



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 6 February 2014**

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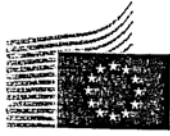
Subject: Recommendation for a COUNCIL DECISION authorising the opening of negotiations on the modernisation of Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data (EST 108) and the conditions and modalities of accession of the European Union to the modernised Convention

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Delegations will find attached the partially declassified version of the above-mentioned document.

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EUROPEAN  
COMMISSION

Brussels, 16.11.2012  
COM(2012) 679 final

Recommendation for a

**COUNCIL DECISION**

**authorising the opening of negotiations on the modernisation of Council of Europe  
Convention for the protection of individuals with regard to automatic processing of  
personal data (EST 108) and the conditions and modalities of accession of the European  
Union to the modernised Convention**

**DECLASSIFIED PART**

on 17 JAN 2014

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EXPLANATORY MEMORANDUM

DECLASSIFIED PART

on 17 JAN 2014

1. CONTEXT OF THE PROPOSAL

**THE REVISION OF CONVENTION 108**

The Convention of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108, hereafter called "Convention 108") was opened for signature on 28 January 1981 and was the first legally binding international instrument in the field of data protection. The Convention requires parties to incorporate into their respective national laws the necessary measures to ensure respect for the human rights of all individuals with regard to processing of personal data. Presently 44 States have ratified Convention 108. All European Union (EU) Member States are members of Convention 108.

The EU has for a long time actively participated in the works of the Council of Europe in the area of data protection<sup>1</sup>. Although the EU is not a party to Convention 108, the Commission enjoys observer status in that context. Moreover, following the adoption of the EU's data protection legislation, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>2</sup>, the Council of the European Union adopted a decision on 22 July 1997 authorising the Commission to start negotiations with a view to the accession by the European Communities to Convention 108. On 15 June 1999, the Committee of Ministers of the Council of Europe, in its 675th meeting, approved the necessary Amendments allowing accession by the European Communities to the Convention and submitted them to the Parties for acceptance. These Amendments have not entered into force since not all parties to Convention 108 have expressed their acceptance.

In 2001, Convention 108 was supplemented by an additional Protocol regarding supervisory authorities and trans-border data flows (ETS No. 181, hereafter called "Additional Protocol"). The Additional Protocol, opened for signature on 8 November 2001, requires the Contracting Parties to set up supervisory authorities, exercising their functions in complete independence. Presently there are only 30 States that have ratified and are bound by the Additional Protocol.

In recent years, the Council of Europe diagnosed the need to respond to rapid technological developments and globalisation trends that have brought new challenges for the protection of personal data. In March 2010, the Committee of Ministers of the Council of Europe, at the 1079<sup>th</sup> meeting of Ministers' Deputies, encouraged the Consultative Committee established under Article 18 of Convention 108 (hereinafter "T-PD") to start preparing a draft additional protocol to Convention 108, which would adapt the Convention to the present and future data protection challenges.

<sup>1</sup> This is reflected, e.g. in the Stockholm Programme, OJ C 115, 4.5.2010, p. 1. See in particular 2.5: "[...]The Union must therefore respond to the challenge posed by the increasing exchange of personal data and the need to ensure the protection of privacy. The Union must secure a comprehensive strategy to protect data within the Union and in its relations with other countries. In that context, it should promote the application of the principles set out in relevant Union instruments on data protection and the 1981 Council of Europe Convention for the Protection of Individuals with regards to Automatic Processing of Personal Data as well as promoting accession to that Convention. It must also foresee and regulate the circumstances in which interference by public authorities with the exercise of these rights is justified and also apply data protection principles in the private sphere".

<sup>2</sup> OJ L 281, 23.11.1995, p.31.

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In November 2010, by Resolution No. 3 of the 30th Council of Europe Conference of Ministers of Justice, the Ministers supported "the modernisation of Convention 108 in order to find appropriate solutions to the new challenges posed by technology and globalisation of information to guarantee effective protection of human rights and fundamental freedoms as well as the exercise of these rights, in particular the right to respect for private and family life while processing personal data, and the enforcement of basic data protection principles, in particular to resolve issues of transparency, data security breaches, jurisdiction, applicable law and liability arising from the use of information and communication technologies". By the same resolution, they encouraged the observer States to the Council of Europe, other interested non-member States, the European Union, international organisations, NGOs and the private sector to participate in the process of modernising Convention 108.

In October 2011, following stakeholders' consultations, began the discussions on a first draft proposal of modernisation of Convention 108. The discussions at technical level so far reflect the complexity and degree of difficulty of the issues debated, as well as the need to ensure coherence and compatibility with the EU legislation in this subject matter.

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Recommendation for a  
**COUNCIL DECISION**

**authorising the opening of negotiations on the modernisation of Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data (EST 108) and the conditions and modalities of accession of the European Union to the modernised Convention**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 218 (3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

The Parties to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data are currently negotiating the modernisation of the said Convention,

The Union should participate in the negotiations on the modernisation of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,

HAS ADOPTED THIS DECISION:

*Article*

The Commission is hereby authorised to negotiate, on behalf of the Union, the modernisation of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereafter called "Convention 108") as well as the conditions and modalities of the accession of the European Union to the modernised Convention 108.

*Article 2*

The negotiating directives are set out in the Annex.

*Article 3*

The negotiations shall be conducted in consultation with the [...].

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*Article 4*

This Decision is addressed to the Commission.  
Done at Brussels,

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*For the Council  
The President*

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on 17 JAN 2014

ANNEX

**Directives for the negotiation of the Modernisation of Europe Convention for the protection of individuals with regard to automatic processing of personal data (EST 108) and of the conditions and modalities of accession of the European Union to the modernised Convention**

**SECTION I: REVISION OF CONVENTION 108**

1. The modernised Convention 108 shall ensure a high level of protection of fundamental rights and freedoms with respect to the processing of personal data.
2. The Convention 108 shall remain comprehensive and wide in scope and general in nature.
3. The core rules of Convention 108, including rules on exceptions and restrictions, shall be maintained and, when necessary, updated while maintaining its technological neutrality.

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