



Council of Europe  
Conseil de l'Europe

# Council of Europe instruments and policies concerning the right to privacy and to personal data protection

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# Convention 108

The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)

- is the only legally binding multilateral instrument in the area of the protection of privacy and personal data
- has been open for signature in 1981
- has currently 55 parties and 36 observers, the Conventional committee's work expands on all continents
- provides for a principle-based framework for the protection of individuals' privacy and personal data and a viable forum for cooperation to supervisory authorities.
- its Conventional committee with its 70-80 members and observers will continue to offer a unique forum for discussions and deliberations concerning the rights to privacy and data protection at multilateral level and in the meantime a viable legal instrument for the convergence towards a high set of standards globally.
- it has recently been modernised by the Protocol CETS No. 223 (Convention 108+)
- it will ensure, upon the entry into force of the amending Protocol, hopefully in the coming years that
  - the flow of data is facilitated, including to and from the European Union
  - the respect for human dignity in the digital age is secured

# Convention 108

Parties to Convention 108 have already reaffirmed several times that Convention 108+:

- Based on its personal and material scope, its new concepts (such as accountability, PbDg, PbDt, P/HRIA, etc.) and commonly acceptable provisions, it can be applicable to all data processing involving personal data even if carried out by new data processing techniques and technologies (such as big data analytics, artificial intelligence, machine learning, profiling, facial recognition, etc.)
- Albeit not greatly detailed on every instance – on purpose to allow different legal systems and jurisdiction to adhere to it – its provisions could give enough reassurance to a country and to individuals to address the concerns they might have in relation to the application of new data processing techniques and technologies in both public and private sector.
- Building on the effective and efficient implementation of its provisions underpinned by new powers and functions of its Conventional Committee (Article 4, paragraph 3 and in Article 23, litterae e, f and h) and on the prospect that other UN Member States also wishes to accede to it, Convention 108+ has the promise of becoming a global benchmark in the area of the protection of privacy and personal data in the digital age.

# Convention 108

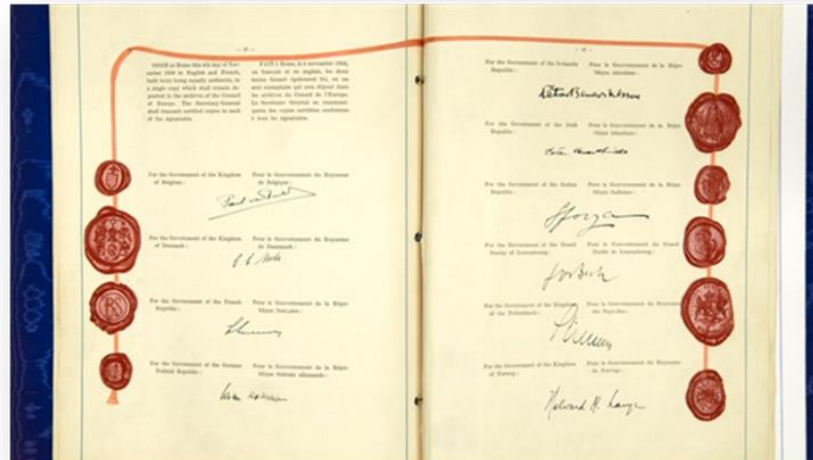
- **A common response to collective challenges**
- A “passerelle” between EU and other part of the world
  - Transfer of data
  - Cooperation between authorities
- 20 recommendations, 1 additional protocol and 1 amending protocol – lots of international negotiations and consensus
- Soft law measures equally important for implementing principle-based standards in practice (in difficult areas such as political campaigns, profiling, biometric data/facial recognition, COVID19 related data processing, education, law enforcement, public security, etc.)
- Convention 108+ has a high level of convergence with EU instruments (GDPR, police Directive)
- Possibility for IGOs to accede, including for the EU
- In the area of public security, it has balanced rules and has the potential of ensuring and international cooperation in the matter
- Its committee gathers 75-80 countries, authorities from around the world
- An essential instrument for guaranteeing the independence of the supervisory authority (see Tunisian example)
- Remarkable standard-setting capabilities (see Argentinian example)
- For non-EU countries it can play an important role in obtaining and/or maintaining adequacy decisions from the EU (which means free flow of data to the EU market)
- Global recognition of the level of protection a country can afford to personal data and to the right to privacy
- Facilitator of international data flows, exchanges (including in development programmes and global, regional endeavours such as UN SDGs)



# ECHR

## Right to private life

### Data protection





## Article 8 – Right to private life

- 1. Everyone has the **right** to respect for his private and family life, his home and his correspondence.
- 2. There shall be no **interference** by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## Data protection : an enabling right

### ECHR

Article 1 – Obligation to respect human rights

Article 8 – Right to private life

Article 9 – Freedom of thought, conscience  
and religion

Article 10 – Freedom of expression

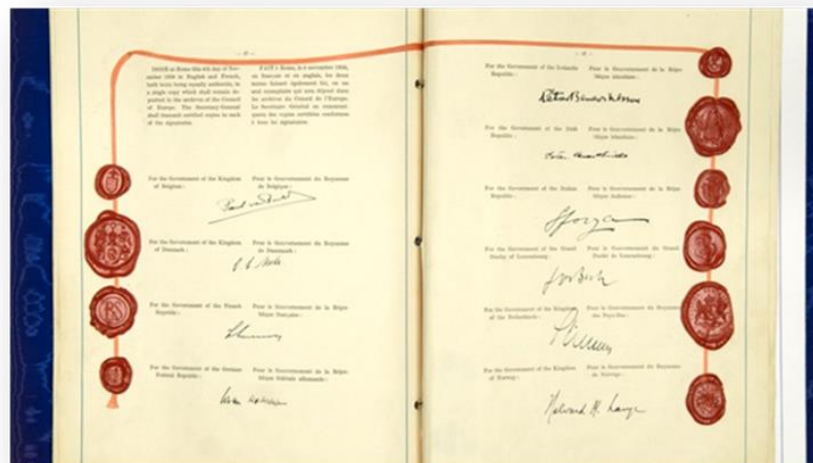
Article 11 – Freedom of assembly and  
association



# Protecting data ? Protecting individuals ?

Convention for the protection of individuals with regard to the processing of personal data

## CONVENTION 108



## Convention 108 (open to signature on 28 January 1981)

**UNIQUE** (no other international legally binding instrument in the field open to any country)

with a complying data protection legislation

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

## Convention 108

### **Article 23 – Accession by non-member States**

“1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council of Europe to accede to this Convention [...]”.

## Convention 108 today

### **55 countries bound by the Convention**

= Argentina, Cabo Verde, Mauritius,  
Mexico, Morocco, Senegal, Tunisia,  
Uruguay, RF + **46 CoE**

pending: Burkina-Faso and Costa Rica

+ 36 observers (Australia, Brazil, Canada, Chile,  
Gabon, Ghana, Indonesia, Israel, Japan, South  
Korea, Philippines, USA, New Zealand)

**= NEARLY 70 COUNTRIES**

## Convention 108 - Modernisation

- Reinforce the protection of individuals
  - 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 (including with the EU)

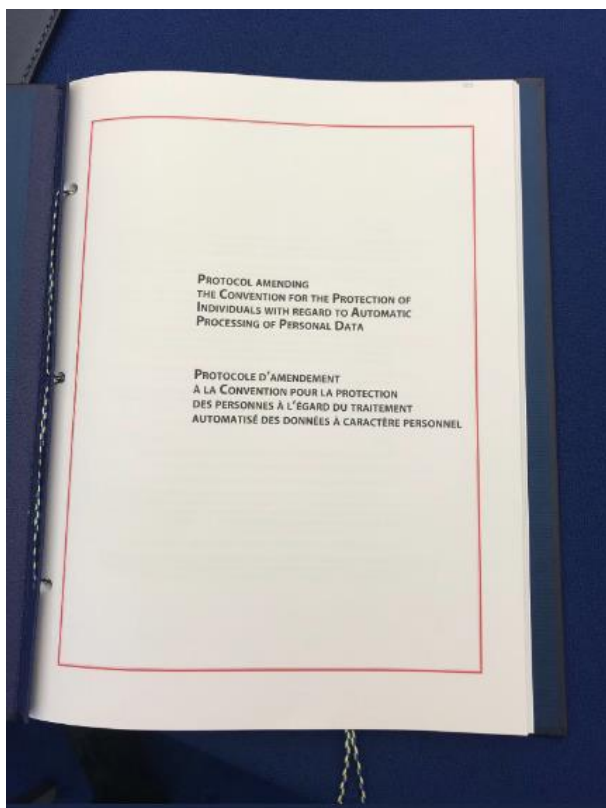
## Convention 108 - Modernisation

January 2011 ..... 18 May 2018





# Opening for signature CETS 223 10 October 2018





# Ratifications

- Bulgaria – 10 December 2019
- Croatia – 18 December 2019
- Lithuania – 23 January 2020
- Serbia – 26 May 2020
- Poland – 10 June 2020
- Mauritius - on 4 September 2020
- Estonia on 17 September 2020
- Cyprus on 21 September 2020
- Malta on 2 November 2020
- Finland – 10 December 2020
- Spain – 28 January 2021
- Italy – 8 July 2021
- Uruguay – 5 August 2021
- Germany – 5 October 2021
- North Macedonia – 13 October 2021
- Armenia – 25 January 2022
- Romania – 9 March 2022
- Austria – 13 July 2022
- Albania 22 July 2022

# Convention 108+

## **Preamble**

## **Chapter I – General provisions**

**Article 1 – Object and purpose**

**Article 2 – Definitions**

**Article 3 – Scope**

## **Chapter II – Basic principles for the protection of personal data**

**Article 4 – Duties of the Parties**

**Article 5 – Legitimacy of data processing and quality of data**

**Article 6 – Special categories of data**

## Convention 108+

**Article 7 – Data security**

**Article 8 – Transparency of processing**

**Article 9 – Rights of the data subject**

**Article 10 – Additional obligations**

**Article 11 – Exceptions and restrictions**

**Article 12 – Sanctions and remedies**

**Article 13 – Extended protection**

**Chapter III – Transborder flows of personal data**

**Article 14 – Transborder flows of personal data**

**Chapter IV – Supervisory authorities**

**Article 15 – Supervisory authorities**

**Chapter V – Cooperation and mutual assistance**

**Article 16 – Designation of supervisory authorities**

**Article 17 – Forms of cooperation**

**Chapter VI – Convention Committee**

**Chapter VII – Amendments**

## Convention 108 modernised

### Provisions possibly subject to exception

- **General principles (fairness, transparency, purpose limitation, data quality requirements: adequate, relevant, not excessive, accurate, up to date, permits only identification no longer that necessary)**
- **Data breach notification to the supervisory authority**
- **Data controller obligation to inform the data subject**
- **Data subject rights**

(Article 5 paragraph 4, Article 7 paragraph 2, Article 8 paragraph 1 and Article 9)

- **Data controller obligation to inform the data subject**
- **Data subject rights**

(Articles 8 and 9)

**In addition to the exceptions above, if provided for by law and only to the extent that it constitutes a necessary and proportionate measure in a democratic society:**

- **Committee's power to evaluate the effectiveness of the measures taken**
- **To provide information to the supervisory authority on international transfer**
- **To require by the supervisory authority to demonstrate the lawful conditions for international transfer and its ability to intervene**
- **Supervisory authority's power to investigate and intervene, functions relating to international transfer, power on taking regulatory decisions and sanctions, to turn to the judiciary**

(Article 4 paragraphs 3, Article 14 paragraphs 5 and 6 and Article 15, paragraph 2, litterae a, b, c and d.)

### Purposes for which the exception can be enacted

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

Archiving purposes in the public interest, scientific or historical research purposes or statistical purposes when there is no recognisable risk of infringement of the rights and fundamental freedoms of data subjects.

Processing activities for national security and defence purposes

## Convention 108+

### **Transborder dataflows** (Article 14.1)

Limitation to free flow between Parties where (to be applied in specific cases and narrowly)

- 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 an appropriate level of protection (*ad hoc* or approved standardised safeguards provided by legally binding instruments)
- Possibilities to transfer in specific cases where consent, specific interests of the data subject, prevailing legitimate interests provided for by law and are necessary and proportionate in a democratic society

## Convention 108+

### **Supervisory authorities** (article 15)

"2. ... such authorities:

a. shall have powers of investigation and intervention;

c. shall have powers to issue decisions with respect to violations of the provisions of this Convention and may, in particular, impose administrative sanctions;

d. shall have the power to engage in legal proceedings or to bring to the attention of the competent judicial authorities violations of the provisions of this Convention;"

## Convention 108+

### **Supervisory authorities** (article 15)

(144 privacy legislation in the world)

“5. The Supervisory authorities shall act with complete independence and impartiality in performing their duties and exercising their powers and in doing so shall neither seek nor accept instructions.”

## Convention 108+

### **Cooperation** (article 17)

Supervisory authorities "shall co-operate with one another to the extent necessary for the performance of their duties and exercise of their powers, in co-ordinating their investigations or interventions, or conducting joint actions;"

## 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)*

# Ongoing work of the Committee

## Work programme 2022-2025

- 
- Evaluation and follow-up mechanism
  - Standard Contractual Clauses
  - Data processing for AML/CFT proposes
  - Digital Identity
  - Interpretative document on Article 11
  - New topics: Data Protection, including biometrics, within in the framework of vote and elections, Digital identity in the context of migration
  - Cooperation with other Conventional committees (in particular): sport integrity (the Macolin and other related Conventions), cybercrime (the Budapest Convention and its additional Protocols), bioethics (Oviedo Convention), elections (Venice Commission, PACE), migration (Special Representative of the Secretary General on Migration and Refugees) and the children's rights (CAHENF)



## Call for UN member countries to accede

**Joseph A. Cannataci, UN Special  
Rapporteur on the right to privacy**



## Call for UN member countries to accede

- **Annual report -UN General Assembly (2018)**

- Report A/73/45712

"As an interim minimum response to agreeing to detailed privacy rules harmonised at the global level, ALL UN Member States been encouraged to ratify data protection Convention108+[...]."

- **Annual report -UN Human Rights Council (2019)\* =**

- Report A/HRC/40/63

# Thank you for your attention



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