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T-PD-BUR (2022)1

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

CONVENTION 108

**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.

6. 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+)**.
7. 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.¹

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”.

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.

¹ In the French version, “chapitre III” should be replaced by “Section III”

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*".²

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.

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.

² Explanatory Report, § 125.

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.