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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 Recommendation of the Committee of Ministers to Member States on the impacts of digital technologies on freedom of expression

On 28September 2021, the Secretariat of the Committee of Experts on Freedom of Expression and Digital Technologies (MSI-DIG) shared the draft Recommendation of the Committee of Ministers to Member States on the impacts of digital technologies on freedom of expression ("Recommendation") with a view to requesting the opinion of the Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, hereafter "Convention 108") ("Bureau") .

The Bureau welcomes this important work, praises the quality of the draft Recommendation and suggests considering the following observations:

1. The Bureau first and foremost recalls that personal data should only be processed in a way which complies with the existing human rights' standards and legal frameworks and in particular with Convention 108 as modernised by the amending Protocol CETS No. 223. ("Convention 108+").

2. The Bureau welcomes that the Guidelines in its Chapter 1 (Foundations for Human Rights-Enhancing rulemaking) recognize privacy as one of the foundations for Human Rights-Enhancing rulemaking. But while expressing its full appreciation for the inclusion of references to relevant provisions of Convention 108+, would like to stress and suggest including that "privacy" or the right to "private life" as guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, "the Convention") shall be referenced and understood in a broad sense and as such should encompass all personal data of the individual available publicly and/or online.

3. For this reason, the Bureau wishes to underline that the European Court of Human Rights has been giving for many years such broad interpretation to the term "private life". Decisions of the ECHR in particular suggest that the respect for private life comprises the right to establish and develop relationships with other human beings; and that there should be no reason of principle to justify excluding activities of a professional or business nature from the notion of "private life" (see, in particular in the case Niemietz v. Germany /judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and the Halford judgment, pp. 1015-16, § 42/).

4. This broad interpretation corresponds also with the one of Convention 108+ whose purpose is "*to secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him*" (Article 1), such personal data being defined as "*any information relating to an identified or identifiable individual*" (Article 2)." (see also in cases a) *Amann v. Switzerland* /[GC], no. 27798/95, § 65, ECHR 2000-II,/ and b) the *Rotaru v. Romania* /[GC], no. 28341/95, § 43, ECHR 2000-V/).

5. The Bureau notes the need and the importance to consider the broad interpretation of the Court and provisions of Convention 108+ to fully ensure, including when drafting new legislation, the right to privacy of individuals who are impacted by the increasing use of sophisticated surveillance and algorithmic persuasion strategies by private actors and states.

6. The Bureau recalls that Article 5 Convention 108+ sets out principles that any data processing must follow: proportionality, lawfulness, fairness, transparency, purpose limitation, data minimization, accuracy and storage limitations. The Bureau underlines that the second paragraph of article 11 of Convention 108+ allows for restrictions from the application of provisions specified in Articles 8 (transparency of processing) and 9 (rights of the data subject) with regard to data processing carried out for "*archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes when there is no recognisable risk of infringement of the rights and fundamental freedoms of data subjects.*". These exceptions therefore could be **used for personal data processed for independent research in the public interest as Chapter 6 of the Guidelines on the impacts of digital technologies on freedom of expression ("Guidelines"), appended to the draft Recommendation suggests, provided that the general conditions for the lawful use of exceptions, as set out in paragraph 1 of Article 11, are fulfilled. This requires that "such an exception is provided for by law, respects the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society"**

7. Consequently the Bureau recalls that personal data held by internet intermediaries and shared it with researchers must comply with other provisions set forth by other articles not listed in paragraph 2 of Article 11 of Convention 108+, notably by Article 5 (legitimacy of data processing and quality of data, general principles of data protection), Article 6 (special categories of data), Article 7 (data security), Article 10 (accountability for the data processing), Article 14 (transborder flow of personal data). It is also to be noted that as Paragraph 50 of the Explanatory Report to Convention 108+ provides: "*The further processing of personal data for (…) scientific or historical* ***research purposes (…)****is a priori considered as compatible provided that other safeguards exist (such as, for instance, anonymisation of data or data pseudonymisation, except if retention of the identifiable form is necessary; rules of professional secrecy; provisions governing restricted access and communication of data for the above-mentioned purposes, notably in relation to statistics and public archives; and other technical and organisational data-security measures) and that the operations, in principle, exclude any use of the information obtained for decisions or measures concerning a particular individual*."

8. The Bureau wishes to further highlight that independent research in the public interest often implies the processing of special categories of data as described in Article 6 of Convention 108+. Such personal data is particularly protected under the Convention 108+ and the processing is only allowed where appropriate safeguards are enshrined in law, complementing those of the Convention 108+. States have, therefore, the obligation of creating a secure processing environment that, on the one hand facilitates research and, on the other hand, provides for complementary safeguards in addition to those already put in place for "normal" categories of personal data. Such measures should be adapted to the risks at stake and should consider duly the interests, rights and freedoms of individuals concerned when the internet intermediaries that held the data share them with the researchers. The Bureau therefore highlights that appropriate safeguards are to be put in place before commencing the processing of special categories of data which could include "*such as for instance, alone or cumulatively; the data subject's explicit consent; a law covering the intended purpose and means of the processing or indicating the exceptional cases where processing such data would be permitted; a professional secrecy obligation; measures following a risk analysis; a particular and qualified organisational or technical security measure (data encryption, for example*)" (paragraph 56 of the Explanatory Report).

9. As the Guidelines recommends – rightfully so – "*the rigorous and independent research in the public interest (…)*" that also implies "*accessing data held by internet intermediaries*", the Bureau wishes to stress that such data processing will increasingly happen in a multijurisdictional context. Therefore, it should be underlined that these data transfers between researchers and Internet intermediaries are to be carried out in accordance with Article 14 of Convention 108+, which establishes the regime for personal data transfers across borders.

10. In this context, but also in general, the Bureau stresses the crucial role of the supervisory authorities when it comes to the enforcement of data protection regulation and independent oversight of data processing in a State party, also in the context of independent research, and in particular when it comes to the sharing/disclosing personal data for and to researchers by internet intermediaries.

11. The current wording of Chapters 6 of the Guidelines seems to propose the setting up of data sharing schemes and dynamics in the field of independent research. The Bureau wishes in this respect to suggest complementing it with a requirement to make a clear distinction between the processing of personal and non-personal data. The Bureau suggests furthermore a deepened discussion on what personal data are to be disclosed and stress the need for anonymization whenever possible.

12. As far as personal data should be concerned, the Bureau finally underlines that Chapter 6 of the Guidelines is not providing sufficient clarity neither on what data categories shall be accessed nor on data security requirements, including the handling of data breaches and subsequent remedial actions, nor on accountability measures (as described in Article 10 of Convention 108+) nor on any effective mechanism to allow data subjects to exercise their rights (as described in Article 9 of Convention 108+). This also includes the need for discussion on what platforms should be included and in what way, what kind of systems and technologies need to be adopted to protect the integrity of the data shared by internet intermediaries and how an independent oversight is ensured for such a system. Should such a data sharing model include personal data, the Bureau is of the opinion that the Guidelines could foresee as a minimum requirement data sharing agreements between internet intermediaries and researchers in line with Article 14 of Convention 108+ above-mentioned, as well as with applicable international data protection standards between internet intermediaries and researchers which could clarify among others those peculiar issues. Finally, it feels necessary to reiterate the importance of the broad interpretation of individuals' "privacy" in this context as well in line with the case-law of the ECHR referred to in Paragraph 4 and by Article 1 of Convention 108+.