform the staff members concerned of the purpose of processing such data, of the method used, of their rights and of the remedies available.

### 3.3 Directorate of Information Technology

The Commissioner had several discussions with the Head of the Directorate of Information Technology and the Directorate's staff on the importance of respecting the right to personal data protection both in terms of data security and data minimisation, conservation and accuracy.

The Commissioner was moreover informed about the cloud service operated by the provider Net.documents, as well as the DIT's decision to have data stored in Germany.

### 3.4 Directorate of Internal Oversight

The Commissioner was consulted on several occasions regarding the use of e-mail addresses to carry out an evaluation survey, the publication of a report containing personal data and plans to acquire data and research analysis software. He was also asked to examine a draft legal instrument on administrative inquiries and investigations.

### 3.5 European Audiovisual Observatory

The Commissioner was consulted in connection with the review of the Observatory's contacts database (networks, Executive Council, journalists, etc.) and concerning the choice of a solution respectful of the right to data protection, in particular with regard to the location of the hosting service (outside Europe ?) and of the fate of the old database once migration to the new system has taken place. He recommended conducting a data protection impact assessment before any decision on the system to be chosen.

### 3.6 Parliamentary Assembly

The Commissioner was consulted in connection with a request by academic researchers to have access to the CVs of judges of the European Court of Human Rights. He stated that, in the case of serving judges whose CVs are published on the Court's website, such access was possible since the CVs were already public, whereas regarding the CVs of candidates for election as judges, a distinction should be made between those having been placed on the Assembly's website and those having been removed from it and which should not be kept but be destroyed. Lastly, he stressed that only the CVs of recent candidates should be made available as there was an issue of whether the data were accurate and up-to-date.

The Commissioner was also asked to review the form for declaring Assembly members' interests. He confirmed that, in view of the public interest in fighting corruption, the information requested, although broad, was justified and necessary for the aim being sought (while recommending that, as far as the interests of spouses, family members and Assembly members' employees are concerned, these persons should be informed and consent to the

processing of their personal data).

### 3.7 European Court of Human Rights

The Commissioner is not competent with regard to personal data collected, stored and used in the context of the European Convention on Human Rights and its Protocols (Article 1 of the Secretary General's Regulation of 17 April 1989 instituting a system of data protection for personal data files at the Council of Europe).

He did, however, receive several requests from applicants relating to anonymising data, which he was unable to investigate, but for which he forwarded the necessary information to the Registry of the Court.

### 3.8 Administrative Tribunal

Following an individual request, the Commissioner examined the anonymity procedure applied by the Administrative Tribunal and, on this occasion, was able to draw attention to the recommendations issued by his predecessor to the Registry of the Tribunal.

## 4 Data security

During the period under consideration, several security flaws or breaches of data protection rules were brought to the Commissioner's attention, although for the moment, there is no legal obligation to notify him of such incidents within the Organisation. For each incident, the departments concerned reacted swiftly and the Data Protection Officer took the necessary measures with the department in question, in co-ordination with the Directorate of Information Technology.

## 5 Data Protection Officer

The Data Protection Officer is tasked with ensuring, independently, that the Secretariat General applies the rules on data protection correctly.

He/she shall contribute to protecting the rights and freedoms of persons whose personal data are processed by the Secretariat. To that end, the Data Protection Officer shall:

- Run general awareness-raising activities on the obligations relating to data protection;
- Provide advice to staff and departments on issues pertaining to data protection;
- Report breaches of the applicable rules.

Apart from a general consultative role, he/she may, on his/her own initiative or upon request, conduct investigations in data protection matters. He/she shall also respond to requests made by the Data Protection Commissioner and co-operate with him/her.

The Commissioner welcomes the appointment of a Data Protection Officer at the end of 2019, which has enabled close co-operation in cases of common interest and constitutes a

significant step forward in applying the right to data protection within the Organisation.

## 6 Revision of the internal rules

As soon as he took office, the Commissioner pointed out that, since the early 2000s, his predecessors and the Consultative Committee of Convention 108 had emphasized the that the applicable internal rules are outdated and inconsistent with the standards promoted by the Organisation in this area.

It is only with the adoption of the updated version of Convention 108 and the applicability of the General Data Protection Regulation of the European Union (in 2018), that the urgency and importance of the situation have been recognised.

The Commissioner was consulted on the draft new regulation, which is in conformity with the standards of Convention 108+, and he hopes that this instrument will be soon adopted.

## 7 Conclusions

Despite his predecessors' sustained and constant efforts, when taking up his office the current Data Protection Commissioner noted significant deficiencies in personal data protection within the Organisation, due both to the applicable legal framework and to practices.

During his term of office, with the appointment of the Data Protection Officer and the adoption of Convention 108+, the situation has considerably improved and the Commissioner welcomes the signs of a heightened awareness, as well as the efforts made. The ultimate goal remains the adoption of a modern internal legal framework, which should be done without delay.

Raising staff members' awareness and providing related training should be a priority for the Organisation in the future, so as to ensure that when the Council of Europe processes data it does so in full conformity with the rules on data protection promoted by the Organisation and followed by many member States.