Accession to Convention 108: Benefits & Commitments

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Getting the balance right

1. Context: Global growth of data privacy laws
2. Benefits of CoE 108 accession
   – Countries, companies, and individuals
3. Countries’ commitments in accession
4. Convention bodies’ obligations
5. Enough individuals rights?
Data privacy laws: Countries by decade

110 jurisdictions with data privacy laws by June 2016
Context of ‘globalisation’: Expansion of data privacy laws (1973-2016)

1. **110 countries now have a data privacy law** (June 2016)
2. Since 2015, **majority** (56/110) are from **outside Europe**.
3. Most outside Europe have **data export restrictions**
4. **Standards** adopted by Acts outside Europe are (on average) **close to the CoE 108 standard**
   - **Average 7/10** higher ‘European standards’
   - Many stronger “2nd generation” **revised laws**
5. **Prospective CoE 108 accessions = ??** (6/56 have applied)
6. **Global spread of data privacy laws will continue**
   - At least 24 more countries currently have **official Bills**
   - Some have e-commerce/consumer privacy laws (China, Indonesia)
24 Bills for new data privacy Acts

1. Antigua & Barbuda
2. Barbados
3. Bermuda
4. Brazil
5. Cayman Islands
6. Chad
7. Dominica
8. Ecuador
9. Ethiopia
10. Falkland Islands
11. Grenada
12. Honduras
13. Indonesia
14. Jamaica
15. Kenya
16. Mauritania
17. Niger
18. Nigeria
19. Qatar
20. Saint Kitts and Nevis
21. Swaziland
22. Tanzania
23. Thailand (private sector)
24. Uganda
10 Benefits of CoE 108 accession

1. CoE 108 has **realistic prospects** of ‘globalisation’
   – CoE 108 already has 48 parties (soon 53): nearly 50% of all countries with data privacy laws

2. There is **no realistic alternative**
   – No other binding global privacy agreements exist
   – No new UN or other treaty is likely
   – ‘Interoperability’ is illusory and usually illegitimate

3. A **voluntary acceptance** of reciprocal obligations
   – Treaties are mutual, not unilateral

4. The **only reciprocal guarantee** of data exports
   – Applies to 28 EU countries (stronger than ‘adequacy’)
   – Applies to another 19 European countries
   – Will apply increasingly to non-European countries
Benefits of accession (cont)

5. Only **moderate** privacy standards are required
   – CoE 108 only requires an approximate EU ‘adequacy’
   – Existing CoE 108 standards are what countries outside Europe have been enacting ‘bottom up’
   – half way between the 1980s standards and the Directive
   – ‘Modernised’ 108 may be close to GDPR ‘adequacy’

6. ‘**Minimum standards**’ – higher local standards OK

7. Parties need not decide which other countries have ‘adequate’/sufficient laws
   – 108 party list can replace a **national ‘Whitelist’**
Benefits of accession (cont)

8. Strong assistance for an EU adequacy finding
   – GDPR recital 105: ‘In particular ... taken into account’

9. Benefits **to businesses** (controllers)
   – Reciprocal 108 obligations means fewer problems with both data exports & imports
   – Standard conditions for exports to other countries

10. Benefits **to individuals** (data subjects)
    – Enforceable global-standard privacy laws apply wherever their personal data is exported.
    – DPAs are required to provide assistance wherever their data goes
Countries’ commitments in accession

1. Must implement a law with global-standard principles & enforcement
2. Must permit data exports to other parties, or where Convention standards are met
3. Must not permit data exports beyond that

These commitments by countries are only justifiable if the Convention bodies ensure that

a. new accessions meet and enforce these standards;
   b. all parties ensure continuing enforcement.
Convention bodies’ obligations to acceding countries & their citizens

• *The national commitments are serious, so the enforcement of the treaty must be equally so.*
  – The ‘Convention bodies’ (Consultative/Convention Committee; Secretariat; Committee of Ministers) have heavy responsibilities.

• Current 108 does not discharge these responsibilities
  – only ‘law on the books’ is checked; no follow-up
  – Committee of Ministers needs to permit broader checks

• Modernised 108 will allow assessment of both
  – strength of enforcement at accession, and continuing compliance (if resources permit)
Individual rights and accession

• 108 requires rights to enforce law domestically
• But no international mechanism for individuals to enforce national compliance with 108
  – Other Parties can only use diplomatic means
  – Europeans can indirectly use ECHR A8
• Cooperation with UN mechanisms needed
  – ICCPR Optional Protocol allows individual complaints
  – Should CoE 108 accessions also require ICCPR & Optional Protocol ratification? (a bit like ECHR A8)
References

• Greenleaf, G 'Global data privacy laws 2015: 109 countries, with European laws now in a minority' (2015) 133 Privacy Laws & Business International Report, 14-17

