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Strengthening and 'Modernising' Council of Europe Data Privacy Convention 108

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Abstract

The Consultative Committee of the Council of Europe data protection Convention 108 issued a draft of its 'New Proposals' for 'modernisation' of the Convention in March 2012, calling for final submisisons before it finalises its proposals in June. This article provides a perspective from outside Europe, one which supports the objectives of the review to 'reaffirm the Convention's potential as a universal standard and its open character.' The advantages of the 'globalisation' of Convention 108 (developing it into a global data privacy agreement, open to all contries providing an appropriate level of data protection) to countries outside Europe are significant, but only if an appropriately high level of privacy protection is required for non-European accessions. This article focuses on those of the proposals that need criticism from this perspective, and various positive changes that are of particular importance, but otherwise supports the 'New Proposals'. Many of the new proposals concern the procedures and standards for accession to the Convention, and the role of the Convention's Consultative Committee in that process. Almost all new parties are likely to come from outside the Council of Europe.

Some of the main criticisms of the proposals made in the article are as follows. There needs to be an explicit statement that accession to the Convention by States not members of the Council of Europe is 'on the basis that the State has taken the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this Convention'. The Explanatory Statement should also set out in detail what factors the Consultative Committee is likely to take into account in preparing its opinion, and in particular that that it is an opinion not only on formal legal measures but also includes an assessment of the extent to which data protection is delivered in practice in order to 'give effect' to the 'basic principles'. The proposal that the Consultative Committee should be able to invite

observers to attend its meetings, by a two thirds majorithy vote will allow Civil Society and Business observers be able to be invited, but the change should refer to “voting” members, not those “entitled to vote”.

Changes concerning data export limitations are also substantial, and, as always, contentious. The Committee says the proposed provisions are still based on the well-known notion of an “adequate level of protection”, which is to be presumed where data is exported to another party to the Convention, unless it can be shown that the other party has not complied with its Convention obligiations, and such protection therefore does not exist. The revision proposed by the Consultative Committee is clearly preferable to the alternative they mention which would allow disclosure to an overseas ‘recipient that has adduced appropriate safeguards’, without any reference to ‘adequacy’ or explanation of what are ‘appropriate’ safeguards. The article argues that adoption of the ‘Alternative proposal’ would considerably weaken the Convention in comparison with the existing Additional Protocol, and should be rejected completely.

Strengthening and 'modernising' Council of Europe data privacy Convention 108

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The Consultative Committee of the Council of Europe data protection Convention 108[1] issued a draft of its 'New Proposals' for 'modernisation' of the Convention[2] in March 2012, calling for final submisisons before it finalises its proposals in June. This article provides a perspective from outside Europe[3], one which supports the objectives of the review to 'reaffirm the Convention's potential as a universal standard and its open character.' The advantages of the 'globalisation' of Convention 108 (developing it into a global data privacy agreement, open to all contries providing an appropriate level of data protection) to countries outside Europe are significant, but only if an appropriately high level of privacy protection is required for non-European accessions[4]. This article focuses on those of the proposals that need criticism from this perspective, and various positive changes that are of particular importance, but otherwise supports the 'New Proposals' which are not mentioned.

Many of the new proposals concern the procedures and standards for accession to the Convention, and the role of the Convention's Consultative Committee in that process. Almost all new parties are likely to come from outside the Council of Europe. Those provisions will be discussed first, but changes concerning data export limitations are also substantial, and, as always, contentious.

Acceding parties must show substantive compliance

The provision in Article 4 that accession to the Convention is "on the basis that the State has taken the necessary measures in its domestic law to give effect to the basic principles for data protection" are the key to whole Convention, at least insofar as accession by non-European States is concerned. It is essential that the Explanatory Statement should clarify that the 'necessary measure' taken do in

[1] Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS No. 108

[2] 'Modernisation of Convention 108 – New Proposals' (T-PD-BUR(2012)01Rev_en, Strasbourg, 5 March 2012)

[3] Many of the views in this article were also included in a Submission to the Consultative Committee by the Australian Privacy Foundation International Committee, prepared by the author and Nigel Waters, but responsibility for the version stated here is with the author.

[4] This perspective is argued in detail in Greenleaf, G 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108' *International Data Privacy Law*, Vol. 2, Issue 2, 2012, avaialnble at <http://ssrn.com/abstract=1960299>

fact (in practice) 'give effect' to the basic principles, and not merely as a matter of passage of legislation. In the context of EU 'adequacy' determinations, terminology such as 'a good level of compliance', 'provision of appropriate redress' and 'provision of support and help' are used to indicate the substantive effect that is required. The comment by the Consultative Committee that "Whether all 'necessary measures' have been taken will be scrutinised a priori by the Consultative Committee, in order to ensure that the conditions for the free flow of data are met" needs to be incorprorated into, and elaborated on, in the Explanatory Report to the revised Convention, to ensure that all parties acceding to the Convention (particularly non-European parties) are aware that accession is not merely a matter of formal legislative enactment.

Accession by non-member States or international organisations

The accession to the Convention by States that are not members of the Council of Europe ('non-member states') is governed by Article 23. Important changes are proposed, but there is a need for more clarification.

The decision to invite a non-member States is made by the Committee of Ministers of the Council, but it is proposed that the decision shall now be taken only 'after having obtained the unanimous agreement of the Parties to the Convention'. This will in effect give non-member States which become parties to the Convention the same right of veto over new accessions as member states have currently. It is now proposed that international organisations may also be invited to accede to the Convention.

It is proposed that the Committee of Ministers' decision on accession will now be made 'in light of the opinion prepared by the Consultative Committee according to Article 19' (discussed below). This reform needs to be improved by the explicit statement that accession is "on the basis that the State has taken the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this Convention". If such words are not inserted, then (in theory) the Committee of Ministers could invite any State, no matter what its level of data protection, to accede. Furthermore, without such a clear statement of the basis of accession, there is no clear standard against which the Consultative Committee must prepare its report, and the criteria for accession by non-member States could be weaker than for member States.

The Explanatory Statement should also set out in detail what factors the Consultative Committee is likely to take into account in preparing its opinion, and in particular that that it is an opinion not only on formal legal measures but also includes an assessment of the extent to which data protection is delivered in practice in order to 'give effect' to the 'basic principles'. In particular, it should be made clear that an opinion of the Consultative Committee is not to be made on the same basis as the EU's Article 29 Working Party opinions on 'adequacy'. The basis of an Article 23 opinion must be the provision of data protection to the citizens of the acceding country, not the adequacy of protection to European citizens (the basis of decisions about 'adequacy').

Strengthening the Consultative Committee

It is proposed that the Consultative Committee should be able to invite observers to attend its meetings, by a two thirds majorithy vote (A 18). It is important that Civil Society and Business observers be able to be invited, but the change should refer to "voting" members, not those "entitled to vote", given the difficulty that the Consultative Committee seems to have in getting responses from members, if the Uruguay accession is any indication[5]. To do otherwise would be a *de facto* veto of non-State observers.

[5] See Greenleaf, cited above

It is also proposed that the Committee's role (A 19) should be strengthened by giving it the four following additional functions:

(1) The Committee would be able to issue opinions about the interpretation and application of the Convention, of its own motion without this having to be "at the request of a party". This is an important change, reducing the Committee's dependence on State parties to initiate action. The Committee sees this as allowing it to 'develop further its standard-setting functions, acting as an international forum to discuss emerging issues and agree on common approaches to new challenges for privacy, in particular resulting from the development of ICTs, developing guidelines and recommendations applicable to specific sectors such as biometrics, insurance, medical data or police'.

(2) It is proposed that the Committee should 'prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of data protection of the State or international organisation concerned.' This is essential to the Committee having an effective role in non-European accessions. As mentioned above, the basis on which the Committee draws up such opinions needs to be clarified in Article 4 and in the Explanatory Statement. It is important that it should also be explicitly stated that any such opinion shall be made public, preferably at the time it is given to the Committee of Ministers. Alternatively, it could be stated that it will be made public, with the decision of the Committee of Ministers, once they make a decision.

(3) The Committee would also have a role before an accession applications is made at the request of a State or an international organisation, to 'evaluate whether the rules of its domestic law ensure an adequate level of protection for the purposes of this Convention'. This is an also a vital role for the 'Article 18 Committee'. It is likely to operate as a confidential advice process to governments that will ensure that applications clearly likely to fail are never formally put forward to the Committee of Ministers.

(4) The Committee would also be able to 'at the request of a Party, prepare an opinion on the legal standards set out in Article 12, in particular to assess whether these standards offer sufficient guarantees to ensure an adequate level of protection for the purposes of this Convention'. This needs clarification. Presumably it is intended to apply where a party to the Convention nevertheless intends to restrict data exports to another party (under A 12(2)) on the grounds that the other party 'has not implemented some or all of the rights and obligations enshrined in the Convention', and the matter has therefore been referred to the Consultative Committee. This change would then allow the preparation of a report by the Consultative Committee, (pursuant to Article 12(2)) on whether the alleged failure by the other party has materially affected the protection it provides.

Data exports restrictions remain contentious

The Consultative Committee says '[t]he issue of transborder data flows will be key in the modernisation process,' and although they put forward two alternative proposals, they claim that

> The proposed provisions are still be based on the well-known notion of an "adequate level of protection". The Convention shall continue to require such protection, in particular if data is communicated or disclosed to recipients not subject to the jurisdiction of a Party to the Convention, recognising that this rule has promoted the development of data protection laws around the world.

An adequate level of protection is to be presumed where data is exported to another party to the Convention, unless it can be shown that the other party has not complied with its Convention obligiations, and such protection therefore does not exist.

The revision proposed by the Consultative Committee is clearly preferable. It requires that 'an adequate level of protection can be ensured, either by the domestic legislation of the State to which the data is to be transferred, or 'standardised or ad hoc legal measures, such as contract clauses, internal rules or similar measures that are binding, effective and capable of effective remedies, implemented by the person who discloses or makes personal data accessible and by the recipient'. This proposal preserves the concept of adequacy as the standard against which alternative measures which are binding and effective are to tbe measured.' It also adds a condition of prior disclosure of these alternative 'adequacy' measures to the competent supervisory authority, so that this data protection authority (DPA) can if it wishes test (and accept or reject) them. This is essential to stopping 'adequacy' becoming the private assessment of the party with something to gain from making it.

The alternative proposal (listed but not proposed by the Consultative Committee) allows disclosure to an overseas 'recipient that has adduced appropriate safeguards', without any reference to 'adequacy' or explanation of what are 'appropriate' safeguards. In addition, it removes any requirement to disclose these alternative measures to a DPA, merely requiring that the recipient 'can demonstrate such measures, and their effectiveness, on request from the competent supervisory authority'. This suggestion seems fraudulent, because it is based on a (hypothetical) request from a supervisory authority that has no means of knowing that the transfer has ever happened, and therefore no reason to ever request a demonstration of effectiveness. Here, the transferor has only 'adduced appropriate safeguards' to its own satisfaction (and its own benefit), safe in the knowledge that its judgement will never be likely to be put to the test.

In my view, adoption of the 'Alternative proposal' would considerably weaken the Convention in comparison with the existing Additional Protocol, and should be rejected completely. Its inclusion would make it much more likely that Civil Society organisations would oppose the Convention becoming a global data privacy Convention, instead of supporting it doing so.

In both versions, exceptions to the requirement of adequacy are provided, including where 'the data subject has given his/her consent, after being informed of risks due to the absence of appropriate safeguards'. It would be preferable if instead of merely requiring 'consent', that the wording used as in proposed Article 5 2(a) ('the data subject has freely given his/her specific and informed consent') was followed. It would also be preferable if the disclosure of 'risks' specifically required the disclosure of the identity of the recipient and the country in which the recipient was located.

Extraterritoriality

The application of Article 12 also would benefit from further clarification of the meaning of the phrase 'a recipient who is not subject to its jurisdiction'. The data protection schemes of several countries cater for extraterritorial application (see e.g. the recent EU proposal, the Australian legislation, and the recent proposal for a privacy regulation in Singapore). In other words, such regulatory schemes claim jurisdiction over foreign organisations in certain circumstances. There may then be a risk that it could be argued that the communication, or making accessible, of data to such organisations does not fall within the regulation of Article 12 as the recipient accessing the data is in fact subject to the jurisdiction of the country from which the data is accessed. This would be undesirable, because the effective reach of extra-territorial laws may fall short of the effectiveness of its territorial application. The proposed provision would be better if it referred to 'a recipient who is not *effectively* subject to its jurisdiction'.

Sanctions and remedies move into the Convention

It is proposed that a 'new chapter will integrate the provisions so far contained in the 2001 additional protocol into the Convention, while reinforcing the independence and powers of supervisory authorities at the same time (e.g. ex officio action, intervention before the courts for

existing proceedings, coordinated investigations in transborder cases)'. These provisions (in *Chapter III bis Supervisory authorities*) in fact bring the requirement of the creation of an independent DPA into the Convention for the first time.

It is puzzling in light of this that no change is proposed to Article 10. The requirement of the 2001 Additional Protocol (ETS 181) that individuals have a right of appeal to the Courts is not being incorporated into the revised Convention. This is a backward step. The words "(include a right of appeal to a Court)" need to be inserted after "domestic law" in Article 10.

Improved definitions, scope and principles

Although minor in comparison with the above matters, other significant improvements are proposed.

There is a proposed Explanatory Report note to the definition of 'personal data' that '[a]n individual is not considered "identifiable" if identification requires unreasonable time or effort'. This should be amended by the addition of words to the Explanatory Report such as "Reasonableness of time and effort required for identification must be considered relative to the privacy interests which may be adversely affected if in fact identification does take place, and to the commercial or other factors which may encourage attempts at identification."

The proposed change "to fully apply the Convention whenever personal data is accessible to persons outside the personal or domestic sphere" is a significant change which could result in the Convernion's application, for example, to data on social networks which is made available to the public by otherwise private individuals. The proposed deletion of rights of derogation will increase the uniformity of the Convention's application.

The requirement of proportionality in processing is now proposed to be included in Article 5(1). The wording proposed to be used to describe the consent requirement in Article 5(2)(a) ('the data subject has freely given his/her specific and informed consent') will also strengthen the requirements of legitimacy of processing.