

Accession to Convention 108 and to its additional Protocol by non-European States

I. Participation in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereafter Convention 108), signed on 28 January 1981, and to its Additional Protocol regarding supervisory authorities and transborder data flows, signed on 8 November 2001, is not exclusively limited to member States of the Council of Europe. The Convention and its Protocol are open to accession by non-member States, even non-European States, provided that they have been formally invited to accede by the Committee of Ministers of the Council of Europe.

Article 23 of the Convention, concerning the accession by non-member States, reads as follows:

"1. After the entry into force of this convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council of Europe to accede to this convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the committee "

Article 3 of the Additional Protocol reads as follows:

"4.a. After the entry into force of this Protocol, any State which has acceded to the Convention may also accede to the Protocol."

II. The procedure for the accession to this Convention and to its additional Protocol by a State which is not a member of the Council of Europe may be summarised as follows:

1. In principle, the Committee of Ministers may take the initiative of inviting a non-member State to accede to a specific Convention. It is nevertheless customary for the non-member State to request accession in a letter addressed to the Secretary General of the Council of Europe. The letter should be signed by the Minister for Foreign Affairs or a diplomatic representative acting upon instructions of his or her government. In principle the accession to the Convention 108 and to its Additional Protocol should be made simultaneously.

2. In accordance with the constant practice of the Council of Europe, before formally putting the item on the agenda of the Committee of Ministers, the Secretariat may informally ascertain the opinion among member States' delegations.

3. Formal requests for accession are examined by a group of rapporteurs, and then, the decision is made by the Committee of Ministers. Once there is an agreement in principle within the Committee to give a positive reply to a request, the Committee of Ministers instructs the Secretariat to consult the other non-member States which are Parties to the Convention. The non-member States are given a precise time-limit for the formulation of objections, usually two months. It should be noted that, in relation to Convention 108, no non-member States of the Council of Europe is, at present, Party to this Convention¹.

4. Following the consultation of the non-member States which are Parties to the Convention, the decision inviting the non-member State becomes definitive. In the case of Convention 108, the decision on whether or not to issue an invitation has to be unanimously agreed by those Council of Europe members which have ratified the Convention (i.e. 43 States as of 1st September 2011). This decision is usually taken at the level of the Ministers' Deputies. An invitation to accede to the Convention is then notified to the State concerned by the Secretariat General.

5. Prior to acceding to Convention 108, the State invited has to take the necessary measures to ensure that its domestic law allows the Convention to be implemented. Article 4 of the Convention provides that : *"1. Each Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this chapter. 2. These measures shall be taken at the latest at the time of entry into force of this convention in respect of that Party."*

6. The request for accession will contain information about the legal framework, especially:

- Legislation (Data Protection Law, sectorial rules).
- Existence of a supervisory authority: composition, statute, activities.
- Possibly, information about case law.

7. It should be noted in this context that the Convention institutes a consultative committee of experts (T-PD) which monitors the application of the Convention by the States Parties and which provides an opinion on the conformity of the State concerned's Law to Convention 108. For more information: <http://www.coe.int/dataprotection>

8. It is customary for the instrument of accession to be deposited at the seat of the Council of Europe in Strasbourg, in the presence of a representative of the acceding State and of the Secretary General of the Council of Europe or his/her deputy. The representative of the acceding State brings with him/her the instrument of accession, and a procès-verbal of deposit is signed by both Parties. Should it prove difficult for the acceding State to send a representative to Strasbourg, the instrument of accession may be sent by diplomatic courier. Deposit of the instrument of accession is notified to the members of the Council of Europe and to the other Parties to the Convention. States having acceded to the Convention are entitled to accede to its Protocol without a specific invitation from the Committee of Ministers being necessary.

9. Article 23, paragraph 2, of the Convention provides that it shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

10. In June 1999, the Committee of Ministers of the Council of Europe has approved amendments to Convention 108 allowing the European Union to accede to the Convention. To enter into force, these amendments must be accepted by all States Parties to the Convention. Given the importance of this Convention and of the European Union's accession to it, it is asked to States wishing to become Parties to it to consider accepting the amendments upon accession to the Convention. Acceptance of the amendments does not require the deposit of a formal instrument of acceptance. A letter or a Note

verbale from the Minister for Foreign Affairs or a diplomatic representative acting upon instructions of his or her government is sufficient to express the consent of the State concerned.

III. The text of Convention 108, its explanatory report, the chart of signatures and ratifications and all declarations and reservations made with regard to it can be consulted on the web site of the Council of Europe's Treaty Office on < <http://conventions.coe.int> >. Information concerning the Protocol and the amendments to the Convention are also available on this website. You also can contact the Secretariat of the Convention's Consultative Committee:

Secretariat of the Convention's Consultative Committee

Directorate General of Human Rights and Rule of Law

Data protection and Cybercrime Department