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Some opinions concerning the modernization of ETS 108 "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data"



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G. Marcoccio, 5th March 2011

Foreword

The international treaty ETS 108 [“Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data”](http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm)¹ has been issued 30 years ago and it has been ratified by more than 40 Countries. Of course it has influenced a large number of legislations concerning data protection and provided essential references for the necessary legal ground in performing trans-border data flows.

The Council of Europe is now in the process of modernizing the treaty in consideration of technological developments and strong social, market and laws evolutions occurred in these years.

An expert committee has been set up with the purpose to identify and discuss the drivers to achieve an appropriate ETS 108 modernization. With the aim to properly acquire more views and opinions, the Council of Europe requires contributions to everybody who intends to express his ideas or concerns on the matter. The dead line set by the Council to receive contributions is: 10 March 2011. Next step in the process of ETS 108 modernization will be the works of the [“Bureau of the consultative committee of the convention for the protection of individuals with regard to automatic processing of personal data \[ETS No. 108\] \(T-PD-BUR\)”](http://www.coe.int/t/dghl/standardsetting/dataprotection/OJ_T-PD-Bureau23_2011_en.pdf)² in the meeting planned on 22-24 March 2011 in Strasbourg.

On the basis of the [first issues](#)³ identified by the expert committee for the purpose of ETS 108 modernization, here below are reported some our opinions, laid down with the aim to provide contributes for the review and update of the present text of the treaty.

¹ <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>

² http://www.coe.int/t/dghl/standardsetting/dataprotection/OJ_T-PD-Bureau23_2011_en.pdf

³ http://www.coe.int/t/dghl/standardsetting/dataprotection/Consultation_Modernisation_Convention_108_EN.pdf



Some relevant aspects and input for the opinions

New services, based on technological developments and consumer products, have the capability to acquire and move personal data everywhere in the world, in few milliseconds. This is not a trend for the future, it represents our day-by-day reality when we make a conversation via mobile phone or we purchase a product via internet.

Service provision based on “cloud computing” should be considered as a relevant starting point to review the meaning of terms such as Data Controller and Data Processor, and impose a humble and critical review of the meaning of personal data transfer.

In these dynamic contexts the same concept of personal data is becoming not so clear from an operative point of view and presently its boundaries cannot be considered completely fixed.

New communications services, such as those allowed by the next new WiFi standard 802.11.u (designed to facilitate interworking with external networks), will involve intense use of personal data and profiling of subscribers based on new protocol components (MSAP = Mobility Services Advertisement Protocol), designed to allow 802.11u-enabled mobile devices to query for local services prior to authenticating to the Wi-Fi network. It is not an easy task to understand how it can be controlled in terms of information to data subjects, their consent, their exercise of rights, rules on data transfers, etc, etc. Same concerns also apply to the “old” cookies, although they do not represent a news for the EU legislation (one of the last references is given by [Directive 2009/136/EC](#)⁴ and its transposition deadline set to 25 May 2011) and for organizations such as ENISA (see its last report on the matter “[Bittersweet cookies. Some security and privacy considerations](#)”⁵)

Some opinions for the purpose of ETS 108 modernization

Technological general approach

Technological neutral approach should be again considered essential and a success factor for such a treaty, although it appears necessary to properly face new specific contexts such as for example social network and “Internet of things”.

Technological neutral approach should be maintained since and at least:

- progress and developments run very rapidly, no one can claim to follow or even precede the technological progress at legislative level
- un-proper legal requirements could negatively affect technological and market developments
- regulations at lower level and for specific sectors issued by national/international bodies could better serve the needs in subject

Instead of trying to follow technological approaches and their rapid evolution, it seems more useful to address specific scenarios of data processing (social network, purchasing via internet made by consumers, fulfillment of necessary administrative procedures both in public and private sectors,..)

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:En:PDF>

⁵ <http://www.enisa.europa.eu/act/it/library/pp/cookies>

Privacy by design

["Privacy by design"](#)⁶ seems to be the essential approach in order to ensure real privacy for the individuals worldwide. In our opinion international or national legislations cannot have the same potentiality to ensure privacy in a rapidly evolving context of available technologies and service for consumers, and provide at the same time effective ground for data protection. Therefore in our opinion an international treaty such as ETS 108 should include provisions aimed to promote and foster the introduction of "privacy by design" principles in equipment, devices, tools and services designed for the Information Society and the electronic communication sector. Proper sanctions should be considered in case of breach of required implementations concerning "privacy design".

Harmonization/coordination with other existing and "popular" data protection legislations

In the last 20 years the data protection laws have rapidly expanded. In Europe the EU Directive 95/46/EC has been transposed in the member states legislations, nevertheless the consequent national laws exhibit critical discrepancies at EU level, again a large number of further Directives (2002/58/EC, 2006/24/EC,...) have been issued, several EU Decisions, and consequent national measures, require many (bureaucratic) fulfillments in order to lawfully transfer personal data to third countries not ensuring an adequate level of data protection.

In any case this composite set of data protection legislations and regulations already defines requirements (at organizational/procedural/technical level). Therefore the modernization of the ETS 108 absolutely needs to take care of this, in order to avoid the imposition of further measures in a un-controlled and un-coordinated way with the existing laws on the matter.

The risk for the data subjects is that large companies have the power and the capability to find methods to overcome excessive un-coordinated legal requirements, and on the other hand the small-medium companies, if wrongly constrained by excessive privacy burdens, they are not in the condition to fulfill.

Furthermore, the discrepancy of the national data protection legislations in such a matter where data and its automatic processing have no national and physical boundaries, should again be considered as a serious issue to address, also in the context of ETS 108 modernization.

Consent and its possible alternatives

In light of more than 20 years of data protection legislations, relative implementations, technological developments and market trends, in our opinion the generalized use of the data subject consent should be strongly reviewed and limited only to those cases where the data subject has effectively the power of deciding or not about the processing of his/her data.

In theory, the consent appears again as the right instrument for the data subject to exercise his/her power, but from a practical point of view the lesson learnt is very different. Therefore the modernization of ETS 108 should carefully consider the use of data subject consent.

⁶ <http://www.privacybydesign.ca/about/>



As example, it could be evaluated the possibility to define the cases where the consent is strictly necessary depending on the nature of data and processing (conversely the actual data protection legislations list the cases where the consent is not required), and in all the other cases it should be strengthened measures such as accountability and/or audit made by third parties on the activities of the processing responsible (data controllers and/or data processors) as well as measures for law enforcement and appropriate sanctions.

Data subject rights

Measures should be considered in order to strengthen the power of data subjects in exercising their rights. In a complex scenario where international companies and bodies process the data of consumers and of service subscribers, it becomes well evident the gap existing among the power of these organizations and the power of single individuals.

Therefore it should be evaluated, in the process for ETS 108 modernization, specific measures for the effective exercise of rights of the data subjects: in our opinion it should be clearly promoted or, better, imposed, advocacy and support from specific competent organizations, properly certified at international level. In this sense, class actions or similar initiatives should be evaluated and taken into consideration.

New power for data protection authorities?

Proper evaluation should be made before to provide new powers to the existing data protection & privacy authorities, carefully considering and understanding the effective and ultimate benefit for the data subjects.