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**‘MODERNISED’ DATA PROTECTION
CONVENTION 108 AND THE GDPR**

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'Modernised' data protection Convention 108+ and the GDPR

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One week before the GDPR came into force on 25 May 2018, the 'modernisation' of data protection Convention 108 was completed by the Council of Europe on 18 May, by the parties to the existing Convention agreeing to a Protocol amending it ('Protocol'). The new version of the Convention is now being called '108+' to distinguish it.

This article analyses some aspects of the relationships between 108 and 108+, and further developments at the Plenary Meeting of the Convention's Consultative Committee in Strasbourg, 19-21 June 2018 including a conference to 'launch' the new 108+.

The transition from 108 to 108+

The protocol will be open for signature by any of the countries that are parties to Convention 108 until the opening for signature scheduled on 10 October 2018. Each Party must then ratify, accept or approve the Protocol (according to domestic procedures), once they comply with its higher 'modernised' standards (Protocol, art. 36).

Once the Protocol is open for signature, any new countries wishing to accede will have to accede to the Protocol (ie to 108+) as well as to Convention 108 (Protocol, art. 37(1)). It appears that the remaining three non-European states previously invited to accede to Convention 108, which have not yet completed the accession process (Argentina, Burkina Faso and Morocco), will be able to accede to 108, and subsequently to its amending Protocol, until the latter enters into force. Cape Verde and Mexico will on 1st of October become respectively the 52nd and 53rd parties to Convention 108. Argentina and Burkina Faso are likely to do so this year, but it is unlikely that Morocco will do so in the short term.

In theory, it is possible that additional countries could be invited to accede to 108, before 108+ becomes open to signature, but it appears that it would be administratively exceptionally difficult for Convention procedures for an invitation to accede to be issued before 108+ becomes open for signature on 10 October. Until then, the window of accession to 108 alone may still be open.

Convention 108+ coming into force

When will Convention 108+ be in force? There are two options: (i) When all existing Parties (53, potentially 55) have consented to be bound by it (Protocol art. 37(1)); or (ii) five years after it is open for signature (10 October 2023), provided 38 Parties have consented to be bound, and only as between those parties that have so consented (art. 37(2)). Because of the GDPR, the 28 EU states can so consent as soon as their domestic procedures allow. Another ten will be needed by 2023, but given that many non-EU countries in Europe are now strengthening their existing laws because of the GDPR, or enacting new 'GDPR-compliant laws', this seems plausible.

Until 108+ comes into force, consenting Parties may also declare that 108+ has 'provisional' in-force status only between themselves and similarly declaring Parties (ie reciprocal in-force status) (art. 37(3)). It is therefore realistic to expect 108+ to be in force by 2023, and possibly to have some reciprocal effects before then.

The globalisation of the existing Convention 108

Although it originated from the Council of Europe, since 2011 data protection Convention 108 is steadily being ‘globalised’. In addition to its 47 European parties, six countries outside Europe are now Parties: Uruguay, Mauritius, Senegal, Tunisia, Cape Verde and Mexico. As discussed above, by the end of 2018 it is likely that eight non-European countries will be parties, one out of 7 (14%) of the parties to the Convention.

Eleven other countries, or their DPAs, are now Observers on the Consultative Committee. At the conference to ‘launch’ 108+, the European Commission stressed Recital 105 of the GDPR, and that the ‘particular’ relevance of accession to Convention 108 for an adequacy finding under the GDPR should be considered seriously by countries such as New Zealand and South Korea, both involved in adequacy applications or renewals.

At the Plenary Meeting of the Convention’s Consultative Committee a proposal (by the author) was made that “Global data protection Convention 108+” be used in future as a common denomination for the modernised Convention. It will be given consideration by the Bureau of the Consultative Committee at its next meeting (24-26 September, Paris).

The increasing globalisation of the Convention was further indicated by the election of the first member of the Convention’s Bureau from outside Europe, Ms Awa Ndiaye, Chair of the DPA of Senegal. Ms Alessandra Pierucci (Italy) was re-elected as Chair of the Committee. Mr Jean-Philippe Walter (Deputy data protection Commissioner of Switzerland) was elected as Council of Europe Data Protection Commissioner, responsible for supervision of data protection within Council of Europe institutions. He succeeded to Ms Eva Souhrada-Kirchmayer.

GDPR adequacy, 108+ and future global standards

GDPR Recital 105 says Convention 108 accession will ‘in particular ... [be] taken into account’ in assessing the adequacy of data protection in third countries. Because 108+ includes most important GDPR innovations (in less prescriptive form), accession to 108+, coupled with proper enforcement, should indicate that *most* aspects of the GDPR requirements are met. However, 108+ does not include all GDPR innovations, and it is as yet uncertain how EU institutions will interpret the adequacy provisions of the GDPR. It is possible that GDPR ‘adequacy’ will not require any of these elements not found in 108+, but on the other hand some might be required or strongly desirable. ‘Adequate’ did not mean ‘identical’ under the Directive, and will not under the GDPR. It is therefore uncertain, but possible, that compliance with the standards found in 108+ may also in practice approximate what it meant by ‘adequate’ under the GDPR. If so, the 108+ standards (which we can call ‘GDPR Lite’) may become the new global standard by 2023. Time, and adequacy decisions, will tell.

Information: This paper is based on the author’s presentation at the conference ‘*Convention 108+ Tomorrow’s Common Ground for Protection*’ (Council of Europe, Palais de l’Europe, Strasbourg, 21 June 2018). Further details can be found in G. Greenleaf ‘Convention 108+ and the data protection framework of the EU’ <https://papers.ssrn.com/abstract_id=3202606>.