

Accession to Council of Europe privacy Convention 108 by non-European states

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A somewhat neglected international agreement on privacy, Council of Europe Convention 108 (the *Convention for the protection of individuals with regard to automatic processing of personal data*) may be receiving a new lease of life by finally being opened up to accession by States outside the Council of Europe.

Since the inception of the Convention in 1981, Article 23(1) has provided for accession by non-member States:

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.

Despite this, the Committee of Ministers has never invited a State to accede, and there has not been a procedure for interested States to apply to accede.

Steps toward change became visible in 2005 when the world's privacy and data protection Commissioners at their 27th International Conference in Montreux, Switzerland included in their concluding 'Montreux Declaration' a number of challenges to global organizations and national governments. One was their appeal 'to the Council of Europe to invite, in accordance with article 23 [of Convention 108 on data protection] ... non-member-states of the Council of Europe which already have a [sic] data protection legislation to accede to this Convention and its additional Protocol.'

In March 2008 the representative of Switzerland at the 24th annual meeting of the Consultative Committee of the Convention recalled the Montreux Declaration and argued that considered that 'now would be a good time for the Council of Europe to issue such an invitation, as these accessions could be a step towards a much called-for universal right to data protection'. The Consultative Committee then recommended 'that non-member states, with data protection legislation in accordance with Convention 108, should be allowed to accede to the Convention', and it 'invited the Committee of Ministers to take note of this recommendation and to consider any subsequent accession request accordingly'.

This has now occurred. The Committee of Ministers 1031st meeting on 2 July 2008, meeting at Deputy level, took note of the Consultative Committee's recommendations and 'agreed to examine any accession request in the light of this recommendation' and 'instructed the Secretariat to disseminate information about the convention'.

The implications of these developments are that, if a non-Member State has enacted legislation 'in accordance with' the standards established by Convention 108, then it should be allowed to accede to the Convention (ie invited to do so by the Committee of Ministers) if it requests to do so. It seems that the Consultative Committee might first examine any such request and report to the Committee of Ministers, as it can do under Articles 19 and 20, though no such procedures have been announced. Any such role would place the Consultative Committee in a position analogous to the EU's Article 29 Committee.

The complexities of the Additional Protocol

Neither the Consultative Committee's recommendation, nor the Committee of Ministers' decision explicitly refers to the Convention's Additional Protocol (ETS No 181) dealing with

transborder data flows and supervisory authorities. There is no need for explicit mention because any party to the Convention can accede to the Additional Protocol by virtue of Article 3(2) of the Protocol. Twenty of the 46 Parties to Convention 108 have also ratified the Additional Protocol of 2001 (as of May 2008), an increase of 15 in the past year. A further 13 parties have signed but not yet ratified the Additional Protocol, leaving only 13 parties to Convention 108 that have neither signed nor ratified the Additional Protocol. The countries that have acceded to the Additional Protocol include five¹ that are not members of the EU, so the Additional Protocol is co-extensive with an expanding number of countries that have data export restrictions in their laws.

It is not too difficult for the data protection laws of quite a few non-European countries to meet the requirements of Convention 108. In summary, the broadly and briefly stated data protection principles in Articles 5-8 of Convention 108 set a standard that can be met by many, particularly given the provisions for derogation in Article 9. The enforcement requirement in Article 10 that requires parties 'to establish appropriate sanctions and remedies' are so general that, at least in theory, most countries with serious data protection laws would be able to show that their enforcement standards are 'in accordance with' Convention 108. The requirements for mutual assistance (Chapter IV) will rarely cause difficulties, and the data export provisions (Article 12) do not require export restrictions.

As a starting point, therefore, it would seem that there could be attractions to countries outside Europe with data protection laws in obtaining the benefits of free flow of personal data exports from other parties to the Convention apparently promised by Article 12(2), in return for the similar guarantee offered by the Convention. But that is where the Additional Protocol, and its widening ratifications, complicates matters. The complexities can only be stated very briefly here. The Additional Protocol requires parties not to export personal data to countries which do not have data export restrictions in their laws, but an exception is made for exports to countries which are parties to the Convention. To limit data exports to other parties to the Convention requires a derogation under Article 12(3)(b) of the Convention. This is further complicated by requirements to limit data exports arising from the EU's privacy Directive. However, some non-European States might seek to accede only to the Convention because they do not have data export restrictions in their laws, with few being in a position to accede to both the Convention and the Additional Protocol. The many possibilities presented by these complexities will be a key element in determining the success of this initiative.

Future developments

The opening up of Convention 108 to non-European countries is one way of sidestepping the cumbersome process of developing a new UN convention on privacy, by starting with an instrument already adopted by the region with the most concentrated distribution of privacy laws, Europe. The Asia-Pacific is probably the region outside Europe with the highest number of information privacy laws (provided you include Canada), followed by Latin America. This approach deserves serious consideration by Asia-Pacific and other governments that already have privacy laws of international standard, or are considering introducing them.

Given that the APEC Privacy Framework has not attempted to provide such a general mechanism for free flow of personal information within the Asia-Pacific, and has had very limited impact after five years, perhaps globalizing this European instrument is now the realistic way to do revitalise international privacy developments.

However, considerable analysis of the implications of accession for non-European countries is necessary before the benefits become clear, as well as development of procedures and policies within the Council of Europe and consideration of how they will align with the work of other bodies in the EU and elsewhere.

¹ Albania, Andorra, Bosnia and Herzegovina, Croatia and Switzerland.

A further analysis of the implications Convention 108 accession, particularly for Asia-Pacific countries, will appear in the next issue of PLBI.