

## **Modernizing Council of Europe Convention 108: Comments and Recommendations from a Civil Society Perspective**

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Panel: “Modernising Convention 108 in the Face of the IT Revolution”  
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European Digital Rights (EDRI<sup>1</sup>) is an association of 28 nongovernmental digital rights organizations active in 18 European countries. This allows EDRI and its members to promote and defend fundamental human rights in the information society, including privacy and data protection, at the European level as well as at the national levels. At the global level, EDRI is a member of like-minded NGO coalitions, among them CSISAC<sup>2</sup> (the OECD Civil Society Information Society Advisory Committee) and The Public Voice<sup>3</sup>, which authored the Madrid Privacy Declaration<sup>4</sup> on “Global Standards for a Global World”, signed by more than 110 NGOs and civil society organizations, and more than 100 privacy experts. This Madrid Civil Society Privacy Declaration was presented in November 2009, at the 31<sup>st</sup> annual meeting of the International Conference of Privacy and Data Protection Commissioners<sup>5</sup> in Madrid.

It is with this global background in mind that I would like to share with you main elements of the discussion we held on Tuesday 24 January 2012 at the civil society privacy Barcamp<sup>6</sup> organized as a pre-event of this CPDP Conference<sup>7</sup>. This consultation introduced the main changes proposed in this modernization<sup>8</sup> of Convention 108<sup>9</sup>,

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<sup>1</sup> See <http://www.edri.org>

<sup>2</sup> See <http://www.csisac.org>

<sup>3</sup> See <http://thepublicvoice.org>

<sup>4</sup> See <http://thepublicvoice.org/madrid-declaration/>

<sup>5</sup> See <http://www.privacyconference2009.org/>

<sup>6</sup> See <http://www.edri.org/Privacy-Camp-EU>

<sup>7</sup> See <http://www.cpdpconferences.org/>

<sup>8</sup> See [http://www.coe.int/t/dghl/standardsetting/dataprotection/Modernisation\\_en.asp](http://www.coe.int/t/dghl/standardsetting/dataprotection/Modernisation_en.asp). The comments and recommendations presented in this paper are based on the latest published version of the document, as of 18 January 2012, which is available at: [http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD\\_documents/T-PD-BUR\\_2012\\_01\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD-BUR_2012_01_EN.pdf)

<sup>9</sup> See <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>

through a presentation by Marie Georges, independent scientific expert of the Council of Europe, and were discussed with Jörg Polakiewicz, head of the Council of Europe Human Rights Policy and Development Department.

First of all, this modernization process is much welcome, and we hope that the final document that will be adopted will increase the Convention's potential as a universal standard since it remains the only binding international instrument in the field.

One of the main provisions of the Madrid Civil Society Privacy Declaration urges countries that have not ratified the Council of Europe Convention 108, together with its additional Protocol of 2001, to do so as expeditiously as possible, and we hope that the modernization will accelerate this process. As a matter of fact, we observe as a good sign in this direction that Uruguay has already asked for ratification<sup>10</sup> and that Mexico and the United States of America recently came back as observers to the Consultative Committee of the Convention<sup>11</sup>.

We also note that the fact that the modernization and promotion of the Convention are a priority for the Council of Europe during 2012 and 2013 is likely to accelerate this process as well. We really hope to see the Council of Europe taking the same proactive role in promoting Convention 108 as it did for its Convention on Cybercrime<sup>12</sup>, and we also hope that the private sector, and especially companies operating worldwide, will understand that they have not only a duty, but also an interest in participating to this process, if only by financing it.

We welcome the new provision that International Organizations could now become a party to Convention 108 (Article 23). As many of them play an important role in setting global standards that more and more impact the rights to privacy and to data protection of individuals, we could hope that their participation to the Consultative Committee of the Convention, together with the adequacy level they would need to show, will drastically improve their respect for these fundamental rights and, at the very least, their transparency and accountability with this respect. Such a provision would have been much needed, for instance, when the ICAO (International Civil Aviation Organization) set up the standards for the biometric passport, not to mention the ITU's (International Telecommunications Union) work on cyber-security and, of course, Internet standards settings and domain name management organizations, such as ICANN (Internet Corporation for Assignment of Names and Numbers), although the notion of "International Organization" would need to be specified so as not to only refer to intergovernmental organizations.

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<sup>10</sup> See [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2011\)1118/10.3](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2011)1118/10.3)

<sup>11</sup> As it appears from the list of observers in reports of recent (2010 and 2011) plenary meetings of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD), available at: [http://www.coe.int/t/dghl/standardsetting/dataprotection/Calendar\\_en.asp](http://www.coe.int/t/dghl/standardsetting/dataprotection/Calendar_en.asp)

<sup>12</sup> See <http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/>

Regarding the provisions related to trans-border data flows, (Article 12) which are at the heart of the Convention purposes, we regret that the notion of “an adequate level of protection” is still kept, instead of an “equivalent” level of protection, and we regret that the modernization has not really introduced any actual enhancement to the current provisions of Convention 108 and its Protocol of 2001, especially under the possible exceptions when no sufficient protections is ensured by a State not party to the Convention: for instance, the addition that the data subject consent needs to be obtained “after having been informed of the risks” (Article 12(7)a) would probably need specifications in the explanatory report regarding the minimum level of information on the risks. In the same way, one might wonder whether the specification, regarding the so-called legitimate interest exception, that it should be “in particular important public interests, prevailing in the particular case” (Article 12(7)c), would add any further guarantee to a data subject’s rights. An example that immediately comes to my mind here is the transfer of PNR (Passenger Name Record) data of EU citizens to US Agencies.

An issue that was discussed in depth during Tuesday consultation is whether a third party that ratified Convention 108 or that got recognition by the Council of Europe of its adequate level of data protection could be considered by the European Union as showing an adequate level of data protection by its own criteria. This seemed highly desirable to the participants, not only as an incentive for ratification of the Convention by third party States (a multilateral process being more attractive, in terms of international relations, than unilateral scrutiny), but also because the adequacy level assessment process by the Council of Europe is likely to become more transparent, participative and effective than that of the European Union, both at initial scrutiny step and periodically afterwards. This is especially true since the Council of Europe scrutiny process is conducted by the Consultative Committee of the Convention (Article 12(6)), which includes observers, including from civil society organizations (Article 18(3)). In addition, new mechanisms are introduced to ensure the application of the Convention by reinforcing the role of the Consultative Committee (Article 19).

Moreover, regarding the periodical scrutiny process, civil society participants to Tuesday consultation strongly suggested that specific scrutiny (Article 19) could be set off following a complaint from NGOs, especially watchdogs, or even individuals, in the same way as provided by the existing complaint mechanism which allows to lodge a complaint with the European Commission against an EU Member State for any measure or practice incompatible with a provision or a principle of the EU law<sup>13</sup>. The details of such a complaint mechanism would need to be discussed, but the important point is that it remains simple (not necessitating a lawyer intervention) and allowing reasonably quick answer, which could be either the start of a scrutiny process or a motivated rejection of the complaint admissibility.

Let me now address the new substantive provisions resulting from this modernization process. A great number of them provide for better protection, while taking into account the technological, sociological and behavioral changes in the use of ICTs, as well as the evolutions of the industry organization, economic models and market, that occurred since Convention 108 was adopted 30 years ago. We think that some of them still need

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<sup>13</sup> See [http://ec.europa.eu/eu\\_law/your\\_rights/your\\_rights\\_en.htm](http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm)

revision, however. Due to time constraints, I will restrain myself to only one important and currently hot issue, taking for granted that detailed comments could still be provided to the Consultative Committee in the following months.

There is a big concern, in the current draft, with the definition of sensitive data (Article 6). While it is much welcome that genetic data are now included in this category, it seems that a final decision has not been made yet regarding the inclusion of biometric data, which mention is still bracketed in the latest document dated 18 January 2012.

I would like to strongly insist that biometric data need to be included in this category and recognized as sensitive data. The fact that they are more and more used, almost routinely now, especially – but not exclusively – as identity and border control means, and that biometrics is a huge industry market, should not override the particular invasiveness of this “biopolitical tattoo” - as the Italian philosopher Giorgio Agamben qualified it<sup>14</sup> – constituting a serious threat to human dignity, beyond the well known violations of privacy and data protection that it allows, as many academic researchers and privacy watchdogs have demonstrated.

That is the reason why biometric data need to be defined and categorized as sensitive data which processing presents specific risks. As a matter of fact, the EU General Data Protection Regulation proposed this week does qualify biometric data, in addition to genetic data, as such<sup>15</sup>.

Finally, I would like to end my presentation with especially commending the Council of Europe for its decision not to explicitly provide for a so-called “right to oblivion” or “right to be forgotten”. The choice made (Article 8) shows that it is perfectly possible to reinforce the fundamental rights of the data subject – or, as I prefer to call it, the citizen – to privacy and data protection while not threatening the fundamental rights to freedom of expression and to freedom of information. I hope that this choice could inspire the discussion on the EU Regulation proposal, in showing that buzz words and fashionable though dangerous concepts should not be implemented in the name of privacy and data protection without caution in preserving other fundamental rights and democracy<sup>16</sup>.

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<sup>14</sup> Giorgio Agamben, *Bodies Without Words: Against the Biopolitical Tattoo*, 5 German Law Journal 167-169 (2004), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=371>

<sup>15</sup> See European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, 25 January 2012, available at: [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf). Biometric data are included in the sensitive data category at Article 33(2)d. Biometric data are defined at Article 4(11) of this Regulation, differently from genetic data which are defined at Article 4(10).

<sup>16</sup> See also EDRI Initial Comments On The Proposal For A Data Protection Regulation, 27 January 2012, available at: <http://www.edri.org/CommentsDPR>.