



Council of Europe
Conseil de l'Europe

	IX SEMINÁRIO DE PROTEÇÃO À PRIVACIDADE E AOS DADOS PESSOAIS	
	SÃO PAULO 07 - 08 AGOSTO 2018	

Data protection Convention 108+

Sophie Kwasny
Sao Paulo, 7 August 2018

Council of Europe
Conseil de l'Europe

Council of Europe ≠ EU



Do not get confused

Council of Europe

An international organisation in Strasbourg which comprises 47 countries of Europe. It was set up to promote democracy and protect human rights and the rule of law in Europe.



European Council

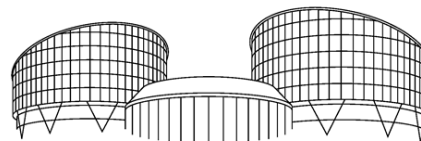
Institution of the European Union, consisting of the heads of state or government from the member states together with the President of the European Commission, for the purpose of planning Union policy.

European Union (EU)

The EU currently has 28 members that have delegated some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at European level. No country has ever joined the EU without first belonging to the Council of Europe.



Council of Europe (Strasbourg - France)



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Convention 108 (28 January 1981)

UNIQUE (no other international legally binding instrument in the field)

OPEN (any country in the world with a complying data protection legislation can request invitation to accede)

INFLUENTIAL (its principles = data protection principles taken up in all regions of the world)

Convention 108 today*

53 countries bound by the Convention

**= 47 + Cabo Verde, Mexico, Mauritius,
Senegal, Tunisia, Uruguay**

pending: Argentina, Burkina-Faso, Morocco

+ observers (Australia, Canada, Chile,
Ghana, Indonesia, Israel, Japan, South
Korea, Philippines, USA, New Zealand)

= NEARLY 70 COUNTRIES ... BRAZIL ?

Convention 108 - Modernisation

- reinforce the individuals' protection
 - strengthen the implementation
-
- **promote** as a universal standard
 - **preserve** general, simple, flexible and pragmatic character
 - **ensure coherence and even convergence** with other relevant legal frameworks

Convention 108 - Modernisation

January 2011 18 May 2018



Convention 108+

“protect every individual, whatever his or her nationality or residence with regard to the processing of their personal data, thereby contributing to respect for his or her human rights and fundamental freedoms, and in particular their right to privacy”

(article 1)

Convention 108+

- Article 3 – scope

"data processing ... in the public and private sectors...

... shall not apply to data processing carried out by an individual in the course of purely personal or household activities."

Convention 108+

- Article 4 – Duties of the Parties

“ 3. Each Party undertakes:

- a. to allow the Convention Committee to evaluate the effectiveness of the measures it has taken in its law to give effect to the provisions of this Convention; and
- b. to contribute actively to this evaluation process.”

Convention 108+

- Article 5 - legitimacy of data processing and quality of data

“... shall be **proportionate** in relation to the legitimate purpose pursued and reflect at all stages of the processing a **fair balance** between all interests concerned and the rights and freedoms at stake.”



Convention 108+

- Article 5 - legitimacy of data processing and quality of data

“... on the basis of the free, specific, informed and unambiguous **consent** of the data subject or of some **other legitimate basis laid down by law**”.

Convention 108+

Sensitive data (article 6)

genetic data, biometric data uniquely identifying a person

“for the information they reveal” – only allowed where appropriate safeguards are enshrined in law, complementing those of the Convention.

+ Ethnic origin, trade-union membership

Convention 108+

Data **Security** (article 7)

obligation to notify, without delay, at least the competent supervisory authority, of those data breaches which may seriously interfere with the rights and fundamental freedoms of data subjects.

Convention 108+

Transparency (article 8)

obligation for the controller to provide a detailed list of information, as well as any necessary additional information in order to ensure fair and transparent processing

Convention 108+

Rights of the data subject (article 9)

“... not to be subject to a decision significantly affecting him or her based solely on an automated processing of data without having his or her views taken into consideration”

“...to obtain, on request, knowledge of the reasoning underlying data processing where the results of such processing are applied to him or her”

Convention 108+

Additional obligations (article 10)

- “... take all appropriate measures to comply with the obligations of this Convention and be able to demonstrate (subject to exceptions)...compliance ”
- “examine the likely impact ... prior to the commencement ... and design the processing to prevent or minimise the risk”.
- “ implement technical and organisational measures at all stages of the processing.
- Adapted, according to ...

Convention 108+

Exception: provided for by law, respects the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society for:

the protection of national security, defence, public safety, important economic and financial interests of the State, the impartiality and independence of the judiciary or the prevention, investigation and prosecution of criminal offences and the execution of criminal penalties, and other essential objectives of general public interest;

the protection of the data subject or the rights and fundamental freedoms of others, notably freedom of expression.

Convention 108+

Exceptions and restrictions (Article 11.3)

Processing activities for national security and defence purposes

...each Party may provide, by law and only to the extent that it constitutes a necessary and proportionate measure in a democratic society to fulfil such aim, exceptions to:

- the review mechanism (Article 4.3)
- DPAs' powers with regard to transborder data flows (Article 14.5 and 14.6)
- DPAs' powers (Article 15.2 a,b,c,d)

Convention 108+

Exceptions and restrictions (Article 11.3)
processing activities for national security and
defence purposes

“
...

This is without prejudice to the requirement
that processing activities for national security
and defence purposes are subject to
independent and effective review and
supervision.”

Convention 108+

Transborder dataflows (Article 14.1)

Limitation to free flow between Parties where

- real and serious risk that the transfer would lead to circumventing the provisions of the Convention
- Party bound by harmonised rules of protection shared by States belonging to a regional international organisation.

Convention 108+

Transborder dataflows (article 14.3 and 14.4)

- Means to secure and appropriate level of protection (*ad hoc* or approved standardised safeguards provided by legally binding instruments)

- Possibilities to transfer where consent, specific interests of the data subject, prevailing legitimate interests provided for by law and are necessary

Convention 108+

Supervisory authorities (articles 15 & 17)

“shall co-operate with one another to the extent necessary for the performance of their duties and exercise of their powers, in particular by:

co-ordinating their investigations or interventions, or conducting joint actions;”

Convention 108+

Convention Committee (article 23)

“e. shall prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of personal data protection... ;

h. shall review the implementation of this Convention by the Parties and recommend measures to take where a Party is not in compliance with this Convention;”

Convention 108 +

Evaluation and follow-up mechanism

Objective: *ensure the credibility of Convention 108+ and establish a genuine dynamic of harmonised protection, guaranteeing that data flows occur among Parties offering an appropriate level of protection*

Transparent, effective and impartial

(independent experts / questionnaire / visits)

Convention 108 and the GDPR

Recital 105

the Commission should take account of obligations arising from the third country's [...] participation in multilateral or regional systems [...]. In particular, the third country's accession to **Convention 108** should be taken into account.



Handbook on European Data Protection Law



Thank you for your attention

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