

DPCOM Report 2020-2022

Activity Report of the Data Protection Commissioner

November 2020 – October 2022

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Foreword

The fundamental right to data protection has never been under so much pressure as it has in the past two years, even to the extent that some people wonder whether it is not a thing of the past. That might be thought to be the case if past and present events are any guide. Almost every day, we see cyberattacks on public and private infrastructure, including public authorities, hospitals, medical practices, universities, humanitarian organisations, lawyers, banks and all kinds of companies that handle personal data, often of a highly sensitive nature. Criminals threaten to publish or sell this information if substantial ransoms are not paid. Often, the data disappears without anyone knowing who has it or who has access to it. These attacks are not only carried out by unscrupulous criminals bent on making money but also by certain intelligence services.

We have come through the Covid crisis, which led our countries to take steps to combat the pandemic, some of which required the tracing of individuals and the processing of sensitive data. Despite the safeguards put in place, there is a real risk of matters getting out of control, as demonstrated by the recent case of the Pegasus spyware, which targeted journalists, human rights activists and politicians and on which the Council of Europe has published a [report](#).¹ There is still a temptation to allow measures detrimental to human rights and fundamental freedoms to persist, thus making it necessary for data protection authorities to exercise greater vigilance.

We are currently facing war in Europe and the various crises that come with it, all of which constitute challenges to respect for the right to data protection. For their part, the major digital services companies are consolidating and strengthening their tools for monitoring the activities and behaviour of the world's citizens, fine-tuning by means of artificial intelligence and big data the profiles that guide our choices and decisions. Lastly, some leaders are tempted to strengthen the range of measures to combat terrorism and serious crime by passing more legislation that enables them to introduce surveillance mechanisms that further restrict our human rights and fundamental freedoms, without the need for such measures being properly demonstrated.

¹ *Pegasus spyware and its impacts on human rights*, Information Society Department, DGI(2022)04, Council of Europe, co-written by Tamar Kaldani and Zeev Prok.

Against this sombre background, it is crucially important to reaffirm that the right to data protection must be upheld and even strengthened in times of crisis. It is an essential condition for respect for human rights and fundamental freedoms, especially the right to privacy when personal data is processed. A weakening of the right to data protection would undermine respect for the rule of law and democracy. Now more than ever, the defence of the rule of law, democracy and human rights – the values on which Europe was built in the aftermath of the Second World War – must be a priority at this particularly sensitive time for the future of our continent and the world. In order to safeguard the right to data protection, it is therefore essential for Convention 108+ to rapidly come into force, to push forward with the legislative reforms underway and to allocate the resources needed to guarantee that right.

At Council of Europe level, the most positive development in the recent past has been the adoption by the Committee of Ministers of the new regulations on the protection of personal data, providing the Organisation with a modern instrument largely – although not fully – in line with Convention 108+. The Council of Europe must thus continue to be an active and credible ambassador for promoting the right to data protection in Europe and the world. This is also the role we intend to continue playing in the future.

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.²

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") from a list of names drawn up by the Secretary General of the Council of Europe.³ To be eligible, the candidates must be independent and have experience and knowledge of the issues raised by data protection.⁴

The term of office of the Data Protection Commissioner is three years and may be renewed once.⁵

The operational costs of the Data Protection Commissioner are borne by the budget of the Organisation.⁶

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:⁷

- 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 (GPA)⁸ and the European Conference of Data Protection Authorities. He/she also addresses various forums and is asked to give his/her opinion on current data protection issues.

² <http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ae59c>.

³ Article 2 of the Appendix to the Secretary General's Regulation of 17 April 1989.

⁴ Article 18 of the Convention *for the Protection of Individuals with regard to Automatic Processing of Personal Data* and Article 1 of the Appendix to the Secretary General's Regulation of 17 April 1989 *instituting a system of data protection for personal data files*.

⁵ Article 3 of the Appendix to the Secretary General's Regulation of 17 April 1989.

⁶ Article 4, *Ibid*.

⁷ Article 6, *Ibid*.

⁸ Previously known as the International Conference of Data Protection and Privacy Commissioners.

In performing his/her functions, the Data Protection Commissioner is assured of co-operation from the Secretariat General.⁹

He/she may at all times make recommendations to the Secretary General.¹⁰

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 re-elected in June 2021 at the Consultative Committee's 41st meeting. This report covers the activities carried out between November 2020 and October 2022.

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

2.1 Visits to the Council of Europe

Despite the pandemic, which still impacted most of the period concerned, the Data Protection Commissioner was able to carry out several working visits to the Council of Europe, in the course of which he met staff members at their request and talked to the heads of various departments, thus continuing to maintain fruitful and effective dialogue with representatives of numerous administrative bodies as well as with several staff members involved in the processing of personal data by the Organisation. He also interviewed a number of individuals in connection with his assessment of complaints addressed to him.¹¹

Again during the reporting period, i.e. 2021 and partly in 2022, the Commissioner held discussions and collaborated with the Chair of the Committee of Convention 108. In particular, they issued a joint statement on the occasion of the 15th Data Protection Day to celebrate the 40th anniversary of Convention 108.

2.2 Participation in external events

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

⁹ Article 7, *Ibid.*

¹⁰ Article 8, *Ibid.*

¹¹ Dates of working visits: 29 and 30 September 2021, 1 October 2021, 15 and 16 November 2021, 8 February 2022, 26 April 2022.

In addition to contributing to side events held by the Council of Europe during meetings of the Committee of Convention 108, the Commissioner took part in and spoke at the following events:

- Data Protection Day on 28 January 2021, at which the 40th anniversary of Convention 108 was celebrated;
- Seminar on the introduction of data protection legislation in Lebanon, in February 2021;
- Conference held by the University of Nancy on the occasion of the 50th anniversary of the European Convention on Human Rights, in March 2021;
- The Commissioner's participation, during the GPA in Mexico in October 2021, in a panel on Convention 108 and artificial intelligence, enabling him to reiterate the importance of Convention 108+ and call for its swift ratification;
- Data Protection Day on 28 January 2021, which enabled the Commissioner to raise public awareness of the impact of the pandemic and mass surveillance on the protection of personal data;
- Hearing of the Data Protection Commissioner on 21 June 2022 before the Parliamentary Assembly's Committee on Culture, Science, Education and Media on monitoring and tracing apps deployed in connection with the Covid-19 pandemic.

In addition, the Commissioner has been invited on several occasions by print and broadcasting media to give interviews 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 has been asked to issue opinions and recommendations on respect for the right to personal data protection across various fields of activity or technologies, as outlined below by department/entity concerned.

3.1 Directorate of General Services

In 2021, in connection with the change of ID badges at the Council of Europe, the Commissioner recommended choosing neutral badges without any data enabling the identification of individuals outside the machine reading of the badges, as that would meet both security needs and also data protection requirements. In particular, he wondered whether it might be possible to dispense with the photos on the badges and store them "inside" so that they would only be visible to security officers when badges were read.

A number of video surveillance issues were reported to the Commissioner. In principle, the presence of cameras in meeting rooms and the possibility of making recordings is not problematic. In particular, the use of these facilities makes it possible to ensure participation by videoconference. However, the Commissioner noted the lack of information given to Council of Europe staff and participants on the presence of these monitoring systems, which make video and audio recordings during meetings.

The Commissioner was also approached by several Council staff members expressing concern about the installation of surveillance cameras near and on the Organisation's premises. He carried out a local survey of existing and planned installations and had in-depth discussions with those responsible for security. On the basis of the explanations provided, the documents supplied and the on-the-spot findings, he concluded that the video surveillance system was necessary for the security of buildings, installations and individuals and complied with data protection requirements. However, he called on those responsible for security, in collaboration with the Data Protection Officer, to improve and enhance the information provided to staff and visitors to the Organisation's premises.

The Commissioner was also informed about the Council of Europe's recent activities with regard to securing IT and surveillance systems to ensure data protection and counter hacker attacks.

On the question of his powers of intervention, the Commissioner noted that he has such powers both within and outside the Organisation. The modernisation of the Convention gives the Commissioner, as a data protection authority, a role in raising awareness and educating people both about the functions, powers and activities of data protection authorities and about the responsibilities of data controllers and data processors under Convention 108+. He has a power of intervention that covers external statements on matters of importance for the protection of personal and investigation data. He acts independently and impartially in the performance of his duties and the exercise of his powers, by virtue of Articles 15 and 17 of Convention 108+, which give him this independent status and allow him, in his work, to put forward his own position rather than that of the Council of Europe. He is accordingly the voice of data protection outside the Organisation.

3.2 Directorate of Human Resources

Owing to the Covid-19 pandemic, the Commissioner was approached to discuss the question of vaccination, especially the agreement of vaccinated individuals and staff to provide proof of vaccination. He noted it was possible, in weighing up the interests involved, to require a person to be vaccinated and to pass on that information so that they could take part in official journeys, particularly in regions where the epidemic was severe and vaccination was not as advanced as in Europe. He stressed, however, that those concerned could always refuse to provide the information, in which case they had to withdraw from the official journeys.

The Commissioner was asked to give his opinion on the holding of the Staff Committee elections by electronic voting in October 2021. He commented on the fact that the vote had taken place via a provider's platform, for which a legal basis was required. In his view, the question centred on a broad interpretation of that legal basis authorising the transfer of data to the service provider and he therefore proposed that the processing be based on the consent of staff members wishing to exercise their right to vote through their registration on an electoral roll.

Still on the subject of that election, the Commissioner highlighted a flaw in the electoral roll system for retired staff and those on short-term contracts. In practice, the Electoral Board had to obtain the personnel numbers of those members of staff from Human Resources, which could then check who was registered or not. He pointed out that no such checks should be possible.

3.3 Directorate of Information Technology

The pandemic and the transition to widespread teleworking over a long period meant that the Council of Europe was forced to adapt and take a number of measures (digitisation of all staff members' personnel files with double safeguards, DMS adaptation and the introduction of a phishing alert with direct access from all staff members' mailboxes). The Commissioner was consulted on these measures to ensure the protection of the data of the Organisation's staff.

The Commissioner was also informed about the existence of numerous fake Twitter accounts using the handle "Council of Europe" and about the growing risk of staff mixing private and professional accounts.

The Commissioner raised the issue of the processing of photos and images, in particular with regard to their purpose and length of retention. This subject should be discussed again with the various departments concerned. In particular, there is a need for better regulation of the taking of photographs and images as well as their processing, distribution and storage.

3.4 Directorate of Internal Oversight

The Commissioner was asked to give his opinion on the lawfulness of the disclosure of data in connection with a fraud investigation. In his opinion, the disclosure was legitimate and could be possible as long as it was confined to the necessary data. He also suggested that it would be appropriate to inform the data subject about the disclosure, provided that it did not jeopardise the ongoing investigation. The individual had to be given the opportunity to comment on the offences of which he or she was accused.

3.5 Parliamentary Assembly

The Commissioner held a meeting with the Secretary General of the Parliamentary Assembly, which provided an opportunity to discuss the Commissioner's terms of reference and the importance of his monitoring and advocacy role outside the Council of Europe.

In addition, the Commissioner was heard on 21 June 2022 by the Parliamentary Assembly's Committee on Culture, Science, Education and Media concerning the monitoring and tracking apps deployed in connection with the Covid-19 pandemic. He said that the legitimate fight against the pandemic did not justify suspending the right to data protection but that measures could be taken with appropriate safeguards for respect for fundamental rights. It was possible to reconcile the requirements of an effective public health policy with the protection of personal data and respect for privacy.

3.6 Administrative Tribunal

The Registrar of the Administrative Tribunal requested a meeting with the Commissioner regarding technical, legal and practical issues relating to the lack of a secure electronic medium for processing appeals and proceedings before the Tribunal.

The Commissioner forwarded the recommendation on the question of data anonymisation to the Registrar of the Administrative Tribunal and made further recommendations to her concerning the protection of personal data in judicial proceedings. In particular, he referred to the principles of confidentiality, data security and authentication and advised the Registrar to consult the documents of the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ).

4- Data security

During the period under review, several security flaws or breaches of data protection were reported to the Commissioner, although there is currently no legal obligation to report such incidents within the Organisation.

For each incident, the departments concerned reacted swiftly and the Data Protection Officer took the necessary measures together with them, in co-ordination with the Directorate of Information Technology.

Data security is also included in the new Council of Europe Regulations on the Protection of Personal Data, namely in Article 6, entitled "Data security". In particular, Article 6.5 mentions the Data Protection Commissioner and the obligation for the Data Protection Officer to inform him or her in the event of data breaches.

5- Data Protection Officer

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

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

- carries out general awareness-raising activities on the obligations relating to data protection;
- provides advice to staff and departments on data protection issues;
- reports 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 also responds to requests made by the Data Protection Commissioner and co-operates with him/her.

The Commissioner believes that, with the arrival of the Data Protection Officer, the protection of the data of staff and individuals interacting with the Council of Europe has improved and is beginning to be taken onboard in the various Council of Europe departments.

The Commissioner also works with her on various issues (adoption of the new Data Protection Regulations, IT developments such as electronic signatures, Staff Committee elections, privacy policy concerning video surveillance, etc.) and regularly holds discussions with her on these matters.

6- Revision of the internal rules and adoption of new regulations

As soon as he took office in 2018, the Commissioner pointed out that the applicable internal rules were outdated and fell short of the standards promoted by the Organisation in this area.

It was only with the adoption of the updated version of Convention 108 and the applicability of the European Union's General Data Protection Regulation (in 2018) that the urgency and importance of the situation was recognised. During the period concerned, the Commissioner and the Consultative Committee were consulted on the new draft regulations in order to assess their conformity with the standards of Convention 108+.

After receiving various opinions from different Council of Europe entities and the Consultative Committee, the Committee of Ministers adopted Resolution CM/Res(2022)14 on establishing the new Council of Europe Regulations on the Protection of Personal Data.

This new text, adopted on 15 June 2022, contains new internal data protection regulations and will come into force on 1 January 2023. It is partly due to the Commissioner's authority that it has been possible to introduce these regulations after at least a decade's delay in their adoption. Their purpose is to ensure the protection of all individuals, in particular Council of Europe staff and experts, with regard to the processing of their personal data by the Organisation, thereby contributing to respect for their human rights and fundamental freedoms, in particular their right to privacy. With these new regulations, the Council of Europe has adopted modern legislation that largely complies with the requirements of Convention 108+. However, the Commissioner regrets that not enough account has been taken of the opinion of the Bureau of the Consultative Committee (see appendix), as that would have made it possible to have provisions that were fully in line with Convention 108+, especially as regards the role and powers of the supervisory authority.

7- Conclusions

The adoption of the new data protection regulations marks the beginning of a new era for the Council of Europe. However, they are not enough to ensure data protection. In order for them to be effective, it is important to allocate the necessary resources to the Data Protection Officer and the Commissioner to enable them to fully carry out their duties and in order to promote and develop a data protection policy and culture within the Organisation, where raising awareness will be a priority task for the coming year.

Appendix 1: Opinion on the draft Resolution establishing the Council of Europe Regulation on the Protection of Personal Data

I. Introductory remarks

1. In a letter of 16 March to the Chair of the T-PD, the Director General of Administration (DGA), responding to requests for a consultative process made repeatedly by the T-PD, asked for the opinion of the Bureau of the Consultative Committee on the draft Resolution establishing the Council of Europe Regulation on the Protection of Personal Data. The opinion should be adopted by 20 April to enable the text to be referred to the Committee of Ministers in May 2022 and to come into force on 1 July 2022. The Bureau's opinion should relate mainly to the compliance of the draft regulation with the Modernised Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+).
2. Before anything else, it is necessary to determine whether the Bureau has the authority to adopt an opinion on compliance with Convention 108+ or whether this authority lies with the T-PD. Under Article 10bis §3 of the T-PD's Rules of Procedure, the Bureau is tasked with preparing and approving opinions requested by Council of Europe bodies. This means that it does have the authority to adopt an opinion in response to a request by the DGA. Under Article 10bis §4, it should however consult the Committee before adopting its opinion. In such cases adoption is by consensus. Where there is disagreement, the Committee must take the final decision. In view of the nature and the purpose of the opinion requested and Article 23f of Convention 108+ (assessment of compliance), the Bureau considers nonetheless that it would have been preferable for the opinion to have been formally adopted by the plenary committee.
3. Bearing in mind the short time span granted it despite the fact that the process of preparing the new regulation has taken several years and it would have been perfectly possible to consult the T-PD within a reasonable timeframe, enabling it to adopt an opinion on compliance at a regular plenary meeting, the Bureau has adopted the following opinion through a written procedure:

II. Overall assessment

4. The draft Council of Europe Regulation on the Protection of Personal Data are due to replace the Secretary General's Regulation of 17 April 1989 instituting a system of data protection for personal data files. The existing regulation are obsolete and no longer meet the current data protection requirements of Convention 108 and Convention 108+. Beginning in about 2010 the Consultative Committee repeatedly suggested to the Council of Europe Secretariat General that it should draw up new regulation in line with the provisions of the convention.

5. The Bureau acknowledges and welcomes the Secretariat General’s desire to adopt modern regulation in line with the provisions of Convention 108+ to ensure a robust level of data protection within the Organisation.

Having examined the draft submitted to it, the Bureau, subject to a few remarks and proposals set out below, comes to the conclusion that the **draft regulation meets and is in compliance with the requirements of the Modernised Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+)**.

6. The draft regulation follows the structure of Convention 108+ where relevant, and is made up of three sections, namely General Provisions (object and purpose, definitions, scope), Principles for the protection of personal data (legitimacy of data processing and quality of data, sensitive data, data security, transparency of processing, rights of the data subject, additional obligations, restrictions, transfer of data outside the Organisation) and Advisory and supervisory authorities.¹²

III. Remarks and proposals

Draft resolution

In the preamble it should be mentioned in the last sub-paragraph that the T-PD Bureau was consulted.

Draft Regulation

Section I – General Provisions

Article 2 – Definitions

In the French version, we propose that the terminology of Convention 108+ should be reproduced in Article 2.5, namely “... qui reçoit communication de données ou à qui des données sont rendues accessibles”

Section II – Principles for the protection of personal data

Article 4 – Legitimacy of data processing and quality of data

We propose that Article 4.2.1 should be rewritten to avoid the semi-colon between “member States” and “performance of other activities”.

In Article 4.2.3, although this is clear from the definition of consent, we propose that, to avoid any ambiguity, the words “or that of his/her legal representative” be added after “the data subject’s consent”.

¹² In the French version, “chapitre III” should be replaced by “Section III”

In Article 4.3.2, we propose that the word “additional” should be inserted between “appropriate” and “safeguards” (see Article 5.4.b of Convention 108+ and Article 5.1 of the Council of Europe Regulation on the Protection of Personal Data). For these safeguards to be entirely appropriate, they must be included in addition to, not instead of, other safeguards in the regulation.

Article 4.2.6: it is proposed to remove this completely as such a justification essentially applies to controllers from the private sector. It should be noted that the GDPR excludes the possibility of the recourse to legitimate interest by public bodies in the performance of their task (article 6.1.f) and the Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the EU institutions does not include legitimate interest in its Article 5.

Article 6 – Data security

It is proposed to add after “controller” “and, where applicable the processor” to align with the provision of Article 7.1 of Convention 108+ including the processor to take appropriate security measures.

Article 7 – Transparency of data processing

In Article 7.1.1, it would be good to add “its identity” before “its contact details”. It would also be good to add the contact details of the competent Data Protection Officer and the Data Protection Commissioner as the competent data protection authority. This would ensure an easy accessibility for data subjects to an effective oversight and redress mechanism.

In Article 7.2 *in fine*, we wonder whether there is any reason for the exception “is likely to render impossible or seriously impair the achievement of the objectives of the processing” to be stated here, and whether it should not be moved to Article 10 if it is considered that it is not already sufficiently reflected in the grounds for restrictions listed there. Alternatively, this could be replaced by “as soon as the processing is expressly foreseen by law”. This would in addition cover the requirement of Article 8.3 of Convention 108+. If this provision is kept, one could add: “In that case, the controller shall take appropriate measures to protect fundamental rights and freedoms as well as the legitimate interest of the data subject.

Article 8 – Rights of the data subject

We propose that the right to be assisted by the supervisory authority, namely the Data Protection Commissioner, should be added. Article 9 (1) (e) foresees that any request to obtain rectification or erasure shall be free of charge, we therefore suggest to insert in Article 8.4 a “free of charge” (see Article 9 (1) (e) Convention 108+) after “to obtain, on request, ...”.

Article 9 – Additional obligations

Under Articles 9.2 and 9.3, it is proposed to add “after “controller” “and, where applicable the processor” in order to provide for the same obligations for processors, in accordance with Article 10.1 and 10.2 of Convention 108+.

Under Article 9.5, is it not the data controller rather than the Organisation which should be responsible for providing for appropriate measures?

Under Article 9.6, assigning data processing to a processor must not exempt the data controller from its responsibility. The wording adopted is confusing and we propose that the words “assign the responsibility of processing” be replaced by “assign the task of processing”.

Article 10 – Restrictions

It is proposed to add “additional” under appropriate safeguards.

Article 12 – Transfer of personal data outside the Organisation

Assessing whether an equivalent level of protection is secured (Article 12.1) is a complex task. It might be more appropriate to assign this task to the Organisation after obligatory consultation with the Data Protection Commissioner or even the Convention Committee. It should be pointed out that in the EU, under the GDPR, it is the Commission which decides whether a state or an international organisation provides adequate protection, but only after the consultation of the European Data Protection Board and the European Parliament and the consent of the member states.

In Article 12.3.2 *in fine*, the passage “or where she or he is physically or legally incapable of giving consent” is at variance with the definition of the data subject’s consent which allows a legal representative to give consent.

Section III – Advisory and supervisory authorities

Article 13 – Data Protection Officers

We welcome the decision to appoint one – or several – Council of Europe Data Protection Officer(s) (DPO). Convention 108+, which sets out the principles to be followed without giving details of how they should be applied, does not formally include such a requirement. However, the implementation of the binding provisions it contains implies at least that some management of data protection should be set up so as to secure and demonstrate compliance. Appointment of a DPO is a good option as he or she can serve as a central link in the process of meeting the compliance requirement enshrined in Article 10.1 of the Convention.

The DPO must be able to exercise a degree of independence in his/her duties and this is duly reflected in Article 13. Article 13 does not say anything, however, about the directorate to which the DPO should be attached. Yet it is important that they are not attached to a directorate which could be exposed from a data protection viewpoint, in particular one which processes the Organisation's staff data or is in charge of the information systems, security or risk assessment.

It could also be added in Article 13.4.2 after "independently", "- especially as regard the controller as well as the directorate concerned –".

Under the new regulation and in keeping with Convention 108+, the implementation of data protection will be a matter primarily for the various Council of Europe bodies and staff members who process personal data (with compliance and demonstration requirements) and for the DPO, who must ensure that the provisions are properly applied. The DPO, who is appointed by the Secretary General, is the internal authority in charge of ensuring that data is protected within the Organisation. He/she supports and advises the various departments, deals primarily with data subjects' requests and raises awareness about data protection within the Organisation. He/she is the contact point for and co-operates with the "external" supervisory authority, namely the Data Protection Commissioner.

Articles 15 et seq. Data Protection Commissioner

Articles 15 to 17 of the new regulation establish the Council of Europe Data Protection Commissioner's role as the Organisation's supervisory authority. His/her functions and tasks derive from the strengthened rules set out in Chapters IV and V of Convention 108+ relating to the supervisory authorities and, more particularly, in Articles 15 and 17.

As a supervisory authority, under Convention 108+, the Commissioner should:

- act independently and impartially in performing their duties and exercising their powers, without seeking or accepting instructions;
- be provided with the resources necessary for the effective performance of their functions and exercise of their powers;
- have powers of investigation and intervention;
- perform the functions in the area of transborder data flows to approve standardised legal clauses;
- have authority to take decisions on violations of provisions of the Convention and, in particular, to punish administrative offences (independent decision-making and sanctioning powers);
- have the power to engage in legal proceedings;
- be responsible for public awareness-raising and education on data protection;
- be consulted on proposals for any legislative or administrative measures which provide for the processing of personal data.

To strengthen and emphasize the structural independence of the Data Protection Commissioner we propose the following additions to Article 15:

15.6 The Data Protection Commissioner shall be provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks by the Organisation in accordance with the modalities established by the Committee of Ministers which shall dedicate a separate, fixed annual budget to the Data Protection Commissioner.

15.7 The Data Protection Commissioner shall be provided with adequate secretariat support necessary for the effective performance of her or his functions and exercise of her or his powers. He or she shall choose and have its own staff subject to his or her exclusive direction.

One of the Commissioner's most important tasks is the role of raising awareness and providing education in data protection. This relates to the public, who should be alerted to the risks, hidden or otherwise, of changes in technology and society. According to the explanatory report on the Convention (also adopted by the CM when the modernised Convention was adopted and opened for signature), it is "*particularly important that the supervisory authority proactively ensures the visibility of its activities, functions and powers. To this end, the supervisory authority must inform the public through periodical reports.... It may also publish opinions, issue general recommendations concerning the correct implementation of data protection rules or use any other means of communication. Moreover, it must provide information to individuals and to data controllers and processors about their rights and obligations concerning data protection. While raising awareness on data protection issues, the authorities have to be attentive to specifically address children and vulnerable categories of persons through adapted ways and languages*".¹³

The Commissioner no longer just applies standards within the Organisation; he/she must be able to express views on major issues raised by the need to comply with the right to data protection. In this respect, the supervisory authorities must be in a position to anticipate the potential risks arising from the changes in information and communication technologies (through "technology watching") and alert the public and the Council of Europe to these risks. This awareness-raising role is key, particularly where it comes to enabling individuals to retain control over their data and exercise their rights. Carrying out this task requires an external presence and visibility from the Commissioner, which should not be limited to the publication of his/her activity report.

The draft regulation lists the Commissioner's powers and functions under the Convention in an entirely satisfactory manner. However, they do also overlook his/her awareness-raising tasks and the requirement to consult him/her on proposals for legislative or administrative measures which provide for the processing of personal data. These two tasks should be included in the draft regulation.

¹³ Explanatory Report, § 125.

Another key task for the Commissioner is co-operation with the national and international authorities on data protection. This task is included in the draft regulation and is compulsory under Convention 108+. In a global, interconnected context, such co-operation is required for data protection to be effective. The Commissioner's external role is crucial and must be highlighted. The main aspect of this is international co-operation, that is to say working with all other data-protection supervisory authorities. The work also involves awareness-raising, training, staff exchanges and information sharing. On the other hand, it is not for the Commissioner to interfere with the Convention Committee's powers of assessment or the powers of Parties' data protection authorities, or to pass judgment on the way in which the Parties fulfil their obligations.

Article 18 Complaints and appeals

This provision sets out the procedure to deal with complaints lodged with the Commissioner. It provides for a legal remedy against decisions of the Secretary General taken in accordance with the conclusions of the Commissioner. This remedy differs according to whether the complainant is a current or former staff member or somebody from outside the Organisation. For current or former staff members the legal remedy is an appeal to the Administrative Tribunal of the Council of Europe. For persons outside the Organisation, if no friendly settlement is reached, disputes are settled by arbitration proceedings under the Optional Rules for Arbitration between International Organisations and Private Parties of the Permanent Court of Arbitration in the Hague. Effective redress is essential to ensure the protection of personal data and privacy. It is therefore reasonable to question whether this difference is justified and whether it does not tend to deter people from outside from asserting their rights through arbitration. The Bureau invites the Secretariat General to review this matter and consider the possibility of assigning the task of examining appeals from persons outside the Organisation to the Administrative Tribunal or a judge of the European Court of Human Rights. If this proves impossible due to the legal structure of the courts, it should at least be ensured that the cost of arbitration is in general – with reasonable exceptions like excessive, repetitive complaints - borne by the Organization. The (high) costs of arbitration could have a deterrent effect otherwise. Concerning the arbitrator, it would be recommendable to ascertain that he has the relevant experience with data protection law.

IV. Conclusion

The T-PD Bureau welcomes the adoption of these new rules and supports their adoption and prompt entry into force. However, it invites the Secretariat General to take into account the comments and proposals made above and to amend the draft accordingly. If the Secretariat General departs from this opinion, it invites it to bring it to the attention of the Committee of Ministers when the draft regulation is submitted to it.

Appendix 2: Comparative table of the opinion adopted by the Bureau of the Consultative Committee of Convention No. 108 and the new Council of Europe Regulations on the Protection of Personal Data entering into force in January 2023

	Opinion of Convention 108 Committee: T-PD-BUR(2022)1	Resolution CM/Res(2022)14 of the Committee of Ministers
Article 4 – Legitimacy of data processing and quality of data (Article 4.2.1)	The Bureau proposed rewriting Article 4.2.1 to avoid the semi-colon between “member States” and “performance of other activities”. It thereby provided guidance on the wording to adopt.	The semi-colon is still used in Article 4.2.1, between “member States” and “performance of other activities”.
Article 4 – Legitimacy of data processing and quality of data (Article 4.2.6)	The Bureau proposed deleting Article 4.2.6 in its entirety, i.e., removing it from the Regulations. The Bureau based its proposal on the fact that neither the GDPR nor Regulation (EU) 2018/1725 included the possibility of recourse to legitimate interest.	Article 4.2.6 is included in the Regulations adopted on 15 June 2022.
Article 7 – Transparency of data processing (Article 7.1.1)	The Bureau proposed adding “its identity” before “its contact details”. It also proposed that the article should provide the contact details of the competent Data Protection Officer and the Data Protection Commissioner as the competent data protection authority.	Article 7.1.1 provides that the controller must inform the data subject of its identity and contact details.
Article 7 – Transparency of data processing (Article 7.2)	In Article 7.2, the passage “is likely to render impossible or seriously impair the achievement of the objectives of the processing” raised some issues. The Bureau therefore proposed replacing it with modified wording or keeping it in Article 7.2 but adding another passage to provide clarification.	In Article 7.2 of the new Regulations, the following has been added: “In such cases, the controller shall take appropriate measures to protect the data subject’s rights and freedoms and legitimate interests”.

Article 8 – Rights of the data subject	In Article 8, the Bureau proposed adding the right to be assisted by the supervisory authority, i.e. the Data Protection Commissioner. This would be pursuant to Article 9.1 of Convention 108+. The Bureau also put forward a suggestion as to the wording of Article 8.4, namely, to add “free of charge” after “to obtain, on request”.	Article 8 of the new Regulations does not refer to the right to be assisted by the Data Protection Commissioner. Article 8.4 has not been amended to include the suggested wording either.
Article 9 – Additional obligations (Article 9.5)	The Bureau wondered whether it was not the data controller rather than the Organisation which should be responsible for providing for appropriate measures.	It remains unclear from Article 9.5 whether or not the responsibility for taking suitable measures is one of the controller’s additional obligations.
Article 12 – Transfer of personal data outside the Organisation (Article 12.3.2)	The Bureau questioned whether in Article 12.3.2, the passage “or where she or he is physically or legally incapable of giving consent” was at variance with the definition of the data subject’s consent which allows a legal representative to give consent.	Article 12.3.2 does include the provision “or where she or he is physically or legally incapable of giving consent”.
Article 13 – Data Protection Officer(s) (Article 13.4.2)	The Bureau pointed to the importance of the DPO’s independence and, to this end, proposed adding after “independently” in Article 13.4.2 “- especially as regard the controller as well as the directorate concerned -”.	Article 13.4.2 of the new Regulations provides that DPOs shall perform their tasks independently and may not be dismissed or penalised for performing them.
Article 15 – Data Protection Commissioner (Article 15.6)	To emphasise and strengthen the structural independence of the Data Protection Commissioner, the Bureau proposed amending Article 15 by adding: “The Data Protection Commissioner shall be provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks by the Organisation in accordance with the modalities established by the Committee of Ministers which shall dedicate a separate, fixed annual budget to the Data Protection Commissioner”.	In the new Regulations, Article 15.6 provides that “The operational costs of the Data Protection Commissioner shall be borne by the Organisation in accordance with the modalities established by the Committee of Ministers”.

<p>Article 15 – Data Protection Commissioner (Article 15.7)</p>	<p>With the aim of underlining the Commissioner’s independence, the Bureau submitted the following provision: “The Data Protection Commissioner shall be provided with adequate secretariat support necessary for the effective performance of her or his functions and exercise of her or his powers. He or she shall choose and have its own staff subject to his or her exclusive direction”.</p>	<p>Article 15.7 of the new Regulations provides that “The Data Protection Commissioner shall be provided with adequate secretariat support necessary for the effective performance of her or his functions and exercise of her or his powers”.</p>
<p>Article 15</p>	<p>The Bureau pointed out that one of the Commissioner’s key functions was raising awareness of and educating people about data protection. The public should be alerted to the risks, hidden or otherwise, of changes in technology and society. This was derived from the explanatory report to Convention 108+: “ [...] the supervisory authority proactively ensures the visibility of its activities, functions and powers”.</p>	<p>While the resolution lists the functions and powers of the Commissioner in accordance with the Convention, it entirely overlooks his/her awareness-raising tasks and the requirement to consult him/her on proposals for legislative or administrative measures which provide for the processing of personal data.</p>
<p>Article 18 Complaints and appeals (Articles 18.6)</p>	<p>Regarding any dispute arising from a decision of the Secretary General, the Bureau asked the Secretariat General to reconsider whether or not it would be possible for the Administrative Tribunal of the Council of Europe or a judge of the European Court of Human Rights to examine appeals from persons outside the Organisation. If this were not the case, it must be ensured that the arbitration procedure and its cost were borne by the Organisation. In addition, the arbitrator should have relevant experience in data protection law.</p>	<p>Article 18.6 provides that in the event of any dispute arising from a decision of the Secretary General, and in the absence of an amicable settlement, arbitration shall be used to settle the dispute. The conditions which apply to such arbitration are also set out in this article.</p>