

Annexe B

EXPLANATORY MEMORANDUM (EM) FOR EUROPEAN UNION LEGISLATION

2018/0237 (NLE)/ 2018/0238 (NLE)

COM(2018) 449 final

COM(2018) 451 final

Council References 9765/18 & 9766/18

PROPOSAL FOR A COUNCIL DECISION AUTHORIZING MEMBER STATES TO SIGN, IN THE INTEREST OF THE EUROPEAN UNION, THE PROTOCOL AMENDING THE COUNCIL OF EUROPE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA (ETS No. 108).

PROPOSAL FOR A COUNCIL DECISION AUTHORIZING MEMBER STATES TO RATIFY, IN THE INTEREST OF THE EUROPEAN UNION, THE PROTOCOL AMENDING THE COUNCIL OF EUROPE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA (ETS No. 108).

Submitted by Department for Digital, Culture, Media & Sport on 19th June 2018

SUBJECT MATTER

1. This Explanatory Memorandum (EM) relates to two Commission proposals for Council Decisions on signature and ratification of a new Council of Europe Amending Protocol to the [1981] Convention for the Protection of individuals with regard to automatic processing of personal data (hereinafter 'Convention 108'), designed to significantly increase the level of data protection afforded under the Convention.
2. The Amending Protocol was adopted by the Council of Europe on 18 May. Convention 108 required acceding States to incorporate into their respective national laws the necessary measures to ensure respect for the human rights of all individuals with regard to the processing of personal data. In 1981 Convention 108 was at the time the leading international instrument on data protection, which the UK ratified in 1987. The 1995 EC Data Protection Directive (which the UK's Data Protection Act 1998 transposed) took Convention 108 as its starting point.
3. Convention 108 is open to all countries in the world and currently has 51 States Parties, namely the 47 Council of Europe member States plus Uruguay, Mauritius, Senegal and Tunisia (by order of accession, Tunisia becoming a Party on 1 November 2017). Argentina, Burkina Faso, Cape Verde and Morocco have also been invited to accede and Mexico has recently submitted an accession request.

4. The Amending Protocol is aimed at modernising Convention 108 and its Additional Protocol regarding supervisory authorities and transborder data flows, and strengthening their application.
5. Modernisation of Convention 108 pursues two main goals: to provide a response to the challenges associated with the development of the new information and communication technologies and to enhance the implementation in practice of the Convention, including its evaluation and follow-up mechanism. The Amending Protocol adopted by the Council of Europe on 18 May seeks primarily to introduce a number of changes to the Convention in order to:
 - a. address the challenges to privacy resulting from the use of information and telecommunication technologies;
 - b. strengthen the right to data protection as a fundamental right that is essential for the exercise of other rights and fundamental freedoms when processing personal data;
 - c. reconcile the right to the protection of personal data with the exercise of other rights and fundamental freedoms (especially freedom of expression);
 - d. enhance the Convention's monitoring mechanisms;
 - e. maintain the general and technologically neutral nature of the Convention's provisions;
 - f. preserve the Convention's consistency and compatibility with other applicable legal frameworks, particularly that of the new European Union regime - the GDPR and Law Enforcement Directive; and
 - g. preserve, reassert, strengthen and promote the universal scope and open character of Convention 108.
6. The UK participated fully in the development of the Amending Protocol and has put legislation in place through the Data Protection Act 2018 to be compliant with the requirements of the Amending Protocol and the Convention.
7. The Amending Protocol is a binding international agreement, subject to ratification, and is linked to the Convention. It creates legal obligations applicable to ratifying States. The Amending Protocol can only be signed by States that have signed the Convention.
8. The Amending Protocol provides for the accession to the Convention by the EU, but only following the Amending Protocol's entry into force. Entry into force of the Amending Protocol will take place once all States who are parties to the Convention have ratified it. A partial entry into force may take place after 5 years, provided at least 38 States have completed the ratification procedure, whereupon the Amending Protocol will enter into force for those States who have ratified it.

SCRUTINY HISTORY

9. There is no Parliamentary scrutiny history relevant to this document

MINISTERIAL RESPONSIBILITY

10. The Secretary of State for Digital Culture Media and Sport has primary responsibility for data protection policy

INTEREST OF THE DEVOLVED ADMINISTRATIONS

11. Data protection policy is a reserved matter under the UK's devolution settlements. However, the devolved administrations have an interest and have been consulted in the preparation of this EM.

LEGAL AND PROCEDURAL ISSUES

- i. Legal basis
12. The Decision on signature and ratification of the Additional Protocol cites Article 218(5) and 218(6) TFEU, in conjunction with Article 16 TFEU .
- ii. European Parliament Procedure
13. The European Parliament is required to be informed of these Decisions in accordance with Article 218(10) TFEU
- iii. Voting procedure
14. Qualified majority voting in accordance with Article 218(8) TFEU
- iv. Impact on United Kingdom Law
15. The UK has comprehensive data protection legislation in place in the form of the Data Protection Act 2018, which is compliant with EU data protection law and includes a power to make any necessary amendments to comply with the modernised Convention once it is in place. Prior to ratification of the Amending Protocol this power will be used to make any necessary amendments to align the parts of the Data Protection Act 2018 which are outside of the scope of EU law with the Amending Protocol.
- v. Application to Gibraltar
16. The draft Council Decision applies to Gibraltar.
- vi. Fundamental rights analysis
17. The objective of the Convention is to protect the right to privacy, recognised under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The rights to privacy and to data protection are also enshrined in Article 7 and 8 of the EU Charter of Fundamental Rights and Article 16 TFEU.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

18. The draft Council Decisions do not apply to the European Economic Area.

SUBSIDIARITY

19. I consider that the draft Council Decisions relating to the Amending Protocol, as proposed by the European Commission, complies with the principle of subsidiarity. The Commission has not asserted that matters contained within the Convention and the Amending Protocol are within the exclusive competence of the EU, and has only authorised Member States to sign the Amending Protocol in the interests of the Union “insofar as its provisions fall within Union competence”. It follows that the proposal complies with Article 5(3) TEU and will be concluded as a shared/mixed agreement.

EU Competence

20. The European Commission put forward a negotiating mandate for consideration by EU Member States in 2013. The mandate gave the EU the ability to negotiate on behalf of all EU Member States in areas where it had competence. The Convention covers certain aspects of data processing such as national security, which fall outside the scope of EU law and therefore outside the scope of the new EU data protection package, and in my view the UK retains competence to act in those areas. The UK was alone amongst the Member States in opposing the mandate since it disagreed with the Commission’s interpretation of competence. The vote on the mandate was a qualified majority vote and so the Commission has been allowed to negotiate on all EU Member States behalf.

21. Article 16 of the TFEU confers on the EU the ability to make rules about data protection. Competence has been exercised in this area in the form of Directive 95/46/EC implemented by the Data Protection Act 1998, and more recently Regulation (EU) 2016/679 (the GDPR) and Directive (EU) 2016/680 (the Law Enforcement Directive) both implemented by the Data Protection Act 2018. This agreement (signing and ratifying the Amending Protocol) is being concluded as a shared agreement. The EU only has competence in relation to the processing of personal data by Member States when carrying out activities falling within the scope of EU law and relating to the free movement of data and therefore excludes things like the processing of personal data relating to national security which are covered by Convention 108. The EU does not have explicit external competence for any external action on data protection under article 16 of the TFEU or elsewhere in the Treaties.

POLICY IMPLICATIONS (including Exit implications where appropriate)

22. On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.

23. The UK participated fully in the drafting of the Amending Protocol and shares with the other 51 contracting Parties to the Convention a desire to see the significantly increased level of data protection afforded under it.

24. I agree that the Convention requires modernising and also agree that the Convention should be aligned with the new EU Data Protection regime. I consider that the Amending Protocol enables both of these objectives to be achieved. The UK already has comprehensive data protection legislation which complies with EU data protection law, by virtue of the Data Protection Act 2018, which includes a power to make any necessary amendments to comply with the modernised Convention once it is in place. Prior to ratification of the Amending Protocol this power will be used to make any necessary amendments to align the parts of the Data Protection Act 2018 which are outside of the scope of EU law with the Amending Protocol.
25. Convention 108 is specifically referenced in the GDPR as being a key consideration when the European Commission is assessing a country's data protection standards as part of its process in determining an adequacy decision, which would be one option for the continued free flow of data between the EU and UK post-Brexit - *subject to our ongoing negotiations on a proposed framework for the UK-EU partnership in relation to data protection*. Supporting the modernised Convention would send a strong message of the UK's commitment to ensuring the highest possible data protection standards, to the Commission and other Member States.
26. It is my understanding that the Amending Protocol will automatically continue to apply to the UK post exit so long as we ratify it.

CONSULTATION

27. Not applicable

IMPACT ASSESSMENT

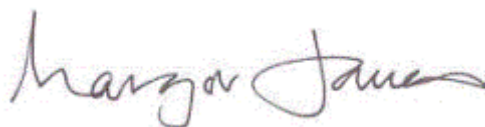
28. Not applicable

FINANCIAL IMPLICATIONS

29. None

TIMETABLE

30. The draft proposals are due to be considered by the Council and Coreper during the week commencing 11 June. The plan is then it to go to COREPER on Wednesday 20 June; and (ECOFIN) Council on Friday 22 June. The Amending Protocol was adopted by the Council of Europe Committee of Ministers on 18 May and will be open for signature as of 25 June.



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