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Subject: Adoption of a Council Decision authorising the Member States to vote unanimously within the competent bodies of the Council of Europe, on behalf of the European Communities, in favour of adopting the draft Additional Protocol to Convention No 108 regarding supervisory authorities and transborder data flows and authorising the publication of its Explanatory Report

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.
"I/A" ITEM NOTE

from: General Secretariat
to: Permanent Representatives Committee/Council

No. prev. doc.: 9084/00 ECO 151
No. Cion prop.: 10858/00 ECO 233 - SEC(2000) 1240 final

Subject: Adoption of a Council Decision authorising the Member States to vote unanimously within the competent bodies of the Council of Europe, on behalf of the European Communities, in favour of adopting the draft Additional Protocol to Convention No 108 regarding supervisory authorities and transborder data flows and authorising the publication of its Explanatory Report

1. On 27 July 2000 the Commission submitted a recommendation for the above Decision to the Council.

2. That recommendation was a follow-up to the Council Decision of 22 February 1999 \(^1\) authorising the Commission to negotiate, within the competent bodies of the Council of Europe, amendments to Convention No 108, with particular reference to the establishment of supervisory authorities and the regulation of transfers of personal data from countries which are Contracting Parties to the Convention to countries which are not.

\(^1\) 13998/00.
The amendments to be requested on behalf of the European Communities to the texts of the draft Additional Protocol and the Explanatory Report were finalised at a series of Community coordination meetings in Brussels¹ and on the spot in Strasbourg.

3. Since the Consultative Committee of the Convention approved the draft Additional Protocol and its Explanatory Report on 8 June 2000, adoption of the first of these texts by the Council of Europe Committee of Ministers and authorisation to publish the second should be imminent.

4. As a result, the Permanent Representatives Committee might suggest to the Council that, under part "A" of the agenda for one of its forthcoming meetings, it adopt the Decision set out in the Annex hereto.


¹ 9084/00, 7077/00, 11677/99 ADD 1, 11677/99, 7825/99.
ANNEX

Draft

DECISION OF THE COUNCIL

authorising the Member States to vote unanimously within the competent bodies of the Council of Europe, on behalf of the European Communities, in favour of adopting the draft Additional Protocol to the Convention for the protection of individuals with regard to automatic processing of personal data (ETS No 108) regarding supervisory authorities and transborder data flows and authorising the publication of its Explanatory Report

The Council of the European Union, on a recommendation from the Commission, authorises the Member States to vote unanimously within the competent bodies of the Council of Europe, on behalf of the European Communities and within the limits of their competence, in favour of adopting the draft Additional Protocol to the Convention for the protection of individuals with regard to automatic processing of personal data (ETS No 108) regarding supervisory authorities and transborder data flows and authorising the publication of its Explanatory Report (draft Protocol and Explanatory Report as set out in their final version in T-PD (2000) 9 Addendum, and annexed to this Decision).
CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA (ETS No 108)

(T-PD)

16th meeting of the T-PD
Strasbourg, 6-8 June 2000

Draft additional protocol
to Convention for the Protection of Individuals
with regard to Automatic Processing of Personal Data (ETS No 108)
regarding supervisory authorities and transborder data flows

and Explanatory Report

(Adopted by the T-PD on 8 June 2000 at its 16th meeting)

Secretariat Document
prepared by the
Directorate General of Legal Affairs
Draft additional Protocol

to Convention for the Protection of Individuals

with regard to Automatic Processing of Personal Data (ETS No 108)

regarding supervisory authorities and transborder data flows

Preamble

The Parties to this additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, opened for signature in Strasbourg on 28 January 1981 (hereafter referred to as "the Convention"),

Convinced that supervisory authorities, exercising their functions in complete independence, are an element of the effective protection of individuals with regard to the processing of personal data,

Considering the importance of the flow of information between peoples,

Considering that, with the increase in exchanges of personal data across national borders, it is necessary to ensure the effective protection of human rights and fundamental freedoms, and in particular the right to privacy, in relation to such exchanges of personal data,

Have agreed as follows:

Article 1

Supervisory authorities

1. Each Party shall provide for one or more authorities to be responsible for ensuring compliance with the measures in its domestic law giving effect to the principles stated in Chapters II and III of the Convention and in this Protocol.

2. To this end, the said authorities shall have, in particular, powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of domestic law giving effect to the principles mentioned in paragraph 1 of Article 1 of this Protocol.

Each supervisory authority shall hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms with regard to the processing of personal data within its competence.

3. The supervisory authorities shall exercise their functions in complete independence.

4. Decisions of the supervisory authorities, which give rise to complaints, may be appealed against through the courts.

5. In accordance with the provisions of Chapter IV, and without prejudice to the provisions of Article 13 of the Convention, the supervisory authorities shall co-operate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.
Article 2

Transborder flows of personal data to a recipient which is not subject to the jurisdiction of a Party to the Convention

1. Each Party shall provide for the transfer of personal data to a recipient that is subject to the jurisdiction of a State or organisation that is not Party to the Convention only if that State or organisation ensures an adequate level of protection for the intended data transfer.

2. By way of derogation from paragraph 1 of Article 2 of this Protocol, each Party may allow for the transfer of personal data:

a. if domestic law provides for it because of:

- specific interests of the data subject, or
- legitimate prevailing interests, especially important public interests, or

b. if safeguards, which can in particular result from contractual clauses, are provided by the controller responsible for the transfer and are found adequate by the competent authorities according to domestic law.

Article 3

Final provisions

1. The provisions of Articles 1 and 2 of this Protocol shall be regarded by the Parties as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

2. This Protocol shall be open for signature by States Signatories to the Convention. After acceding to the Convention under the conditions provided by it, the European Communities may sign this Protocol. This Protocol is subject to ratification, acceptance or approval. A Signatory to this Protocol may not ratify, accept or approve it unless it has previously or simultaneously ratified, accepted or approved the Convention or has acceded to it. Instruments of ratification, acceptance or approval of this Protocol shall be deposited with the Secretary General of the Council of Europe.

3. This Protocol shall enter into force on the first day of the month following the expiry of a period of three months after the date on which five of its Signatories have expressed their consent to be bound by the Protocol in accordance with the provisions of paragraph 2 of Article 3.

In respect of any Signatory to this Protocol which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiry of a period of three months after the date of deposit of the instrument of ratification, acceptance or approval.
4. After the entry into force of this Protocol, any State which has acceded to the Convention may also accede to the Protocol.

Accession shall be effected by the deposit with the Secretary General of the Council of Europe of an instrument of accession, which shall take effect on the first day of the month following the expiry of a period of three months after the date of its deposit.

5. Any Party may at any time denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

Such denunciation shall become effective on the first day of the month following the expiry of a period of three months after the date of receipt of such notification by the Secretary General.

6. The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the European Communities and any other State which has acceded to this Protocol of:

   a. any signature;
   b. the deposit of any instrument of ratification, acceptance or approval;
   c. any date of entry into force of this Protocol in accordance with Article 3;
   d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this ... day of ..., in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, the European Communities and any State invited to accede to the Convention.
Explanatory Report

Introduction

1. The purpose of this Protocol is to improve the application of the principles contained in Council of
   Europe Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal
   Data (ETS 108, "the Convention") by adding two substantive new provisions, one on the setting up of one
   or more supervisory authorities by each Party and one on transborder flows of personal data to countries or
   organisations which are not parties to the Convention.

2. The Consultative Committee set up by virtue of Article 18 of the Convention prepared this draft Protocol
   at its 15th meeting held from 16 to 18 June 1999. It was submitted to the Committee of Ministers on the
   proposal of the Consultative Committee for transmission to the Parliamentary Assembly. The Consultative
   Committee considered the draft in the light of the Opinion adopted by the Assembly, on 5 April 2000, and
   then adopted the draft Protocol at its 16th meeting, from 6 to 8 June 2000. The Committee of Ministers
   adopted the additional Protocol on …

Remarks concerning the provisions of the Protocol

Preamble

3. Improving the application of the principles set forth in the Convention has become necessary because of
   the increase in exchanges of personal data across national borders between states which are Parties to the
   Convention and states or entities which are not.

4. This increase in the flow of data across national borders is a consequence of the ever-growing volume of
   international exchanges on a global scale, together with technological progress and its numerous
   applications. At the same time, therefore, a constant effort is needed to improve the effective protection of
   the rights guaranteed by the Convention. Effective protection in turn requires international harmonisation
   not only of the basic principles of data protection but also, to a certain extent, of the means of implementing
   them in such a rapidly changing, highly technical field and of the conditions in which the transfers of
   personal data can be made across national borders.

5. Effective application of the principles of the Convention necessitates the adoption of appropriate
   sanctions and remedies (Article 10). Most countries which have data protection laws have set up
   supervisory authorities, generally a commissioner, a commission, an ombudsman or an inspector general.
   These data protection supervisory authorities provide for an appropriate remedy if they have effective
   powers and enjoy genuine independence in the fulfilment of their duties. They have become an essential
   component of the data protection supervisory system in a democratic society.

6. The flow of information is at the very core of international co-operation. However, the effective
   protection of privacy and personal data also means that there should in principle be no transborder flows of
personal data to recipient countries or organisations where the protection of such data is not guaranteed.

**Article 1**

**Supervisory authorities**

**Article 1.1**

7. Article 10 of the Convention requires the establishment of appropriate remedies in the relevant legal provisions of each Party in respect of violations of provisions of domestic law giving effect to the principles of the Convention. However, it does not explicitly require the Parties to establish supervisory authorities to monitor compliance on their territory with the measures giving effect to the principles set forth in Chapters II and III of the Convention and in this Protocol. The first article of this Protocol has in this context a dual aim:

8. It aims to enforce the effective protection of the individual by requiring the Parties to create one or more supervisory authorities that contribute to the protection of the individual’s rights and freedoms with regard to the processing of personal data. More than one authority might be needed to meet the particular circumstances of different legal systems. These authorities may exercise their tasks without prejudice to the competence of legal or other bodies responsible for ensuring respect of domestic law giving effect to the principles of the Convention. The supervisory authorities should have the necessary technical and human resources (lawyers, computer experts) to take prompt, effective action in a person’s favour.

9. The article also aims to achieve improved harmonisation of the rules governing the supervisory authorities already established in respect of Parties to the Convention. In principle, all the Parties to the Convention shall provide in their domestic legislation for the establishment of one or more supervisory authorities. Depending on the national legal system, however, their composition, powers and modus operandi differ considerably from one country to another.

10. The aforementioned harmonisation not only aims at improving the level of data protection in the Parties but also aims at achieving closer co-operation between the Parties, without prejudice to the co-operation system set up by the Convention.

**Article 1.2**

11. Parties have considerable discretion as to the powers, which the authorities should be given for carrying out their task. According to the Protocol, however, they must at least be given powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities any violations of the relevant provisions.
12. The authority shall be endowed with powers of investigation, such as the possibility to ask the controller\textsuperscript{1} for information concerning the processing of personal data and to obtain it. Such information should be accessible in particular when the supervisory authority is approached by a person wishing to exercise the rights provided for in domestic law, by virtue of Article 8 of the Convention.

13. The supervisory authority's power of intervention may take various forms in domestic law. For example, the authority could be empowered to oblige the controller of the file to rectify, delete or destroy inaccurate or illegally collected data on its own account or if the data subject is not able to exercise these rights himself/herself. The power to issue injunctions on controllers who are unwilling to communicate the required information within a reasonable time would be a particularly effective manifestation of the power of intervention. This power could also include the possibility to issue opinions prior to the implementation of data processing operations, or to refer cases to national parliaments or other state institutions. The supervisory authority should have the power to inform the public through regular reports, the publication of opinions or any other means of communication.

14. Whilst contributing to the protection of individual rights, the supervisory authority also serves as an intermediary between the data subject and the controller. In this context, it seems particularly important that the supervisory authority should be able to provide information to individuals or data users about the rights and obligations concerning data protection. Moreover, every person should have the right to lodge a claim with the supervisory authority concerning his/her rights and liberties in respect of personal data processing. For the reasons referred to in paragraph 7 of this Explanatory Report, this lodging of a claim helps to guarantee people's right to an appropriate remedy, in keeping with Article 10 and Article 8 paragraph d. of the Convention. It is recalled that every person has a judicial remedy. However, domestic law may provide for the lodging of a claim with the supervisory authority as a condition of this judicial remedy.

15. The Parties should give to the supervisory authority the power either to engage in legal proceedings or to bring any violations of data protection rules to the attention of the judicial authorities. This power derives in particular from the power to carry out investigations, which may lead the authority to discover an infringement of a person's right to protection. The Parties may fulfill the obligation to grant this power to the authority by enabling it to make judgments.

16. The supervisory authority’s competences are not limited to the ones listed in Article 1 paragraph 2. It should be borne in mind that the Parties have other means of making the task of the supervisory authority effective. It could be possible for associations to lodge complaints with the authority, in particular when the rights of the persons that it represents are restricted in accordance with Article 9 of the Convention. The authority could be entitled to carry out prior checks on the legitimacy of data processing operations and to keep a data processing register open to the public. The authority could also be asked to give its opinion when legislative, regulatory or administrative measures concerning personal data processing are in preparation, or on codes of conduct.

\textsuperscript{1} Or “controller of the file”
Article 1.3

17. Supervisory authorities cannot effectively safeguard individual rights and freedoms unless they exercise their functions in complete independence.¹ A number of elements contribute to safeguarding the independence of the supervisory authority in the exercise of its functions. These could include the composition of the authority, the method for appointing its members, the duration of exercise and conditions of cessation of their functions, the allocation of sufficient resources to the authority or the adoption of decisions without being subject to external orders or injunctions.

Article 1.4

18. As a counterpart to this independence it must be possible to appeal against the decisions of the supervisory authorities through the courts in accordance with the principle of the rule of law when these decisions give rise to complaints.

19. Moreover, in cases where the supervisory authority does not itself have judicial competence, the intervention of a supervisory authority shall not constitute an obstacle to the possibility for the individual to have a judicial remedy.

Article 1.5

20. Strengthening co-operation between the supervisory authorities must contribute to the development of the level of protection in the Parties’ practice under the Convention. This co-operation is in addition to the mutual assistance provided for in Chapter IV of the Convention and the work of the Consultative Committee. Its purpose is to provide improved protection to the people concerned. With increasing frequency people are directly affected by data processing operations which are not confined to one country and therefore involve the laws and authorities of more than one country. The development of international electronic networks and increasing cross-border flows in the service industries and the work environment are examples. In such a context international co-operation between supervisory authorities ensures that people are able to exercise their rights on an international as well as a national level.

Article 2

Transborder flows of personal data to a recipient which is not subject to the jurisdiction of a Party to the Convention

21. Article 12 of the Convention establishes the principle of the free flow of personal data between the Parties subject to the possibilities for derogation provided for in sub-paragraph 3. This implies, in particular, that the principles of the Convention have been implemented.

¹ In respect of the procedural guarantees set forth in Article 8 of the European Convention on Human Rights, the case law of the organs of this Convention already considers the intervention of an independent body, in certain circumstances, as a guarantee of “effective supervision” of the need for an interference by a public authority with the exercise of the rights provided by Article 8 (cf Gaskin vs United Kingdom, decision of 7 July 1989, series A no. 160, § 49).
22. Transborder flows of personal data to a recipient which is not subject to the jurisdiction of a Party are only indirectly concerned. According to Article 12 paragraph 3b, a country may derogate from the principle of the free circulation of data between its territory and a recipient which is not subject to the jurisdiction of a Party via another Party, in order to avoid such transfers resulting in circumvention of the legislation of the Party of origin. There is therefore no specific provision on transborder flows of data in respect of states or organisations which are not Parties to the Convention.

23. It follows that the Parties to the Convention might make provision in their legal systems for the explicit authorisation of transfers of personal data to a recipient which is not subject to the jurisdiction of a Party with a different level of protection to the Convention. At the time this Protocol was drafted, even though they were under no explicit obligation to do so, some Parties had introduced rules into their domestic law concerning the transfer of data to a recipient which was not subject to the jurisdiction of a Party. Differences in practice, particularly in the light of the above-mentioned Article 12 paragraph b, could lead to substantial restrictions on the free circulation of data between the Parties, which would also be contrary to the purpose of the Convention. It is therefore necessary in the light of specific provisions in Council of Europe recommendations on data protection, to establish common rules concerning transborder flows of personal data to a recipient which is not subject to the jurisdiction of a Party.

24. Such a measure is determined on the one hand by the will to guarantee effective protection of personal data outside national borders and, on the other, by the Parties’ determination to ensure the free circulation of information between peoples, in accordance with the wording of the Preamble to the Convention.

**Article 2.1**

25. Transborder flows of data to a recipient which is not subject to the jurisdiction of a Party are subject to the condition of an adequate level of protection in the recipient country or organisation. Paragraph 70 of the explanatory report to the Convention refers to “non-Contracting States (having) a satisfactory data protection regime”. A recipient which is not subject to the jurisdiction of a Party to the Convention could only be regarded as having a satisfactory data protection regime, if it afforded an adequate level of protection.

26. The adequacy of the level of protection must be assessed in the light of all the circumstances relating to the transfer.

27. The level of protection should be assessed on a case-by-case basis for each transfer or category of transfers made. Thus the circumstances of the transfer should be examined and, in particular, the type of data, the purposes and duration of processing for which the data are transferred, the country of origin and the country of final destination, the general and sectoral rules of law applicable in the state or organisation in question and the professional and security rules which obtain there.

28. An assessment of adequacy can similarly be made for a whole state or organisation thereby permitting all data transfers to these destinations.
In that case, the adequate level of protection is determined by the competent authorities of each Party.

29. The assessment of an adequate level of protection must take into account the principles of Chapter II of the Convention and of this Protocol and the extend to which they are met in the recipient country or organisation - as far as they are relevant for the specific case of transfer - and how the data subject can defend his or her interests in case of non compliance in a specific case.

30. The Consultative Committee of the Convention may, at the request of one of the Parties, give an opinion on the adequacy of the level of data protection in a third country or organisation.

Article 2.2, a

31. The parties have discretion to determine derogations from the principle of an adequate level of protection. The relevant domestic law provisions must nevertheless respect the principle inherent in European law that clauses making exceptions are interpreted restrictively, so that the exception does not become the rule. Domestic law exceptions can therefore be made for a legitimate prevailing interest. That interest may be to protect an important public interest, such as is specified in the context of Article 8 paragraph 2 of the European Convention on Human Rights and Article 9 paragraph 2 of Convention ETS n° 108 ; the exercise or defence of a legal claim ; or the extraction of data from a public register. Exceptions may also be made for the specific interest of the data subject as for the fulfilment of a contract with the data subject or in his interest, or for protecting his vital interest or when he has given his consent. In this case, before consenting, the data subject would have to be informed in an appropriate way about the intended transfer.

Article 2.2 b

32. Each party may provide for the transfer of personal data to a recipient which is not subject to the jurisdiction of a Party and does not ensure an adequate level of protection, provided that the person in charge of the transfer supplies sufficient safeguards. These safeguards must be found adequate by the competent supervisory authorities according to domestic law. Such safeguards may in particular be the result of contractual clauses binding the controller who makes the transfer and the recipient who is not subject to the jurisdiction of a Party.

33. The content of the contracts concerned must include the relevant elements of data protection. Moreover, in procedural terms, contract terms could be such, for example, that the data subject has a contact person on the staff of the person responsible for the transfer, whose responsibility it is to ensure compliance with the substantive standards of protection. The subject would be free to contact this person at any time and at no cost and, where applicable, obtain assistance in exercising his or her rights.
Article 3

Final provisions

34. According to the conventional practice of the Council of Europe, an additional Protocol to a Convention can only be signed by the Signatories to the Convention itself. The European Communities, which have participated in the elaboration of the present Protocol, may sign this Protocol after acceding to the Convention under the conditions provided by it.

35. Paragraph 2 of Article 3 only applies to Council of Europe member States and to the European Communities. Paragraph 4 only applies to non-Member States of the Council of Europe, which can only accede to the Protocol as well as to the Convention.

36. Paragraph 3 fixes at five the number of ratifications necessary for the entry into force of the Protocol, corresponding to the provisions of article 22 of the Convention.

37. The provisions in paragraphs 3 to 6 are in conformity with the final clauses of the Convention and with the customary final clauses contained in Council of Europe conventions and protocols.