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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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**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 14 February 2013 (15.02)  
(OR.en,fr)**

**6176/13**

**RESTREINT UE/EU RESTRICTED**

**JAI 84  
DATAPROTECT 11  
MI 99  
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RELEX 112**

**NOTE**

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from : General Secretariat  
to : Delegations

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No. Cion prop. : 16466/12 RESTREINT UE/EU RESTRICTED JAI 815 DATAPROTECT 129  
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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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Further to the invitation by the Chair of JHA Counsellors at its meeting on 14 January 2013 (CM 1153/1/13 REV 1) delegations have sent in written 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 (16466/12 RESTREINT UE/EU RESTRICTED JAI 815 DATAPROTECT 129 MI 750 FREMP 139 RELEX 1062).

The comments received at 13 February 2013 are set out hereafter.

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**JOINT PAPER by CY, CZ, DE, EE, ES, FR, HU, IT, LV, NL, PL, SE, SI and UK**

CY, CZ, DE, EE, ES, FR, HU, IT, LV, NL, PL, SE, SI and UK would like to submit a joint contribution to amend the COMs proposal for a 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. General remarks**

1. Regarding the nature of the agreement we are of the opinion that the CoE Convention No. 108 should take form of a **mixed agreement**. According to the division of competences in the EU, the area of data protection is one of a shared competence between the European Union and the Member States (Articles 4 and 16 TFEU), and one in which both the Union and its Member States continue to adopt important measures within their respective ambits of competences.
2. Notwithstanding the provision of Article 3(2) TFEU (whereunder “[t]he Union shall also have exclusive competence for the conclusion of an international agreement [. . .] **in so far** as its conclusion may affect common rules or alter their scope”), we therefore believe that the mixed nature of the competences being exercised dictates the conclusion of a mixed agreement. In any event, we believe that Article 3(2) TFEU could not be read as automatically pre-empting the entire agreement as falling within the exclusive competence of the EU the moment any part thereof may affect common rules, but only granting it exclusive competence to the extent that it may do so. This is clearly indicated by the words “in so far as” in Article 3 (2) TFEU.

3. Since both CoE Convention No. 108 and the Data Protection Regulation are currently under revision, the final outcome of the provisions of both legal acts is still unclear, which at this stage makes it impossible to ascertain the final import of their provisions and makes it entirely possible that certain provisions of the refurbished CoE Convention No. 108 will not only affect the Union rules but also impinge on areas within the Member States' competence (including but not limited to national security, defence etc.). In such circumstances, the choice of proceeding in the format of a mixed agreement is not only in accordance with EU law (including the requirements of the principle of subsidiarity) but also functionally warranted.

**II. Concrete proposals to amend the COM-proposal (doc. 16466/12)**

**Recommendation for a Council Decision**

(...)

*Article 1*

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.<sup>1</sup>

The negotiations shall be conducted on the basis of the negotiating directives set out in the Annex.

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<sup>1</sup> A question to CLS: Must the COM be the negotiator or would it be possible to nominate the Council?

*Article 2*

The Commission shall negotiate the modernisation of the provisions of the Convention which, in accordance with the Treaties, fall within the competence of the Union, either as matters falling within the Union's exclusive competence or as matters in respect of areas of supporting<sup>1</sup> or shared competence to the extent that the Union has exercised its competence.

*Article 3*

The Commission shall conduct the negotiations following consultation and coordination of the Union's position with the Working Party on Data Protection and Information Exchange (DAPIX), as the special committee appointed by the Council, in accordance with Article 218 (4) TFEU.

The Commission shall brief the special committee on proposed negotiating directives in advance of each set of negotiations, and shall report in writing on the progress of the negotiations after each meeting.

*Article 4*

All Member States are also Contracting Parties to the Convention. Member States participating in the negotiations and the EU-negotiator shall, in accordance with Article 4 (3) TEU, assist each other in full mutual respect.

*Article 5 (Review Clause)*

The Council may at any time review the content of the negotiating directives set out in Section I and Section II of the Annex.

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<sup>1</sup> A question to CLS: Can the EU acquire external competences when exercising supporting competences?

**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. Special regard should be given to the division of competences between the EU and the Member States.
  - a)  
In accordance with Protocol 25 TFEU the negotiations shall involve Member States where shared competences are concerned, in a full transparent manner.
  - b)  
Member States retain exclusive competences in areas that fall outside the scope of Union law for instance in the areas of national security and defence. In those areas Member States shall have discretion to negotiate on their own behalf.
4. The essential nature of the system of Convention 108 including its rules on exceptions and restrictions, shall not be altered. The rules shall, when necessary, be updated while maintaining the general nature and the technological neutrality of the Convention. This should include provisions addressing quality and legitimacy of data processing, proportionality, special categories of data and supervisory authorities.

- 5 The consistency of Convention 108 with the EU data protection acquis shall be ensured taking duly into account the agreed positions on the on-going reform of the data protection legislation.
- 6 In particular, the Commission shall seek consistency between the EU data protection acquis and Convention 108 rules governing trans-border data flows (...), in order to ensure the effective application of both the EU and Council of Europe rules on transborder data flows, including the EU rules on adequacy.

## SECTION II: ACCESSION BY THE EU TO THE MODERNISED CONVENTION 108

1. The Union should be granted a full contracting party status on equal footing with States and with equal rights.
2. As to voting rights the Commission on behalf of the Union should vote on matters falling within the competence of the Union as referred to in Article 2 of this decision and in Section I.3 of this Annex. In such cases the Union should have a number of votes equivalent to the number of Member States (...).
3. The Union shall not make any financial contribution to the Council of Europe budget regarding its participation to the Convention 108 in addition to that of the Member States. In case this did not prove possible to achieve, or would compromise acceptance of Union full membership by current members of Convention 108, the Union could accept as a fall-back position making available a sum compensating for the administrative and other expenses arising out of its membership in Convention 108.
4. The accession should not affect the obligations of Member State under the Convention and the protocols thereto, nor reservations or derogations made by them thereto (principle of neutrality regarding Member States' obligations).
5. As a full contracting party, the Union should be entitled to negotiate in the areas of its exclusive competence.



6. For the purposes of the accession by the Union to the Convention 108 and respecting the EU specific legal system, the Convention 108, where necessary, should clarify the possibility for the European Union to accompany the accession by declarations and reservations in a way similar to other contracting parties.
7. The negotiations should ensure that it is clarified that terms used in the Convention which cannot be applied with regard to the Union as a Contracting Party to the Convention are understood to refer to the Union as a Contracting Party or its Member States as the case may be.

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**BELGIUM**

**Article 2**

1. The negotiating directives are set out in the Annex.
2. The Council may review the content of the negotiating directives at any time.

**Article 3**

1. The negotiations shall be conducted in consultation with the [DAPIX Working Party].
2. To that effect, the [DAPIX Working Party] will be consulted before each round of negotiations and the Commission shall report regularly to it, where possible in writing, on the progress of negotiations.

**SECTION I: REVISION OF CONVENTION 108**

4. The consistency of Convention 108 with the EU data protection acquis shall be ensured taking duly into account the on-going reform of the data protection legislation. To that effect, the Commission shall conduct negotiations in accordance with relevant Union rules or agreed positions of the Union established specifically for the purpose of those negotiations within the special committee of representatives of the Member States referred to in Article 3(1) of the Council Decision or within the Council.

## BULGARIA

The Commission for Personal Data Protection welcomes the Recommendation for a Council Decision authorizing the opening of negotiations on the modernization 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 modernized Convention.

**1. We support the broad scope of the negotiating directives, as set out in Section I of the Annex, outlining the principal negotiation objectives:**

- To maintain the wide scope, the general nature and the technological neutrality of Convention 108;
- To ensure high level of consistency of Convention 108 with the EU data protection standards. This holds true especially for the trans-border data flows between EU Member States and third countries which are parties of Convention 108 and which are subject to the adequacy assessment rules.
- To ensure consistency between the process of modernization of Convention 108 with the current EU data protection reform.

**2. We encourage the inclusion of general review clause in the negotiating directives.**

**3. As regards Section II of the negotiating directives, we support the granting of full contracting party status to the European Union, in accordance with Article 3 (2) of the Treaty on the Functioning of the European Union, which shall enable the EU to act as international legal personality.**

As to the proposed voting rights, we deem there is a need for additional information regarding the mechanism, according to which Member States are expected to transfer competence to the Union, as well as further justification concerning the meaning and the purpose of such transfer of competence and voting rights.

In this context, we express concern about the potential risk Member States to be put in a situation, where they have to balance between their own position as parties of Convention 108 and their obligation to provide all possible support regarding the established common rules of the European Union in the data protection filed.

4. With regard to the budgetary issues related to the EU membership in Convention 108, we consider that, regardless the transfer of competence on certain matters, Member States should not be expected to bear any additional financial burden, different from the financial contributions they have as parties of Convention 108.

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FRANCE

General remarks

First and foremost, the French authorities would like clarifications regarding the timetable for this negotiating mandate as well as on the timetable for the revision of Convention 108 in the Council of Europe.

Generally speaking, the French authorities would stress that they feel it is difficult to begin discussions on this draft mandate before there has even been any discussion on the articles of Chapter V of the proposal for a regulation, concerning international transfers of data.

Concerning the twofold objective of this mandate, the French authorities are surprised that the Commission is presenting a double mandate given that, until now, it was only a question of a negotiating mandate for the modernisation of Convention 108.

However, as far as the legal basis of the mandate is concerned, the French authorities stress that, although they do not have a problem with the reference to Article 218 TFEU, they nevertheless feel that the reference is not sufficient and that, in addition to this procedural article, the recitals should also refer to an article dealing with the subject matter.

With regard to the scope of the mandate, the French authorities would like the Commission to outline the *acquis* that it feels must be included in the negotiations in the Council of Europe.

- In this connection, the French authorities stress that, as far as the existing *acquis* are concerned, they consider that Regulation (EC) No 45/2001 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 should be

included so that, upon the EU's accession to the Convention, the processing of data by the institutions and bodies of the Union will fall within the scope of Convention 108 (cf. in particular point 7 of Section II of the Annex setting out the negotiating directives, which states that: "*Terms such as national law, national laws, national authority shall be understood as relating also, mutatis mutandis, to the European Union.*").

- Still on the subject of outlining the *acquis*, the French authorities are firmly of the opinion that, as regards data protection, and in view of the fact that the revision of the existing instruments is not yet complete and is still giving rise to many difficulties and differences of opinion within the Council, the *acquis* to be included in the negotiations in the Council of Europe must be limited to EU law currently in force.

The question of the scope of the mandate is also directly related to the scope envisaged for the EU's accession to the Convention. In this connection, it is the French authorities' understanding that accession would cover not only the law applicable to the Member States but also the law applicable to the EU institutions. The French delegation would therefore like the Commission to confirm that this is indeed the case. If so, the French authorities would also like the Commission to provide delegations with explanations of the reasoning behind the mandate, in which it states that it wishes to export the rules currently being revised in the Council (in particular the rules on international transfers, even though the institutions are excluded from those rules).

#### **Negotiating mandate for the modernisation of Convention 108**

Concerning the Union's competences to represent the Member States in these negotiations, the French authorities stress that the Commission does not have exclusive competence in this matter.

Directive 95/46/EC in fact excludes certain types of situation from its scope, or makes provision for a margin of manoeuvre for the Member States (see in particular recitals 9, 13, 22, 24, 30, 34, 37, 42 - 45 and 53 of Directive 95/46/EC). However, Convention 108 does not exclude all these situations. The Member States therefore retain some competence in the field covered by the Convention.

For example, recital 13 of the Directive provides that "*the processing of personal data that is necessary to safeguard the economic well-being of the State does not fall within the scope of this Directive where such processing relates to State security matters*", whereas the Convention applies to all types of data while leaving it to the Parties to declare that they will not apply it to certain categories.

The French authorities therefore stress that the EU's external competences vis-à-vis the Convention are competences shared with the Member States. They will call for the phrase "*within the limits of its competences*" to be inserted into Article 1 of the draft mandate.

Concerning point 5 of Section I of the Annex, on trans-border flows of personal data, the French authorities are not at all in favour of data transfers between States Parties to Convention 108 being suspended on the grounds that such States, which are not members of the EU but which are Parties to Convention 108, would not ensure a level of data protection as high as that in the European Union.

The French authorities take the view that, politically, it would be problematic to impose an extraterritorial application of EU law on a third State via a Council of Europe convention, and that, contrary to what is stated in the Commission's explanatory memorandum, this position is unlikely to help speed up discussions in the Council of Europe.

Furthermore, the French authorities also stress that, if the EU Member States have to suspend their transfers of data to the other 17 States Parties to Convention 108 with which they have been exchanging data legally for years, while waiting for those States to adopt the EU's legislation or to have an adequacy decision granted, there is a risk that the process of adopting adequacy decisions will be slowed down considerably and that data transfers with those third States will be suspended for a long time.

**Mandate for the accession of the European Union to Convention 108**

The French authorities would like the Commission to clarify the situation with regard to the former accession procedure begun in 1997, which culminated in the approval by the Committee of Ministers of the Council of Europe, on 15 June 1999, of the necessary amendments allowing the Union to accede to Convention 108.

The French authorities would also like the Commission to explain the exact meaning of point 2 of Section II.

Concerning point 3 of Section II of the Annex, on the Union's financial contribution in the framework of its accession to Convention 108, the French authorities believe that it will be up to the Union, and not, under any circumstances, the Member States, to bear all the costs related to such accession.



**AUSTRIA**

**Art 2**

„The negotiations shall be carried out in accordance with the negotiating directives set out in the Annex.“

**Art 3**

„The Commission shall conduct the negotiations in consultation with the Working Party on Data Protection (DAPIX), as the special committee appointed by the Council in, in accordance with Article 218 (4) TFEU. The Commission shall report regularly to the special committee on the progress of the negotiations and shall forward all negotiating documents without delay to this special committee.“

**Art 4 (new)**

„In view of the special situation resulting from the fact that all Member States are also Contracting Parties to the Convention, Members States present at the negotiations shall, in accordance with Article 4 (3) TEU, in full mutual respect support the Union negotiator in carrying out the tasks following the Treaties.“

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PORTUGAL

- 1) The mandate transfers to the Commission the representation of the Member States in all matters to which the Convention is relevant, which is a questionable approach because the generic, horizontal and comprehensive nature of the Convention calls into question its application in areas that continue to be the sole responsibility of Member States or a shared responsibility.
- 2) The desirability of the approach taken on funding (point 3 of Section II: Accession by the EU to the modernised Convention 108) needs to be made clear.
- 3) Convention 108 does not allow for reservations to be formulated. This is true in the current text and remains the case in the modernised version. It therefore seems that such reservations could not be accepted as implied in the mandate (point 6 of Section II: Accession by the EU to the modernised Convention 108).
- 4) The European Union is an organisation governed by international law, with the specific characteristic that it is a supranational organisation. That being the case, appropriate expressions are: "European Union law", "European Union legislation" and "European Data Protection Supervisor".

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**ROMANIA**

The participation of the European Union (than European Community) to the Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data (“Convention 108”) was agreed at the Council of Europe’s level as from 1999 – but these “amendments” adopted in conformity with article 21 of the Convention have not entered into force.

The process of negotiating the modernization of the Convention 108 was initiated at the level of the Council of Europe since 2010, with the aim of adapting the Convention “to the present and future data protection challenges” and on October 16<sup>th</sup> 2012 a draft Additional Protocol to the Convention was submitted to the Committee of Ministers for approval. The participation of the European Union to this process was possible as an observer.

At the level of the European Union, since January 2012, the Commission proposed a reform of the EU data protection legislation – legislative package that is currently under the negotiation with the European Parliament (with possible major amendments at the end of this process).

In RO’s view, taking into consideration the above-mentioned elements, there can be distinguished three benchmarks on which the EU approach to this process must be conceived:

- first is the matter of opportunity for the EU to join the Convention at this moment, when its legislative framework on data protection is under negotiation;
- second is the matter of the competence of the EU;
- third is related to the negotiating process of a treaty under the international law.

The question of opportunity to join the Convention at this moment should be addressed and decided at the appropriate political level. In our view, the fact that the EU legislation is currently under negotiation and that the new package was conceived as an important reform – constitute arguments in favour of delaying the process of EU accession to the Convention at this moment.

On the other side, a comparative substantial analysis between the provisions of the Convention and of its additional Protocol is also needed in order to decide on the matter of competence. We consider that an assessment of the Council Legal Service of how the provisions of the Convention and its Protocol may affect the common rules on data protection or alter their scope is needed. In the explanatory memorandum of the Commission's proposal it is stated that "the EU legislation goes much further in both substantial and procedural terms than those principles [which are contained in Convention 108]". However, the question remains: are there any provisions of the Convention or of its Additional Protocol which are not covered by the EU legislation?

As for the international law perspective – the proposal of the Commission envisages to tackle in one single demarche, three different processes:

- the modification of the Convention in order **to allow** the EU to participate to the Convention<sup>1</sup>, which is a negotiating process among the existing Contracting Parties to the Convention;
- the negotiation of the **conditions of accession** of the European Union to the Convention (voting rights, financial contribution, principle of equal participation to future instruments negotiated in the context of Convention 108, possibility to make reservations or declarations to the Convention – part II of the negotiating directives), which is a negotiating process among the existing Contracting Parties and the EU<sup>2</sup>, represented by the Commission (according to the procedure provided in article 218 TFEU).

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<sup>1</sup> This process was already initiated by means of the Amendments approved by the Committee of Ministers on 15 June 1999, which could still enter into force following their acceptance by all Parties to the Convention.

<sup>2</sup> In this process, the position of the EU member states will be included in the Council Decision authorizing the Commission to negotiate the accession of the EU to the Convention 108.

- the negotiations on the **modernization of the Convention** – which was already initiated at the Council of Europe’s level and could be finalized if the Committee of Ministers approves the Additional Protocol. If this process is reopened (for example if the Additional Protocol is not approved by the Committee of Ministers), the participation of EU as a negotiating Party will only be possible if the accession process was already completed (implying both the modification of article 23 of the Convention and a subsequent accession demand approved in the conditions provided in the first paragraph of article 23 of the Convention). Otherwise, the EU will have only the status of observer. However, based on the above mentioned analysis on the type of competence involved, for which we request the opinion of the Council Legal Service, in order to preserve the interest of the Union, the Commission may empower the member states to negotiate on matters falling within EU competence.

Therefore, at this stage, we consider that the mentioned assessment from the Council Legal Service is necessary.

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FINLAND

**General remarks**

Our position is still preliminary.

We are in favour of giving the Commission the mandate to negotiate on behalf of the Union the modernisation of Convention EST 108 regardless of the nature of the agreement.

However, at this stage we would prefer to limit the mandate to negotiations on the modernisation of Convention EST 108.

If the mandate would include negotiations on the conditions and modalities of accession of the EU to the modernised Convention, the Explanatory Memorandum of the Recommendation should clarify the implications of Union's status as full contracting party to the Convention. In particular, it should be clarified how this would affect the Member States' status as contracting parties and in T-PD Committee.

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**Drafting suggestions:**

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) (...)**

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 1*

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") (...)

*Article 2*

The negotiating directives are set out in the Annex.

*Article 3*

In view of the special situation resulting from the fact that parallel negotiations on a comprehensive data protection reform are currently conducted within the EU, the Council can at any time review the content of the negotiating directives set out in the Annex.

*Article 4*

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

The Commission shall report regularly to the special committee on the progress of the negotiations and shall forward all negotiating documents without delay to this special committee.

*Article 5*

The legal nature of the Agreement will be determined at the end of the negotiations on the basis of an analysis of the precise scope of the coverage of the individual provisions.

*Article 6*

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council*

*The President*



**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) (...)**

**(...) 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. This should include provisions addressing quality and legitimacy of data processing, proportionality, special categories of data and supervisory authorities.
4. The consistency of Convention 108 with the EU data protection acquis shall be ensured taking duly into account the on-going reform of the data protection legislation.
5. In particular, the Commission shall seek consistency between the EU data protection acquis and Convention 108 rules governing trans-border data flows among Parties of the Convention as well as between Parties of the Convention and third countries, in order to ensure the effective application of EU rules on transborder data flows, including the rules on adequacy.

(...)

(...)