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CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA

CONVENTION 108

Opinion on the Draft Second Additional Protocol (version 2) to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence[1]

Directorate General Human Rights and Rule of Law

[1] Out of the 55 voting members consulted by written procedure: Germany abstained

1. Introduction

1. The Cybercrime Convention Committee (T-CY) started in 2017 to work on the drafting of a Second Additional Protocol to the Convention on Cybercrime (ETS 185). On 14 April 2021, the T-CY has opened its 6th round of consultations, based on a release of the full draft of the Protocol, the publication of which was approved by the T-CY Drafting Plenary on 12 April 2021. On 13 April 2021, the T-CY Secretariat has also provided the text of the draft to the Secretariat of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108, hereafter "Convention 108") in order to request the opinion of the Committee of Convention 108 until 7 May. Taking into account the importance attached by the Organisation to the adoption of the draft Protocol and the outstanding efforts made by many delegations to this end, including through the participation of data protection experts in the negotiation of this text, and the tight deadline set, the present opinion of the Committee was subject to adoption by expedited written procedure. The Committee of Convention 108 recalls that it has continuously offered its support and expertise in the process of negotiation of the Second Additional Protocol to the Convention on Cybercrime and remains fully available for any necessary follow-up to the present opinion.

2. This opinion, in part, builds on inputs provided by the Committee of Convention 108 in the context of the 1st, 2nd and 4th consultation rounds organised by the T-CY. It builds upon the Provisional Answers to the Discussion paper for the 2018 Octopus Conference (adopted by the 36th Plenary of Convention 108 which was held on 19-21 June 2018), oral interventions by both the expert and the Secretariat of the Committee of Convention 108 during the consultations with data protection experts held in Strasbourg on 26 November 2018, and Opinion T-PD(2019)8FIN on the provisional text and Explanatory Report of the draft Second Additional Protocol to the Budapest Convention on Cybercrime (ETS 185) on direct disclosure of subscriber information and giving effect to orders from another Party for expedited production of data (adopted by the 39th Plenary of the Committee of Convention 108 on 19 November 2019).

3. The present opinion due to the very short deadline available for its adoption is limited to the newly released provision on the protection of personal data (Article 14), of which the Committee of Convention 108 had no knowledge prior to its publication on 14 April 2021 and will only provide comments on other parts of the Protocol where those are in direct connection with the data protection article or with the possible future implementation thereof. The Committee of Convention 108 thus highlights the severe time-pressure under which the present opinion was prepared and that due to this constraint this opinion is limited to general comments and does not include a thorough and exhaustive examination of all data protection implications of the proposed provisions.

2. Protection of personal data | Article 14

4. The Committee of Convention 108 stresses the importance of a data protection regime complementing criminal justice cooperation and thus ensuring effective and efficient prevention, investigation, prosecution of criminal offences, including through the handling of electronic evidence while at the same time protecting and promoting human rights and fundamental freedoms, notably the right to privacy and to the protection of personal data. In that sense the Committee of Convention 108 is fully aware that the draft article is a compromise reached in negotiations with a very wide range of countries and legal systems (including the one of the European Union which was represented during the negotiations by the European Commission) and recognises the potential stemming from the inclusion

of a stand-alone data protection article in the Protocol in providing rules and procedures in international criminal justice cooperation based on and vetted in Council of Europe's standards. Acknowledging the efforts in shaping those, the Committee of Convention 108 wishes to also underline the need for effectivity of the data protection safeguards and ensuring that Parties to the Second additional Protocol apply and enforce them in practice. Hence, it welcomes paragraph 3 of Article 23 (on consultations of the Parties and assessment of implementation), providing that the assessment of Article 14 shall commence once ten Parties to the Convention have expressed their consent to be bound by this Protocol.

5. The Committee of Convention 108 notices that Article 14 of the Protocol provides for obligations incumbent upon public authorities processing personal data received under the Protocol, including received under an asymmetrical transfer by providers and registrars (based on Articles 6 and 7). The Committee of Convention 108 is aware of the fact that the Protocol is not aiming at the harmonisation of national data protection regimes and that the domestic processing by data controllers is to be governed by domestic rules, including pursuant to obligations undertaken under Convention 108, and upon its entry into force, Convention 108+, for its State Parties. The Committee of Convention 108 recalls the instrumental role of Convention 108+ as a global multilateral treaty on the protection of privacy and personal data, also fully relevant in relation to the processing of personal data in criminal matters. The Committee of Convention 108 therefore invites Parties to the Budapest Convention, and in the future to its second additional Protocol to accede to Convention 108+ or use it as a reference for the processing of personal data falling under its scope, and more specifically when implementing this Protocol. This could lead to the approximation of domestic rules including the ones governing service providers with relation to the implementation of Articles 6 and 7. The Committee of Convention 108 will, as in the past remain open and available for supporting these actions of the Parties and all interested countries. In such common endeavour the two-directional data protection safeguards, including for asymmetrical transfers could be developed as part of efforts in reaching a convergence towards a high set of standards for the protection of privacy and personal data worldwide.

6. The Committee of Convention 108 underlines the following concerning Article 14.1:

- both paragraphs 1.b and 1.c offer Parties options to mutually decide on the application between them of alternative rules to the rules embedded in paragraphs 2-15 that paragraph 1.a would otherwise apply by default. Given the high importance of the compromise text on paragraphs 2-15, the complexity of data processing in criminal justice cooperation involving often several jurisdictions and the potential and benefit of sharing information obtained from cooperation under 1b and 1c outside of the Parties of these cooperation arrangements and instruments, the Committee of Convention 108 would recommend considering adding more emphasis on the application of standards developed and agreed upon in paragraphs 2-15. This could potentially be done by amending the operational text of Article 14 or recalling Parties using 1b or 1c for their cooperation to have due regard to the level of protection established by paragraphs 2-15;

- the text of paragraph 1.b does not expressly state that, between Parties bound by it, even when involving an EU Member State, Convention 108+ will *per se* qualify as an "international agreement establishing a comprehensive framework for the protection of personal data" in the sense of paragraph 1.b, the Committee of Convention 108 would recommend that the Explanatory Report to the text (which has not been released for consultation) confirms that Convention 108+ qualifies for the application of paragraph 1.b, [including in the relationship between EU and non-EU Member States

bound by it];

- the option of paragraph 1.c does not make full benefit of the default standard of paragraphs 2-15; paragraph 1.c does not even require the "other agreements or arrangements" that Parties may mutually determine to apply between them in lieu of paragraphs 2-15 to actually contain data protection safeguards *at all*. Therefore the Committee of Convention 108 would recommend amending the operational text of paragraph 1.c or recalling Parties making use of it to apply data protection safeguards in line with paragraphs 2-15 or to provide some explanations in the Explanatory Report that this paragraph will only be used where Parties don't consider the need for specific additional data protection safeguards, because they are transferring personal data based on appropriate e.g. mutual legal assistance (MLA) agreements.

7. As to paragraph 4 (on sensitive data), the Committee of Convention 108 notices that biometric data is only included under sensitive data if "considered sensitive in view of the risks involved" and suggests considering that it is not defined in the text which of two (or more) cooperating Parties involved is supposed to make such assessment and how conflicting positions would be dealt with, but also that the discretionary margin inherent to any such assessment would also allow to potentially treat biometric data "uniquely identifying a person" as non-sensitive, which is contrary to Article 6.1 of Convention 108+; hence, the Committee of Convention 108 proposes to insert explanations in the Explanatory Report in clarifying the parties to Convention 108+ would have to take Article 6.1 of Convention 108+ into account when classifying a personal data sensitive or non-sensitive.

8. The Committee of Convention 108 would recommend considering to explicitly extend the application of paragraph 8 (on maintaining records) to "storage" and "use" (by adding the word "stored" and "used" to "access, used and disclosed") or alternatively extending it to all data processing operations.

9. The Committee of Convention 108 proposes that in paragraph 10 (on onward international transfers) the condition is added that "transfer of personal data may only take place where an appropriate level of protection based on the provisions of Article 14 is secured" or alternatively to explain in the Explanatory Report that when a receiving Party wishes to send the data to a recipient outside of the scope of the Protocol the "transferring authority" when authorising such transfer takes due regard to the protection the regime established under Article 14 provides for the personal data in question.

10. In paragraph 11.a, the Committee of Convention 108, in view of ensuring compatibility with Article 8 of Convention 108+, would welcome extending the list of required notices as follows:

v. the identity and habitual residence or establishment of the data controller;
vi. the categories of personal data processed.

11. In paragraph 12.a, under i, the Committee of Convention 108, in view of ensuring compatibility with Article 11 of Convention 108+, suggests considering to insert "and rights and freedoms" after "legitimate interests". The Committee of Convention 108 would furthermore recommend to consider adding in the same paragraph a reference to the right to obtain the confirmation of the processing and the right to know the reasoning underlying data processing as provided for by Article 9 of Convention 108+ as it may prove relevant in practical cases, or alternatively suggests to include in the Explanatory Report that Parties to Convention 108+ may, if no restrictions or derogations apply, implement article

12.a.i as also covering these rights.

12. In paragraph 12.a, under ii, the Committee of Convention 108, in view of ensuring compatibility with Article 9.1, under e, of Convention 108+, suggests replacing "rectification" with "rectification and erasure" on both instances.

13. In paragraph 14, the Committee of Convention 108, in view of ensuring compatibility with Article 12 of Convention 108+, would recommend inserting "sanctions" after "after "corrective action".

3. Territorial 'presence' of a service provider | Articles 6 and 7

14. Both Article 7 (direct disclosure) and Article 8 (expedited disclosure) pertain to the obtaining of subscriber data from a service provider in another Party's territory. The Explanatory Report (respectively in paragraphs 98 and 128) reads as follows:

> "[T]he term 'a service provider in the territory of another Party' requires that the service provider be physically present in the other Party. Under this Article, the mere fact that, for example, a service provider has established a contractual relationship with a company in a Party, but the service provider itself is not physically present in that Party, would not constitute the service provider being 'in the territory' of that Party. Paragraph 1 requires, in addition, that the data be in the service provider's possession or control."

15. The Committee of Convention 108 invites to further clarity, ideally in the text of the articles themselves, and at least in the corresponding parts of the Explanatory Report, when a service provider will be considered 'physically present' in a Party's territory. The Committee of Convention 108 finds such clarity crucial for any future direct cooperation mechanism not to be undermined as well as to avoid forum shopping by authorities/Parties. Not only may the latter confront multinational service providers with parallel orders issued to its establishments or branches in several jurisdictions, it may also encourage authorities/Parties to opt for sending orders to the jurisdiction of presence of the service provider where the lowest data protection standards apply. The Committee of Convention 108 sees relevance in adding more clarity, e.g. by stipulating in the Protocol or in the Explanatory Report that a service provider will be considered 'physically present' in a Party's territory when it has a stable infrastructure through which it actually pursues an economic activity for an indefinite period and from where the business of providing services is carried out or managed.

4. Giving effect to orders for expedited production of [traffic] data | Article 8

16. The Committee of Convention 108 welcomes the efforts in keeping the principled and historical distinction the Convention on Cybercrime has made between measures relating to subscriber data vs. measures relating to traffic data in requiring an almost as detailed and high standard for such cooperation as for MLA. The Committee also believes that such principled distinction should be preserved as traffic data may be even more revealing than content data, and that its disclosure may be more intrusive than the disclosure of domain name registration information or subscriber information (IP addresses for identification included). The Committee's position is moreover supported by arguments used in other instances of the Explanatory Report to defend the direct disclosure of respectively domain name registration information (paragraphs 80 and 82, 6th indent) and subscriber information (paragraph 91). Both are argued not to permit or allow "precise conclusions [to be drawn] concerning the private lives and daily habits of individuals [concerned]", so that

"[their] disclosure may […] be less intrusive than/of a lower degree of intrusiveness compared to the disclosure of *other* categories of data". Admittedly, traffic data does allow to draw intrusive conclusions concerning the private lives and daily habits of individuals, and, hence, a different treatment as described in Article 8 of the Protocol is fully justified to be put in place to the one applied for subscriber data.

17. In addition to that and in relation to paragraphs 4 and 7 of Article 8, the Committee of Convention 108 wishes to offer for consideration that when the transmitting Party has to provide "additional supporting information (…) to give effect to orders" or when the requested Party shall "specify any conditions under which it could comply" that the relevant parts of the Explanatory Report describe that for disclosure of traffic data a *combined* data protection, procedural and rule of law safeguards of at least the Party of the requesting competent authority and the *Party where the data subject was present whilst using the targeted service(s)*, if different from the requesting Party or the Party where the service provider is present are suggested to be considered. The main rationale for that would be the legitimate expectation of privacy under primarily the laws of that Party of a person who is communicating or using services in a Party's territory. As soon as it is possible to establish, based on the prior obtaining of subscriber data, where a person was while using any targeted service(s), it is key for the Protocol to make sure that the data protection, procedural and rule of law safeguards of the latter Party may be applied and complied with. If that Party is the Party where the order originates from, such assurance is implied already. If the Protocol would than promote such *combined* data protection, procedural and rule of law safeguards of at least the Party of the requesting competent authority and the *Party where the service provider is located* it would certainly contribute combined with .some specific provisions which would guide Parties in case of conflict of laws to the widest protection of the data subjects.

5. Confidentiality | Articles 6, 7 and 9

18. The Explanatory Report (paragraphs 83, under d, 105, 166) to respectively paragraph 3.d. of Article 6 (relating to direct requests for domain name registration information), paragraph 4.f of Article 7 (relating to direct disclosure of subscriber information), paragraphs 3.g *juncto* 6 of Article 9 (relating to expedited disclosure of stored computer data in an emergency) clarifies that the "special procedural instructions" that need to accompany a disclosure request or order submitted to entities providing domain name services or service providers are meant to cover "[any request for confidentiality, including] [a] request[s] for non-disclosure of the request/order to the registrant/subscriber(s) and/or other third parties". Whilst the Committee of Convention 108 sees no difficulty with this, it would however invite to a reconsideration of the opening left in the further explanation given for domestic laws or discretionary policies of the private entities involved that would not guarantee the confidentiality sought ("Therefore, where confidentiality is needed/in order to avoid the risk of premature disclosure of the investigation, Parties are encouraged to review publicly available information and to seek guidance from other Parties regarding/be aware of/communicate regarding […] applicable law and […] the policies of the entities providing domain name services concerning subscriber/registrant information/a service provider's policies concerning subscriber notification, prior to submit[ting] a request/the order under paragraph 1 to the entity/service provider"). Whilst confidentiality may be important to maintain efficiency in criminal investigations, it is equally vital in safeguarding data protection. The Committee of Convention 108 therefore supports the inclusion of an explicit possibility to phrase hard confidentiality requirements in the direct procedures of Article 6 and 7 of the Protocol, modelled after either Article 26.2, Article 27.8 or Article 28.2.a and 28.3-4 of the Convention on Cybercrime, or after paragraphs 3.c *juncto* 3.7 through 3.9 of Article 8 of the Protocol (on the expedited disclosure of subscriber information). The latter

Article, in contrast to Articles 6, 7 and 9 of the Protocol, features such explicit possibility to phrase hard confidentiality requirements, as confirmed in the Explanatory Report (paragraph 131: “Under paragraph 3.c, the request should also include all special instructions, including for example requests for certification or confidentiality under Article 27.8; paragraph 140: “The requested Party may also require additional information from the requesting Party in order to support any applications for supplementary orders, such as confidentiality orders”; paragraph 141: “It may also impose conditions necessary to permit execution of the request, such as confidentiality”).

6. Federal clause | Article 17

19. Finally, the Committee of Convention 108 takes note of the insertion of the federal clause, especially of the reservation possible under paragraph 1 which could in theory limit the applicability of Chapter III (on conditions and safeguards) to only Article 13. The Committee of Convention 108 would evidently support if constituent States or similar territorial entities provide for a level of protection of personal data *comparable* to that afforded by Article 14 in the event where the federal state has onward shared the data concerned with them if not otherwise by the voluntary application of/adherence to thereof.