

MODERNISATION OF CONVENTION 108 : GIVE US YOUR OPINION !

The Council of Europe celebrates this year the 30th Anniversary of its Data Protection Convention (usually referred to as [Convention 108](#)) which has served as the backbone of international law in over 40 European countries and has influenced policy and legislation far beyond Europe's shores.

With new data protection challenges arising everyday, the Convention is being overhauled to meet new realities and time is now ripe to think about modernising it.

The technological developments of the information and communication society as well as the globalisation of exchanges lead to unexplored challenges and potential new risks for the protection of human rights and fundamental freedoms.

Is Convention 108's protection still in line with today's needs in respect of data protection or should it be modified and complemented in order to better satisfy the legitimate expectations of individuals and concerned professionals ?

What are your views ?

Please share with us your views on the future Convention 108: the expert committee set up under Convention 108 (called the T-PD) is in charge of this modernisation and will in its work greatly benefit of your comments and suggestions on the topic.

This committee has already identified several issues to discuss in the context of the modernisation of Convention 108 and a number of interrogations and proposals are now shared with you in order to bring food to your thoughts:

Object and Scope of the Convention, Definitions

1. Convention 108 has been drafted in a technologically neutral approach which keeps it general and simple: can this still be the case or should a more detailed text be prepared ?
2. Should Convention 108 give a definition of the **right to data protection** and **privacy**?
3. Convention 108 protects against privacy intrusions by private and public authorities, including law enforcement. Should this comprehensive approach be retained?
4. Convention 108 does not exclude of its scope data processed by a natural person in the course of a purely **personal or household activity**. Should this continue to be the case or should a specific exception be introduced (and specifically considered in the context of Web 2.0.)?
5. The definition of **automatic processing** does not include the collection of data: is it a problem if collection is subject to a special provision? Is it enough? Should other operations be added to the existing list?

The definition of the **controller of the file** should be reviewed: should several criteria be listed, should such criteria be cumulative, can there be several controllers for one file ?

6. New definitions may be necessary, such as for the **processor** or the **manufacturer of technical equipment**.

Protection principles

7. New principles could be added to the Convention, such as the **proportionality** principle, which should apply to all operations carried out on the data. Such a principle is also linked to the **data minimisation principle** which aims at limiting the collection of personal data to a strict minimum or even to cease personal data collection when possible.

8. Should the question of **consent** be considered, in close connection with the principle of transparency and obligation to inform, or as a necessary condition to a fair and lawful processing, to satisfy before any other step?

9. Should the **legitimate processing** be addressed by Convention 108 as Directive 95/46 does in its article 7? Should there be a list of legitimate grounds for data processing?

10. Convention 108 does not expressly mention **compatibility in relation to purpose**. In today's context, personal data is commonly used for purposes that go far beyond what may have been initially foreseen, far beyond what may be compatible with the initial purpose of the collection.

11. **Special categories of data** which benefit of an increased protection are defined very widely which could lead to excessive application of this restrictive regime : is the data sensitive or is its processing? Should other categories of data be added such as (national) identification numbers and biological or biometric data, etc.?

12. A specific protection could also be applied to certain categories of data subjects. In particular, **children** may need specific protection because of their vulnerability. Is there a need for specific provisions regarding the protection of children? If so, which are the issues that should be addressed in such provisions?

13. Article 7 of the Convention addresses **security** in a narrow sense, namely as protection against accidental or unauthorised destruction, accidental loss and unauthorised access, alteration or dissemination. Should the notion of security also include a right for data subjects to be informed of **data security breaches**?

14. There are special risks arising from the use of **traffic and localisation data** (technical data accompanying a communication) since such data can reveal movements, orientations, preferences and associations with others. Do we need special rules for the use of such data ?

15. Should **accountability** mechanisms and an obligation to demonstrate that effective measures have been taken in order to ensure full respect of data protection rules be introduced?

16. Should the principle of **privacy by design**, which aims at addressing data protection concerns at the stage of conception of a product, service, or information system, be introduced?

Rights – Obligations

17. The **right of access** should not be limited to data but should cover access to the origin of the data, i.e. who was at the origin of the communication. Should this right also cover access to the **logic** of the processing?

18. The **right of opposition** is justified in cases where the data processing is not based on the data subject's consent. The articulation between the right of opposition and the right to oblivion could be examined, as well as means to guarantee respect and exercise of this right.

19. Should there be a right to guarantee the confidentiality and integrity of information systems?

20. Should a right 'not to be tracked' (RFID tags) be introduced?

21. Should everyone have a right to remain anonymous when using information and communication technologies?

22. Should Convention 108 address the question how to strike the balance between the protection of personal data and freedom of expression (new notion of press and journalism in the context of Web 2.0.)?

Sanctions and Remedies

23. Should class actions be introduced in the Convention? Should more scope be given to alternative dispute resolution mechanisms?

Data protection applicable law

24. Should a rule determining the applicable law to the data processing (in cases where different jurisdictions are involved) be considered?

Data Protection Authorities

25. How to guarantee their independence and ensure an international cooperation between national authorities?

26. Should their role and tasks be specified?

Transborder data flows

27. The aim of Convention 108 was to reconcile effective data protection with the free flow of information, regardless of frontiers. The Convention's principles have been further

developed in an additional protocol (CETS 181, 2001). In principle, an adequate level of protection must be ensured.

28. Do we need to reconsider the notion of “transborder data flows” altogether in the Internet age, where data instantaneously flows across borders? Would it be useful to establish internationally agreed minimum rules to ensure cross-border privacy? What could be their content?

29. Should there be different rules for the public and private sector? In particular as regards the private sector, should more use be made of binding corporate rules, possibly combined with rules on accountability of the final recipient to ensure respect for such rules?

Role of the consultative committee

30. Convention 108 established a committee to facilitate its application and, where necessary, to perfect it. Should the so far primarily consultative role of the committee be strengthened? If so, which functions should be developed further? Standard-setting, dispute resolution, monitoring functions?

Useful links

[Convention 108](#)

[Additional protocol](#)

[Modernisation of Convention 108](#)

[Data protection website of the Council of Europe](#)

And You?

Please send us your reactions, thoughts, comments on any (or all!) of the points raised above, or any related issue which you consider important to address in the context of tomorrow’s data protection.

Email us **before 10 March** at: data.protection@coe.int!