

International Data Protection Conference
Convention 108 as a global privacy standard?

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Convention 108 – still going strong after 30 years?

- This year marks the **30th anniversary** of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (“Convention 108”).
- The Convention’s declared purpose, as laid down in article 1, remains as valid today as it was 30 years ago: “to secure [...] for every individual ... his right to privacy.”
- Convention 108 was opened for signature in Strasbourg on 28 January 1981. Together with its 2001 protocol, it has become a **benchmark for more than 40 countries in Europe** and has **influenced legislation far beyond**.
- I would like to use the **SWOT analysis** to examine the **Strengths, Weaknesses, Opportunities** and **Threats** for convention 108 as a global standard.

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Strengths

- The Convention formulates a number of core **principles, drafted in a simple and technologically-neutral way.**
- The Convention's fundamental standards have **stood the test of time.** You find them reflected in the “**international standards**” adopted by the International Conference of Data Protection and Privacy Commissioners in Madrid (2009)¹ or in agreements that the European Union is currently concluding with Australia or the USA on the exchange of data for law enforcement purposes. They include purpose specification or limitation, data quality and security, individual access and rectification, independent oversight, transparency and redress.
- The Convention is a **legally binding** international treaty, providing legal certainty and predictability.
- It has a **cross-cutting scope of application.** Convention 108 protects against privacy intrusions **by public and private authorities**, both in the **off-line and on-line worlds.** There are no loopholes regarding defense, national security or law enforcement.
- Convention 108 provides a unique **framework for multilateral co-operation** through a conventional committee, where all states parties are working together on an equal footing. 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.

¹ Joint Proposal for a Draft of International Standards on the Protection of Privacy with regard to the processing of Personal Data (5 November 2009).

- The T-PD (Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data) is much more than a forum for exchange of information and good practices. It has important **standard-setting functions**. Most recently, it has prepared a recommendation on **profiling**, which was adopted by the Committee of Ministers of the Council of Europe. Indeed, the complexity of issues concerning the effective protection of personal data, caused in particular by the constant emergence of new technologies and practices, calls for innovative solutions and analysis. In such circumstances, soft law instruments, which allow for the further development of the Convention's core standards and lead to a certain degree of harmonisation of national practices, are preferable to treaty law, which is subject to cumbersome negotiation and ratification procedures.
- Finally, Convention 108 is **not a purely “European” instrument**. It is worth recalling the Convention’s point of departure, namely that, “certain rights of the individual may have to be protected vis-à-vis the free flow of information regardless of frontiers, the latter principle being enshrined in international and European instruments on human rights [...]”. It does not seem advisable, however, to rely solely on the European Human Rights Convention for data protection, *inter alia* because it is a ‘closed’ instrument, which does not permit the participation of non-European and non-member States.”²
- Indeed, representatives from **Australia, Canada, Japan and the United States of America** took part in the drafting work which was carried out in close collaboration with the OECD.

² Paragraph 19 of Convention 108’s explanatory report.

Weaknesses - too European and without teeth?

- I remember vividly a panel discussion at the 2008 International Conference of Data Protection and Privacy Commissioners in Strasbourg, with the following intervention: the Convention's principles may be sound, but who is checking that states parties live up to their commitments?
- It was argued that the Convention **lacks a strong follow-up mechanism**. T-PD is a "consultative committee", with limited resources and without real enforcement powers.
- Moreover, is Convention 108 not **too European to serve as a global standard**? None of the non-European states that participated in its drafting have actually signed up it.
- Both criticisms raise **serious points that we must address** in order to be credible when promoting Convention 108 worldwide.
- To start with the **first point** – absence of signatories outside Europe. The situation may change very soon. **Uruguay** has requested accession and may become a party later this year. We are confident that it will only be the first country in a long list.
- But, more importantly, **is it really surprising** that so far no non-European countries, in particular those having participated in its elaboration, have signed up?
- The Council of Europe never really promoted the Convention outside Europe. It was only in December 2009 that the **EU's Stockholm Programme** explicitly called for the promotion of Convention 108 worldwide.³
- 30 years ago we lived in a **different world**, much less globalised and interconnected. 30 years ago, an American president would not have said: "This world – cyberspace – is a world that we depend on every single

³ "... [I]t should promote the application of the principles set out in relevant EU instruments on data protection and the 1981 Council of Europe Convention on data protection as well as promoting accession to that convention", Extract from item 2.5 of the Stockholm Programme.

day... [it] has made us more interconnected than at any time in human history.”⁴

- Today, over **2 billion people**⁵ **worldwide** regularly use the Internet. People go online to obtain information, communicate with each other and express themselves, to do business and to participate in social and political life.
- Citizens have **legitimate expectations** that their personal data is not abused and **governments** have a **responsibility** to protect their citizens' privacy in an increasingly borderless world.
- That's why **Ministers of Justice** from 47 Council of Europe member states at their conference in Istanbul in November 2010 called for the **modernisation of Convention 108**. They encouraged states from all over the world, NGOs and the private sector to actively participate in this process.
- The modernisation pursues two **main objectives**:
 - to deal with **challenges for privacy resulting from the use of new ICTs**. In their Istanbul resolution, Ministers of Justice echoed concerns voiced by civil society and highest jurisdictions in a number of member states when they noted, “that modern information and communication technologies enable observation, storage and analysis of most day-to-day human activities, more easily, rapidly and invisibly than ever before, thereby potentially creating a feeling of being permanently watched, which may impair the free exercise of human rights and fundamental freedoms.”
 - **strengthen the Convention's follow-up mechanism**. The effective enforcement of data protection standards is crucial for their credibility. The committee's functions in this regard could be strengthened, building on the experience and working in association

⁴ President Barack Obama, 29 May 2009.

⁵ www.internetworldstats.com

with already existing initiatives such as the “global privacy enforcement network”.

- If we succeed in modernising and strengthening Convention 108 with the **active participation of countries and organisations all over the world**, the Convention will eventually fulfil the vision of its drafters and become a truly international standard for data protection.

Opportunities: the modernisation process – where do we stand, where are we going?

- The **revision process is in full swing**.
- In **March 2011**, the Council of Europe's Committee of Ministers fully endorsed the conclusions adopted by the Ministers of Justice. This will be a **priority for the Organisation** during the next biennium 2012-2013.
- The **Parliamentary Assembly** will adopt a report on "**Protection of privacy and personal data on the Internet and online media**" at its October plenary session, in which parliamentary delegations from OECD member countries will also participate.
- 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** from all sectors concerned: governments, data protection authorities, NGOs, private sector, professional associations, including many non-European contributors, mainly from the Americas and Africa.
- T-PD will have a **first discussion of the results at its forthcoming meeting**, in 10 days time, with a view to defining options for the revision of Convention 108. Participation of Mexico and US is already confirmed.
- Consultations on the future of Convention 108 will not only take place in Europe, but also in other regions of the world:
 - o in September at the **Internet Governance Forum in Nairobi**;
 - o at the **33rd International Conference of Data Protection and Privacy Commissioners in Mexico** (31 October- 4 November);

- o At the margins of the conference, on 31 October, a **consultation of Latin American countries** will be organised through the **Iberoamerican Network on Data Protection**.
- From 29 November to 2 December 2011, the T-PD plenary meeting is expected to adopt a **report on the modernisation** already containing as far as possible draft provisions to be included in a revised Convention 108.
- The report will be used for **multi-stakeholder consultations** with private sector and civil society, notably in the context of the 2012 Data Protection Day, with a central event in Brussels that we would like to organise together with the European Commission.
- The **drafting of the legal instruments** required for the modernisation will take place **in 2012**, with the participation not only of the 47 Council of Europe member states and the EU, but also as many other interested countries and organisations as possible.
- Finally, I should mention the last element of the SWOT analysis: **Threats**.
- We are fully aware that setting global standards will not be an easy task. Privacy in the sense of the **right to be left alone** may not be understood in the same way by individuals living in places as diverse as Dakar, Mexico, Oslo, Washington or Tokyo.
- However, our efforts will concentrate on a more limited and yet essential dimension of privacy, the **right to the protection of personal data**. Everybody, regardless of nationality or residence, has a right to decide how their personal information is collected, used and distributed. This right is the foundation of other freedoms and liberties that define our open societies, in particular freedom of expression.
- Another challenge is the **sheer speed of technological development** which may make our efforts look like the famous **race between a turtle and a rabbit**, with the regulators always lagging behind.

- But do we have a choice? Addressing data protection issues with a view to ensuring a trusted Internet-based environment is both a **social and an economic imperative**.
- **Global online transactions** currently total an estimated **\$10 trillion annually**. It will not pass to the predicted \$24 trillion by 2020 unless there is **confidence not only in security but also privacy**.
- Instead of the current **patchwork of fragmented and unpredictable rules**, which are sometimes enforced unilaterally and sometimes simply ignored, we need agreement on some basic norms facilitating the free flow of information and data across borders, while effectively protecting human rights.
- **Transborder data flows** will certainly be an issue that we shall have to re-examine in the context of the revision process. At our June meeting, we shall hear the views of a leading expert, the former UK Commissioner Richard Thomas, on this subject.
- Only adherence to **internationally agreed norms** brings **legal certainty** and **predictability** to state conduct. Self-regulation and awareness-raising are important, but simply not enough. As the European Court of Human Rights emphasised in many of its judgments, where fundamental values and essential aspects of private life are at stake, state authorities have a duty to establish an efficient regulatory and enforcement framework of protection.

Conclusions

- Convention 108's assets are its **legally binding force** and its **technologically neutral, human rights and principle-based approach**. After 30 years, time has come to revisit the Convention's principles, to test their relevance against the new realities of the on-line world and, where necessary, to complement or even amend them.

- Without wanting to anticipate the conclusions of our experts and expressing a purely personal view, I would not expect radical changes. The results of the consultation process clearly indicate, with governments, data protection authorities, private sector, professional associations and civil society all concurring, that the essential features of Convention 108 should be retained. As a Haitian proverb says, a **new broom sweeps clean, but the old brush knows all the corners**.
- The Convention's modernisation process corresponds to the **conclusions of the recent G8 summit in Deauville**, which encouraged the development of common approaches regarding privacy.
- We are well aware that we are not alone in pursuing this exercise. We can count on close collaboration with **our partners**, in particular in the **European Union and OECD**.
- The **European Union** will soon propose new legislation for its 27 member states. We expect them to be a driving force in negotiations leading to the revision of Convention 108. **Consistency with EU law** is another message that clearly emerges from the consultations.
- But **Europe alone is obviously too small** to address data protection on a global scale. A thorough and balanced instrument can only emerge if we succeed in **bringing closer together the various normative frameworks** that have developed in different regions of the world, being prepared to learn from each others' experiences.
- At the Council of Europe, we are convinced that a regulatory framework for privacy can only be effective if it is **human rights based**, facilitates **transparency**, promotes **co-operation** and strengthens **multi-stakeholder governance**.
- Let me conclude by calling on all interested parties to **actively participate in the modernisation process of Convention 108**, which we want to be **as international and inclusive as possible**.