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EXPERT OPINION

FOR THE CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA (T-PD)

ON THE COMPATIBILITY OF THE GLOBAL CROSS BORDER ENFORCEMENT COOPERATION ARRANGEMENT (MAURITIUS ARRANGEMENT) WITH THE SAID CONVENTION

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Introduction

1. The present opinion investigates whether the provisions of the Council of Europe (hereinafter: the Council) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter: Convention 108)[1] as well as of the pending modernisation thereof (hereinafter: modernised Convention 108)[2] raise any concerns and barriers for the functioning of bilateral or multilateral agreements between privacy enforcement agencies (hereinafter: PEAs, authorities) wishing to cooperate in order to enforce data privacy laws in cross-border proceedings (hereinafter: enforcement proceedings).[3]
2. A number of PEAs from Contracting Parties to the Convention 108 already 'participate'[4] to the Global Cross Border Enforcement Cooperation Arrangement,[5] adopted at the 36th International Conference of Data Protection and Privacy Commissioners (hereinafter: International Conference, Conference, ICDPPC), held in Mauritius on 13-16 October 2014 (hereinafter: Mauritius Arrangement).[6] The Mauritius Arrangement exemplifies a multilateral agreement between PEAs wishing to cooperate in enforcement proceedings.
3. The Council of Europe has requested external experts to examine the compatibility of the Mauritius Arrangement with the Convention 108. The Council has received several doubts from these experts, concerning the conformity of the Mauritius Arrangement with:
   a. the administrative nature of the cooperation[7] foreseen under Convention 108,
   b. the need for a legal basis for cooperation in either international or domestic law, and
   c. the sharing of personal data between PEAs.
4. Therefore the Council of Europe requested further opinion.
5. In a reply to the Council of Europe's request, I shall analyse these three issues against both the current text of the Convention 108 as well as its pending modernisation. A reference shall be made to European Union (EU) law – especially data protection law (both current and reformed) and competition law – that is able to offer a solution under 3(c). All these shall be preceded by an overview of applicable legal provisions.
6. The present opinion was originally delivered on 10 December 2015 in Strasbourg at the 37th Bureau meeting of the Consultative Committee of the Convention for the Protection of individuals with regard to automatic processing of personal data (T-PD-BUR). It was subsequently revised on 29 June 2016, having received feedback from the participants to the said meeting. I thank for all the comments and suggestions received.

I. Legal framework

Convention 108

7. Article 13(1) reads:

   "The Parties agree to render each other mutual assistance in order to implement this Convention."

[1] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28 January 1981, ETS 108.
[2] CAHDATA(2014)RAP03Abr, version as of 3 December 2014.
[3] I use the term 'data privacy' to cover both the European concept of 'data protection' and Anglo-Saxon one of 'informational privacy'. Cf. Lee Andrew Bygrave, *Data Privacy Law: An International Perspective* (OUP Oxford, 2014), 23–29.
[4] Terminology used by the Mauritius Arrangement.
[5] Cf. http://www.privacyconference2014.org/media/16667/Enforcement-Cooperation-Agreement-adopted.pdf.
[6] As of 28 June 2016, eleven PEAs participate to the Mauritius Arrangement. Cf. https://icdppc.org/participation-in-the-conference/global-cross-border-enforcement-cooperation-arrangement-list-of-participants.
[7] In the Council's request, 'cooperation' is understood narrowly, as enforcement of data privacy laws in cross-border cases, i.e. "any proceedings, in individual cases, aiming to establish privacy and data protection contraventions […], as well as the outcome of such processes". Cf. Dariusz Kloza and Anna Mościbroda, "Making the Case for Enhanced Enforcement Cooperation between Data Protection Authorities: Insights from Competition Law," *International Data Privacy Law* 4, no. 2 (June 2, 2014): 121, doi:10.1093/idpl/ipu010.

8. Article 13(3) reads:

"*An authority designated by a Party shall at the request of an authority designated by another Party:*
a furnish information on its law and administrative practice in the field of data protection;
b take, in conformity with its domestic law and for the sole purpose of protection of privacy, all appropriate measures for furnishing factual information relating to specific automatic processing carried out in its territory, with the exception however of the personal data being processed."

Modernised Convention 108

9. Art 12bis(7) reads:

"*7. In accordance with the provisions of Chapter IV, 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 cooperating with each other under the condition that, as regards the protection of personal data, all the rules and safeguards of this Convention are complied with;
b. co-ordinating their investigations or interventions, or conducting joint actions;
c. providing information and documentation on their law and administrative practice relating to data protection."

10. Art 12bis(7bis) reads:

"*7bis. The information referred to in paragraph 7 littera a shall not include personal data undergoing processing unless such data are essential for co-operation, or where the data subject concerned has given explicit, specific, free and informed consent to its provision.*"

Mauritius Arrangement

11. Section 3 'Aims' reads:

"*This Arrangement aims to achieve its objective by:*
(i) Setting out key provisions to address the sharing of enforcement-related information, including how such information is to be treated by recipients thereof […]"

12. Section 4 'Nature of the Arrangement' reads:

"*This Arrangement is NOT intended to* […]
(ii) create legally binding obligations, or affect existing obligations under other arrangements or international or domestic law;
(iii) prevent a Participant from cooperating with other Participants or non-participating PEAs, pursuant to other (binding or non-legally binding) laws, agreements, treaties, or arrangements […]."

13. Section 5 'Reciprocity Principle' reads:

"*A Participant may limit its cooperation in relation to cross border enforcement at its sole discretion. The following is a non-exhaustive list of such circumstances:*
(i) The matter is not within the Participant's scope of authority or their jurisdiction […]
(iv) The matter is inconsistent with other priorities or legal obligations […]"

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[8]

14. Art 12 reads:

"*1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.*
2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority."

[8] OJ L 1, 04.01.2003, pp. 1–25.

II. Analysis

Constitutional fitness of the Mauritius Arrangement

(a) Non-binding nature

15. I would like to precede the considerations on the three aspects to be examined with a brief note on the legal status of the instruments under discussion. These are foundational for answering the Council's questions.

16. First and foremost, the Convention 108 is a legally binding instrument. As any international treaty, it requires ratification, acceptance, approval or accession by each Contracting Party, in accordance with their respective constitutional systems, and – subsequently – implementation into domestic law, since it is *not* a self-executing legal instrument.[9] (Only in exceptional situations, when a legal provision in the text of an international treaty is sufficiently clear, precise and unconditional, it might be invoked directly.)[10]

17. Conversely, the Mauritius Arrangement has no legally binding force whatsoever. It even claims its non-binding nature in its Section 4, second paragraph, letter (ii).

18. In consequence, the provisions of the Convention 108, after their implementation into national law, in case of conflict, will always take precedence over those of the Mauritius Arrangement. (Even if I assume dangerously that the latter has any binding force.) The modernised Convention 108 is meant to retain both its legally binding and not self-executing nature. It would thus retain its precedence over the Mauritius Arrangement.

(b) Enactment by an incompetent body

19. Second, while the Convention 108 is concluded among the states under the auspices of the Council of Europe, an international organisation in the meaning of public international law, the Mauritius Arrangement has been adopted by a *resolution* of the International Conference.[11] This body – in turn – is an informal, voluntary yet structured network of PEAs.

20. The International Conference, being predominantly a global forum for discussion, has no legislative or enforcement powers whatsoever. After almost forty years after its inception, the Conference is widely respected for its efforts to mainstream the protection of data privacy worldwide, and in particular for setting standards of the protection thereof and for shaping the agenda to that end. But nothing less and noting more lies in its competences. This is not to underestimate or otherwise undermine the role of this body, but rather to point out that its role is different and the Conference has at its disposal tools fitted to its particular role.

21. The Conference is composed of PEAs who are "accredited" thereto if they fulfil certain admission criteria (hereinafter: members).[12] The Conference is able to impose commitments on their members insofar as these commitments concern solely the functioning of the Conference (i.e. *inter partes*).[13] Such powers deal with, for example, the admission of new members, the set-up of working groups to advise on pertaining data privacy problems and the adoption of resolutions and declarations advising on solutions thereto. Conversely, the Conference is *not* empowered to 'legislate', in a sense of creating commitments for PEAs producing effects on the individuals and/or the public at large (i.e. *erga omnes*). The Conference is *not* empowered, for example, to establish rules on handling personal data of third parties – i.e. individuals – by its members. Even if the Conference was empowered so, its members must have been duly authorised in advance by their home jurisdictions to take any commitments on behalf thereon. However, for the vast majority of PEAs, this seems not to be the case.

(c) Highly sensitive subject matter

22. Third, the Mauritius Arrangement concerns the cross-border enforcement of data privacy laws. The notion of enforcement, in any legal area, is without any doubt a highly sensitive matter. From the

[9] Art 11, Vienna Convention on the Law of the Treaties, Vienna, 23 May 1969.
[10] I am aware I use here the European Union terminology. However, 'direct effect' seems *not* to be exclusive to the EU law. Cf. Andre Nollkaemper, "The Duality of Direct Effect of International Law," *European Journal of International Law* 25, no. 1 (2014): 105–125, doi:10.1093/ejil/cht085.
[11] Cf. https://icdppc.org/wp-content/uploads/2015/02/ResolutionInternational-cooperation.pdf.
[12] Cf. Art 5.1 of ICDPPC Rules and Procedures. https://icdppc.org/wp-content/uploads/2015/02/Rules-and-Procedures-including-new-amendments-adopted-at-the-37-Conference.pdf.
[13] Cf. Art 2.1 of ICDPPC Rules and Procedures.

constitutional point of view, it has to do, for example, with the observance of the fair trial principle (due process), comprising, *inter alia*, the protection against self-incrimination or *ne bis in idem*.[14] Prioritising the efficiency of cooperation often neglects the safeguards against possible abuses it might cause. Furthermore, from the point of view of the state concerned, it has to do with its sovereignty. And states are usually very reluctant to give away any part thereof.[15]

23. Looking from another angle, the protection of data privacy enjoys the status of a human right under the Council of Europe system,[16] and thus its protection must be – at least – practical and effective. On the grounds of the European Convention on Human Rights, the European Court of Human Rights, on numerous occasions, and most recently in *Nježić and Štimac v. Croatia* (2015),[17] observed that the 'object and purpose of the Convention as an instrument for the protection of individual human beings require that [its provisions] be interpreted and applied so as to make its safeguards practical and effective'.

24. When it comes to the enforcement of laws, some level of compulsion is a first prerequisite for the 'practical and effective' protection. I find it somehow surprising that an arrangement for cooperation has been concluded without imposing any form of compulsion thereof. Currently, the non-binding nature of the majority of cooperation initiatives in data privacy law, focusing on enforcement of these laws, does not result in much concrete commitment and thus renders it ineffective and inefficient.[18]

25. It is my understanding that for the Mauritius Arrangement there was no consideration given to the sensitivity of subject matter. Neither was there any willingness among the PEAs to be legally bound by the Mauritius Arrangement they were negotiating.

(d) Possible invalidity of individual decisions made on the basis of the Mauritius Arrangement

26. In the majority of Western democratic societies, public authorities (including governments and independent regulatory authorities)[19] act solely on the basis of law and within the limits of the law. In other words, law of sufficient quality must confer any power for public authorities to act and these authorities must act within the limits prescribed by the law.[20] Courts of law are to verify whether these conditions have been fulfilled.

27. It follows that, for example, if a PEA takes a decision in an individual case, based on a piece of evidence received from its counterpart *solely on the basis* of the Mauritius Arrangement, it risks this decision being struck down by a court of law if this court finds the evidence was obtained illegally or it is otherwise inadmissible. (That is to say, the power to obtain evidence by a PEA and to share it with some other PEAs might not have been conferred thereon by law in a first place.) Or, alternatively, a PEA during an investigation shares with their counterpart(s) some personal data, which is explicitly outlawed by many legally binding instruments. (I will come back to this issue *infra*, cf. § 57 ff.) Put simply, in many Western democratic societies, the law of evidence – be it in criminal, civil or administrative proceedings – sets forth precise and extremely strict conditions for a piece of evidence to be handled, i.e. used *against* or *for* an individual. This has to do predominantly with due process (fair trial) considerations, to a large extent applicable also outside the classical domain of criminal law. I acknowledge the law of evidence is always a matter of national law and it varies considerably, thus adding to this complexity.

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[14] Cf. Art 6 European Convention on Human Rights, Rome, 4 November 1950, ETS 5.

[15] Cf. Paul De Hert and Auke Willems, "Dealing with Overlapping Jurisdictions and Requests for Mutual Legal Assistance While Respecting Individual Rights. What Can Data Protection Law Learn from Cooperation in Criminal Justice Matters?," in *Enforcing Privacy: Lessons from Current Implementations and Perspectives for the Future*, ed. Paul De Hert, Dariusz Kloza, and Paweł Makowski (Warszawa: Wydawnictwo Sejmowe, 2015), 56, http://www.phaedra-project.eu/wp-content/uploads/phaedra1_enforcing_privacy_final.pdf.

[16] Interpreted from Art 8 ECHR, cf. also Arts 7-8 Charter of Fundamental Rights of the European Union.

[17] European Court of Human Rights (ECtHR), *Nježić and Štimac v Croatia*, application No. no. 29823/13, judgment of 9 April 2015, § 61.

[18] Dariusz Kloza and Antonella Galetta, *Towards Efficient Cooperation between Supervisory Authorities in the Area of Data Privacy Law*, vol. 1, Brussels Privacy Hub Working Papers (Brussels, 2015), 9, http://www.brusselsprivacyhub.org/Resources/BPH-Working-Paper-VOL1-N3.pdf.

[19] Cf. Philip Schütz, "The Set Up of Data Protection Authorities as a New Regulatory Approach," in *European Data Protection: In Good Health?*, ed. Serge Gutwirth et al. (Springer Netherlands, 2012), 125–42, doi:10.1007/978-94-007-2903-2_7.

[20] For the concept of a 'firm legal basis', cf. e.g. ECtHR, *Olsson v Sweden (No. 1)*, application No. 10465/83, judgment of 24 May 1988, § 61.

(e) Conclusion

28. All these raise a number of doubts about the legal status of the Mauritius Arrangement, yet the analysis thereof lies outside the scope of the present opinion. The conclusion must be that the Mauritius Arrangement is a "strange legal creature". It constitutes: (1) a non-binding normative instrument, (2) adopted by a body incompetent to do so, and (3) dealing with a sensitive subject-matter that would normally require careful political and constitutional consideration before its adoption.[21] As a consequence, individual decisions based on the Mauritius Arrangement risk invalidity. The Mauritius Arrangement could be interpreted solely as "a demonstration of good will rather than anything legal".[22]

(f) Alternative: a model law or a model agreement respecting constitutional standards

29. I have already demonstrated that the Conference is not able to "legislate" (cf. *supra*, §§ 20-21). The Conference could, for example, in its standard-setting capacity, propose a model law or a model agreement to be adopted in accordance with constitutional standards of jurisdictions from which PEAs originate.[23] It is irrelevant where the legal provisions on cooperation originate from as long as these provisions are properly implemented to legal systems of jurisdictions concerned.[24] This approach has been used successfully for many years by, for example, the United Nations Commission on International Trade Law (UNCITRAL)[25] or the International Competition Network (ICN).[26]

Administrative nature of the cooperation under the Convention 108

(a) Administrative cooperation in the Convention 108

30. The Council of Europe has been advised that the "Convention 108 allows for administrative cooperation [between PEAs] only". As the Mauritius Arrangement does not distinguish between the types of cooperation, it "can hardly be entered into by PEAs from jurisdictions that are bound by Convention 108".

31. The question of the respect for the administrative nature of the cooperation between PEAs under the Convention 108 and its articulation with the Mauritius Arrangement is thus to be considered.

32. Art 13(1) of the Convention 108 requires the Parties to the said Convention to "render each other mutual assistance", yet without any specification of the nature thereof. The Explanatory Report clarifies that "[t]he main provisions of this chapter are based on the two recent European conventions relating to mutual assistance in administrative matters" (§ 71).

33. I agree that the Convention 108 allows for administrative cooperation only. This is clearly visible from both the legal tools the Convention offers and the safeguards available against these tools. In other words, the legal tools and safeguards for civil cooperation are different from those tools and safeguards for criminal cooperation, although they normally would have a few in common.

(b) An alternative approach: Towards a holistic view of the available legal framework

34. It is clear that the focus of the Convention 108 is on administrative cooperation, yet there is no provision therein that prohibits resolving to other types of cooperation, be in civil or criminal.[27]

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[21] It could be e.g. a treaty in the meaning of public international law or an executive agreement, if the constitutional system of a given jurisdiction allows so. Executive agreements are meant to be concluded by agencies of the executive (i.e. the government) in matters of lesser importance than those requiring ratification by means of the consent of the parliament and the assent of the head of state. Executive agreements are meant solely to facilitate the daily work of the state's administration.

[22] Comment received during the meeting.

[23] For further considerations on that matter, cf. Kloza and Mościbroda, "Making the Case for Enhanced Enforcement Cooperation between Data Protection Authorities: Insights from Competition Law," 137.

[24] Cf. Christopher Kuner, "An International Legal Framework for Data Protection: Issues and Prospects," *Computer Law & Security Review* 25, no. 4 (July 2009): 307–17, doi:10.1016/j.clsr.2009.05.001.

[25] Cf. http://www.uncitral.org/uncitral/en/other_organizations_texts.html.

[26] Cf. http://www.internationalcompetitionnetwork.org/library.aspx.

[27] For the data controllers and processors who are legal entities and not natural persons – to the extent they are criminally liable.

35. First and foremost, data privacy goals, this including practical and effective cooperation (cf. *supra*, §§ 23-24), can be obtained by various co-existing legal and extra-legal means.[28] In the context of enforcement of laws, the nature of legal means must be binding.

36. Therefore PEAs can resort to other legal instruments to pursue cooperation of a civil and/or criminal nature, thus "supplementing" the Convention 108. In other words, the Convention 108 does not exclude resolving to other forms of cooperation. The concerned PEAs are able to base their cooperation on international binding agreements other than the Convention 108 and specific to the nature of an enforcement action, or to complement one with another.

37. The Mauritius Arrangement explicitly suggests such a possibility in its Section 4, second paragraph, letter (iii). The mere fact its preamble mentions only the Convention 108 and the 2007 OECD Recommendation on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy[29] is of no importance here.

38. Such agreements could include the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73), the Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127) or the Convention on Cybercrime (ETS No. 185).

39. Such a holistic understanding of the legal framework reflects the very nature of data privacy law. Its substantive provisions do not sit comfortably within any traditional branch of law. Only particular aspects thereof can be qualified, for example remedies might be of an administrative, civil or criminal nature and their various types can co-exist within a single jurisdiction.[30] Furthermore, the mere notion of cooperation is of procedural nature. The nature of procedural provisions for cooperation follows the nature of substantive norms being enforced.

40. When it comes to the modernised Convention 108, the text of Art 13(1) remains unchanged. A change comes with the draft Explanatory Report that – at the time of writing this opinion – does not specify any type of cooperation, be it administrative or any other (cf. § 133).

(c) An alternative approach: Possible limitations

41. First, I acknowledge that each of the instruments mentioned above (in § 38) might have their own limitations as to their applicability, e.g. the requirement of double criminality.

42. Second, the engagement (and the extent thereof) of a PEA into particular types of enforcement cooperation – be it administrative, civil or criminal – depends on their enabling legislation and this differs significantly among them.[31]

43. Third, various types of enforcement cooperation might come to conflict in cross-border proceedings. Consider, for example, that an authority in the jurisdiction X opens administrative proceedings against a multi-jurisdictional data controller while its counterpart in jurisdiction Y opens criminal proceedings in the same case.

44. PEAs could be using the tools and safeguards common to various types of cooperation. Typically, any enforcement proceedings of a cross-border nature will utilise one or more of the classical tools available in the field: the spectre ranges from contact point designation, to requests for assistance, to sharing information.[32]

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[28] Cf. "There might be no need to create a specific branch of law or specific legal constructions for the cooperation of supervisory authorities in data privacy law if existing legal tools, even if combined, can efficiently protect data privacy". Kloza and Galetta, *Towards Efficient Cooperation between Supervisory Authorities in the Area of Data Privacy Law*, 11. The whole spectre of extra-legal tools includes methodologies such as impact assessment. Cf. further Antonella Galetta and Paul De Hert, "The Proceduralisation of Data Protection Remedies under EU Data Protection Law: Towards a More Effective and Data Subject-Oriented Remedial System?," *Review of European Administrative Law (REALaw)* 8, no. 1 (2015): 123–49.

[29] Cf. http://www.oecd.org/sti/ieconomy/oecdrecommendationoncross-borderco-operationintheenforcementoflawsprotectingprivacy.htm

[30] Cf. Paul De Hert, "The EU Data Protection Reform and the (Forgotten) Use of Criminal Sanctions," *International Data Privacy Law* 4, no. 4 (2014): 262–268, doi:10.1093/idpl/ipu024.

[31] Cf. further FRA, *Access to Data Protection Remedies in EU Member States* (Luxembourg: Publications Office of the European Union, 2014), doi:10.2811/51206.

[32] Kloza and Mościbroda, "Making the Case for Enhanced Enforcement Cooperation between Data Protection Authorities: Insights from Competition Law," 123–124.

45. My point is that each authority could benefit from any of such possibilities and could utilise its results in their home proceedings, regardless of a type thereof. In other words, in case the types of proceedings do not converge, the very same results thereof could be subsequently used, for example, by a PEA from jurisdiction X in their administrative proceedings and by the one from jurisdiction Y – in their criminal ones.

46. Fourth, in practice, PEAs from jurisdictions in which neither substantive nor procedural data privacy laws converge can hardly work together on more than evidence gathering or exchange of information. For example, in the joint Canadian-Dutch investigation into privacy policy of WhatsApp, "it seems that the only linking element between the two separate investigations under respective national laws was joint evidence gathering on the basis of the [memorandum of understanding]. Having conducted a joint investigation, the paths of the two [PEAs] diverged: each of them issued a separate report[33] and would individually monitor compliance with their respective laws".[34]

(d) An alternative approach: Conclusion

47. The conclusion must be the Convention 108, allowing for administrative cooperation only, does not preclude basing cooperation on alternative instruments, as long as these fit purpose and as long as the law permits so.

The need for a legal basis for enforcement cooperation in either international or domestic law

48. The Council of Europe has been advised that the "majority of [Council of Europe] jurisdictions" have "no other lawful cross-border cooperation basis than Chapter IV of the Convention 108" and that "[e]ven at [the] EU level, [Art 28(6) of the 1995 Data Protection Directive][35] requires transposition into domestic law".

49. A quick look at the powers of supervisory authorities in the area of cross-border enforcement cooperation seems to confirm this view.[36]

50. This argument, building on the non-self-executing nature of the Convention 108 (cf. *supra*, § 16), implies that the majority of PEAs from jurisdictions who are Contracting Parties to the Convention 108 have no firm legal basis enabling them to enter into enforcement cooperation. This argument also implies these PEAs could understand the Mauritius Arrangement as offering them a firm legal basis for cooperation.

51. It is visible from the mere reading of the text of the Mauritius Arrangement that it is silent as to whether PEAs should have any legal basis for enforcement cooperation in either international or domestic law. Had these PEAs have in place clearly established legal bases for cooperation, the Mauritius Arrangement could be assumed – although still dangerously, due to its constitutional status – to function like an executive instrument, e.g. offering procedures for cooperation. However, this seems not to be the case.

52. Conversely, for example, the Memorandum of understanding between the Privacy Commissioner of Canada and College Bescherming Persoonsgegevens on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in Private Sector, signed in Ottawa and The Hague in 2011,[37] explicitly, in its preamble, enumerates the legal bases for enforcement cooperation between both jurisdictions.

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[33] CPB, *Investigation into the processing of personal data for the 'whatsapp' mobile application by Whatsapp Inc., Z2011–00987, Report on the definitive findings*, The Hague, 15 January 2013, pp. 6–7, https://cbpweb.nl/sites/default/files/downloads/rapporten/rap_2013-whatsapp-cbp-definitieve-bevindingen-nl.pdf; Office of the Privacy Commissioner of Canada, *Report of Findings Investigation into the personal information handling practices of WhatsApp Inc., PIPEDA Report of Findings #2013–001*, Ottawa, 15 January 2013, http://www.priv.gc.ca/cf-dc/2013/2013_001_0115_e.asp [footnote mine].

[34] Ibid., 127–128.

[35] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 Nov 1995, pp. 31-50 [footnote mine].

[36] Cf. Paul De Hert and Gertjan Boulet, *A Compass towards Best Elements for Cooperation between Data Protection Authorities* (Brussels, 2014), 443–448, http://www.phaedra-project.eu/wp-content/uploads/PHAEDRADeliverable2.1_FINAL.pdf.

[37] *Supra*, note 34.

53. The question whether the Mauritius Arrangement requires a firm legal basis for cooperation in either international or domestic law is thus to be addressed. This question, however, provokes another one, namely whether the Mauritius Arrangement can constitute a standalone, firm legal basis for cross-border cooperation.

54. In my opinion:

    a. the Mauritius Arrangement does not require any legal basis for enforcement cooperation in either international or domestic law;

    b. the above-mentioned questions would have been of any relevance if the Mauritius Arrangement was binding; however, the Mauritius Arrangement is non-binding; *and*

    c. as I have demonstrated *supra* (§ 26), public authorities act solely on the basis of law and within the limits of law; therefore PEAs would be able to enter into any enforcement cooperation agreement as long as their enabling legislation permits so, yet whether this permission originates from an international treaty, supranational legal instrument or a domestic provision, is irrelevant here. (The Mauritius Arrangement seems to implicitly acknowledge that in Section 5, fourth paragraph, letters (i) and (iv).)

55. The conclusion must be that the Mauritius Arrangement cannot constitute any legal basis for cross-border cooperation. It is the enabling legislation of the PEA concerned that is decisive in this regard.

56. There is no alternative approach to be discussed.

Allowing or promoting the sharing of personal data between PEAs

(a) Explicit prohibition

57. The Council of Europe has been reminded that the Convention 108, in its Art 13(3)(b) prohibits "the exchange between DPA's of personal data" while, conversely, the Mauritius Arrangement explicitly envisages 'to allow/promote' such an exchange, e.g. in Section 3, letter (i).

58. The exchange of non-personal data is explicitly allowed and encouraged by both instruments.

59. The law is clear here and nothing remains to be added.

(b) An alternative approach

60. Although Art 13(3)(b) of the Convention 108 is explicit here, in my option the sharing of personal data for the purposes of enforcement of data privacy laws is not entirely precluded as there exist other means to do so.

61. There are at least two aspects to be analysed here:

    a. what could be the legal basis for sharing personal data?

    b. who could share such data?

(c) An alternative approach: Legal basis

62. For the former, it might be instructive to look how other branches of law solved the problem of sharing confidential or otherwise privileged information, including personal data. For example, competition law knows at least four legal bases for that purpose:

    a. unilateral provision in domestic law,

    b. international or supranational legal instrument,

    c. confidentiality waiver,

    d. Leniency programme.[38]

63. For example, Art 12 of Regulation 1/2003 explicitly allows sharing any information for the purposes of the enforcement of European Union (EU) competition law.

[38] Cf. Kloza and Mościbroda, "Making the Case for Enhanced Enforcement Cooperation between Data Protection Authorities: Insights from Competition Law," 136.

64. Art 13(3) of the Convention 108 explicitly excluded possibilities (a) and (b) as it allows only "furnishing factual information […], with the exception however of the personal data being processed".

(d) An alternative approach: Actors involved

65. What strikes my attention is the fact that the said provision is addressed solely to the PEAs. (Cf. "An authority … shall … take … measures for furnishing …".) This opens a possibility for other actors to share personal data.

66. Possibilities (c) and (d) rely on the free will of the actors concerned. Whenever it is essential for enforcement cooperation and whenever it is in the vital interest of an individual (*sensu largo*), he or she might agree to share his or her personal data with the counterpart(s) of PEA investigating the case. In such a situation, a PEA would serve as a facilitator only, taking the role of a data controller.

67. Similarly, a data controller might share personal data held at its disposal, having obtained all necessary consents from individual(s) concerned. Such a situation is not unimaginable, for example, when data controllers wish to defend themselves in the proceedings against them and data subjects support their claim.

68. Standard conditions for a meaningful consent in data privacy law must be maintained, i.e. it should be free, explicit, specific, informed and documented.[39]

(e) An alternative approach: Further analysis

69. This understanding is close to the very aim of data privacy law, i.e. to protect an individual while his or her personal data are processed. Data privacy laws channel the use of personal data by multiple actors and empower an individual to exercise some level of control over his or her data. And precisely this understanding focuses on exercising the control thereof.

70. Furthermore, it has been already observed that the protection of fundamental rights must be 'practical and effective' (cf. *supra*, § 23).

71. Thus, under the current Convention 108 regime, the only practical and effective means to share personal data in enforcement proceedings is to resort to the individual's right to control the processing of personal data and obtain his or her consent.

72. By means of example, Art 26(1)(d) of the 1995 Data Protection Directive, within the scope of its application, could constitute an alternative means to the consent regime discussed above (§ 66), i.e. it permits transfer of personal data when it is 'necessary or legally required on important public interest grounds, or for the *establishment*, *exercise or defence of legal claims*' (emphasis added).

73. The General Data Protection Regulation (GDPR), within the scope of its application, would not provide any limits in sharing personal data between PEAs for the purposes of cooperation (cf. Art 57(1)(g), Art 60(1), Art 60(3) and Art 67).[40]

74. The modernised Convention 108, in its Art 12b(7bis) explicitly recognises a possibility for an individual to consent to transfer his or her data to a PEA in another jurisdiction for the purposes of enforcement cooperation.

III. Conclusion

(a) Status quo

75. Before answering the questions asked by the Council of Europe, I shall emphasise that the Mauritius Arrangement is a "strange legal creature". It is a non-binding normative instrument, adopted by an incompetent body and dealing with sensitive matter that would normally require careful political and constitutional consideration. This quality of the Mauritius Arrangement is decisive for any further analysis. In consequence, it is unable to create any obligations for PEAs producing effects *erga omnes*.

76. In answering the questions asked by the Council of Europe and looking through the prism of the Convention 108, in its *current* wording:

[39] Cf. Art 29 Working Party, *Opinion 15/2011 on the definition of consent*, Brussels, 13 July 2011, WP187.

[40] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 04.05.2016, pp. 1-88.

a. the Convention 108 allows solely for administrative cooperation, since it offers tools and safeguards meant for that particular type of cooperation and the Mauritius Arrangement is unable to expand the cooperation toolbox available;

b. the Convention 108 precludes *PEAs* from sharing personal data *between themselves* for the purposes of enforcement cooperation and – again – the Mauritius Arrangement is unable to alter that.

77. The Mauritius Arrangement cannot constitute a standalone, firm legal basis for cross-border cooperation. It constitutes a non-binding instrument and thus is unable to empower PEAs neither to act nor to set the boundaries of these powers of PEAs. PEAs can enter into cooperation as long as their enabling legislation permits so.

(b) Overcoming existing limitations

78. The two above-mentioned limitations (§ 76) of the Convention 108, in its *current* wording, can be overcome as follows:

a. The administrative nature of enforcement cooperation in Convention 108 does not exclude the possibility to complement such cooperation by other legal instruments of civil and/or criminal nature.

b. Art 13(3)(b) of the Convention 108 could be interpreted as not precluding from sharing personal data for the purposes of enforcement cooperation, provided such sharing is essential for the proceedings, is in a vital interest of an individual and is based on his or her free will.

(c) Modernised Convention 108

79. It is my opinion that the *modernised* Convention 108 would, similarly, allow solely for administrative cooperation. The change would come with sharing personal data among the PEAs for the purposes of enforcement cooperation since this would be explicitly allowed by the *modernised* Convention 108 (cf. Art 12bis(7bis)).

(d) Conclusion

80. To recast: the Mauritius Arrangement is a “strange legal creature” and its major concern is its non-binding nature. The Mauritius Arrangement exceeds the administrative nature of the cooperation foreseen under Convention 108. Next, it does not require any firm legal basis to cooperate and cannot, furthermore, constitute such a basis. Finally, the Mauritius Arrangement allows (or even promotes) sharing personal data while Convention 108 explicitly forbids so. (However, there exist a few possibilities to overcome these obstacles.)

81. The conclusion must be that the Mauritius Agreement is, in the three above-mentioned aspects, incompatible with the Convention 108. Any attempt of PEAs to cooperate *solely* on its basis will contravene the Convention 108.

82. The Council of Europe is advised to inform the Contracting Parties about the above-mentioned incompatibility before the Contracting Parties adhere to the Mauritius Arrangement or act thereon.
