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Compilation of Comments

**on the Draft structure for a normative document on the interpretation of Article 11 of
Convention 108+¹**

Compilation des commentaires

**sur le Projet de structure d'un document normatif sur l'interprétation de l'article 11 de la
Convention 108+²**

¹ The present document of the Committee of Convention 108 contains guidance aimed at facilitating ratification of the amending protocol to the Convention.

² Le présent document du Comité de la Convention 108 contient des orientations visant à faciliter la ratification du protocole d'amendement à la Convention.

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GERMANY / ALLEMAGNE

2. General conditions on the lawful use of exceptions provided for in Article 11

2.1. Provided by law

The criterion "provided for by law" ~~implies means~~ that the exception in question must be enshrined in ~~a law~~ in the broadest sense (it may be a domestic law or legal provision, ~~a decree, a regulation~~ taking into account the legal system of the respective Party). The explanatory report precises "Such a measure must be prescribed by an accessible and foreseeable law, which must be sufficiently detailed". ~~Concretely, a legislative text shall provide precisely for the scope of the measures, individuals, group of individuals concerned, conditions of the applicability of measures based on this exception (by giving indications on, for example, what are the conditions of its implementation, which body is responsible for controlling the implementation, how individuals' rights and freedoms will be safeguarded or how the proportionality principle will be implemented and what will be the maximum duration of implementation).~~

Commented [A1]: This is not specified in the Convention 108+ and should be deleted.

2.2. Respects the essence of the fundamental rights and freedoms

The exceptions must in this sense limit the infringement of human rights and fundamental freedoms. ~~In practice, this means limiting the scope, duration of measures, the number of data subjects and assessing the impact on human rights and fundamental freedoms of techniques, technologies used for the data processing.~~

Commented [A2]: See above

2.3. Constitutes a necessary and proportionate measure in a democratic society

Necessity means that the interference with the protection of personal data must be duly justified by the interest(s) at stake, which should directly emanate from a pressing social or governmental ~~need~~ and cannot be achieved by less intrusive means. Therefore, it is also necessary that the interference with the private life of individuals' is carried out based on a reasonable ground and in direct correlation of this objective. Any measure should moreover be necessary and proportionate in terms of the outcome to be achieved with due regard for the legitimate interests of the affected data subjects. In choosing those, ~~state~~ Parties have to have a margin of appreciation to decide on the most appropriate measures and means. The processing operations carried out under this exception have to meet proportionality criteria in relation to the legitimate objective pursued and should be subject to independent oversight ~~possibly carried out by a judge~~. Where this is not possible, it is necessary to provide ex post effective ~~effective ex-post~~ remedies to redress the harm done to individuals by the application of such an exception.

Commented [A3]: Based on democratic process. This could be add in the text too.

Commented [A4]:

4. Recommendations

(...)

4.2. The necessity and proportionality of the exceptions need to be justified and, on a case-by-case basis

Commented [A5]: Sentence doesn't make sense

(...)

4.2. To apply "Data protection by design and by default" (and other recommendations on accountability by the explanatory report)

Commented [A6]: If exceptions apply no « privacy by design » can apply.

(...)

4.7. International transfers of personal data: facilitating data flows while upholding the safeguards of the Convention

Commented [A7]: Why should this be a recommendation in the context of Article 11 ?

MEXICO

3. Guidance on exceptions listed in Article 11 of Convention 108+

3.1. *Guidance on general data protection safeguards provided by the Convention 108+ in itself*

→ Article 11 §1 applies only in relation to specific provisions, other provisions not mentioned in Article 11 still apply:

(...)

- Article 14§ 1 to 4: Transborder data transfers rules apply Article 15§ 2e to 10: i) awareness rising activity by the DPA, ii) to be consulted on legislative/administrative measures, iii) to deal with the request and complaints lodged by the data subject, shall keep them informed, ~~iiii~~iv) shall act in complete independence and impartiality, ~~iiiii~~v) shall have sufficient resources, ~~iiiiii~~vi) shall prepare annual report, ~~iiiiiivii~~vii) confidentiality obligations for members, ~~iiiiiiviii~~viii) decisions to be appealed reviewed by a court, ~~iiiiiivix~~ix) no review of the judiciary

3.2.4. Article 9

Right of the data subject

This exception allows State Parties to Convention to derogate from the provisions regulating the rights of data subjects. The consequences of such derogation could directly affect ~~others~~other rights and fundamental freedomsfundamental rights.

5. Guidance on Article 11§ 3

- 5.1.3. Article 15, paragraph 2, litterae a, b, c and d: i) to empower the DPA to have powers of investigation and intervention, ii) to perform functions relating to transborder transfers (approval of safeguards), iii) issue decision with respect to violations, impose administrative sanctions, ~~iiii~~iv) engage in legal proceedings

6. Recommendations

- 6.2. To apply "Data protection by design and by default" (and other recommendations on accountability by the explanatory report)
- 6.4. Judicial oversight of the measures taken and carried out (~~ex~~ex-ante)

7. Definitions

7.7. Other essential objective of general public interest (also with regard to Article 62 of the Vienna Convention)

~~7.7.~~7.8. Other rights and fundamental freedoms