

The role of „Convention No. 108” and “Convention No. 108+” as part of the examination of the level of protection in third countries under the GDPR

Dr. Carlo Piltz & Philipp Quiel, LL.M., 1st of September 2020

Following the [decision of the European Court of Justice](#) in the Schrems II case (C-311/18), it is becoming increasingly clear that the content of this ruling by no means only affects data transfers to the USA. Internationally operating companies often also have subsidiaries in third countries, some of which are members of the Council of Europe. Within company groups, data transfers regularly take place by accessing data stored in Europe or by transferring data from Europe to a company that is not located in a member state.

The provisions of Chapter V GDPR of course also apply to the transfer of data to such third countries. Ultimately, in reverse to the statement in the second sentence of marginal 135 of the Court of Justice' s ruling, it must be examined whether the law of a third country does not impose obligations on the recipient of personal data transferred from the Union that contradict the contractual agreement between exporter and importer and whether the contractual arrangements are not undermined and in practice complied with. This raises the question of the relevance of Council of Europe's "Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data" in its currently applicable version. In addition, the question also arises as to what role Convention No. 108+ (one speaks of "No. 108+", since the current Convention was adapted in 2018) will play in the future for examining the level of protection in third countries that are party to this international agreement. According to Art. 23 Convention No. 108 and Art. 27 para. 1 of Convention No. 108+, not only members of the Council of Europe may be parties to the conventions, but also other "non-member states" that are invited to accede to the convention.

A. Relevance of appropriate guarantees for data transfers

If there is no adequacy decision pursuant to Art. 45 GDPR for a country, sector or territory in a country, appropriate guarantees pursuant to Art. 46 GDPR – and as such, standard contractual clauses (SCC) – are particularly relevant as a mechanism for transfers that are not occasional or cannot be justified for other reasons under Art. 49 para. 1 GDPR. Regarding the USA, an answer is currently being searched for on how to solve the key question regarding what appropriate additional safeguards could be implemented so that the SCC and other appropriate guarantees in the sense of Art. 46 para. 2 GDPR can be used as transfer mechanisms.

The main problem for companies is that "enforceable data subject's rights" and "effective legal remedies" required under Art. 46 para. 1 GDPR largely depend on the legal system in the third country and are therefore normally beyond the control of the parties processing data. In addition, the legal system of the third country must provide the necessary restrictions and guarantees for permissible interference in rights (C-311/18, marginal 168). In this context, the footnote to the heading of clause 5 of the SCC should also be noted. The reference to Art. 13 para. 1 of Directive 95/46 EC contained therein is now to be understood as a reference to Art. 23 GDPR. On this basis, the permissibility of restrictions provided for in the law of a third country must be examined. Mandatory requirements of the law in the third country that do not go beyond what is necessary in a democratic society to guarantee, inter alia, national security, defense and public security do not contradict the SCC (C-311/18, marginal 141).

B. Examination of the level of protection in a country party to Convention No. 108 / Convention No. 108+

The CJEU has emphasized in marginal 125 of the judgement that SCC and other contractual arrangements between exporter and importer cannot bind government bodies, because they are not parties to those contractual agreements. In addition to private-sector agreements between parties processing and transferring data, we believe that, when seeking and examining an equivalent level of protection, consideration should also be given to agreements to which countries are parties and that impose obligations on those countries. The first binding treaty under international law with data protection content is Convention No. 108. In particular, the version of the Convention adapted in 2018 is very closely oriented to the GDPR and European data protection standards in primary legislation, but also reveals points of reference to the right to respect for private and family life under Art. 7 CFR and Art. 8 ECHR and to the right to effective legal remedies and fair trial under Art. 47 CFR.

Although Convention 108+ has not yet been ratified by many states, the 2018 version is also referred to below for future consideration. When examining the level of protection for data transfers to a third country that is a party to Convention No. 108 and Convention No. 108+, the question arises as to what role the obligations for the protection of individuals with regard to the automatic processing of personal data regulated in these conventions play.

The general prohibition of prohibiting data transfers to countries that are party to the convention, as set out in Art. 12 para. 2 Convention No. 108 and Art. 14 para. 1 Convention No. 108+, strongly suggests that the conventions may play a major role in the assessment of the level of protection in the countries party of the conventions. In the 2018 version, Art. 14 para. 3 a) also stipulates that international treaties and agreements can be considered when examining the level of protection in a third country. In principle, this also supports the inclusion of the provisions of Convention No. 108 and Convention No. 108+ and other international treaties and obligations when examining the level of protection in a country that is party to these contracts under international law.

According to Art. 1 Convention No. 108+, *“the purpose of the convention is to protect every individual, whatever his or her nationality or residence may be, with regard to the processing of their personal data, thereby contributing to respect for his or her human rights and fundamental freedoms, and in particular the right to privacy”*. Additionally, there is the obligation under Art. 4 para. 1 Convention No. 108+ 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”*. These provisions are essentially equivalent to the provisions in Convention No. 108, except for some differences in wording.

In the following, individual provisions from Convention No. 108 and Convention No. 108+ are compared with specific requirements for transfers to third countries. Both general requirements of the GDPR and special requirements applicable to transfers are considered.

Requirements	Provisions under Convention No. 108	Provisions under Convention No. 108+
Principles relating to processing of personal data	Article 5 – Quality of data Personal data undergoing automatic processing shall be: a) obtained and processed fairly and lawfully ;	Article 5 – Legitimacy of data processing and quality of data (1) Data processing shall be proportionate in relation to the legitimate purpose pursued and reflect at all stages of the

	<p>b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes;</p> <p>c) adequate, relevant and not excessive in relation to the purposes for which they are stored;</p> <p>d) accurate and, where necessary, kept up to date;</p> <p>e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.</p>	<p>processing a fair balance between all interests concerned, whether public or private, and the rights and freedoms at stake.</p> <p>(2) Each Party shall provide that data processing can be carried out on the basis of the free, specific, informed and unambiguous consent of the data subject or of some other legitimate basis laid down by law.</p> <p>(3) Personal data undergoing processing shall be processed lawfully.</p> <p>(4) Personal data undergoing processing shall be:</p> <p>a) processed fairly and in a transparent manner;</p> <p>b) collected for explicit, specified and legitimate purposes and not processed in a way incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes is, subject to appropriate safeguards, compatible with those purposes;</p> <p>c) adequate, relevant and not excessive in relation to the purposes for which they are processed;</p> <p>d) accurate and, where necessary, kept up to date;</p> <p>e) preserved in a form which permits identification of data subjects for no longer than is necessary for the purposes for which those data are processed.</p> <p>Article 10 – Additional obligations</p> <p>(1) Each Party shall provide that controllers and, where applicable, processors, take all appropriate measures to comply</p>
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		<p>with the obligations of this Convention and be able to demonstrate, subject to the domestic legislation adopted in accordance with Article 11, paragraph 3, in particular to the competent supervisory authority provided for in Article 15, that the data processing under their control is in compliance with the provisions of this Convention.</p>
<p>Special protection of special data categories</p>	<p>Article 6 – Special categories of data Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.</p>	<p>Article 6- Special categories of data (1) The processing of: – genetic data; – personal data relating to offences, criminal proceedings and convictions, and related security measures; – biometric data uniquely identifying a person; – personal data for the information they reveal relating to racial or ethnic origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life,</p> <p>shall only be allowed where appropriate safeguards are enshrined in law, complementing those of this Convention.</p> <p>(2) Such safeguards shall guard against the risks that the processing of sensitive data may present for the interests, rights and fundamental freedoms of the data subject, notably a risk of discrimination.</p>
<p>Data security and reporting of breaches of security to the responsible supervisory authority</p>	<p>Article 7 – Data security Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.</p>	<p>Article 7 – Data security (1) Each Party shall provide that the controller, and, where applicable the processor, takes appropriate security measures against risks such as accidental or unauthorised access to, destruction, loss, use, modification or disclosure of personal data.</p> <p>(2) Each Party shall provide that the controller notifies, without delay, at least the competent supervisory authority within the meaning of Article 15 of this Convention, of those data breaches</p>

		<p>which may seriously interfere with the rights and fundamental freedoms of data subjects.</p> <p>Article 10 – Additional obligations (3) Each Party shall provide that controllers, and, where applicable, processors, implement technical and organizational measures which take into account the implications of the right to the protection of personal data at all stages of the data processing.</p>
<p>Informational duties</p>	<p>Article 8 – Additional safeguards for the data subject Any person shall be enabled: a) to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file</p>	<p>Article 8 – Transparency of processing (1) Each Party shall provide that the controller informs the data subjects of: a) his or her identity and habitual residence or establishment; b) the legal basis and the purposes of the intended processing; c) the categories of personal data processed; d) the recipients or categories of recipients of the personal data, if any; and e) the means of exercising the rights set out in Article 9, as well as any necessary additional information in order to ensure fair and transparent processing of the personal data.</p>

Interferences in rights are limited to the mandatory necessary and do not go beyond what is necessary in a democratic society to safeguard, inter alia, national security, defence and public security

Article 9 – Exceptions and restrictions

(1) **No exception** to the provisions of Articles 5, 6 and 8 of this Convention **shall be allowed except within the limits defined in this article.**

(2) Derogation from the provisions of Articles 5, 6 and 8 of this Convention **shall be allowed** when such **derogation is provided for by the law** of the Party and **constitutes a necessary measure in a democratic society** in the interests of:

- a) protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences;

- b) protecting the data subject or the rights and freedoms of others.

(3) Restrictions on the exercise of the rights specified in Article 8, paragraphs b, c and d, may be **provided by law** with respect to automated personal data files used for statistics or for scientific research purposes when there is **obviously no risk of an infringement of the privacy** of the data subjects.

Article 8 – Transparency of processing

(2) **Paragraph 1 shall not apply** where the **data subject already has the relevant information.**

(3) Where the personal data **are not collected from the data subjects**, the controller shall **not be required** to provide such information where the processing is **expressly prescribed by law** or this **proves to be impossible or involves disproportionate efforts.**

Article 9 – Rights of the data subject

(2) **Paragraph 1.a shall not apply** if the decision is **authorised by a law** to which the controller is subject and which also **lays down suitable measures to safeguard the data subject’s rights, freedoms and legitimate interests.**

Article 11 – Exceptions and restrictions

(1) **No exception to the provisions set out in this Chapter shall be allowed except** to the provisions of **Article 5 paragraph 4, Article 7 paragraph 2, Article 8 paragraph 1 and Article 9**, when **such an exception is provided for by law, respects the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society for:**

- a) the protection of national security, defense, 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.

		<p>(2) Restrictions on the exercise of the provisions specified in Articles 8 and 9 may be provided for by law with respect to data processing for 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.</p> <p>(3) In addition to the exceptions allowed for in paragraph 1 of this article, with reference to processing activities for national security and defense purposes, each Party may provide, by law and only to the extent that it constitutes a necessary and proportionate measure in a democratic society to fulfill such aim, exceptions to Article 4 paragraph 3, Article 14 paragraphs 5 and 6 and Article 15, paragraph 2, litterae a, b, c and d.</p> <p>This is without prejudice to the requirement that processing activities for national security and defense purposes are subject to independent and effective review and supervision under the domestic legislation of the respective Party.</p>
<p>Enforceable subject's rights</p>	<p>data</p> <p>Article 8 – Additional safeguards for the data subject Any person shall be enabled: b) to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form;</p> <p>c) to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this Convention</p>	<p>Article 9 – Rights of the data subject (1) Every individual shall have a right: a) not to be subject to a decision significantly affecting him or her based solely on an automated processing of data without having his or her views taken into consideration;</p> <p>b) to obtain, on request, at reasonable intervals and without excessive delay or expense, confirmation of the processing of personal data relating to him or her, the communication in an intelligible form of the data processed, all available information on their origin, on the preservation period as well as any other information that the controller is required to provide in order to</p>

		<p>ensure the transparency of processing in accordance with Article 8, paragraph 1;</p> <p>c) to obtain, on request, knowledge of the reasoning underlying data processing where the results of such processing are applied to him or her;</p> <p>d) to object at any time, on grounds relating to his or her situation, to the processing of personal data concerning him or her unless the controller demonstrates legitimate grounds for the processing which override his or her interests or rights and fundamental freedoms;</p> <p>e) to obtain, on request, free of charge and without excessive delay, rectification or erasure, as the case may be, of such data if these are being, or have been, processed contrary to the provisions of this Convention;</p> <p>f) to have a remedy under Article 12 where his or her rights under this Convention have been violated;</p> <p>g) to benefit, whatever his or her nationality or residence, from the assistance of a supervisory authority within the meaning of Article 15, in exercising his or her rights under this Convention.</p>
Effective legal remedies	<p>Article 1 – Object and purpose The purpose of this Convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection").</p>	<p>Article 1 – Object and purpose The purpose of this Convention is to protect every individual, whatever his or her nationality or residence, with regard to the processing of their personal data, thereby contributing to respect for his or her human rights and fundamental freedoms, and in particular the right to privacy.</p>

	<p>Article 3 – Scope (1) The Parties undertake to apply this Convention to automated personal data files and automatic processing of personal data in the public and private sectors.</p> <p>Article 8 – Additional safeguards for the data subject Any person shall be enabled: d) to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with.</p> <p>Article 10 – Sanctions and remedies Each Party undertakes to establish appropriate sanctions and remedies for violations of provisions of domestic law giving effect to the basic principles for data protection set out in this chapter.</p>	<p>Article 3 – Scope (1) Each Party undertakes to apply this Convention to data processing subject to its jurisdiction in the public and private sectors, thereby securing every individual’s right to protection of his or her personal data.</p> <p>Article 4 – Duties of the Parties (3) Each Party undertakes: a) 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; and b) to contribute actively to this evaluation process.</p> <p>Article 10 – Additional obligations (4) Each Party may, having regard to the risks arising for the interests, rights and fundamental freedoms of the data subjects, adapt the application of the provisions of paragraphs 1, 2 and 3 in the law giving effect to the provisions of this Convention, according to the nature and volume of the data, the nature, scope and purpose of the processing and, where appropriate, the size of the controller or processor.</p> <p>Article 12 – Sanctions and remedies Each Party undertakes to establish appropriate judicial and non-judicial sanctions and remedies for violations of the provisions of this Convention.</p>
Supervisory authorities, supervising compliance with the regulations	<p>Article 13 – Co-operation between Parties (1) The Parties agree to render each other mutual assistance in order to implement this Convention.</p> <p>(2) For that purpose:</p>	<p>Article 15 – Supervisory authorities (1) Each Party shall provide for one or more authorities to be responsible for ensuring compliance with the provisions of this Convention.</p>

	<p>a) each Party shall designate one or more authorities, the name and address of each of which it shall communicate to the Secretary General of the Council of Europe;</p> <p>b) each Party which has designated more than one authority shall specify in its communication referred to in the previous sub-paragraph the competence of each authority.</p> <p>(3) An authority designated by a Party shall at the request of an authority designated by another Party:</p> <p>a) furnish information on its law and administrative practice in the field of data protection;</p> <p>b) take, in conformity with its domestic law and for the sole purpose of protection of privacy, all appropriate measures for furnishing factual information relating to specific automatic processing carried out in its territory, with the exception however of the personal data being processed.</p>	<p><i>Anmerkung:</i> An dieser Stelle wurde aus Platzgründen auf den Abdruck der weiteren Vorgaben aus Art. 15 verzichtet.</p> <p>Article 16 – Designation of supervisory authorities (1) The Parties agree to co-operate and render each other mutual assistance in order to implement this Convention. <i>Anmerkung:</i> An dieser Stelle wurde aus Platzgründen auf den Abdruck der weiteren Vorgaben aus Art. 16 verzichtet.</p>
<p>Estimation and consideration of the risk arising from data processing</p>		<p>Article 10 – Additional obligations (2) Each Party shall provide that controllers and, where applicable, processors, examine the likely impact of intended data processing on the rights and fundamental freedoms of data subjects prior to the commencement of such processing, and shall design the data processing in such a manner as to prevent or minimise the risk of interference with those rights and fundamental freedoms.</p>

According to Article 3 para. 1 of the Convention No. 108 and Convention No. 108+, all the contracting parties undertake to apply the conventions to data processing in the public and private sectors under their jurisdiction, thereby guaranteeing the right of each individual to the protection of his or her personal data. In Art. 3 para. 2 a) Convention No. 108, it is still provided the possibility that individual parties of the convention do not apply the provisions of the convention to certain types of automated files and data processing. On this basis, some countries have, for example, declared not to apply the convention to data processing

carried out by public bodies for the purposes of national security, defense and the investigation and prevention of crime. This possibility of not applying provisions to certain areas no longer exists in the No. 108+ version (see this [overview](#)).

C. Summary of the significance of Conventions No. 108 / No. 108+

The comparison carried out above reveals that the Convention No. 108 and Convention No. 108+ compensate for much of what was criticized by the CJEU regarding the legal situation in the USA and the level of protection deriving from it. Even the currently still valid version of the convention can offer guarantees in many places that have a positive effect on the level of protection in the third country. In particular, enforceable rights and effective legal remedies and a minimum level of the right to protection of personal data and the right to respect for private and family life are extensively ensured by the international law obligations of the contracting parties in Convention No. 108+. In the older version, comparatively detailed regulations are missing in some places. However, the basic concept is largely identical, and the individual regulations are comparable.

In our opinion and in the overall picture, the provisions in the conventions have a very positive effect for the level of protection in a third country that is party to the convention. The provisions of the conventions should definitely be considered, and considerations should be documented when companies are examining the level of protection for countries that are parties of the conventions. However, it is also clear that the USA is not a party to Convention No. 108 or Convention No. 108+.