OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)

on: 14 September 1993

No. prev. doc.: 8431/93
No. Cion prop.: 8460/90 COM(90) 314 final SYN 287 and 288

Subject: Recommendation for a Council Decision on the opening of negotiations with a view to the accession of the European Communities to the Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data

1. At its meeting on 14 September 1993, the Working Party on Economic Questions (Data Protection) (1) examined the abovementioned recommendation for a Decision (2). The outcome of the discussions may be summarized as follows:

(1) The Greek and Irish delegations were not represented.
(2) See 8460/93, pages 117 and 118.
2. Without ruling out the accession of the European Communities to Convention 108 of the Council of Europe following the adoption of the proposal for a Council Directive on data protection (1), the large majority of delegations considered it too early and inadvisable to open accession negotiations with non-Community countries parties to Convention 108 at this juncture and felt it more appropriate to focus discussions on the amended proposal for a Directive referred to in footnote 1. The Commission representative shared this viewpoint and stated that the said negotiations could be initiated as soon as the common position had been adopted.

3. Moreover, the Commission representative considered it useful to instruct the Commission not to open accession negotiations but to represent the Community, following co-ordination with the Member States, at the preparatory technical meetings of the Consultative Committee provided for by Convention 108 of the Council of Europe. The Community could thus reply to the questions posed by the other countries parties to Convention 108 as regards its possible accession to the Convention.

   The majority of delegations was opposed to such instructions as long as the Working Party had not examined all the problems inherent in the Community's accession to the Convention, particularly those concerning the Community's external powers in the data protection area. The Italian delegation suggested that the Commission departments submit a working document dealing with the points referred to in the Annex and with questions relating to the hierarchy of standards in the event of incompatibility between Convention 108 and the Community Directive and to the implications of possible accessions.

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(1) Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (9400/92 ECO 221).
accession for the role of the Committee of Ministers of the Council of Europe.

4. As regards the Community's external powers in this area, the representative of the Council's Legal Service made the preliminary comment that in accordance with the Court's case law (\(^\ast\)), the Community would have exclusive authority to enter into any external commitment which would affect the common rules contained in the Directive under discussion relating to data protection (see footnote 1 on page 2) as soon as the Directive was adopted. Such commitments could only be identified on a case-by-case basis.

Following adoption of the Directive, the Community's exclusive competence would thus be defined in accordance with the content of the Community Directive in relation to that of Convention 108. The exercising, where appropriate, of such competence by the Community would be facilitated if the latter were a party to Convention 108. If the Community did not accede to the Convention, recourse would have to be had to ad hoc procedures.

The representative of the Council's Legal Service further pointed out that in accordance with Opinion 1/76 of the Court of Justice, the Community's external power corresponded to the power it held at internal level and that it could exercise its external power without prior adoption of internal rules. As the Community had the authority to legislate in that area, it consequently possessed non-exclusive virtual power to accede to the Convention within the limits of the Treaty.

\(^\ast\) See AETR Judgment, case 22/70 of 31 March 1971.
5. While deciding to give priority to its further discussions on the amended proposal for a Council Directive on data protection (see footnote 1, page 2), the Working Party agreed that it should be stated at the next meeting of the Consultative Committee under Convention 108 that discussions on possible Community accession were being continued at Community level.
MINIMUM LIST OF QUESTIONS TO BE EXAMINED

1. DETERMINATION OF THE FACTORS JUSTIFYING EC ACCESSION TO CONVENTION 108

2. TIMING OF ACCESSION

   – Possibility of acceding before adoption of the Directive?
   – Possibility of acceding before all Member States have implemented the Directive?

3. DETAILED ARRANGEMENTS FOR ACCESSION

   – Type of directives to be given to the Commission
     (directives to start negotiations or directives to deal with technical matters);

   – Content and duration of the directives
     (general directives or accompanied by restrictions on and conditions for the Commission's action;
     possible fixing of a deadline);

   – Form of accession
     Additional Protocol or amendment to Convention 108);
Nature of accession

(Does the EC accede with status similar to that of a State as a supranational organization leaving some "freedom" to the Member States of the EC? Does the obligation to align domestic law on the Convention - Article 4 of the Convention - apply only to the Community institutions or also in respect of the Member States of the EC? What will be the role of the EC in respect of national rules which do not comply with the Convention?)


- Does the proposed Directive comply with the Convention in all respects?
  (deceased persons; transborder flows of data; Art. 2 of the Directive - reasonable possibility of identifying the data subject; Art. 6 of the Directive as regards storage of data; etc.).

- How can Article 11 of the Convention be reconciled with the narrow leeway which the proposal for a directive leaves Member States for reasons of harmonization?

- How can the option to extend the Convention to include manual data be reconciled with Article 3 of the proposed Directive (manual data contained in files)?

- How can the territoriality principle (Article 4(1) of the Convention) which also applies in respect of transborder flows of data and which implies an obligation on each State having acceded to the Convention be reconciled with Article 3(2) of the proposed Directive (on the basis of which the Member State of the EC should "refrain" from applying its internal law if the controller of the file resides elsewhere in the territory of the EC)?
What will be the relationship between the derogations provided for in the Convention and those provided for in the Directive?

5. OPERATIONAL ASPECTS LINKED TO POSSIBLE ACCESSION

- Criteria governing Community powers;
- Criteria to be applied in resolving possible disputes in connection with the definition of powers;
- Activities of the Consultative Committee of Convention 108, particularly as regards the right to vote;
- Will the Commission have to deposit in Strasbourg the lists provided for in Article 3 of the Convention?
- Applicability of the Convention to Community institutions;
- Relationships between the Community authority responsible for mutual assistance provided for in the Convention and the national authority responsible for carrying out the same tasks;
- Role of the EC as regards Art. 10 of the Convention.