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**CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION
OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING
OF PERSONAL DATA**

CONVENTION 108

**Draft Update of Council of Europe's contractual clauses
in the context of transborder data flows**

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I. Introduction

This paper addresses the need to update the contractual clauses in the context of transborder data flows ("CoE SCCs") based on the modernised Convention 108 (Protocol CETS No 223 amending the Convention for the protection of individuals with regard to the processing of personal data).

II. Background

In 1992 the CoE developed a Model Contract and then in 2002 a Guide, both based on the Convention for the Protection of Individuals regarding Automatic Processing of Personal Data (ETS N°108) ("Convention 108").

Nearly three decades have passed since those legal documents were created. There are new developments in the international legal arena and it is necessary to review and update the 1992 CoE SCCs and the 2002 Guide accordingly. There are past developments such as the adoption of the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows that have already been ratified by many state Parties to Convention 108 that entered into force in 2004, without the model contract being updated; and recent developments in the field that also need to be taken into account. The EU has developed and then perfected its SCCs during the last two decades. Those models have evolved due to industry necessities and also have been adapted to new regulations (e.g. the GDPR and the modernised Convention 108).

The international data transfer regime is today more complex and more widely used while data protection regimes have evolved, and new tools have been developed to facilitate international data transfers.

CoE updated the Convention 108 with Protocol CETS N°223 the Convention for the Protection of Individuals regarding Automatic Processing of Personal Data (ETS N°108).

In addition several other jurisdictions are working on new SCCs. The Iberoamerican Network of Data Protection has released two draft SCCs and a Guide to implement them in November 2021. The UK has published draft SCCs post Brexit. New Zealand also has a new set of SCC and ASEAN adopted Model Contractual Clauses in January 2021.

III. Benefit of the standard contractual clauses

The advantages of updating the SCC are several:
-   The objective of new SCCs is to provide companies with a "ready-made" tool that is "up to date" and that takes into account the further developments of the Convention 108+.
-   The Convention 108 and the Convention 108+ includes state Parties from 3 continents already. Thus the new SCC model may serve as a "bridge" for differing international legal regimes.
-   The new SCCs can help to overcome limitations, while not lowering the level foreseen by the modernised Convention, to data transfers that stem from existing differences in the level of protection between countries that are not members of Convention 108+.
-   The SCCs build convergence at a contractual level, by creating a self-standing data protection regime.

- Over time SCCs will also contribute to convergence overall, as they set common standards that companies will get familiar with; this makes it easier in the future to align data protection rules in domestic laws of those countries since companies have already adopted those principles in their agreements.
- SCCs serves to ensure transparency, legal certainty and thus predictability because (i) they ensure the continuity of an appropriate level protection when data travels abroad, and do so in a way that provides legal certainty by extending the principles of Convention 108+, (ii) they help to build trust, which in turn gives companies using such clauses a competitive advantage.
- SCCs serve to protect the "weaker" party in international transfers: the data subject, while at the same time facilitating free flow of data.

IV. Possible changes

There are several issues to address in the new CoE SCCs and also to be included in an explanatory Guide in light of the principles of Convention 108+. Below a sample list of possible additions:

Different models: The European Commission in their last Decision has established four (4) different modules[1]:. The 1992 CoE SCC were only limited for controller to controllers transfers and does not cover transfers from data controllers to data processors. Nowadays this is a very common scenario and providing more flexibility would make the SCC more useful and usable. This modular approach provides broad coverage of different transfer scenarios and makes the SCC more attractive to companies with domicile in Members of Convention 108+.

Docking Clause: this clause allows other parties to join an SCC by adhering to a previous agreement.

Scope of the SCC: define the coverage of the SCCs based on the territorial scope of the Convention 108+.

Optional clauses: define what clauses are optional and what clauses are mandatory in order to provide legal certainty to the users of the SCCs.

Annexes to the SCC: should contain additional information like supervisory authority, a model form to join the SCC as a party, list of technical measures to be implemented and list of sub processors.

Third party beneficiary rights: to provide enforceable rights for data subjects under the domestic law.

Right and Duties of the parties: Include provisions related to the purpose limitation principle, transparency, data minimization, storage limitation, security, confidentiality, onward transfers, and compliance. The new SCC should specifically take into account the following articles of Convention 108+: (i) Article 5. Legitimacy of data processing and quality of data; (ii) Article 6. Special Categories of data; (iii) Article 7. Data Security and (iv) Article 8. Transparency of processing.

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[1] (i) module one: transfer from controller to controller, (ii) module two: transfer from controller to processor, (iii) module three: transfer from processor to processor and (iv) module four: transfer from processor to controller

<u>Data Subjects Rights</u>: provide for the rights available in articles 9

Accountability: Incorporate requirements stemming from article 10 of Convention 108+.

<u>Use of Sub processors</u>: the use of sub processors is very common nowadays and this should be an option available in the SCCs provided that all the safeguards are available to protect the personal data and provide the data subject for the protection of its rights.

<u>Redress</u>: detail how the data subject can exercise its rights (taking into account various specificities of domestic legal orders and traditions) and how the parties of the SCC have a duty to provide adequate information to the data subject for this purpose.

<u>Liability of the parties</u>: Provide a specific clause detailing liability of the parties of the SCC vis a vis each other and also with respect to the data subject. Article 10 of Convention 108+.

<u>Local Laws and practices affecting compliance with the clauses</u>: article 11 of the Convention 108+, but also the Chapter V: Co-operation and mutual assistance.

<u>Obligation of the Data Importer in case of access by public authorities</u>: As pointed out by Alessandra Pierucci, Chair of the Committee of Convention 108 And Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe in the joint statement "Better protecting individuals in the context of international data flows: the need for democratic and effective oversight of intelligence services", this is an important issue that needs to be provided in the new SCC. Alternatively, the clause can also contain some safeguards detailed in the EDPS paper "[Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data](#)". Some of these measures can also be detailed in an annex related to data security measures.

<u>Non-compliance with the clauses and termination</u>: Under general principles of contract law a party has the right to terminate the agreement in case of non compliance of the other party. In SCC, since the purpose is to protect individuals and their personal data in an international transfer, such a clause must be included.

<u>ADR clause</u>: The 1992 SCC version (drafted with collaboration of the ICC) contained an arbitration clause. This is very important to be able to take into account ADR methods which may expedite the solution of controversies. The new SCC may have as an alternative mediation + arbitration for B2B conflicts and leave the data subject free to file an administrative or a court complaint to protect its rights in addition to the recourse of ADR methods.

V. Documents

- COE, Model Contractual to ensure equivalent protection in the context of transborder data flows with explanatory report (1992).
- COE, Guide to the preparation of contractual clauses governing data protection during the transfer of personal data to third parties not bound by an adequate level of data protection (2002).
- COE Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows: [additional protocol 181](#)

- COE, Protocol CETS N°223 the Convention for the Protection of Individuals regarding Automatic Processing of Personal Data (ETS N°108) (Convention 108+).
- EU, Commission Implementing Decision on Standard Contractual Clauses for the Transfer of Personal Data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council (2021).
- EDPS, "Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data".
- Switzerland, Federal Data Protection Commissioner, Transborder data flows.
- RIPD, Draft SCC for Latin America (2021).
- ASEAN, ASEAN Model Contractual Clauses for Cross Border Data Flows.
- UK, ICO, Standard Contractual Clauses (SCCs) after the transition period ends.
- New Zealand Privacy Commissioner, Sending information overseas.
- Joint statement by Alessandra Pierucci, Chair of the Committee of Convention 108 and Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe "Better protecting individuals in the context of international data flows: the need for democratic and effective oversight of intelligence services"https://rm.coe.int/statement-schrems-ii-final-002-/16809f79cb