

Exchange of views on Convention 108+

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Your Excellency, Ambassador Giacomelli, Honorable Deputy Ministers, dear Alessandra and colleagues from the T-PD, dear speakers and other participants to this conference,

Thank you very much for the invitation to join you on this important day.

Today's event and the large group of countries and participants that it brings together, reflects well the relevance that data protection has acquired over the years – a growing consciousness as to the important role of this fundamental right for our societies, not only in the economic context, but also in our daily lives.

Looking back to the past, we can only marvel at the extent of the revolution in thought and attitude that Convention 108 has brought about in this area since its inception in the 1980s, at a time when discussions on the protection of personal data were confined mostly to academic or other specialist circles.

Observing this development from today's perspective, we can say with confidence that the core principles enshrined in Convention 108 have stood the test of time and proved their value by having served as the basis for data protection laws around the world.

So there is much reason for celebration, in this 41st year of the Convention. But there is no time for complacency: much has changed since 1981 and new technological and economic developments have brought new risks for privacy.

Which brings me to the modernisation of the Convention. Convention 108+ has been the result of a great common effort, and a long series of discussions from the start of the project back in 2011. These discussions, between countries from many parts of the world, and the need to bridge different legal traditions and perspectives, mean that the Convention is not a European instrument, but a truly global one. Sometimes, the negotiations were difficult – I certainly recall some heated exchanges – but the outcome was worth all the energy spent.

From the perspective of the European Union, this instrument represents a huge step forward towards global convergence, and thus for a better and more effective protection of our citizens' data. This is why promoting the Convention is a core part of our – the European Commission's – outreach with international partners.

Commissioner Reynders in his opening speech this morning referred to the fact that we are witnessing growing convergence of data protection regimes at national, regional and global level. Beyond the numerous new or modernised national laws that have recently been passed, or are in preparation, very relevant developments are also taking place at regional and global levels.

In Latin America, the Ibero-American Data Protection Network is emerging as a major regional player, thanks to the 2017 Ibero-American Data Protection Standards and their further development through practical guidance and tools. This includes for example the recent approval of model data protection contracts for international data transfers.

In Asia, ASEAN is becoming an important driver for privacy, as is the APPA, the forum of Asian Pacific Privacy Authorities. In rapid succession, we have seen the development of the ASEAN Framework on Personal Data Protection, the ASEAN Framework on Digital Data Governance and, most recently, the ASEAN Cross Border Data Flows Mechanism and model contract clauses (or MCCs). All of this helps to contribute to greater convergence, both within ASEAN and between ASEAN and other parts of the world. Outside ASEAN, countries like Japan and Korea (both of which went through successful adequacy talks with the European Union) have led the way in the development of modern data protection regimes – and others, like India, Indonesia, Sri Lanka, Taiwan or Thailand, have followed or are in the process of doing so. While there are differences in the details, they all converge on the core principles of a modern data protection law.

In Africa, the African Convention on Cybersecurity and Personal Data Protection (“the Malabo Convention”) provides another example of a regional regime converging towards core data protection principles. There are also promising developments at sub-regional level, for instance in ECOWAS.

Finally, in the case of the European Union, the new legislative framework on data protection continues to be further developed through the guidelines of our data protection authorities and important case law from our two highest courts in Europe, the Court of Justice and the European Court of Human Rights.

It is important to note the connections and synergies between some of these initiatives. For example, it is increasingly common for national laws that provide for adequacy decisions as a ground for data transfers to recognise as equivalent similar decisions adopted by other countries. This creates a network effect that contributes to multiplying the impact of adequacy decisions at global level. Likewise, certain countries recognise model contract clauses

developed in other jurisdictions, and some regional organisations have started to cooperate to find common ground and bridge remaining differences between their respective model contracts.

We can also see increasing efforts by supervisory authorities to cooperate across borders, both in the shaping of standards and in terms of enforcement. In a world where data travels easily between jurisdictions, this type of cooperation is essential, and perhaps the only way to tackle effectively challenges of a cross-border nature.

At the same time, we also see some backsliding. This includes, for example, increased State surveillance in certain parts of the world, or initiatives taken by some countries to excessively restrict data flows or even require data localisation, at the risk of fragmenting the Internet.

As much as these are worrying developments, they underscore the value and importance of convergence around modern data protection rules. While access by public authorities often takes place for perfectly legitimate reasons (such as law enforcement or national security), such access must be “framed” by the proportionality principle and come with enforceable rights and safeguards – which a modern data protection law provides for. Also, where other countries can be trusted to ensure a high level of data protection, there is generally no good reason to limit data flows.

In this regard, the modernised Convention has the potential to become the global reference point that defines the core elements of a modern data protection regime.

However, the importance of the Convention is not limited to being such a common benchmark. Through the Convention Committee it provides a forum for the exchange of best practices and the shaping of global standards, often in a very practical manner. And, through

the network of supervisory authorities that will be created by the modernised Convention, it offers an essential tool for enforcement cooperation.

The fact that the Convention is applicable in the areas of law enforcement and national security is also a very important element in the current context, in which international police and judicial cooperation is often playing a decisive role in fighting organized crime and terrorism.

A telling example of these efforts is the Second Additional Protocol to the Budapest Convention, which includes a full set of data protection safeguards inspired by Convention 108+. Besides that, the new Protocol will allow those Parties that are mutually bound by the modernised Convention to use it as the regulatory framework for their exchanges under the Protocol.

In the EU, we see how government access to data is increasingly subject to legal and judicial scrutiny, and how civil society reacts with indignation when these practices threaten privacy and data protection rights. The same is true elsewhere, for instance in India where the Puttaswamy judgment by the Indian Supreme Court recently defined new standards for government access.

There are numerous initiatives to tackle these issues, at various levels, including the work of the UN Special Rapporteur for Privacy, the Global Privacy Assembly or the OECD. Last but certainly not least, there is an important role for the Convention Committee to play through its ongoing work on a guidance document for Article 11 of the modernised Convention.

Which brings me to an essential point: it is time for the modernised Convention to enter into force now. While it is true that the ratification threshold is high, this alone does not explain why we

are not there yet. In this regard, I would like to recall the clear and strong message from the Committee of Ministers when adopting the Amending Protocol in 2018. In their decision, Ministers “*stressed the importance of a speedy accession to the Protocol by the maximum number of the current States Parties*”, and “*urged member States and other Parties to the Convention to take without delay the necessary measures to allow the entry into force of the Protocol within three years from its opening for signature...*”

There is hope, though: 44 parties, and thus 6 more than the threshold of 38 parties, have already signed the Amending Protocol. This suggests we are headed in the right direction, although ensuring the necessary number of ratifications (currently at 16 only) will still require a real effort from all sides. This applies of course also to our EU Member States, 15 of which still have to ratify the Protocol. On the positive side, let me take the occasion to commend Armenia for its ratification this week – bravo!

And beyond entry into force? Beyond that comes the ambition to grow the Convention, to convince more countries to join this global family.

We see progress in this respect, with interest especially from Africa and Latin America. However, it is equally true that so far no Asian country has applied for full membership. As Commission, we would like to invite all those countries that currently have Observer status – some are certainly present with us today – to join forces with those that are already Parties to the Convention.

Equally, there are a number of countries that have adopted or are about to adopt robust data protection laws, in different parts of the world, which could benefit from the Convention – at a policy level through the exchange with other Parties, or in terms of regulatory and enforcement cooperation.

With that in mind, it is important to develop all the elements that will allow the effective implementation of the Convention, including a reliable evaluation instrument that ensures the Convention is more than “law on the books”, but also applied (and complied with) in practice.

With this, I would like to close. On behalf of the European Commission, I look forward to working together with all of you in the development and enhancement of this fundamental instrument for data protection.

Thank you!