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Update on the Council of Europe Convention 108¹

The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (“Convention 108”) formulates a number of core principles, drafted in a simple and technologically-neutral way.

Its standards have influenced legislation far beyond Europe and served as a basis for the 1995 EU Directive.

The Convention has a cross-cutting scope of application. It protects against privacy intrusions by public and private authorities, both in the offline and on-line worlds. There are no loopholes regarding defense, national security or law enforcement.

The process to modernise Convention 108

On Data Protection Day (28 January 2011), the Secretary General launched a public consultation aimed at hearing concerns of governments, civil society and the private sector. Some 50 replies were received (amounting to nearly 400 pages) from all sectors concerned; governments, data protection authorities, NGOs, private sector, professional associations, including many non-European contributors, mainly from the Americas and Africa. Those responses were analysed and fed into the modernisation proposals.

The modernisation of Convention 108 will be a priority for the Organisation during the next biennium 2012-2013.

The revision process will pursue two main objectives:

- to deal with **challenges for privacy resulting from the use of new ICTs**;
- to **strengthen the Convention’s follow-up mechanism**.

There appears to be a large consensus on the objectives to be pursued, which also clearly emerged from the public consultation, namely to:

- maintain the Convention’s provisions at principle-level, to be complemented by more detailed sectoral texts by way of recommendations or guidelines;
- ensure for consistency and compatibility with the legal framework of the European Union;
- maintain technologically neutral provisions;
- reaffirm the Convention’s potential as a universal standard.

¹ Update provided by the Data Protection Unit of the Secretariat General of the Council of Europe www.coe.int/dataprotection

As regards substantive provisions, the main **innovations** currently considered concern the following issues:

- proportionality (so far implicit and concerning only the data), in particular data minimisation;
- accountability;
- privacy by design;
- obligation to declare data breaches;
- transparency of data processing;
- additional safeguards for the data subject such as the right of access to the origin of data and the right to obtain knowledge of the logic involved in the processing, the right to object.

The issue of transborder data flows will be key in the modernisation process. The current provisions on transborder data flow contained in the Convention and its 2001 Protocol will have to be revised.

It is expected that the new provisions will 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.

At the same time, elements of the concept of accountability should be introduced, focusing on the obligations of data controllers and processors.

The use of standard contractual clauses and binding corporate rules (BCRs) will also be foreseen and encouraged, provided that suitable and effective control measures by supervisory authorities are in place.

Data protection is an area par excellence where Convention 108 can usefully complement the EU legislation. Attempting to enforce European standards worldwide would be the wrong approach. Instead there is a need to collectively enforce truly international standards. When modernising Convention 108, one of the aims is therefore to bring closer together the various normative frameworks that have developed in different regions of the world.

Convention 108 could provide a multilateral framework that is flexible, transparent and robust at the same time, facilitating the free flow of information and data across borders while providing effective safeguards against abuse.

In keeping with the Convention’s philosophy, any new provisions will consist of general principles only; simple, sound and concise, allowing states parties a certain measure of discretion when implementing them through their national legislation.

Strengthening the follow-up mechanism

Convention 108 provides a unique framework for multilateral cooperation through a conventional committee, the T-PD. It is composed of representatives of governments and data protection authorities alike. It also allows for the participation of states that are not parties to the Convention (currently Australia and the USA) as well as non-state actors, such as the International Chamber of Commerce, the International Conference of Data Protection and Privacy Commissioners or the Francophone Association of Data Protection Authorities.

The committee is more than a forum for exchange of information and good practices. It has important follow-up and standard-setting functions. More recently, it has prepared a recommendation on profiling, which has been adopted by the Committee of Ministers of the Council of Europe.

Strengthening the Convention's follow-up mechanism will be essential for the establishment of the Convention as a truly global standard. We need a dynamic and truly international forum for exchange of experience, cooperation between national authorities and policy development.

Indeed, the effective enforcement of data protection standards is crucial for their credibility. It is expected that the committee's functions will be strengthened during the modernisation process. However, much can already be done on the basis of the existing Convention text, provided there is the political will to fully exploit its potential.

How to modernise the Convention?

The legal instruments required to modernise Convention 108 have not yet been determined definitively. There are several options: the Convention could either be formally amended, which would require consent by all existing states parties, or an additional protocol could be used, which would have the advantage that the revisions could enter into force with a limited number of ratifications (e.g. five or ten).

Finally, it is possible to replace the original treaty in its entirety by a new one ("revised convention"). The distinction between amending and additional protocols is not as clear-cut as it would seem. In Council of Europe practice, there have been "hybrid" protocols which both amended certain provisions of the original convention and added new provisions and still entered into force after a limited number of ratifications.

But even if the nature and scope of the proposed amendments would require the use of an amending protocol, the latter could enter into force using a tacit acceptance clause. Such a clause could provide that the amendments would enter into force automatically after a fixed period (e.g. two years) unless a party objects (due to delays in internal ratification procedures). In the event of objections, entry into force

would be postponed until the last objecting state has deposited its instrument of ratification.

Perspectives: Convention 108's potential as a global standard

Data protection is a good example of the complementarity between the European Union and the Council of Europe. On the basis of shared values and human rights standards, the EU adopts comprehensive legislation for its member states, while the Council of Europe sets international standards and provides a dynamic framework for cooperation including like-minded countries well beyond Europe.

The Commission's intention to seek a negotiating mandate for the revision of Convention 108 is to be welcomed, as it would ensure coherence with the reform of the EU data protection framework.

At the same time, it cannot be emphasised enough that Convention 108 is not a purely "European" instrument. Representatives from Australia, Canada, Japan and the United States of America already took part in the drafting work thirty years ago.

So far, Convention 108 has been ratified by 43 European states. In June 2011, the Committee of Ministers invited the first non-member state, Uruguay, to accede.

It will only be the first in a long list of countries, indeed, the truly international character of Convention 108 should be strengthened during the modernisation process.