

## Accession to Convention 108: Benefits & Commitments

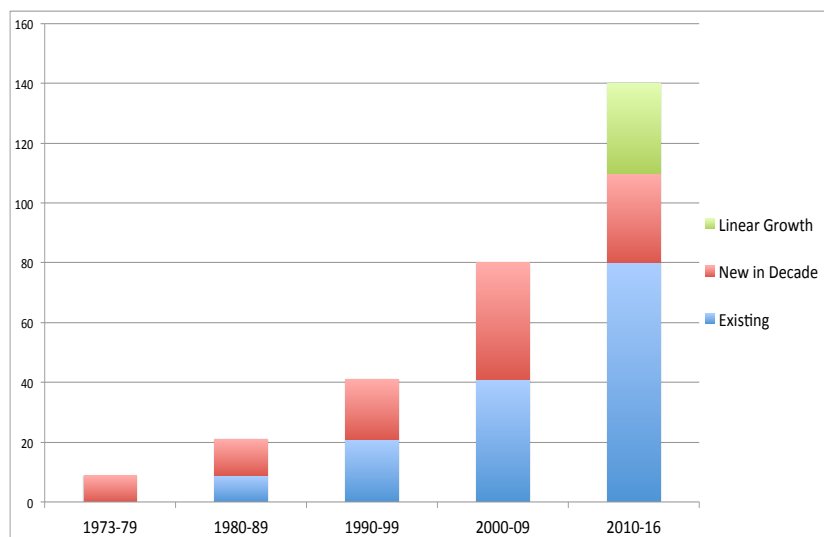
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### Getting the balance right

1. Context: Global growth of data privacy laws
2. Benefits of CoE 108 accession
  - Countries, companies, and individuals
3. Countries' commitments in accession
4. Convention bodies' obligations
5. Enough individuals rights?

## Data privacy laws: Countries by decade



110 jurisdictions with data privacy laws by June 2016

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## Context of 'globalisation': Expansion of data privacy laws (1973-2016)

1. **110 countries now have a data privacy law** (June 2016)
2. Since 2015, **majority** (56/110) are from **outside Europe**.
3. Most outside Europe have **data export restrictions**
4. **Standards** adopted by Acts outside Europe are (on average) **close to the CoE 108 standard**
  - **Average 7/10** higher 'European standards'
  - Many stronger "2<sup>nd</sup> generation" **revised** laws
5. **Prospective CoE 108 accessions = ??** (6/56 have applied)
6. Global spread of data privacy laws **will continue**
  - At least 24 more countries currently have **official Bills**
  - Some have e-commerce/consumer privacy laws (China, Indonesia)

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## 24 Bills for new data privacy Acts

- |                      |                               |
|----------------------|-------------------------------|
| 1. Antigua & Barbuda | 13. Indonesia                 |
| 2. Barbados          | 14. Jamaica                   |
| 3. Bermuda           | 15. Kenya                     |
| 4. Brazil            | 16. Mauritania                |
| 5. Cayman Islands    | 17. Niger                     |
| 6. Chad              | 18. Nigeria                   |
| 7. Dominica          | 19. Qatar                     |
| 8. Ecuador           | 20. Saint Kitts and Nevis     |
| 9. Ethiopia          | 21. Swaziland                 |
| 10. Falkland Islands | 22. Tanzania                  |
| 11. Grenada          | 23. Thailand (private sector) |
| 12. Honduras         | 24. Uganda                    |

## 11 Benefits of CoE 108 accession

1. CoE 108 has **realistic prospects** of 'globalisation'
  - CoE 108 already has 48 parties (soon 53): nearly 50% of all countries with data privacy laws
2. There is **no realistic alternative**
  - No other binding global privacy agreements exist
  - No new UN or other treaty is likely
  - 'Interoperability' is illusory and usually illegitimate
3. A **voluntary acceptance** of reciprocal obligations
  - Treaties are mutual, not unilateral
4. The **only reciprocal guarantee** of data exports
  - Applies to 28 EU countries (stronger than 'adequacy')
  - Applies to another 19 European countries
  - Will apply increasingly to non-European countries

## Benefits of accession (cont)

5. Only **moderate** privacy standards are required
6. CoE 108 only requires an approximate EU 'adequacy'
  - Existing CoE 108 standards are what countries outside Europe have been enacting 'bottom up'
  - half way between the 1980s standards and the Directive
  - 'Modernised' 108 may be close to GDPR 'adequacy'
7. 'Minimum standards' – higher local standards OK
8. Parties need not decide which other countries have 'adequate'/sufficient laws
  - 108 party list can replace a national 'Whitelist'

## Benefits of accession (cont)

9. Strong assistance for an EU **adequacy** finding
  - GDPR recital 105: 'In particular ... taken into account'
10. Benefits **to businesses** (controllers)
  - Increasing number of CoE 108 parties to whom data exports pose few problems
  - Standard conditions for exports to other countries
11. Benefits **to individuals** (data subjects)
  - Enforceable global-standard privacy laws apply wherever their personal data is exported.
  - DPAs are required to provide assistance wherever their data goes

## Countries' commitments in accession

1. Must implement a law with global-standard principles & enforcement
  2. Must permit data exports to other parties, or where Convention standards are met
  3. Must not permit data exports beyond that
- These commitments by countries are only justifiable if the Convention bodies ensure that*
- a. new accessions meet and enforce these standards;
  - b. all parties ensure continuing enforcement.

## Convention bodies' obligations to acceding countries & their citizens

- *The national commitments are serious, so the enforcement of the treaty must be equally so.*
  - The 'Convention bodies' (Consultative/Convention Committee; Secretariat; Committee of Ministers) have heavy responsibilities.
- Current 108 does not discharge these responsibilities
  - only 'law on the books' is checked; no follow-up
  - Committee of Ministers needs to permit broader checks
- Modernised 108 will allow assessment of both
  - strength of enforcement at accession, and continuing compliance (if resources permit)

## Individual rights and accession

- 108 requires rights to enforce law domestically
- But no international mechanism for individuals to enforce national compliance with 108
  - Other Parties can only use diplomatic means
  - Europeans can indirectly use ECHR A8
- Cooperation with UN mechanisms needed
  - ICCPR Optional Protocol allows individual complaints
  - Should CoE 108 accessions also require ICCPR & Optional Protocol ratification? (a bit like ECHR A8)

## References

- Greenleaf, G 'Global data privacy laws 2015: 109 countries, with European laws now in a minority' (2015) 133 *Privacy Laws & Business International Report*, 14-17
  - <<http://ssrn.com/abstract=2603529>>
- Greenleaf, G 'The UN Special Rapporteur: Advancing a global privacy treaty?' (2015) 136 *Privacy Laws & Business International Report*, 7-9
  - <<http://ssrn.com/abstract=2672549>>
- Greenleaf, G 'Modernising' Data Protection Convention 108: A Safe Basis for a Global Privacy Treaty? ' (2013) *Computer Law & Security Review*, Vol 29, Issue 4
  - <<http://ssrn.com/abstract=2262296>>
- Greenleaf, G 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108' (2012) *International Data Privacy Law*, Vol. 2, Issue 2
  - <<http://ssrn.com/abstract=1960299>>