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

**CONVENTION 108**

**Evaluation and review mechanism under Convention 108+**

**Process and rationale**

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## Introduction

The review of the implementation of Convention 108<sup>1</sup> was a priority issue for the Consultative Committee of the Convention which accordingly included this question in its *“Work programme for 2009 and beyond”*.

The Committee endorsed on 15 April 2014 a document entitled "Elements of information on the evaluation and monitoring mechanism" (T-PD-BUR(2013)02). These elements of information were based on the provisions contained in the Convention 108 modernisation proposals. They were also largely based on the 2011 report<sup>2</sup> of the scientific expert. This report was intended to provide reflection elements on the modalities and mechanisms that would be relevant to develop for the evaluation and monitoring of the implementation of the modernised Convention in order to ensure long-term protection of individuals' fundamental rights and freedoms with regard to the processing of personal data in time and space at global level.

The Committee of Ministers adopted the amending Protocol (CETS No. 223) to the Convention for the protection of individuals with regard to the automatic processing of personal data (ETS No. 108) at its 128<sup>th</sup> session held in Elsinore, Denmark, on 17-18 May 2018. The amending Protocol was open for signature on 10 October 2018.

This document updates the 2014 "Elements of Information on the Evaluation and Monitoring Mechanism" with respect to the final text of the modernised Convention 108 (hereinafter "Convention 108+").

Article 24, paragraph 4 of Convention 108+ states:

*“The Convention Committee shall draw up the other elements of its Rules of Procedure and establish, in particular, the procedures for evaluation and review referred to in Article 4, paragraph 3, and Article 23, litterae e, f and h on the basis of objective criteria”*.

The present document specifies all the elements of the procedure for evaluation and review referred to in Article 4, paragraph 3 and in Article 23, litterae e, f and h of Convention 108+.

### **1. Missions of the Convention Committee: evaluation of Candidates to accession and review of the Parties**

Convention 108+ assigns new evaluation and review functions to the Convention Committee – the current Consultative Committee – and strengthens its powers in that respect.

Article 23 of Convention 108+ states:

*“The Convention Committee:*

*e. shall prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of personal data protection of the Candidate for accession and, where necessary, recommend measures to take to reach compliance with the provisions of this Convention;*

*f. may, at the request of a State or an international organisation, evaluate whether the level of personal data protection the former provides is in compliance with the provisions of this Convention and, where necessary, recommend measures to be taken to reach such compliance;*

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<sup>1</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) of 1981

<sup>2</sup> [T-PD-BUR\(2010\)13Rev- Report on the modalities and mechanisms for assessing implementation and follow-up of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data \(ETS No. 108\) and its Additional Protocol](#), by Marie GEORGES.

*h. shall review the implementation of this Convention by the Parties and recommend measures to be taken in the case where a Party is not in compliance with this Convention; i. shall facilitate, where necessary, the friendly settlement of all difficulties related to the application of this Convention.”*

These functions are exercised in respect of Candidates for accession to the Convention (evaluation functions, art. 23, lit. e and f) and existing Parties (review functions, art. 23, lit. h).

Thus, from the entry into force of the Amending Protocol, the Convention Committee will have new functions:

- Evaluate a Candidate for accession in terms of the guaranteed level of protection and its compliance with the Convention with a view of adopting an opinion on this subject for the Committee of Ministers;
- Assess, at the request of a State or an international organisation, their compliance with the provisions of this Convention.
- Review the implementation of the Convention by a Party to the Convention.

As a result of these various evaluations and reviews, the Convention Committee makes recommendations, if necessary, on the measures to be taken to achieve compliance with the provisions of the Convention.

The purpose of this document is to indicate how to proceed with the evaluations and reviews referred to above.

## **2. Purpose of the evaluation and review mechanism**

The purpose of the evaluation and review mechanism is to evaluate the effectiveness of the measures a Candidate for accession or a Party has taken in its law and in practice, to give effect to the provisions of Convention 108+.

In a nutshell, the objective pursued is to ensure the credibility of Convention 108+ and to establish genuine dynamic of harmonised protection, guaranteeing that data flows between Parties occur among states or organisations offering an appropriate level of protection.

To achieve this purpose, the evaluation and review mechanism aims to assess the compliance of the legal framework of a data protection system with the provisions of Convention 108+ and the actual implementation of that system by using notably publicly available information e.g. periodical reports by the supervisory authorities, official information about the resources allocated to the supervisory authorities, court decisions etc. No Candidate for accession nor Party shall be required to provide classified information.

### 2.1. Evaluation

Prior to acceding to Convention 108+, the Candidate for accession must take the necessary measures to ensure that its domestic law implements the Convention. These measures must be adopted and enter into force at the latest at the time of ratification or accession to the Convention. Article 4 of Convention 108+ provides that:

- 1. Each Party shall take the necessary measures in its law to give effect to the provisions of this Convention and secure their effective application.*
- 2. These measures shall be taken by each Party and shall have come into force by the time of ratification or of accession to this Convention.”*

The purpose of the evaluation mechanism is to identify whether the level of protection provided by a Candidate for accession<sup>3</sup> is in compliance with the Convention. The aim of this evaluation is to prepare an opinion for the Committee of Ministers relating to the level of personal data protection of the Candidate for accession, and where necessary, recommend measures to be taken to reach compliance with the provisions of the Convention.

In view of the Convention's objective of ensuring a harmonised level of protection and thus promoting the free flow of data between Parties, it is necessary to evaluate the level of protection prior to accession, in order to guarantee that all new Parties satisfy their commitments. This verification is necessary to ensure trust between Parties, as an indispensable condition for the free flow of personal data.

## 2.2. Review

The review mechanism aims to review the implementation of the Convention by a Party and to ensure that the latter complies with its commitments. A new paragraph 3 has been added to Article 4 in relation to the 1981 Convention, stipulating that

*"3. Each Party undertakes:*

- a. to allow the Convention Committee provided for in Chapter VI to evaluate the effectiveness of the measures it has taken in its law to give effect to the provisions of this Convention; and*
- b. to contribute actively to this evaluation process."*

In view of evaluating both the measures taken and their effectiveness, the evaluation must take into account all necessary elements, namely:

- a comprehensive data protection legislation providing the general principles applicable to any sector, the data subject's rights, rules on transborder transfers of data and an independent supervisory authority (composition, statute, activities);
- possible other special laws supplementing the general data protection legislation;
- and information about the concrete implementation and effectiveness of the legislative measures.

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In the event of non-compliance, the Convention Committee shall recommend measures to take as detailed in Chapter 9 and shall facilitate, where necessary, the settlement of all difficulties related to the application of the Convention<sup>4</sup>.

The Convention Committee should learn lessons from the evaluations and reviews carried out and regularly take stock of them, in particular in order to draft new guidelines and recommendations. The Committee may also revise or adjust the evaluation and monitoring mechanism as necessary in the light of its experience. The evaluations and reviews could also lead to the identification of good practices among the Parties under review. In that respect, the Secretariat will facilitate the dissemination of the best practices identified by preparing a compilation.

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<sup>3</sup> A Candidate for accession could be a state but also an international organisation.

<sup>4</sup> Article 23.h of Convention 108+.

### **3. Composition and functions of the Convention Committee and of its Evaluation and Review Group(s)**

#### 3.1. Composition of the Convention Committee and of its Evaluation and Review Group(s)

The Committee is composed of representatives of each Party to Convention 108+ (or in their absence, the deputy representatives), as well as observers. Observers do not have the right to vote.

According to the (current) rules of procedures of the Convention Committee, the Committee's Bureau is in charge of drafting opinions. The Committee may decide to set-up working groups (also called working Parties in the rules of procedure) and decide on their composition and mandate. In order to render the evaluation and review mechanism more efficient, such working groups – called “Evaluation and Review Groups” – should be set up.

One or more Evaluation and Review Groups should be set up within the Convention's Committee in order to carry out the evaluations and reviews. Each Group would be in charge of several evaluations or reviews.

Each Evaluation and Review Group will be composed of six members and six substitutes appointed for a term of three years. After the initial period of three years, one-third of members (the order of departure being the alphabetical order) will be renewed each year in order to ensure some stability in the Group's methods and work. Substitution is implemented as soon as a member is no longer available to take part in the activities of the Group.

The chair is elected by and amongst the members of each Evaluation and Review Group and appointed for the rest of his/her term, at the most three years. The term can be renewed. The Chair shall direct the work of the Group and sum up the conclusions of the discussions.

Each Party is invited to propose up to 6 experts to be part of the Evaluation and Review Groups, after consultation of their data protection supervisory authority. A representative of a Party in the Convention Committee (be he/she member of the Government or of the data protection supervisory authority) may be designated as an expert by this Party. Experts could also be external to the Committee (from the academic sector or lawyers, for example, or from a national supervisory or oversight body).<sup>5</sup> The list of proposed experts should reflect a gender and institutional balance and include legal and IT expertise.

The designated persons:

- must have recognised expertise in the field of data protection (for instance in a data protection authority, a government agency, in the judiciary, as academic, attorney/barrister, data protection officer, consultant, computer scientist, etc.). Experience in international treaty monitoring mechanisms<sup>6</sup> or in data protection assessment processes<sup>7</sup> would be an asset.
- need to have a sufficient command of one of the Council of Europe's official languages (English or French),
- need to be able to conduct interviews and discussions in legal and other technical subject-matters with a broad variety of interlocutors,

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<sup>5</sup> A detailed curriculum vitae with names and contact details of two references will be required for all proposed experts, in order to assess the person's ability to carry out the requested tasks.

<sup>6</sup> Such as GRECO, GRETA or Universal Periodic Review mechanisms.

<sup>7</sup> Such as the SCHEVAL national evaluations in the framework of the EU Schengen Evaluation and Monitoring Mechanism, or the European Union GDPR adequacy decisions process.

- and have adequate analytical and drafting skills.

A list of all the experts will be drawn up by the Secretariat and submitted to the Convention Committee for adoption. On the basis of the adopted list, the Secretariat makes a proposal for the composition of each Evaluation and Review Group to be adopted by the Committee.

The composition of the Evaluation and Review Groups should respect a geographical (in terms of countries as in terms of international organisations), gender, institutional balance (representatives of governments and of supervisory authorities, be they data protection authorities or other public bodies such as national security authorities and oversight bodies). Each Group should include legal and IT expertise.

Members of the Evaluation and Review Groups sit in their individual capacity and must be independent and impartial in the exercise of their functions.

They will benefit from an instruction session on evaluation and review organised by the Secretariat.

Persons taking part in an evaluation or review process should participate until the end of the process, except in cases preventing the nominated person to deliver the expected work (such as a temporary incapacity to work due to sickness, cases of force majeure, change of functions, complete unavailability, etc.). In such a case they are being substituted.

When the state or the international organisation of a particular Group member is being reviewed, the said member shall be substituted for the review process of that country or of that organisation, to ensure that the process is delivered in an impartial manner.

For each evaluation or review process, one member of the Evaluation and Review Group will be designated as rapporteur and will be in charge of drafting the evaluation or review document. After adoption by the Evaluation and Review Group, the rapporteur will present the document to the convention Committee.

### 3.2. Role of the Convention Committee and of its Evaluation and Review Group(s)

The role of the Convention Committee is to facilitate and improve the effective implementation of Convention 108+<sup>8</sup>.

The Convention Committee must prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of personal data protection of the Candidate for accession<sup>9</sup>. In this evaluation process, the Convention Committee assumes an advisory and assistance function to the Candidate for accession in view of its compliance to the requirements of the Convention. It can recommend to that Candidate measures to achieve compliance and to overcome possible difficulties in implementing the Convention<sup>10</sup>.

Furthermore, the Committee shall review the implementation of the Convention by the Parties<sup>11</sup>. In the framework of the review of the Parties, one of its roles is also to provide advice and assistance. In particular, it can recommend measures to be taken in the case of non-compliance<sup>12</sup>.

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<sup>8</sup> Article 23.a of the Convention

<sup>9</sup> Article 23.e of the Convention

<sup>10</sup> Article 23 e of the Convention. For details of measures that maybe taken in case of non-compliance with the Convention, see Chapter 7 below.

<sup>11</sup> in accordance with the provisions of Article 4.3

<sup>12</sup> Article 23, h of the Convention. See in particular Step 6 of the follow-up procedure presented below.

The Evaluation and Review Groups established by the Convention Committee to carry out the evaluation and review procedures have the following tasks and responsibilities linked to the different steps of the procedure (sending of a questionnaire, possible additional questions and field visit, elaboration of the preparatory report: see the detail of these functions under item 8 below):

- To analyse the answers to the questionnaire regarding the Candidates or the Parties undergoing review;
- To draft a preparatory report of evaluation or review (as the case may be);
- When necessary, to send additional questions for clarifications or further understanding of received answers;
- To organise and participate in the field visit (when necessary);
- To finalise and adopt the preparatory report: with conclusions and, if needed, recommendations.

#### 4. Characteristics of the evaluation and review mechanism

Paragraph 38 of the Explanatory Report of Convention 108+ states that “*The evaluation of a Party’s compliance will be carried out by the Convention Committee on the basis of an **objective, fair and transparent** procedure established by the Convention Committee and fully described in its rules of procedure.*” The Explanatory Report further adds that “*In providing such opinions on the level of compliance with the Convention, the Convention Committee will work on the basis of a **fair, transparent and public** procedure detailed in its rules of Procedure.*”<sup>13</sup>

##### 4.1. Transparency

To ensure the transparency of the evaluation and review process while maintaining an appropriate pressure-free working environment:

- the standard documents adopted for gathering information on the effective implementation of the Convention principles (evaluation and review questionnaires, country profile, information on the procedure) are made public on the website of the Council of Europe;
- information gathered by the Evaluation and Review Groups in relation to an evaluation or review process, including replies to the questionnaire, reports and related correspondence are kept confidential according to Council of Europe standards and transparency rules. This is without prejudice to the application of Candidates’ and Parties’ Freedom of Information Acts and domestic and international confidentiality rules.
- the preparatory report adopted by the Evaluation and Review Groups and submitted to the Convention Committee is kept confidential according to Council of Europe standards and transparency rules. The report adopted by the Convention Committee is made public.

No personal data shall be published without valid legal ground (with the data subject’s consent,

<sup>13</sup> Amending Protocol (CETS No. 223) to the Convention for the protection of individuals with regard to automatic processing of personal data (ETS No. 108), Explanatory Report, §39 and §163



or if provided by a legal norm, for example).

Representatives of the Committee, experts participating in Evaluation and Review Groups, the Secretariat and other persons assisting the Committee are required, during and after their term of office, to maintain the confidentiality of the facts or information of which they have become aware during the exercise of their functions.

A provision to the above effect shall be inserted in the contracts of experts and interpreters recruited to assist the Evaluation and Review Groups.

An effective communication strategy shall be prepared to enhance the impact of the Committee's reports and conclusions.

Documents mentioned here-above are accessible to all Parties on the Committee except if the confidentiality of a document is deemed necessary by the Evaluation and Review Group to protect an overriding legitimate interest. Appeal against the Group's decision to refuse access to a document may be lodged with the Secretariat.

#### 4.2. Objectivity

The use of standard evaluation and review questionnaires helps to ensure the objectivity of the process. The same applies to the order following which Parties will be evaluated (see item 5).

Furthermore, as stated above (see 3.2), to help ensure the objectivity of the evaluation and review mechanism, any member of a Evaluation and Review Group belonging to a Party undergoing the process must withdraw and be replaced by a substitute member of the Group.

#### 4.3. Fairness

To ensure fairness, every evaluation and review assessment should go as far, and no further than Convention 108+ and be consistent with the Explanatory Report.

In joining Convention 108+ Parties commit, under Article 4.3, to allow the Convention Committee to evaluate the effectiveness of the measures it has taken in its law to give effect to the provisions of the Convention and to contribute actively to this evaluation process notably by submitting reports on the measures it has taken.

### **5. Order and frequency of evaluations and reviews**

All **Candidates** for accession are evaluated before their accession to the Convention.

**Parties** will be reviewed every six years taking into account the availability of the Evaluation and Review Groups and following the alphabetical order. Furthermore, Parties will be reviewed totally or partially should a substantial criterion occur.

Parties to Convention 108 having ratified Convention 108+ before its entry into force will undergo a review procedure after this entry into force. These reviews will be phased in over time taking into account the availability of the Evaluation and Review Groups and following the alphabetical order or according to one of the substantial criteria mentioned below.

Concerning the review of Parties, for impartiality reasons, it is suggested to proceed by alphabetical order (English alphabetical order, see table in Appendix II).

It is recommended that a review of each Party takes place at least every six years to ensure that the Party complies with its obligations.

Indeed, in the context of technological innovations, as well as innovations in design methods, including participatory design, new procedures for use and the emergence of new or alternative economic models, a cyclical process of regular reviews is considered necessary. This process ensures, in terms of time and space, the sustainability of individual rights and freedoms in light of political, legal, technical, social and economic developments. Each round is estimated to last six years.

After a first review, subsequent reviews should focus on the new elements or developments (in law, case law and practice) since the previous report.

A review may also take place without following the alphabetical order or before the period of 6 years expires, if one or more of the following substantial criteria are met:

- a significant final decision of the highest or other competent national or supranational courts regarding the Party concerned which may deliver sufficient grounds for doubts on a properly functioning of the rule of law with regard to privacy and data protection; or
- any possible major concern or incident related to the Party indicating significant non-compliance with Convention obligations; or
- a change in the relevant legislation of the Party significantly affecting the implementation of the provisions of the Convention.

As soon as the Secretariat receives any relevant communication related to one or more of the substantial criteria as regards a Party, it shall bring it to the attention of this Party in order to obtain explanations within the time limit set by the Secretariat. It shall forward the information to the Committee together with the explanation of the Party. Any relevant communication received by individual members of the Committee shall be forwarded to the Secretariat which shall bring it to the attention of the Committee.

On the basis of a communication addressed by the Secretariat, a request for a review out of the alphabetical order or before expiration of a 6-year period can be made by one member of the Committee. Such a request should be accepted by the majority of its members laid out in the Rules of Procedure of the Committee. This intermediary review can be partial and focused on the aspects at stake in the judgement, in the incident or in the legislative change having triggered the review request.

To sum up, there are two types of review:

- cyclical review (every 6 years with a focus on the new elements or developments since the previous report)
- intermediary review (total or partial) triggered by a substantial criterion.

The Convention Committee ensures that a reasonable review schedule be achieved for each Party.

The Secretariat publishes a schedule of the programmed reviews for all the Parties (corollary to the budgetary and work programming of the Committee).

## **6. Evaluation and review methods**

### 6.1. Evaluation and review questionnaires, field visits

The Convention Committee has at its disposal two methods to evaluate a Candidate for accession or to review the implementation by a Contracting Party and may combine both

methods:

- Evaluation/review questionnaires, in all cases and
- field visits, when necessary.

The Committee may decide to address the questionnaire to specific non-governmental organisations, other relevant organisations and members of civil society of the Candidates/Parties, which shall be invited to respond to it within the time-limit set by the Evaluation and Review Group. These organisations and persons shall be active in the field of the protection of privacy and personal data . Moreover, they should have access to reliable sources of information. The replies to the questionnaire or requests for information shall be returned to the Secretariat.

In addition to the answers provided to the questionnaire and responses to the call for contributions from NGOs, from other relevant organisations and from members of civil society , other sources of relevant information may be taken into consideration to supplement the analysis, such as public pieces of documentation and country profiles elaborated by the Secretariat with the cooperation of the Party concerned (see annex 1 of Questionnaire<sup>14</sup>).

The Evaluation and Review Group shall treat replies to the questionnaire as confidential unless the respondent requests publication, in which case the Candidate or Party should be informed prior to such publication and provided with the opportunity to respond simultaneously to the publication of such a reply.

A model of the evaluation and review questionnaire has been developed within the Committee<sup>15</sup>.

Depending of the answers received, additional questions could be necessary for clarification or further understanding of collected information.

The modalities of field visits are addressed under 8.3.

## 6.2. Testing phase

The evaluation and review mechanism should begin by a testing phase: a few Parties would volunteer to be reviewed. The monitoring that would then be carried out would enable to verify the appropriateness of the evaluation and review procedure, the relevance of collected information, the adopted methods and the sources used. This would allow to identify possible gaps or unclear elements and provide the opportunity to identify better solutions. This would also give indications as to the appropriateness of the envisaged schedule.

Following the testing phase, adjustments to the process will then be possible if deemed relevant. The testing phase should not lead to any binding decision but the reviews carried out during this testing phase should be taken into consideration when setting the review schedule.

## **7. Evaluation and review criteria**

Evaluation and review criteria shall reflect the following aspects:

- The separation of powers and independence of the judiciary, and the substantial risks to the integrity of data protection safeguards of the Candidate or Party;

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<sup>14</sup> See T-PD(2018)20rev7, Draft Evaluation and Follow-up Questionnaire.

<sup>15</sup> See T-PD(2018)20rev7, Draft Evaluation and Follow-up Questionnaire.

- International commitments regarding the protection of personal data or having an impact on it;
- Constitutional guarantees concerning the protection of personal data; If the Candidate or Party is an international organisation, the evaluation or review will not concern constitutional guarantees but the legally binding instrument relating to the protection of personal data within the said organisation.
- General data protection law in force, applicable to all activity sectors, as well as other relevant national laws, including those providing for restrictions to the right of privacy and to the protection of personal data as well as the laws applicable to specific topics (video-surveillance, credit reporting, etc.) or to activity sectors (medical, banking, social security sectors...) or laws allowing large-scale processing (census database, national identification database, large-scale processing of special categories of personal data, etc.);
- The supervisory authority (or authorities) of data protection and the practice it has developed (including its independence<sup>16</sup>, structure, duties, powers including investigative, enforcement and sanction powers, and the availability of appropriate resources);
- Effective remedies (judicial or non-judicial) available to the data subject;
- Relevant case-law from relevant courts and tribunals as well as from any authority involved
- Awareness and training programmes on the right to data protection and its implementation including on data security.

It should be noted that the notion of 'law' in the Convention encompasses all enforceable rules, i.e. not only the legislation in force on data protection but also regulatory measures, administrative guidelines, and the case-law, if applicable under the jurisdiction of the Contracting Party (see paragraph 32 of the Explanatory report).

In order to evaluate the legislation in force and its effectiveness under an application for accession to the Convention, particular attention should be given to the application of the provisions set out in Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15 and 18 of Convention 108+ and in the light of its explanatory memorandum. In the case of review of the situation of a Party, the review covers the application of the same articles, to which must be added the control of the application of Articles 16 and 17 of the Convention.

All exceptions shall be carefully examined to assess the proportionality and the necessity of any measures in law taken in order to derogate from such rights.

As explained under Chapter 2, the analysis covers not only the adoption of measures implementing Convention 108+ provisions, but also their real and concrete application in practice. Also, efforts to ensure that field actors know the rules to be respected and to inform data subjects of their rights will be taken into account.

## 8. The evaluation and review procedure

The procedure described below should be set out in the *Rules of Procedure* of the Convention

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<sup>16</sup> Explanatory Report, § 129. "[...] A number of elements contribute to safeguarding the independence of the supervisory authority in the exercise of its functions, including the composition of the authority; the method for appointing its members; the duration of exercise and conditions of cessation of their functions; the possibility for them to participate in relevant meetings without undue restrictions; the option to consult technical or other experts or to hold external consultations; the availability of sufficient resources to the authority; the possibility to hire its own staff; or the adoption of decisions without being subject to external interference, whether direct or indirect."

Committee.

The result of an evaluation or review process could be that the Party or Candidate for accession is:

- 1) compliant, even if attention should be paid to certain elements to improve or maintain compliance in the future; or
- 2) non-compliant (shortcomings are identified, recommendations to settle them may be issued by the Convention Committee which verifies any future corrections).

### 8.1 Evaluation process of a Candidate for accession

The evaluation process of a Candidate for accession shall follow the following steps (see also the diagram in Appendix III).

(The deadlines indicated here-under may be exceptionally extended for legitimate reasons such as translation deadlines)

**Step 1:** the evaluation questionnaire will be sent by the Secretariat to the Candidate (to its relevant Government department and to its competent supervisory authority) with a three-month time limit to respond. The questionnaire will also be published on the website of the Council of Europe with an announcement of the evaluation process concerning the Candidate. It will be open for replies from any organisations or individuals. If deemed necessary by the Evaluation Group, the questionnaire may also be sent to civil society representatives (consumers associations, NGOs, National Human Rights Institutions, or academics and recognised independent experts).

**Step 2:** the Secretariat will receive the replies and will make any necessary requests for additional information or clarification within four weeks. It will forward all the received documents to the relevant Evaluation and Review Group.

**Step 3:** the Evaluation Group will examine the information gathered and request additional information or clarification if necessary. This evaluation will be based on the criteria defined under chapter 7 above. The Evaluation Group will produce a draft preparatory report within a three-month period, suggesting whether additional clarifications or a field visit<sup>17</sup> is necessary to gather missing information.

In order to acquire an overall vision of the Candidate situation, it is suggested that the following points should be included in the preparatory report deriving from comments and conclusions drawn on each section of the questionnaire:

- a general description of the legislation, case-law and any other relevant documentation, including guidelines and best practices regarding implementation of the Convention, where available;
- a description of the supervisory authority(ies) put in place, including its independence, structure, duties, powers and resources;
- a description of the available legal remedies;
- an overview of any shortcomings or problems encountered in the implementation of the Convention;
- preliminary conclusions with regard to the compliance with the provisions of the Convention including recommendations on the measures to be taken to improve the

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<sup>17</sup> For the modalities of the field visits refer to 8.3.

practical implementation of the Convention.

**Step 4:** The draft preparatory report will be submitted to the Candidate, which will have a two-month opportunity to comment and clarify any issue. The draft preparatory report will be revised if necessary, to take account of any comments and observations from the Candidate. It will be then submitted again to the Candidate for a final observation within a four-week period. The Evaluation Group will adopt it as its preparatory report within eight weeks of the receipt of the final observations of the Candidate.

**Step 5:** The Secretariat will send the preparatory report to the members of the Committee who will have four weeks to send their observations to the Secretariat. The latter will forward them to all delegations. The Committee will discuss the preparatory report during its Plenary meeting. If the Plenary meeting is to be held more than two months after the transmission of the preparatory report and in case the report conclusions do not raise any issue or recommend that the candidate be invited to accede to Convention, the Bureau may decide that the report will be discussed by written procedure. The adoption of the finalised report will be done at the Plenary meeting, or by written procedure if so decided by the Bureau. The written procedure shall be interrupted if three representatives request within two weeks of receiving the preparatory report that the report be discussed during a meeting of the Committee.

The finalised report will indicate whether or not the Candidate for accession is in a position to be invited by the Committee of Ministers to accede. It will be submitted to the Committee of Ministers after its adoption. Where the Committee concludes that the evaluated framework of protection is non-compliant with Convention 108+, the report will contain a set of recommendations and include details on measures to be taken to reach compliance (see appendix III).

**Step 6:** If the Convention Committee concludes that the evaluated framework of protection is compliant with Convention 108+ but improvements are necessary to reinforce or maintain compliance in the future, the Candidate for accession will be offered assistance, such as legal expertise or capacity building support (for more details see chapter 9).

This evaluation process should be achieved as rapidly as possible in order to enable the Candidate to initiate improvements and co-operation programmes, where appropriate.

## 8.2 Review procedure of a Party to the Convention

Under the Convention, the concerned Contracting Party is required to make an active contribution to this exercise.

The review procedure shall follow the same steps as for the evaluation, with different time-frames applicable and with exception of steps 5 & 6 (see also the diagram in Appendix IV).

**Step 1:** The Party will have 6 months to respond to the questionnaire, the rest is similar to the evaluation process (see above 8.1., step 1). If the Party is reviewed on the basis of a substantial criterion mentioned under chapter 5, It will have 2 months to respond.

**Step 2:** Same as for the evaluation process (see above 8.1., step 2).

**Step 3:** The Review Group will produce a draft preparatory report within a four-month period.

For the first review the following points should be included in the preparatory report deriving from comments and conclusions drawn on each section of the questionnaire:

- a general description of the legislation, case-law and any other relevant documentation, including guidelines, best practices and statistics regarding implementation of the

- Convention, where available;
- a description of the supervisory authority(ies) put in place and the practice it has developed, including analysis of its independence, structure, duties, powers and resources;
  - a description of the available legal remedies and of their effectiveness;
  - a general description of how the effectiveness of the rules has been ensured in practice, including details of the sanctions applied and remedial measures obtained;
  - an overview of any shortcomings or problems encountered in the implementation of the Convention;
  - preliminary conclusions including recommendations on the measures to be taken to improve the practical implementation of the Convention.

For the cyclical review (every six years), the focus should be on the new elements or developments since the previous report. Where there is no new development, the previous report may be referred to.

**Step 4:** Same as for the evaluation process (see above 8.1., step 4).

**Step 5:** The preparatory report together with the final observations of the Party will be submitted to the Convention Committee.

The Secretariat will send the preparatory report to the members of the Committee who will have four weeks in which to send their observations to the Secretariat. The latter will forward them to all delegations. The Committee will discuss the preparatory report during its Plenary meeting. If the Plenary meeting is to be held more than two months after the transmission of the preparatory report and in case the report conclusions do not raise any issue, the Bureau may decide that the report will be discussed by written procedure. The adoption of the finalised report will be done at the Plenary meeting, or by written procedure if so decided by the Bureau. The written procedure shall be interrupted if three representatives request within two weeks of receiving the preparatory report that the report be discussed during a meeting of the Committee.

The report will indicate whether the Party is in compliance with the provisions of Convention 108+ and will make any necessary recommendations. The final report will be submitted to the Party. In case of **compliance**, this will conclude the process. If improvements are necessary to reinforce or maintain compliance in the future, the Party will be offered assistance, such as legal expertise or capacity building support.

**Step 6:** in case of **non-compliance**, a dialogue will be opened with the Party and a co-operation process will be initiated to help the Party to achieve compliance. A series of measures will be taken as discussed under chapter 9 and the Party will be given a timeframe within which to comply with the report's recommendations. Such timing should take into consideration the nature of the recommendations made in the final report, as well as the complexity of their implementation and their impact on existing situations. Past the allocated timespan, the compliance will be verified by the Evaluation and Review Group.

### 8.3 Details of field visits

Where the information gathered under step 3 is insufficient to allow an accurate assessment of the level of compliance with the Convention's principles and their effective implementation, the Evaluation and Review Group may decide to organise and conduct a field visit.

Such field visits should be conducted by the Evaluation and Review Group in charge of the specific evaluation or review.

The purpose of the visit will be the collection of information and clarifications concerning any

insufficient or incomplete replies provided by the Candidate or Contracting Party to the questionnaire. At the same time, the experts carrying out the visit will endeavor to provide an overall view of the national situation in order to ensure that the respect for the Convention's principles is substantive and effective.

## 9. Measures in the event of non-compliance

The Convention Committee shall recommend measures to be taken where a Party is not in compliance with the Convention<sup>18</sup> and shall facilitate, where possible, the amicable resolution of any difficulties related to the application of the Convention.

In the event of non-compliance, the Committee's objective will be to provide assistance to the Candidate for accession/Party concerned and to its competent authorities to comply with its (future) commitments under the Convention. In order to do so, it will take due account of the nature and causes of non-compliance.

Regarding Parties, non-compliance will have an impact on transborder data flows, according to Article 14.1 of the Convention.

The recommended measures should be inducing and constructive:

- The Committee may offer advice and, if necessary, provide assistance from experts; this assistance could take the form of recommendations on the understanding of legal texts or on technical or administrative methodology;
- As the case may be, the Committee may invite and/or provide assistance to the Candidate for accession/ Party to draw up an action plan to achieve compliance within a timeframe agreed between the Committee and the Candidate for accession/Party concerned. The Party may be able to apply for funding towards the implementation of an action plan under the cooperation projects<sup>19</sup> of the Council of Europe, or/and other donators;
- The Committee may ask the Party/Candidate for accession concerned to submit reports on the progress made in order to comply with its (future) obligations<sup>20</sup>.

If these measures fail to achieve the expected results within the timeframe agreed and if the Party still does not comply with its commitments under the Convention, other measures could be taken<sup>21</sup>, i.e.:

- High-level visits will be organised by the Convention Committee;
- The Committee of Ministers will be duly informed by the Convention Committee about the lack of compliance;

These measures may not be applied simultaneously.

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<sup>18</sup> In accordance with the provisions of Article 23.h and 23.i of Convention 108+.

<sup>19</sup> "Strategic programming and resource mobilisation project of the Council of Europe"

<sup>20</sup> In accordance with Article 4.3 of Convention 108+.

<sup>21</sup> This is not precluding the application of Article 60 of the Vienna Convention on the Law of Treaties of 1969 which provides for the measures available to the Parties to a multilateral treaty in the event of a material breach by one of the Parties (including the possibility for Parties to suspend the operation of the treaty in respect of the defaulting state).



## **10. Secretariat of the Convention Committee**

The Secretary General shall secure the Convention Committee with the necessary staff, including a Secretary of the Committee. The Secretariat will provide the Committee with the administrative services it may require and will be responsible for co-ordinating the meetings of the Evaluation and Review Group. It will also forward the questionnaires to the Contracting Parties concerned or to the Candidates for accession concerned, compile the replies received and request further information if the replies are lacking in detail, without prejudice to the right of the Evaluation and Review Group to request additional information.

## **11. Financing the evaluation and review activities**

The Convention Committee budget will cover the cost of the Committee's evaluation and follow-up activities, such as per-diem and travel costs in order to attend meetings or for field visits, but will not pay any fees to the members of the Evaluation and Review Group. To reduce costs, the Groups will be holding some meetings using conference calls/video-conferences over the internet.

It should also be noted that in accordance with the provisions of Article 22.4 of Convention 108+, any Party which is not a member of the Council of Europe shall contribute to the funding of the activities of the Convention Committee as established by the Committee of Ministers in agreement with that Party

## APPENDIX I

### Convention for the protection of individuals with regard to the processing of personal data - Convention 108+ (abstract)<sup>22</sup>

#### Article 4 – Duties of the Parties

- 1 Each Party shall take the necessary measures in its law to give effect to the provisions of this Convention and secure their effective application.
- 2 These measures shall be taken by each Party and shall have come into force by the time of ratification or of accession to this Convention.
- 3 Each Party undertakes:
  - a. to allow the Convention Committee provided for in Chapter VI to evaluate the effectiveness of the measures it has taken in its law to give effect to the provisions of this Convention; and
  - b. to contribute actively to this evaluation process.

#### Article 23 – Functions of the committee

The Convention Committee:

*e.* shall prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of personal data protection of the Candidate for accession and, where necessary, recommend measures to take to reach compliance with the provisions of this Convention;

*f.* may, at the request of a State or an international organisation, evaluate whether the level of personal data protection the former provides is in compliance with the provisions of this Convention and, where necessary, recommend measures to be taken to reach such compliance;

*h.* shall review the implementation of this Convention by the Parties and recommend measures to be taken in the case where a Party is not in compliance with this Convention;

*i.* shall facilitate, where necessary, the friendly settlement of all difficulties related to the application of this Convention.”

#### Article 24 – Procedure

4. The Convention Committee shall draw up the other elements of its Rules of Procedure and establish, in particular, the procedures for evaluation and review referred to in Article 4, paragraph 3, and Article 23, *litterae e, f and h* on the basis of objective criteria.

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<sup>22</sup> Convention 108+ – consolidated version:  
[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016807c65bf](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807c65bf)

**Article 27 – Accession by non-member States and international organisations**

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consulting the Parties to this Convention and obtaining their unanimous agreement, and in light of the opinion prepared by the Convention Committee in accordance with Article 23.e, invite any State not a member of the Council of Europe or an international organisation to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

## APPENDIX II

## List of Parties to Convention 108

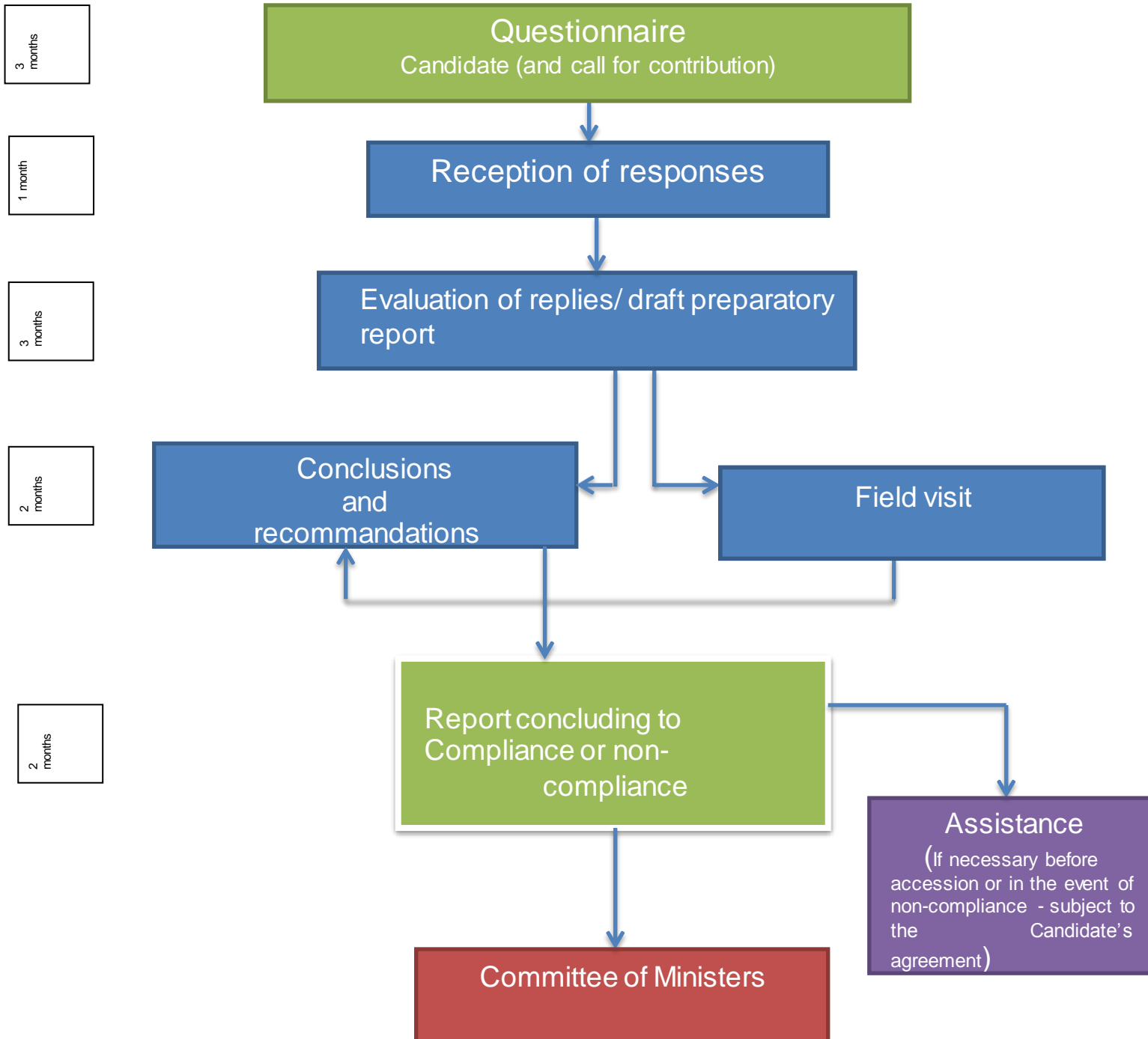
	Signature	Ratification	Entry into Force
Albania	09/06/2004	14/02/2005	01/06/2005
Andorra	31/05/2007	06/05/2008	01/09/2008
Armenia	08/04/2011	09/05/2012	01/09/2012
Argentina		25/02/2019	01/06/2019
Austria	28/01/1981	30/03/1988	01/07/1988
Azerbaijan	03/05/2010	03/05/2010	01/09/2010
Belgium	07/05/1982	28/05/1993	01/09/1993
Bosnia and Herzegovina	02/03/2004	31/03/2006	01/07/2006
Bulgaria	02/06/1998	18/09/2002	01/01/2003
Cabo Verde		19/06/2018	01/10/2018
Croatia	05/06/2003	21/06/2005	01/10/2005
Cyprus	25/07/1986	21/02/2002	01/06/2002
Czech Republic	08/09/2000	09/07/2001	01/11/2001
Denmark	28/01/1981	23/10/1989	01/02/1990
Estonia	24/01/2000	14/11/2001	01/03/2002
Finland	10/04/1991	02/12/1991	01/04/1992
France	28/01/1981	24/03/1983	01/10/1985
Georgia	21/11/2001	14/12/2005	01/04/2006
Germany	28/01/1981	19/06/1985	01/10/1985
Greece	17/02/1983	11/08/1995	01/12/1995
Hungary	13/05/1993	08/10/1997	01/02/1998
Iceland	27/09/1982	25/03/1991	01/07/1991
Ireland	18/12/1986	25/04/1990	01/08/1990
Italy	02/02/1983	29/03/1997	01/07/1997
Latvia	31/10/2000	30/05/2001	01/09/2001
Liechtenstein	02/03/2004	11/05/2004	01/09/2004
Lithuania	11/02/2000	01/06/2001	01/10/2001
Luxembourg	28/01/1981	10/02/1988	01/06/1988
Malta	15/01/2003	28/02/2003	01/06/2003
Mauritius		17/06/2016	01/10/2016
Mexico		28/06/2018	01/10/2018
Monaco	01/10/2008	24/12/2008	01/04/2009
Montenegro	06/09/2005	06/09/2005	06/06/2006
Morocco			01/09/2019
Netherlands	21/01/1988	24/08/1993	01/12/1993

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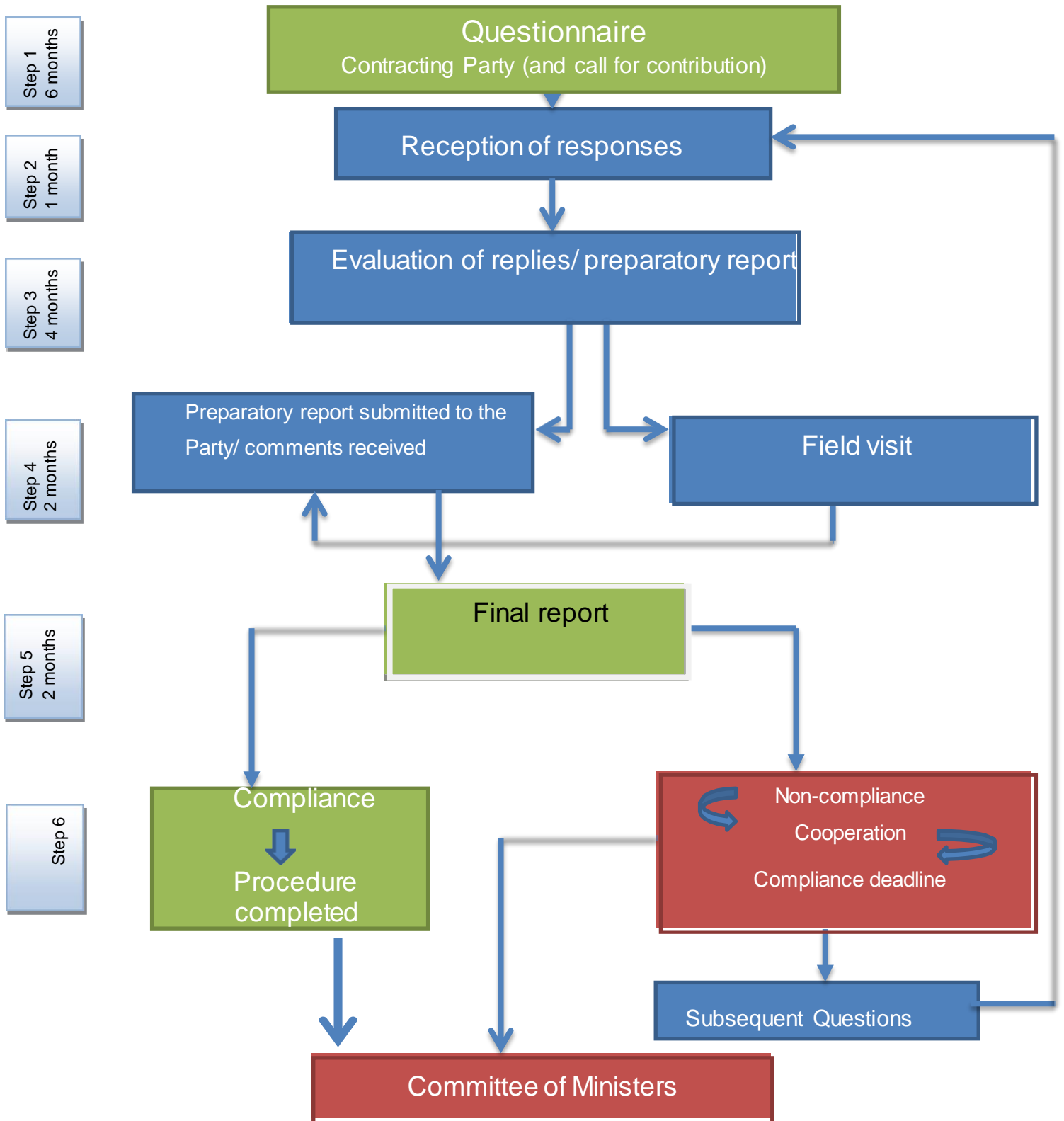
North Macedonia	24/03/2006	24/03/2006	01/07/2006
Norway	13/03/1981	20/02/1984	01/10/1985
Poland	21/04/1999	23/05/2002	01/09/2002
Portugal	14/05/1981	02/09/1993	01/01/1994
Republic of Moldova	04/05/1998	28/02/2008	01/06/2008
Romania	18/03/1997	27/02/2002	01/06/2002
Russian Federation	07/11/2001	15/05/2013	01/09/2013
San Marino	02/03/2015	28/05/2015	01/09/2015
Senegal		25/08/2016	01/12/2016
Serbia	06/09/2005	06/09/2005	01/01/2006
Slovak Republic	14/04/2000	13/09/2000	01/01/2001
Slovenia	23/11/1993	27/05/1994	01/09/1994
Spain	28/01/1982	31/01/1984	01/10/1985
Sweden	28/01/1981	29/09/1982	01/10/1985
Switzerland	02/10/1997	02/10/1997	01/02/1998
Tunisia		18/07/2017	01/11/2017
Turkey	28/01/1981	02/05/2016	01/09/2016
Ukraine	29/08/2005	30/09/2010	01/01/2011
United Kingdom	14/05/1981	26/08/1987	01/12/1987
Uruguay		10/04/2013	01/08/2013

## APPENDIX III

## Evaluation mechanism of a Candidate for accession



# APPENDIX IV Review mechanism Diagram



**APPENDIX V**

**GLOSSARY (to be completed at a later stage)**

**Convention Committee**

**Evaluation and Review Group**

**Evaluation**

**Review**

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