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Subject: EDPS comments on the 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 declassified version of the above document.

The text of this document is identical to the previous version.



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**NOTE**

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from : General Secretariat  
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Delegations find in Annex the European Data Protection Supervisor's comments on the 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.

## I. Introduction

### *I.1. Consultation of the EDPS*

On 19 November 2012 the Commission adopted a draft Recommendation for a Council decision authorising the opening of negotiations on the modernisation of the 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 (hereinafter: "the recommendation"). The EDPS received the draft on 8 February 2013 in accordance with the Administrative Arrangement between the European Commission (DG HR) and the European Data Protection Supervisor (EDPS) on access by the EDPS to European Union classified information<sup>1</sup>.

The EDPS regrets the fact that he was not consulted in advance on the recommendation, contrary to Article 28(2) of Regulation (EC) No. 45/2001<sup>2</sup> and the Note of the Secretary Generals of the Commission of 8 December 2006 to Director-Generals and Heads of Service on Consultation of the European Data Protection Supervisor, and in particular paragraph 3 thereof<sup>3</sup>.

### *I.2. Aim of the recommendation and of the EDPS comments*

The aims of the recommendation are to authorise the Commission to negotiate the modernisation of Convention 108 and to propose that the Union become a full contracting party of the modernised Convention 108 (hereinafter: "the Convention") that will emerge.

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<sup>1</sup> See the letter from Ms Souka to Mr Docksey of 5 March 2012 on DG HR/EDPS Arrangements for the exchange of EUCI (HR/IS hr.ds.dir(2012)234206).

<sup>2</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p.1).

<sup>3</sup> SEC(2006)1771; DPO/PR/gj D(2006) 11716.

The recommendation contains:

- an explanatory memorandum explaining the background of the modernisation of Convention 108, the legal elements of the recommendation and its budgetary implications, as well as the proposed negotiation objectives for the EU;
- the text of the recommendation itself, authorising the Commission to negotiate the modernisation of Convention 108 on behalf of the Union and the modalities of the accession of the EU to the Convention;
- an annex with the Directives for the negotiation of the modernisation of [Council of] Europe Convention for the protection of individuals with regards to automatic processing of personal data (EST 108) and the conditions and modalities of accession of the European Union to the modernised Convention (hereinafter: "the directives").

The present comments will focus on the proposed negotiation objectives for the EU and the negotiation directives.

## II. Comments on the negotiation objectives

The EDPS welcomes the approach proposed by the Commission in favour of coherence and consistency and a high level of protection of the rights to privacy and data protection.

The EDPS would therefore encourage the Council to follow the Commission recommendation that the Union become a full contracting party of the Convention. In this respect, the EDPS would recall his position on the need to address EU institutions and bodies in the review of the EU data protection legal framework<sup>1</sup>. The EDPS would recommend that EU institutions and bodies be subject to the same rules as the Member States, which are all Parties to the Convention. This would limit the risk of discrepancies, especially as regards the exchange of personal data between EU institutions and bodies and the Member States' public and private organisations.

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<sup>1</sup> See para. 89 of the EDPS Opinion on the data protection reform package of 7 March 2012, available on [http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-03-07\\_EDPS\\_Reform\\_package\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-03-07_EDPS_Reform_package_EN.pdf).

### III. Comments on the negotiation directives

#### III.1. Section I: Revision of Convention 108

##### a) Directives 1, 2, 4 and 5

The EDPS welcomes directives 1 and 2 stating that the Convention should ensure a high level of protection and remain comprehensive and wide in scope. In particular, it should remain applicable to both the private and the public sector, and exceptions from its scope should be very restricted.

The EDPS also welcomes directives 4 and 5 on consistency with the EU legal framework.

However, the EDPS does not entirely agree with the recommendation that the modernised Convention remain general in nature<sup>1</sup>. It is true that this might make it easier to ensure consistency with the EU legal framework, as it is currently under revision and its final outcome is still unknown. None the less, a higher degree of detail of the Convention is needed, especially as regards implementation and enforcement, in order to ensure its effectiveness. The EDPS would therefore recommend deleting or at least amending the last part of directive 2.

##### b) Directive 3

The EDPS supports the statement in directive 3 that the core rules of Convention 108 should be maintained and updated, ensuring that they remain technologically neutral. However, he would strongly recommend limiting the rules on exceptions and restrictions. For example, Article 9 of the Convention should not allow derogations from the provisions of Article 5 on legitimacy and quality<sup>2</sup> or of Article 6 on sensitive data<sup>3</sup>.

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<sup>1</sup> See last part of directive 2, p. 9 of the recommendation.

<sup>2</sup> "Quality of data" in the current text of Convention 108 and "Legitimacy of data processing and quality of data" in the final draft of the modernised Convention (T-PD(2012)04 rev3 en).

<sup>3</sup> "Special categories of data" in the current text and "Processing of sensitive data" in the final draft, cited above.

The EDPS acknowledges that derogations to the principle of transparency or the rights of data subjects might be necessary in the circumstances provided for in the Convention, if this is laid down by law and necessary in a democratic society. However, even in these cases, the principles of legitimacy of the processing and quality of the data should be respected, and sensitive data should be especially protected.

In addition, apart from the core provisions that the recommendation proposes maintaining (on quality and legitimacy of data processing, proportionality, special categories of data and supervisory authorities), the EDPS would also recommend maintaining the provisions on data security, rights of the data subject, sanctions and remedies, and the obligation for the Parties to give effect to these provisions. He considers that these provisions are also core to the Convention and should not only be maintained and updated, but also strengthened in order to ensure that the protection granted by the Convention is effective. The EDPS would recommend amending directive 3 accordingly.

*c) Other directives*

In addition, the EDPS would propose to add a directive recommending the enhancement of the functions of the Convention Committee<sup>1</sup> in the evaluation of the Parties and candidates' level of data protection. It should be also specified that States not members of the Council of Europe which have taken part in the drafting should also undergo the evaluation by the Convention Committee and the usual procedure for accession to the Convention.

Finally, the EDPS would recommend that the evaluation and follow-up mechanisms follow a phased approach, including questionnaires and on-the-spot visits. The EDPS would underline that, in case of a persisting breach of an essential provision of the Convention, other Parties should be able to suspend the operation of the Convention with regard to a defaulting State, in accordance with the Vienna Convention<sup>2</sup>. This could be reflected in the directives.

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<sup>1</sup> "The Consultative Committee" in the current text.

<sup>2</sup> See Article 60.

*III.2. Section 2: Accession by the EU to the Convention*

The EDPS does not take a view on the modalities of accession of the Union, covered by directives 1-5 and 7 of section II. However, as regards directive 6, he would recommend that the Commission consult the EDPS on declarations and reservations envisaged to accompany the Union's accession that would affect the scope and level of data protection.

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