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Convention 108+, the 'modernised' and strengthened version of global data protection Convention 108, was finalised in 2018. Originally a convention with Parties drawn only from the Council of Europe, for most of the last decade Convention 108 has been 'globalising' its membership, resulting in accessions from eight countries¹ outside the Council of Europe, to give a total of 55 parties. These Parties are currently finalising the ratifications of Convention 108+.

The Convention's Consultative Committee (to be called the Convention Committee under 108+) has admitted as Observers a variety of organisations, including: non-Party States,² both those which have an interest in becoming Parties and those with a long-standing relationship with the Council of Europe; international organisations³ with an interest in the Convention; some DPAs⁴ from potential Parties; and just five non-government organisations (NGOs) with strong interests in data privacy.⁵ The new Convention 108 allows its Convention Committee to do likewise (art. 22(3)).

This article considers whether the roles proposed for 108+ involvement by this last category, 'NGO Observers', are satisfactory, or whether they need to be strengthened.

Open procedures

Although the Convention's 55 state Parties make the decisions of the Consultative Committee (by virtue of their voting rights), the Council of Europe and the Convention's Secretariat are remarkably open in the extent of participation in debates that is afforded to Observers of all categories. This openness gives Observers opportunities to influence the content of instruments adopted by the Committee, including Recommendations on substantive areas of data privacy, and procedural instruments determining how the new Convention 108+ will operate.

The Evaluation and Follow-up Mechanisms for 108+

The most important instruments in this latter category under consideration by the Committee at present are two documents setting out how, once 108+ is in effect, its Convention Committee will evaluate (i) applications by new countries to accede to Convention 108+ (the 'evaluation mechanism'); and (ii) the implementation of the Convention by each of its existing

¹ Non-European accessions: Argentina, Cabo Verde, Mauritius, Mexico, Morocco, Senegal, Tunisia and Uruguay.

² Non-party State Observers: Australia, Brazil, Canada, Indonesia, Israel, Japan, and the United States.

³ International organization Observers: the EU and its institutions and bodies, the French-Speaking Association of Personal Data Protection Authorities (AFAPDP), Hague Conference, the Ibero-American Data protection Network (RIPD), the International Chamber of Commerce (ICC), International Commission on civil status (ICCS), International Committee of the Red Cross (ICRC), the Global Privacy Assembly (GPA), Interpol, and the Organisation for Economic Co-operation and Development (OECD),

⁴ Data protection authority Observers: Abu Dhabi, Chile, Gabon, Ghana, Korea, New Zealand, and the Philippines.

⁵ Privacy NGO Observers: Australian Privacy Foundation (APF), European Association for the Defence of Human Rights (AEDH), European Digital Rights' (EDRi), Internet Society (ISOC), and Privacy International.

Parties (both periodic evaluations, and assessments made at their request) (the ‘follow-up mechanism’).

Of particular relevance to this article, the Explanatory Report accompanying Convention 108+ says that in relation to its opinions on the level of compliance with the Convention, ‘the Convention Committee will work on the basis of a fair, transparent and public procedure detailed in its Rules of Procedure’ (cl. 163).

Both types of evaluation under 108+ will be very different from the current practices under Convention 108. Under the current Convention the Consultative Committee can only assess the legislation of a candidate for accession, not whether it is effectively enforced. It has no role in assessing compliance by existing Parties. As explained below, the 108+ Convention Committee has a very different role.

What does 108+ require of countries acceding or continuing as Parties?

Convention 108+ has the following basic requirements⁶ of all State Parties⁷ to it:

1. A Party must be a State, according to the practice of UN membership, or the EU or an international organisation.
2. It must be a State which is democratic (including consideration of human rights and the rule of law).
3. Its data protection law must be of sufficient scope, covering both the public and private sectors.
4. The law must be enforced by one or more ‘completely independent’ supervisory authorities.
5. The law must secure effective application of the Convention’s provisions. Convention 108+ requires that ‘Each Party shall take the necessary measures in its law to give effect to the provisions of this Convention and secure their effective application’ (art. 4(1)).

The requirements of 108+ go considerably beyond those of Convention 108, which were comparable to the EU Directive of 1995. Although falling short of the EU GDPR’s requirements in some ways, they go beyond the Convention 108 requirements in at least thirteen ways, usually in provisions expressed in rather general wording allowing for some flexibility in interpretation of what constitutes the compliance required by article 4(1).⁸

The fifth requirement above raises two complex issues for the evaluation and follow-up processes. First, Convention 108+ goes beyond what is in the pages of the law, unlike Convention 108. It requires that ‘Each Party undertakes ... to allow the Convention Committee provided for in Chapter VI to evaluate the effectiveness of the measures it has taken in its law to give effect to the provisions of this Convention’ (art. 4(3)(a)) and ‘to contribute actively to this evaluation process’ (art. 4(3)(b)). Together with the requirement to secure the ‘effective application’ of the Convention’s provisions (art. 4(1)), this makes it clear that accession to Convention 108+ is not based solely on ‘the law on the books’, but also requires sufficient demonstration of effective implementation of the Convention provisions in practice.⁹ The

⁶ For details G. Greenleaf ‘How Far Can Convention 108+ ‘Globalise’?: Prospects for Asian Accessions’ (2020) *Computer Law & Security Review* (in publication). Pre-print at <https://ssrn.com/abstract=3530870>

⁷ An innovation in Convention 108+ is that it also accepts as parties the EU, and appropriate international organisations.

⁸ See [6.3] in the above-cited article.

⁹ See [6.1] in the above-cited article.

follow-up mechanism is also an example of monitoring compliance with a Convention, which has only become a significant part of Council of Europe treaties practice in the last decade.¹⁰

Second, how close to the provisions of Convention 108+ must an acceding country's law be in order to satisfy the article 4(1) requirement that it 'give effect' to its provisions? This is not explained anywhere. Opinions by the Consultative Committee and decisions by the Committee of Ministers on the existing Convention 108 are only of limited assistance, because the standards required by Convention 108+ are considerably higher, but they illustrate that there is a degree of flexibility. In some cases this involved accepting that countries would in future bring their laws more fully into line with 108's provisions, in others simply that a country 'generally complies' with or even 'heads toward' 108's standards. However, there is no clarity as to which 108 principles are essential for compliance, and which allow more flexibility.¹¹

Why are the evaluation processes important to NGO Observers?

At least four distinct reasons for NGO Observer interest can be identified:

- A national NGO may want to insist that its home country does genuinely live up to all the requirements of 108+, including the evidence of enforcement required, before it is allowed to accede. This may enable it to exert pressure locally for the strengthening of a national law.
- Any NGO from a country that is or may become a Party to 108+ has an interest in the strength of the laws in other countries (both those proposing to accede, and existing Parties), because 108+ requires (in summary) that there be free flow of personal data to all other Parties to the Convention. It is against the interest of citizens and others from the NGO's country to have other countries with weak or non-enforced laws as Parties to 108.
- If existing Parties to 108+ have become deficient in any of the requirements of 108+ (such as retrograde steps in relation to democracy or the rule of law, or failure to enforce the data privacy law), then it is possible that other State Parties may have diplomatic reluctance to 'blow the whistle' on these deficiencies, whereas NGOs do not have diplomatic constraints, and are likely to be far less hesitant.
- More generally, all NGOs (national or otherwise) that see Convention 108+ as the best prospect for a global data privacy treaty, and want it to have strong protections for citizens/consumers, have an interest in ensuring it maintains high standards. Preventing low-standard countries from being Parties may also increase its attraction for new accessions, thus improving 108+'s prospects of successful globalisation.

In short, NGOs have good reasons for wanting 108+ to maintain high standards, and to advocate for that. It is easy to say in theory, but will they have the opportunity in practice?

Operation of the accession/follow-up mechanisms, from a NGO perspective

The operation of the accession and periodic follow-up evaluation mechanisms, for each country to be considered, is essentially that an Evaluation and Follow-up Group (E&F Group) - comprised of six Parties to the Convention - is allocated the evaluation task. The E&F Group gathers information from many sources about the data protection law, its context, and its effective application in the country being evaluated or followed up, and prepares a draft report to the Convention Committee for finalisation.

¹⁰ Observation by Jörg Polakiewicz, treaties adviser to the Council of Europe, 'Data Protection – Views from Strasbourg' webinar, 1 July 2020.

¹¹ See [6.2] in the above-cited article.

input necessary for effective E&F group contributions. Ensuring transparency of the process, and that NGO Observers have access to documents and the ability to make submissions, is a reasonable alternative.

- The Evaluation and Follow-up Mechanism document still does not emphasise that exemptions for defence, national security etc must comply with the conditions of Article 11 [6.1], but the Questionnaire is however now explicit on that point [para 18].

Conclusions

Although this article focuses on the role of NGO Observers in relation to 108+, and is not a thorough examination of the evaluation and follow-up processes, three aspects of 108+ are clear from the above. First, the standards which must be met for both accession to 108+ and continuing compliance with its provisions, are higher than the ‘compliance standard’ for 108, but they are also expressed in terms which allow some flexibility of interpretation. Second, this expanded requirement for interpretation, and the new requirement to assess the effectiveness of enforcement of a country’s laws, means that the 108+ Convention Committee has a more complex and important task than was the case under 108. Third, the current draft of the Evaluation and Follow-up Mechanisms for 108+ demonstrates that these assessments are going to be thorough and will require a high standard of compliance.

The processes adopted by the Convention 108/108+ are very open. They enable NGOs, and particularly those NGOs that have been accredited as Observers to the Convention, to play an active role in the Consultative Committee, and to achieve meaningful results in the Committee processes.

From an NGO perspective, these Council of Europe processes are significantly more transparent, participatory and responsive than those adopted by APEC (Privacy Framework and Cross-border Privacy Rules system), the OECD (Privacy Guidelines) and European Union (‘adequacy’ under the GDPR). The Council deserves acknowledgment for this achievement.

As a NGO Observer representative (Australian Privacy Foundation¹⁵) I encourage more consumer-oriented and privacy-specialist NGOs that have a substantial interest in the development of Convention 108+ to consider submitting a letter of application to be accredited as an Observer to Convention 108/108+. This applies particularly to NGOs with a regional or international orientation, and those from prospective accession countries. The application criteria are more restrictive than is desirable, but can be interpreted flexibly.¹⁶ Some data protection authorities and governments from prospective parties to 108+ are also Observers. A broader understanding of how Convention 108/108+ operates, and more informed voices globally contributing their opinions on its future, will make it more likely that 108+ will become the global data privacy treaty that the world needs.

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A recording of the webinar is now available at <https://www.coe.int/en/web/data-protection>

¹⁵ Australian Privacy Foundation < <https://privacy.org.au/> >

¹⁶ Consultative Committee of the Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data *Observers - State of play and admission criteria* Strasbourg, 29 November 2018 , T-PD(2018)04Rev3 <<https://rm.coe.int/observers-state-of-play-and-admission-criteria/16808fdc4d>>

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