

CONVENTION FOR THE PROTECTION OF  
INDIVIDUALS WITH REGARD TO AUTOMATIC  
PROCESSING OF PERSONAL DATA  
CONSULTATIVE COMMITTEE  
THE CHAIR

International Conference of Data  
Protection and Privacy Commissioners  
Mr John Edwards  
Chairperson  
PO Box 10-094, the Terrace  
Wellington, New Zealand

Strasbourg, 1 July 2016

Dear Mr Edwards,

In view of the forthcoming closed session of the 38<sup>th</sup> International conference of Data Protection and Privacy Commissioners that will be held in Marrakech (17-18 October 2016), I would like to follow up on an issue raised on the occasion of the 37<sup>th</sup> International conference in Amsterdam (26-27 October 2015) in relation to the compatibility of the provisions of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) with the Global Cross Border Enforcement Cooperation Arrangement, adopted at the 36<sup>th</sup> International Conference in Mauritius, which provides for a multilateral agreement between privacy enforcement agencies (PEAs) wishing to cooperate in enforcement proceedings.

During the closed session of the Conference in Amsterdam, the question of this compatibility was raised by one delegation and concerns were expressed regarding the legality of the commitment to such a multilateral agreement of PEAs of Parties to Convention 108.

As I proposed it during the 2015 closed session, the Consultative Committee of Convention 108 examined this issue. An external expert was commissioned to examine the compatibility of the Mauritius Arrangement with Convention 108. The expert's report – drafted in December 2015 and revised in June 2016 - is herein enclosed for your information. The issue was discussed during the 37<sup>th</sup> Bureau meeting of the Consultative Committee (9-11 December 2015), as well as during the 33<sup>rd</sup> Plenary meeting (29 June – 1 July 2016).

It should be underlined from the outset that Convention 108 having no self-executing nature, it is the relevant national laws of the Parties to Convention 108, adopted to give effect to the provisions of the Convention according to Article 4.1 of the Convention, which could possibly legally conflict with the Mauritius agreement. Furthermore, the question of the legal nature of the Arrangement was raised, as well as the legal capacity of PEAs to enter into multilateral agreements, which needs to be examined in light of the respective domestic legislations.

The following important elements need to be highlighted with regard to the issue considered:

- Nature of the data exchanged: Convention 108 precludes PEAs (of Parties to the Convention) from sharing personal data for the purposes of enforcement cooperation (Article 13.3.b. of Convention 108, which only allows "furnishing factual information") The text of the draft modernised Convention<sup>1</sup> (currently not applicable but taken into consideration with a view to providing information as to the future regime envisaged) provides for more flexibility in this regard as Article 12bis paragraph 7bis recognises the possibility of exchanging personal data when this exchange is essential for the cooperation and the data subject has consented to it.
- Nature of the cooperation: while both Convention 108 and the text of the draft modernised Convention allow solely for administrative cooperation, nothing precludes Parties from resolving – through other international legally binding instruments - to other forms of cooperation complementing the administrative one deriving from the Convention.

I trust that you will find the expert's report of interest and assure you of the availability of the Committee to respond to any further question on this topic.

Yours sincerely,



Jean-Philippe Walter

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<sup>1</sup> See the consolidated draft at:

<http://www.coe.int/t/dghl/standardsetting/dataprotection/CAHDATA/Consolidated%20version%20of%20the%20modernised%20convention%20108%20July%202016.pdf>