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DECLASSIFICATION

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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

From:	General Secretariat of the Council
To:	Delegations
Subject:	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) - Preparation of the CAHDATA meeting on 1-3 December 2014 (Strasbourg)

Delegations will find below comments by Member States on 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).

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CZECH REPUBLIC

CZ contributions on proposed EU position
- CAHDATA meeting on 1-3 December 2014 (Strasbourg)

Article 3 paragraph 1bis

The word *purely* should be deleted or the EU should reserve its position.

Article 2(2)(d) of draft Regulation loosened partly the household exemption.

Given the new ubiquity of data processing in personal lives, it seems prudent to recognize that in the modernized Convention as well. That is the purpose of modernization, after all.

Article 4

Given its previous form and, indeed, Article 4 of the standing Convention text, the first two paragraphs point out the obvious – that *pacta sunt servanda*.

The first and second paragraph should be deleted.

Article 8 letter (f)

The wording should be précised even more:

"… Article 10, **if his or her rights established pursuant to this Convention have been violated.**"

Structure of this Article and preceding letters should be respected by referring to "him or her". Also, Article 10 enforces only the rights under this Convention rather than all rights someone might have.

Article 9, Article 12 paragraph 5, Article 12bis

The national security exemptions set out in Article 9(1) should be broadened to apply to Article 12(5) and to Article 12bis as well.

CZ understands that the exemptions in Article 9(1) refer only to Chapter II, which does not include Articles 12 and 12bis. Still, there is need for such exemption - for example, Article 12(4)(c) cannot be applied to national security data transfers. Therefore, as the Convention disallows reservations and contains no other Article providing for exemptions, CZ believes that redrafting Article 9 is the most acceptable way to achieve these necessary derogations.

Article 10

This article requires Parties to provide for sanctions to enforce all obligations set out by the Convention. While the present Convention does the same, the situation effectively changes due to many new rights and obligations stipulated by modernized Convention.

Certain unclear and very general obligations (such as data protection by design and default – see Article 8bis paragraphs 2 and 3 of the draft Convention) should not be enforced by sanctions.

Article 12 paragraph 6

The proposed addition at the end of this paragraph is problematic as **it puts the supervisory authority above the law** referred to in paragraph 4(c) of the same Article.

GERMANY

General points

In light of the state of play of negotiations on the European General Data Protection Regulation, Germany maintains its scrutiny reservation on the current version of the draft Council of Europe Convention 108, which forms the basis for the Commission's proposed negotiating line. Germany also enters a scrutiny reservation on the negotiating line (13963/14 of 6 October 2014).

The Council of Europe Convention and the General Data Protection Regulation must ultimately be structured in a coherent way. The negotiations on the General Data Protection Regulation are progressing rapidly, but are not yet concluded. At the current stage of negotiations Germany does not yet see itself in a position to be able to provide its final assessment on the individual articles of the draft Convention. A (final) agreement in December 2014 is therefore also out of the question for Germany.

Specific points

- Subject to the final examination of the wordings of the individual articles, Germany can support the following amendments proposed by the Commission:
  - Article 1
  - Article 3 (1)
  - Article 6 (1)
  - Article 8 (f) and (g)
  - Article 12 (5), (6) and (7)
  - Article 12bis (2bis)
  - Article 12bis (8), (10)
  - Article 14 (1) and (2)
  - Article 15 (2)

- Germany has reservations regarding the following amendments proposed by the Commission:
    - Article 4 (2) - Germany prefers the current proposed wording.
    - Article 5 (3) - the Commission's proposed amendment is unclear, because the current proposed wording corresponds more to Article 5 of the General Data Protection Regulation; request for the Commission to explain the reference to EP deletion.
    - Article 7 (2)

      - Scope of the Commission's proposed insertion unclear: Which entities are intended here? What is meant here? This should be clarified.

      - The data subjects should also be notified. This should be provided for explicitly.
    - Article 7bis - Germany prefers the current proposed wording; request for the Commission to explain the need for the proposed amendment.
    - Article 8 - Commission proposed amendment unclear: "data subject" corresponds to data protection legal terminology and is also used in the title; who or what else should also be included?
    - Article 8 (b) and (e) - scrutiny reservation given the state of play of negotiations on Chapter III of the General Data Protection Regulation.
    - Article 8bis - Ultimately agree, although Commission proposed wording seems too far-reaching; Commission rationale "to everybody" - which entities are to be included? And why?
    - Article 9

      - Scrutiny reservation to examine whether further exceptions are necessary.

      - Request for the Commission to explain the reference to EP deletion.
    - Article 12bis (7) (a) - Commission proposed amendment unclear.
    - Article 20 (3) - scrutiny reservation.

- For the rest Germany refers to its previous comments.

ESTONIA

Please find herewith the Estonian comments on the amendments of the Convention 108 with additional Protocol (*CAHDATA Working Document ST 13963/14, 6.10.2014*):

Article 5 - Legitimacy of data processing and quality of data

Article 5(2)(c) states currently that personal data undergoing processing shall be adequate, relevant and not excessive in relation to the purposes for which they are processed. The last EU position[1] preferred to include in the article both of the following notions: "*not excessive*" and "*limited to the minimum necessary*". The purpose was to underline expressly both dimensions of the principle of minimisation. As the last round of negotiations in the Council Working Party has shown, this question is still not yet resolved by the Council.

In our view the extent of those notions is different, whereas "*not excessive*" is a bit broader and allows more flexibility than "*limited to the minimum necessary*", i.e. there is a possibility to collect more information under the first notion. Therefore, we support keeping the "*limited to the minimum necessary*" as it would give a higher protection to the data subjects. However, we can be flexible in this regard would not object the use of both terms as long as there is no dublication and the extent of the terms is clearly defined.

Article 6 - Processing of sensitive data

This article determines what is meant by processing of sensitive data. Among others, it includes the processing of personal data relating to offences, criminal proceedings and convictions and related security measures.

We would like to draw your attention to the fact, that the General Data Protection Regulation does not include the processing of criminal proceedings as processing of sensitive data. Namely, art 9a of the last GDPR version (24.10.2014 doc no 14270/14) does not include reference to the criminal proceedings, but only refers to the criminal convictions and offences. The new version also does not consider such data to be sensitive data and it´s regulated in separate article. Estonia strongly supports this approach.

[1] *The reference here and in all further comments regarding the EU position is made to the document No 6365/2/14 (25.04.2014).*

Therefore we believe there is a contradiction between the amendments of the Convention 108 and the General Data Protection Regulation. We would prefer keeping here the approach taken in the negotiations on the GDPR.

Article 9 - exceptions and restrictions

Article 9 stipulates the exceptions and restrictions of the regulations set out in Convention 108. We have two remarks regarding the last wording of the text.

Firstly, we would like to have a possibility for an exception also for article 6, i.e. we would support the Netherlands suggestion to add to article 9(1) the reference to article 6. As mentioned in the discussions of the General Data Protection Regulation, we do have a reservation on the regulations of the sensitive data and we would like to have more flexibility due to our national rules regarding criminal convictions and offences. Therefore, we see the need to have more flexibility also in the Convention 108. The Council´s negotiations directives given to the Commission explicitly provide for the need to maintain current structure of the Convention 1087, including exceptions and restrictions (p. 3). It is also important to notice that in the last version of the GDPR data related to the criminal offences and convictions has been moved from article 9 (sensitive data) to article 9a (draft GDPR version from 24.10.2014, doc no 14270/14). Therefore we consider it important to keep the reference to article 6 in the text of article 9 of the Convention.

Secondly, we have a small technical remark regarding article 9(2). The last part of the clause refers to the rights and fundamental freedoms of data subject. However, we believe that the word "*fundamental*" should be in front of the word "*rights*", i.e. the last part of the clause should be as follows "*the fundamental rights and freedoms of data subject.*"

To sum up, we would like to add in article 9(1) a possibility to have an exception also regarding article 6 and we would slightly change the wording of article 9(2) by changing the place of the word "*fundamental*".

Article 12 - transborder flows of personal data

Article 12(1) states the principle that a Party shall not, for the sole purpose of the protection of personal data prohibit or subject to special authorisation the transfer of such data to a recipient who is subject to the jurisdiction of another Party to the Convention. However, as an exception, a Party may however do so, if bound by harmonised rules of protection shared by States belonging to a regional international organisation.

We would like to point out that we have to further analyse the exception mentioned in article 12(1). Namely, in the last CAHDATA meeting, several third countries mentioned the need to have more benefits for joining the Convention 108 (e.g. deleting the second sentence of article 12(1)).

Therefore, we have to take into consideration the political aspects of the scope of this exception and further analyse the second sentence of article 12(1).

Therefore, as we do not have a clear position on this matter yet, we would like to reserve our position on article 12(1) and we will notify our position as soon as it has been fully analysed and discussed.

IRELAND

Modernisation of Convention 108

Ireland's Comments on Document 13963/14

Recital 3

The text in square brackets in recital 3 ("given the diversification, intensification and globalisation of data processing and personal data flows,") should be transferred to the explanatory memorandum.

Article 1

Ireland would welcome the views of the Council Legal Service on the implications of the Commission's proposal.

Article 4

Paragraph 1: Ireland would welcome the views of the Council Legal Service on the compatibility of paragraph 1 with the EU *acquis* as there is no similar text in EU data protection instruments.

*Paragraph 2:*In fact, paragraph 2 was discussed at the last CAHDATA meeting and the Chair of the T-PD, in response to concerns, suggested that "prior to" could be replaced with "at the time of".

Article 5

*Paragraph 2:*Ireland is in favour of "unambiguous" consent rather than "explicit" consent.

*Paragraph 3:*Ireland supports the existing paragraph 3a; we do not agree with the Commission's proposal to divide paragraph 3 into two separate paragraphs – see comments on Article 9(1).

Article 6

Paragraph 1: Ireland suggests the replacement of "the present Convention" with "this Convention".

Article 7

Paragraph 2: Ireland does not support inclusion of "at least" in paragraph 1 as it will create uncertainty. The requirement to notify data subjects in cases of serious breaches should be explained in the explanatory memorandum.

Article 8

Use of the term "data subject" is consistent with the title of this Article.

Point b: we do not support the Commission's proposal.

Points e & f: we would welcome the advice of the Council Legal Service in relation to the Commission's proposal to delete the reference to the law giving effect to the Convention.

Point f: Ireland supports the circulated by the Council of Europe for consideration at the December CAHDATA meeting

Point g: See comment on point e in relation to advice from the Council Legal Service.

Article 8bis

Paragraph 1: We would welcome the advice of the Council Legal Service in relation to the Commission's proposed amendments to this paragraph. Furthermore, it is not clear what "applicable law" refers to.

Article 9

Paragraph 1: We do not support the Commission's proposed amendments to paragraph 1. Furthermore, we note that the scope of the exemption in paragraph 1(a) is more restrictive than the scope of Article 21 of the draft Regulation.

Paragraph 2: Ireland supports paragraph 2.

Article 12

Paragraph 4(a): We favour "unambiguous" consent.

Paragraph 5: We do not support the Commission's suggested amendments to this paragraph.

Paragraph 6: Ireland would suggest the replacement of "or the legitimate interests do not prevail" with "or the legitimate interests are deemed to be invalid".

Paragraph 7: We do not understand the Commission's proposed amendments to this paragraph.

Article 12bis

Paragraph 2bis: We do not support the Commission's proposed amendment as it makes the text too narrow.

Paragraph 3: We consider that this paragraph must refer to data protection rights in order to ensure clarity.

Paragraph 7(a): We would like an explanation of the meaning of the Commission's proposed amendment.

Paragraph 8: We support the use of "shall" in this paragraph.

Paragraph 10: We support "unambiguous" consent.

Article 14

Paragraph 1: We support the text circulated by the Council of Europe for consideration at the December CAHDATA meeting.

Paragraph 2: We would like an explanation for the Commission's proposed changes.

Article 15

Paragraph 2: We would like an explanation from the Commission for the proposed changes.

Article 18

Paragraph 3: We understand that the text circulated by the Council of Europe for consideration at the December CAHDATA meeting reflects Council of Europe practice and current rules.

Article 20

Paragraph 3: We would like an explanation from the Commission for the proposed changes.

SPAIN

I. General comments

1. It should be clear that the Commission must remain within the boundaries of the mandate conferred by the Member States, without exceeding them. Spain understands that the purpose of the meeting of November 13 DAPIX should be to define as clearly and specifically as possible the terms of the mandate of the Commission. The Commission shall not deliver at the CAHDATA meeting opinions that exceed the issues on which the position of the Member States is not clearly and explicitly determined.

2. The margin of manoeuver given to the Commission should be established at the DAPIX meeting. In case it is necessary to exceed or alter the mandate, the Commission should consult the Member States.

II. Specific comments

1. Issues in which Spain considers that remarks should be made

Article 4.1. In order to increase consistency, it would be advisable for the Commission to propose replacing "secure" for "ensure". Anyway, the Commission is inconsistent in its remarks regarding the replacement of the word "ensure" for "secure". Possibly, the meaning of these terms may be similar, but this is an issue that should be clarified by native speakers. Nevertheless, we consider that the position of the Commission in this matter should be uniform, and should not admit "secure" in certain items and demand to replace it for "ensure" in others.

Section 9.1.a). It would be useful to consider the convenience of the expression "impartiality and independence of the judiciary" in this article. Obviously, exceptions to the principles laid down in the Convention should apply to data processing operations related to the exercise of judicial activities; the problem is that the reference to them in Article 9.1 implies submission to principles that are not expressly excluded. In this point, the Commission´s competence is doubtful, so it should be the Member States who assess the application of these principles to the judicial activity.

Article 9.2. The Commission should support the drafting of the T-PD in the sense of specifying that the reference to "scientific purposes" does only refer to the purpose of "scientific research". Strictly speaking, for example, the exploitation of large databases in order to establish patterns and behavior profiles for marketing purposes could be treated with "scientific" purposes, though probably not fit into the concept of "scientific research."

2. Issues in which Spain would introduce nuances to the position of the COM

Article 5.3 (proposed): Spain supports the fact that the principle of fair and lawful processing should be dealt with in a separate paragraph from the other principles referred to in the current Article 5.3. However, an issue that could be raised is whether if this rule should not apply to other principles contained in that article as well. In particular, the general principle of purpose should be taken into consideration (the data should only be processed for specified, explicit and legitimate purposes and not used for purposes incompatible); in cases excluded by Article 9.1, it should be noted that this principle is always applicable taking into account precisely the areas in which exclusion occurs; ie, if the processing is done for the purpose of safeguarding national security, this purpose would obviously comply with the provisions of the principle of purpose and the data should not be processed for any purpose other than that of the safe harbor. Therefore, we would like to ask if the new Article 5.3 should not include in full the current Article 5.1 a) and 5.1 b).

Articles 8 b) and 8 e): The COM proposed in both cases that the expression "without excessive (...) expenses" is erased, and replace it in art. 8.1 b) for the expression "free of charge". In art. 8.1 e) this expression will not be mentioned. The literality of the proposed expression could lead to unreasonable conclusions. It is possible that the exercise of the right may involve minimal cost (a mailing stamped by the data subject or a phone call or Internet use associated with an electronic communication) that could also be variable depending on the data subject (eg, depending on whether or not telephone or internet access "flat rate"). We believe that the proposed wording seems more logical, because the aim is that whoever exercises the right should not assume an additional cost an, especially, that the possibility that the controller obtains an income as a result of the exercise of the right is banned.

Article 12.5: The COM considers that the expression "safeguards" should be substituted by "transfers". In our opinion, if an improvement of this text is necessary, it could be done by differentiating between the three cases mentioned by the article, requiring the provision of guarantees for a transfer (singular) covered by paragraphs 3 b) and 4 b) and guarantees generally required if the transfer is based on paragraph 4 c).

3. Issues in which Spain disagrees with the position of the Commission

Article 4.2: The Commission´s remark should be analyzed from the interpretation that the Council of Europe´s Legal Service gives to the terms "prior to ratification" and "by the time of ratification", which are considered synonymous. Therefore, it would seem important to modify the wording of the draft. However, we consider that it would have been convenient that the measures of compliance of the Convention were not only be adopted, but also legally binding, so would be irrelevant whether "prior to ratification" or "by the time of ratification".

Articles 5.2 and 12.4 a): The nature of consent has been repeatedly debated both in the CoE and the EU. From our perspective, Convention 108 should refer to consent as “unambiguous” and not “explicit”, since the decision is currently open in the DAPIX. Thus, maintenance of the broader term would allow the discussions of the issue in the DAPIX to continue; if the Convention established that consent must be "explicit", the issue would be closed for DAPIX, since this condition is more restrictive. That is, by proposing an “explicit” consent, the COM would be forcing the Member States to accept their concept of consent.

Article 8 e): The COM proposes that the rights of rectification and erasure apply not only to the data being processed, but to those that have been processed too. This observation contains a contradiction, because if the data are not being processed it is difficult to rectify or cancel.

Article 9.1: We do not understand the requirement of COM that the exception to the application of the rules regarding information is restricted to section 1 of Article 7a. First, this provision could be considered as a competence of Member States, as it provides the exclusion of certain provisions that are reserved mostly to MS. Furthermore, the observation of COM appear to require notification to the data subject concerned by the processing of data that were not collected directly from them in the cases listed, which would directly contradict the very purpose of the processing. For example, it would require that the Security Forces or intelligence services always reported to the data subject concerned by an investigation that their data are being processed.

Article 12.6: Without prejudice to the substantive issue raised by the COM on this remark it is not consistent to say that the transfer will be "suspended", which implies the prior realization, or that it will be "subject to conditions", which is not possible if the enabling legitimate interest does not prevail. In short, we do not object to the spirit of the proposal, but its location in Article 12.6.

Article 12.7: at this point the COM´s remark entirely alter the wording of the text, because the aim of the draft, in line with the current wording of the Convention, is that a processing operation required by a law can be exempted from certain guarantees and that this constitutes a proportionate measure to ensure the freedom of expression. On the contrary, the COM with its wording precisely pretend that they national law can prohibit such transfers by national legislation. There could be problems raised due to the extensive jurisprudence existent in the ECHR.

Article 12.8a: Reducing the capacity of the Supervisory authorities of establishing networks does not appear to fall within the scope of the COM´s competences. The content of article 12.8a is out of the boundaries of the COM´s mandate.

FRANCE

By way of introduction, the French authorities would once again like to ask the European Commission some questions concerning the following three points:

- What is the **exact content of the *acquis* in the European Commission's opinion?** It seems that the Commission considers the Union *acquis* in terms of data protection to go beyond the content of Directive 95/46 and the instruments already in force and also to cover the proposals under discussion. In this respect, we struggle to distinguish what exactly, in the texts under discussion in the Council (the provisions of which have not yet all been agreed on), constitutes the Union *acquis* to be taken into account in the framework of the negotiations in the Council of Europe on Convention 108. (Which provisions of the proposal for a Regulation can for example be considered as constituting the *acquis*, insofar as those provisions can still be substantially amended in the framework of Council discussions, and then in the trilogue with the European Parliament?) **Written** clarifications on this point from the legal services of the Commission and the Council would be welcome.

- We also reiterate our questions concerning the **division of competence between the European Union and the Member States and the voting rights arrangements within the Council of Europe with respect to the revision of Convention 108.** We once again strongly emphasise that since certain external competences continue to be shared between the European Commission and the Member States, it still falls to the Member States to exercise their voting rights within the Council of Europe.

- Finally, we would like the Commission to distribute precise information to the delegations concerning the **conduct and schedule of proceedings in the CAHDATA.**

With regard to the substance, the French authorities would like to submit the following comments on the revised text of Convention 108:

On the whole, we can go along with most of the proposed comments and support for provisions expressed by the Commission, which are directed at improved protection of personal data and of the rights of individuals.

We would nevertheless like to make observations on the following points:

Article 4 "Duties for the Parties"

- We still wonder about the significance of replacing the verb "ensure" by "secure". The difference in scope between these two English terms should be clarified.

Article 5 "Legitimacy of data processing and quality of data"

- Paragraph 2 indicates that "Each Party shall provide that data processing can be carried out on the basis of the free, specific, informed and [explicit, unambiguous] consent…". It seems preferable to use the term "explicit" to qualify the consent of data subjects.

Article 7 bis "Transparency of processing"

- In paragraph 1, we support the original wording of the article and stress the need to maintain in the body of the text the words "at least", which act as an additional guarantee.

Article 8 bis "Additional obligations"

- Concerning paragraph 2, we would like the explanatory memorandum to specify that the supervisory authorities will have the power to take action against processors who do not meet their obligations.

Article 12 "Transborder flows of personal data"

- The wording of paragraph 1 still raises questions regarding its scope and even its meaning; we think that it should therefore be drafted more clearly.

- In paragraph 5, we support the T-PD version. It is not appropriate to delete the safeguards from the list of information to be communicated to the supervisory authority, contrary to the Commission's proposal.

Article 12 bis "Supervisory authorities"

- The draft still plans to replace "to issue decisions" by "to take corrective action". The original version appears preferable in order to ensure the effectiveness of the supervisory authorities' action.

- In paragraph 7, point (a), the insertion proposed by the Commission seems unnecessary, since the supervisory authorities may not, as a matter of principle, violate the data protection rules. We therefore consider that this comment is superfluous and that it could even lead to suspicion where the supervisory authorities intervene in other circumstances.

- Finally, in paragraph 8, the Commission indicates that it considers the "conference/network" which would be put in place would be too costly. We would like some clarifications on this point. (What would be the cost? What would be the advantages and disadvantages of setting up such a platform? Why might such a platform be necessary?)

Articles 18 and 19 "Composition of the committee - Functions of the committee"

- Certain aspects of these articles should be submitted to the Treaty Office of the Council of Europe for an opinion. We would like information regarding the schedule for issuing this opinion.

- In terms of the role assigned to the committee, we would reiterate that we do not consider it should be set up as a quasi-judicial body with coercive powers over States. Issuing general recommendations, to be implemented at States' discretion, must therefore be seen as a maximum.

LATVIA

Recital 7 states that "recognizing that it is necessary to promote at the global level the fundamental values of respect for privacy and protection of personal data, thereby contributing to the free flow of information between people [..] have agreed as follows".

Latvia supports the idea of the recital at the same time being of opinion that the wording of this recital has to be changed. Free flow of information and the fundamental right to information on the one hand and the right of respect for privacy on the other hand are mutually exclusive rights. Namely, if the right of respect for privacy is promoted very strictly, the free flow of information automatically diminishes due to the restricted access to information which contains private data. If the right to information is to be promoted, less stringent rules concerning the access to private data has to be adopted. For those reasons it is necessary to align both rights. Latvia proposes to replace "promote" with "reconcile".

Article 1 regulates the object and purpose of the convention. Thus Latvia prefers 25/3 proposed wording of the Article 1 which is broader than the EU proposal. Latvia however supports the proposal of the wording of the Article 3 which stipulates the scope of the Convention stating that "Each party undertakes to apply this Convention to data processing subject to its jurisdiction in the public and private sectors thereby securing every individual's right to protection of their personal data.

In **Article 2e** Latvia suggests to add following wording after the proposed text: "other than the data subject, the controller of the processor".

In Latvia's opinion **Article 5** covers the main principles of data processing relating to "law" (Article 5(2) and 5(3)), "legitimate aim" (Article 5(4)), "necessity" (Article 5(4)) and "proportionality" (Article 5(1)). Thus the title of the Article 5 could be broadened, stating that it covers all principles of data processing not just legitimacy, for example, naming it „Principles of data processing". Besides it would be more transparent if the Article would be structured the same way – first of all principle of lawfulness, legitimate aim and necessity and at the very end proportionality.

Article 8(1)d states that a data subject shall have a right to object at any time to the processing of personal data concerning him/her unless the controller demonstrates compelling legitimate grounds for the processing which override their interests of rights and fundamental freedom. Basically this Article means that the processor has to perform a proportionality test every time he receives a complaint from data subject. In Latvia's opinion in cases where the legitimate ground is to be found in the law stipulating the obligation to process data, such proportionality test would be unnecessary burden as proportionality test in those cases has to be performed by legislator. For these reasons exemption from the Article 8(1)d shall be made, stating that this Article does not apply to situations where processing takes place in accordance with obligation to process personal data stated by national law.

In **Article 12(4)** reference to Article 12(2) and 12(3) should be made as Article 12(1) doesn't contain restrictions to transfer personal data. On the contrary, the Article 12(1) includes the general principle that the transfer of personal data can't be forbidden for the sole purpose of the protection of personal data. In addition if Article 12(7) is meant to be an exception from Article 12(1) it has to be moved straight after Article 12(1) and numbering has to be changed. Also in that case there may be a need to amend Article 12bis(2)b stating that authorities.

NETHERLANDS

The Netherlands truly appreciates the effort and commitment of the European commission while executing the EU-mandate given by the EU-Member states. The bottlenecks of NL relate foremost to the position of the Dutch legislation with respect to national security (exclusively the Intelligence and Security Services Act 2002, hereinafter: the Dutch Act). This law lays down the tasks and competences of the intelligence services. It is also covered by C 108. A specialized supervisory authority (Dutch Review Committee on the Intelligence and Security Services, or: CTIVD)is attached to the Dutch Act.[2] The Netherlands is furthermore of the opinion that C 108 should, as far as national security is regarded, must now and in future shall indisputably meet the demands of the European Convention of Human Rights. Preferably, it also meets the demands of C 108, but if those standards are more narrow, than we have to fall back to the ECHR.

- **Article 9 encompasses the general exceptions in Chapter I**. With regard to national security, the exception of article 6 (sensitive data) is important. Primarily it needs to be pointed out that the Dutch Act prohibits processing of personal data that relate to religion, race, health and sexual preference. The Dutch Act does not mention the grounds 'genetic data, personal data relating to offences, criminal proceedings and convictions and related security measures, biometric data and political opinions, trade-union membership'.

- **Article 12, section 6 on transfer of personal data to third party states not being party to C 108** requires that 'each party shall provide that the supervisory authority be entitled to request that the person who transfers data […] demonstrates that the effectiveness of the prevailing safeguards or the existence of prevailing legitimate interests […] and that the supervisory authority be entitled to prohibit, suspend or subject to condition such transfers where the safeguards are not deemed appropriate […]'.

[2] See: http://www.ctivd.nl/?English

In the Dutch Act the supervisory authority has in some situations been given the power to judge the consistency with requirements of the law. To its powers does not, however, belong the judgment of effectiveness and efficiency of the intelligence and security services, nor prior to, nor after the processing of personal data has taken place. In the Dutch system, the Minister of the Interior or the Minister of Defence has the power to judge on efficiency. He or she is in the end politically responsible in front of Parliament. This is how the checks and balances in the specific domain of national security are embedded in the rule of law in the Netherlands. The proposed power of the supervisory authority (the Dutch Data Protection Authority) fits well with respect to other domains of society, and respective legislation. NL truly supports the role of the supervisory authority and the position of the European Commission in this respect, but not with regard to national security. Therefore, NL pleas for an exception with regard to 12, section 6 with regard to national security.

- **Article 12Bis (concept) the powers of the supervisory authority**
    - **Section 2 sub a:** 'intervention'. With regard to the supervisory authority on national security, this requirement is too strong. Why mention 'intervention' as a power in general here, whereas the article sums up further down below the specific areas of intervention? The term 'investigation' is not a problem, but intervention in all aspects is too far reaching. Maybe another term instead of intervention could be suggested here?
    - **Section 2 sub c**: 'supervisory authorities shall have powers to issue decisions with respect to violations of the law giving effect to the provisions of this Convention and may in particular impose administrative sanctions' is also problematic for NL. In our opinion, states should have a discretion to grant such powers to the Dutch supervisory authority with respect to national security. Now this subsection reads as if supervisory authorities in general can give those powers to themselves. We propose an alteration of the text on this point: 'shall have powers to issue decisions with respect to violations of the law giving effect to the provisions of this Convention and may in particular be granted the power to impose administrative sanctions'.

- Nor does NL support the obligation in article **12Bis, section 2 sub d**: an obligation for the supervisory authority with regard to national security to engage in legal proceedings […] giving effect to the provisions of this Convention. It suffers from the same problem as the previous subsection: the state may consider granting the powers mentioned in section d. We also propose an alteration of the text here: 'may be granted the power to engage in legal proceedings or to bring to the attention of the competent judicial authorities violations of (…) the law giving effect to the provisions of this Convention'.
- **Section 6** prescribes that decisions of supervisory authorities may be appealed against through the courts. Netherlands does not offer the possibility to appeal through the courts, except that a person who has suffered damage as a result of an unlawful processing operation by the intelligence and security services is entitled to bring a claim to an administrative court against the state of the Netherlands to receive compensation. Does the 'may' leave enough space to maintain this position?
- **Section 7**, **subsections a and b** (read in conjunction with article 16 of the Convention): In accordance with the provisions of chapter IV (articles 13-17 of the Convention) the supervisory authorities shall co-operate with one another to the extent necessary for the performance of their duties and exercise of their powers, in particular by:

  a) providing mutual assistance by exchanging relevant and useful information and cooperation with each other;

  b) coordinating their investigations or interventions, or conducting joint actions'.

  For the Netherlands, this section is, read altogether, too heavy an obligation with regard to national security. NL might plea for an exception with regard to national security, which could for instance be inserted in article 16. Alternatively, is it possible to read this in conjunction with article 16 of the Convention? Does the exception in article 16 create space for the exception proposed by NL with regard to the obligatory cooperation between supervisory authorities as laid down in article 12Bis?
- **Section 8** (read in conjunction with article 16 of the Convention) on the obligation to form a conference or network with the aim to organize the cooperation and the performance of duties set out in section 7, the 'shall' poses problems with regard to the specialized supervisory authority on national security in NL. Article 16 may however provide sufficient space here because of the exception mentioned with respect to cooperation in the framework of national security

AUSTRIA

The Austrian delegation would like to propose the following changes. Preliminary we have to draw the attention to the fact that according to the Council of Europe secretariat the December Meeting is going to be the last CAHDATA meeting and the negotiation have to be finalized. We have always urged to avoid any inconsistency with the current EU reform on data protection.

At first we have to answer the question whether the EU should give its agreement on the Council of Europe text or keep its cautious position. Austria is of the position that in principle the CoE text can be finalized. In order to do that the CoE text has to be broader and more general bearing in mind that under no circumstances the current level of protection can be limited.

The further remarks are to be read in this context.

We would also like to draw the attention to the other documents like the Explanatory Memorandum where an EU position is still missing. A lot of open questions are to be answered there and therefore special attention has to be taken to this.

Preamble

AT prefers the deletion of the wording [given the diversification, intensification and globalization of data processing and personal data flow] because we don´t see any additional value in it.

Art 1 – Object and purposes

AT supports the proposed EU position.

Art. 3 para 1bis – Household exemption

AT can accept the proposed wording as it is the same as in the Directive 95/46/EC. Nevertheless exemptions have to be clear and precise and leave as little room as possible for interpretation. Austria therefore draws special attention to the Explanatory memorandum and the details in point

30. During the negotiation of the EU data protection reform we always stated that personal and household activities potentially adversely affecting legitimate rights of (other) data subjects shall not be fully covered by the household exemption and still be subject to the obligations resulting from the general principles and individual rights (such as right to access, rectification, deletion etc.).

Art. 4 para 2 – Duties of the parties

According to our minutes of the last CAHDATA meeting the changes were orally proposed by the T-PD. AT could accept this. In our understanding the situation should be avoided that States join the Convention and only afterwards take the necessary implementation measures.

Art. 5 – Legitimacy of data processing and quality of data

Para 2 - Consent

As stated in the beginning a reserved position of the EU is no longer feasible. We should therefore support the broader approach which in this case is "unambigious" consent. The Explanatory Memorandum must provide further details. It is of utmost importance for AT that the Memorandum tackles in particular the problems of opt-in and opt-out solutions in the online and offline context.

Para 3 – lawfully and fairly

AT supports the proposed wording by the Commission.

Para 3 lit. c – Data minimization

AT supports the wording "limited to the minimum necessary" instead of "not excessive". This mirrors our position for Data protection Regulation.

Art. 6 – Processing of sensitive data

Para 1

AT supports the proposed EU position.

Para 2

AT raises the question whether "prevent" is a stronger wording than "guard against" or whether it has the same meaning. In the first case we would support the term "prevent".

Art. 7 – Data security

AT also supports the reinstatement of the term "at least". The text shall not preclude other complementary notifications like for example to the data subjects themselves. It should be an open list.

Art. 7bis – Transparency of processing

AT supports the proposed wording by the Commission.

Art. 8 – Rights of the data subject

Para b – Right to access

We don´t understand the EU position here. Do we suggest the insertion of the term "free of charge" and then reserve the position? We could accept the current proposal for the CAHDATA meeting ("without excessive delay or expense") as long as the Explanatory memorandum (see point 78) makes it clear that this also includes the term "free of charge".

Para c – Right to access in connection with profiling

AT could accept the proposed wording. The details (e.g. concerns in the context of copyright and trade) have to be further explained in the Memorandum.

Para e – Right to rectification and erasure

AT supports the proposed wording by the Commission as it is also part of the current wording of the Convention.

Para f

The question is whether the proposal by the Commission is really just a clarification or rather narrows the scope. Eventually, we definitely support the broadest scope possible.

Art. 8bis – Additional obligations

Para 1 – General obligation

The Convention 108 is not directly applicable to the controller and has to be transposed into national law. We think that the proposed wording of the Commission doesn´t take that into account and produces the opposite effect so that it is unclear who the addressee is.

Para 2 – Impact Assessment

The reservation shall be lifted according to the partial general approach of the last October JHA-Council. We are of the opinion the current wording accommodates the EU position as well as the reservations of the Member States.

Art. 9 – Exceptions and restrictions

Para 1

In our understanding the reference to Art. 5 para 4 is a reference to the proposal by the Commission in Art. 5. In general every exception has to be as narrow as possible. AT could only support the reference to Art. 5 para 4 point a ("transparency"). Furthermore there should be no reference to Art. 8 point f. Even in the case of the legitimate restriction to the rights of the data subjects (for example access) there must be a way for the data subject to establish whether or not the aforementioned restrictions have been applied correctly. The data subject therefore has to have the right to a remedy and this has to be done by an independent authority.

Para 2 point a

We would like to draw the attention to the new term "impartiality and independence of the judiciary" as well as "investigation and prosecution of criminal offences". These are new notions and also not mentioned in Art. 8 of the ECHR (national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others).
Since these exceptions are not mention in the current Convention the question is whether they are necessary as well. This should be re-evaluated.

Para 2 – Statistic and scientific purpose

In general reservations should be avoided. The background of the changes proposed should be clarified in particular the question arises what is to be understood under the term "a recognizable risk". We prefer the wording by the T-PD. Here as well there should be no reference to Art. 8 point f (see the explanation before).

Art. 10 – Sanctions and remedies

In the light Art. 13 ECHR it seems appropriate to use following wording: "judicial and non-judicial sanctions and judicial remedies".

Art. 12 – Transborder flows of personal data

Para 2 is missing in the EU position. AT has no objection against the proposed wording.

Para 4 point a – consent

As the result of the partial general approach of the June JHA-Council the Regulation speaks currently of the explicit consent. We think that the EU can therefore support the following wording: "specific, free and explicit consent".

Art. 12bis – Supervisory authority

In general the question arises whether a new Paragraph is needed for the advisory activities of the DPAs.

Para 2bis – Consultation

AT supports the position of the Commission to delete the last part. It would be highly unclear who decides whether a measure severely affects data subjects or not. This has to be done by the DPAs themselves.

Para 3 – Requests and complaints by data subjects

AT supports the proposed wording by the Commission.

Para 4 – complete independence

The wording should be maintained. It would send rather the wrong signal if we would delete the word "complete" and therefore lower the level of protection.

Para 8 – Conference/network

AT supports the wording of the Commission.

New para 10 – proposed by the Commission

AT could accept the inclusion here. We would favor in this context the wording "explicit" since it is designed for the data transfer between supervisory authorities.

Art. 19 – Functions of the Committee

In general it has to be pointed out that the EU-position for para 1 point f to h is missing.

Para 1 point f

AT supports the T-PD version and the inclusion of the wording "or on its own initiatives" otherwise we fear that this provision will never be used in practice.

Art. 22 – Entry into forces

The question is whether para 1 is too narrow because there are already Non-Member States of the CoE which ratified the Convention (see Uruguay). This countries should be included in para 1.

PORTUGAL

Article 1

We support the modification being proposed by the EU.

Article 3

We support the modification being proposed by the EU.

Article 4, par. 2

We also support T-PD proposals.

Article 6

We support the modification being proposed by the EU.

Article 7, par. 2

We support the modification being proposed by the EU.

Article 7bis, par.1

We support the modification being proposed by the EU.

Article 8

We support the modification being proposed by the EU.

Article 8bis – Additional – par. 1

We support the modification being proposed by the EU.

Article 9, par. 1

We support the modification being proposed by the EU.

Article 12

We support the modification being proposed by the EU.

We however would like to suggest a modification to subparagraph a) of paragraph 4 in what the expression in square brackets is concerned.

We believe consent should always be explicit, admitting no graduation on that. Consent should also as much as possible be unambiguous. We accept that the degree of unambiguity may vary even with sufficient information being provided taking into account, for instance, the ability or the preparation of the data subject to fully understand what is proposed. We suggest, therefore, that the draft should be:

"Article 12

Paragraph 4

Subparagraph a)

The data subject has given his or her specific, free, explicit and, if possible, unambiguous, consent, after being informed of risks arising in the absence of appropriate safeguards, …".

Article 12bis

We support the modification being proposed by the EU.

Article 13

We support the modification being proposed by the EU.

Article 14

We support the modification being proposed by the EU.

Article 15, par. 2

We support the modification being proposed by the EU.

Article 20, par. 3

We support the modification being proposed by the EU.

SLOVAK REPUBLIC

Preamble – First paragraph

SK supports the proposal of the EU position as it is better to formulate general aspects of the proposed draft of the Convention at the first place and subsequently introduce specific reasons.

Article I

We consider as redundant to point out "the jurisdiction of the Parties" that this circumstance is evident from the whole Convention 108. For this reason SK supports the EU position but we do not agree to add word "every" before the word "individuals".

Article 2(c)

SK supports the EU position to the second paragraph.

Article 3(1)

SK consider the Convention 108 as a general legal instrument which should provide general provisions of data processing regardless if it relates to public and private sector. It is on the side of the contracting party to set out special provision or make difference between public and private sector in its national legislation. Separate remittance for the private and public sector could cause necessity to provide further specifications and provisions. For this reason we propose following wording: **"Each Party undertakes to apply this Convention to data processing subject to its jurisdiction, thereby securing the right of every individuals to protection of his/her personal data."**

Article 4(2)

Taking into account the provisions set out in Article 19(e) and 23(1) we support the proposal of T-PD because the adequacy level will be evaluated before any State or organisation will be invited to accede to the Convention.

Article 6(1)

Personal Identification Number belongs to the special category of personal data according to the Slovak Act on Personal Data Protection. The Personal Identification Number is a very specific personal data based on which data subject could be easily and uniquely identified. We know that many other countries use the PIN to identify data subject in the filing systems. Based on the above we propose to add **Personal Identification Number** as one of the dash point of the Article 6(1).

Article 8

SK does not agree with the first sentence of Article 8 and supports the wording of this sentence proposed for a discussion. Only data subject concerned by data processing possesses the rights set out by this Article and wording "every person" could lead to a legal uncertainty.

Article 8bis(3)

SK supports the proposal for discussion.

SWEDEN

Sweden wishes to thank the Presidency for inviting delegations to submit written comments.

Sweden has the following comments.

The T-PD has proposed that Article 10 of the Convention shall have the following content.

Each Party undertakes to establish appropriate judicial and non-judical sanctions and remedies for violations of domestic law giving effect to the provisions of this Convention.

The EU supports the T-PD proposal.

The concept of non-judical sanctions is new. For Sweden, it is unclear what is meant by this concept. The term "non-judical sanctions" needs to be clarified.

The EU has proposed that a provision with the following contents shall be included in the Convention (article 12.2bis).

The competent supervisory authorities shall be consulted on proposals for any legislative or administrative measures which provide for personal data.

Sweden has no objections to the supervisory authorities being consulted regarding proposals for new legislation. The same obligation can be found in Article 28.2 of the Data Protection Directive. Of the proposed rule follows, however, that the authority should also be consulted when administrative measures are to be taken. It seams unclear what administrative measures the proposed provision covers. However, one should be able to assume that the rule will impose new administrative burdens for controllers. Against this background, Sweden opposes such an obligation imposed by the Convention.

The expression racial or ethnic origin is used in article 6. According to Sweden it should be mentioned in the Convention that the use of the term "racial origin" does not imply an acceptance of theories which attempt to determine the existence of separate human races. A similar statement is found in the Preamble of the proposal for a General Data Protection regulation within the EU.

UNITED KINGDOM

1. We would like to thank the Committee of CAHDATA for the work that they have undertaken in redrafting the text. This is as a concrete step towards arriving at a final text. We would also like to thank the Commission for their proposed amendments to the draft text and the opportunity for delegations to provide further comments in advance of the meeting of CAHDATA in December. It is essential that the Council arrives at a considered and co-ordinated position before we hold those discussions at the December meeting.

2. On the substance of the text, we broadly support the revisions proposed by the Commission for consideration by the Council. We look forward to hearing the views and observations of other Member States on the proposed changes in DAPIX in advance of the CAHDATA meeting in December. We are keen to make further progress on the text at the meeting in December.

3. However, while we are content with much of the substance of the proposed text, we still retain concerns about the process by which Commission has proceeded on this matter, and in particular whether they have complied with the specific terms of the negotiating mandate agreed last year. In particular, we are no further forward in reaching a common understanding of where the exclusive competence of the Commission begins and ends, and therefore, where Member States retain competence to negotiate in proceedings on the Convention on their own behalf. The Commission has previously indicated that they are unable to meet this demand, i.e. articulating a clear delineation between the Commission and Member State competence. Under these circumstances therefore we reserve the right to intervene and assert competence in these and future negotiations.

4. Given that we support the broad substance of the proposed changes, these questions won't prevent us signalling agreement to the text if our comments are taken on board. However, our agreement to this text does not set a precedent for accepting the Commission's position on competence – we reserve the right to revisit questions of competence similar to the ones that arguably arise in this negotiation in other negotiations in the future.

5. We also wish to underline some areas that are of continued concern to us that we would not be able to support which we shall outline in this document.

6. ***Article 5.2***

   We feel that the Commission's reference to **'explicit'** consent is excessive and that **'unambiguous'** would be preferential. The use of **'explicit'** could lead to cases of consent fatigue.

7. ***Article 8.b***

   The proposed addition of **'and free of charge'** runs the risk of incurring heavy financial impacts for organizations, in particular where information on data subjects is in an unstructured format and the data subject requests the actual data undergoing the processing. It is absolutely right that controllers, when requested by the data subject, provide details such as the categories of data being processed,, the purposes of the processing and the intended storage period. However, any additional requirements to collate such data and providing copies is a much more onerous process and likely to incur significant cost. We therefore propose for a provision to be made for the possibility of a fee to be charged for copies made of the data undergoing the processing, as in the draft Regulation.

8. ***Article 8.f***

   We prefer the 25/3 proposed text to that of the Commission: "to have a remedy under Article 10 (…) where rights **under the law giving effect to this Convention** have been violated". This version makes a provision for recognition of Member State law in this article and we feel this to be important.

9. We believe that National Security should be explicitly exempted from the scope of the entire text and believe that the best way for this to be achieved would be by making explicit reference to this in a preambulatory clause. In the event that it is not, we would require the following amendment to Article 9.1:

Article 9.1

The 25/3 text seeks a provision for Article 5.3, which states that *"Personal data undergoing (...) processing should be a) processed lawfully, fairly and in a transparent manner; b) collected for explicit, specified and legitimate purposes and not processed in a way incompatible with those purposes; c) adequate, relevant and not excessive (...) in relation to the purposes for which they are processed; d) accurate and, where necessary, kept up to date; e) preserved in a form which permits identification of data subjects for no longer than is necessary for which those data are processed"*.

The text proposed by the Commission splits Article 5.3 into two: Article 5.3 and Article 5.4. When it comes to outlining the provisions in Article 9.1, the Commission makes no reference to the content of the 25/3 text's original Article 5.3(a). We therefore recommend that the Commission's proposal takes their newly-created **Article 5.3** into account, which would therefore read: *"No exception to the provisions set out in this Chapter shall be allowed,* ***except to the provisions of Articles 5.3, 5.4, 7.2, 7bis paragraph 1 and 8*** *when such derogation is provided for by law and constitutes a necessary and proportionate measure in a democratic society for…"*.

10. ***Article 12.5***

We do not support the Commission's proposed deletion of **'safeguards applying in the case of'** as this extremely broad, would be very burdensome and risks heavy financial implications.

11. ***Article 12.6***

We do not support the Commission's addition of **'or the legitimate interests do not prevail'** as it is broad and unclear.

12. ***Article 12bis.2bis***

We do not support the Commission's deletion of 'personal data **which may severely affect data subjects by virtue of the nature, scope and purpose of such processing**'; this is too broad and could over-burden regulators.

Article 12bis.8

We **appreciate** the recommendation of the Commission to change 'shall' to **'may'** and **fully support** this due to the risk of heavy financial impact posed by 'shall'.

13. ***Article 12bis.10***

We don't support inclusion of **'explicit'** proposed by the Commission for the same reasons as we cite in paragraph 5 of this paper.
