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## **THE CYBERCRIME CONVENTION COMMITTEE (T-CY)**

**Fifth meeting  
Paris, 24 - 25 June 2010**

**Modalities of accession  
by third countries to the Convention on Cybercrime**

**Secretariat Memorandum  
prepared by  
the Directorate General of Human Rights and Legal Affairs**

## **Modalities of accession by third countries to the Convention on Cybercrime**

1. This paper sets out different options that may be pursued to define a procedure that would facilitate accession by third countries to the Convention on Cybercrime ("Budapest Convention"). The T-CY is requested to examine which, if any, of these options should be pursued further. If general agreement is reached on one of these options during the plenary, the T-CY could instruct its Bureau to prepare concrete proposals.

### **Current situation**

2. Article 37 of the Convention on Cybercrime provides for the following procedure of accession to the Convention by non-member States of the Council of Europe:

"1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting with and obtaining the unanimous consent of the Contracting States to the Convention, may invite any State which is not a member of the Council and which has not participated in its elaboration to accede to this Convention. The decision shall be taken by the majority provided for in Article 20.d. of the States of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

"2 In respect of any State acceding to the Convention under paragraph 1 above, the Convention 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."

3. This provision describes the usual Council of Europe practice to invite non-member States of the Organisation to become party to a Council of Europe convention, which is based on the "Model Final Clauses for Conventions and Agreements concluded within the Council of Europe" adopted by the Committee of Ministers in February 1980.

### **Option 1: amending article 37 of the Budapest Convention**

4. Article 37 could be amended with the aim to allow all or certain categories of UN member States to accede, possibly under certain conditions. The modification of the accession procedure would require the amendment of the Convention on Cybercrime. Such an amendment is normally done through an amending protocol. The drafting and entry into force of an amending protocol is often a complex and time-consuming process but, as it has been done in the past for amending protocols of a technical nature, it could provide for its automatic entry into force after the expiry of a period of time, usually two years (see, for example, the 1998 Protocol amending the European Convention on Transfrontier Television).

### **Option 2: Committee of Ministers decision inviting states to accede**

5. This option would avoid the cumbersome procedure of treaty amendment, while obtaining virtually the same result. The Committee of Ministers could invite all or certain categories of UN member States to accede. This option entails the risk that states accede that have not properly implemented the Budapest Convention and will not be able to cooperate fully.

### **Option 3: Committee of Ministers' resolution defining a number of technical conditions for accession**

6. The resolution would define minimum requirements for accession. These should be drawn primarily from the Budapest Convention itself. The idea is to make it clear to third countries that their application for accession would be judged only against a series of predefined technical conditions, excluding all other considerations, in particular political ones.

7. Under this options, it would be necessary to decide which organ would assess their fulfilment and it should be kept in mind that if an organ (for example, the T-CY) was instructed to assess the

fulfilment by non-member States of the conditions set forth for acceding to the Convention, it would not necessarily simplify the current procedure, nor facilitate or speed up the accession of Council of Europe non-member States to the Convention. In that case, the decision-making procedure would only be moved from the Committee of Ministers to the T-CY.

8. An alternative could be that the conditions for accession be purely formal ones (such as, having abolished the death penalty, being party to certain international treaties, etc.), which the depositary of the Convention on Cybercrime could easily check itself before accepting an instrument of accession deposited by a non-member State of the Council of Europe.

#### **Option 4: Advisory role of the T-CY**

8. The T-CY would play a role in advising the Committee of Ministers on the invitation of non-member States to accede to the T-CY. This could make the process of inviting non-member States more transparent and consistent. Since the T-CY meets only once a year, this should be done via a written procedure. The Bureau would most likely finalise the advice to the Committee of Ministers. The final version of the advice from the T-CY to the Committee of Ministers should be shared with all delegations before the matter is discussed in the Committee of Ministers.

9. In this context, mention is made of a note recently submitted by the Netherlands to the CDPC concerning in general accession of non-member States to Council of Europe conventions in the criminal law field (The Hague, 2 June 2010). This note enumerates the points which would be relevant for the examination of an accession request:

- a) How many member States have ratified the convention and could the accession of a particular non-member State limit the willingness of member States to ratify the convention;
- b) How many of the observers have ratified the convention and could the accession of a particular non-member State limit the willingness of member States to ratify the convention;
- c) What would be the advantage for the states parties *in concreto* to invite a particular non-member State;
- d) Is the non-member State party to any other criminal law convention and what are the experiences with the application;
- e) Information on the legal and operational infrastructure in the criminal field and the protection of human rights in particular the respect for fair trial and data protection in the non-member State.

## **ANNEX**

The following decision was taken by the CDPC at its meeting in Strasbourg, 7-10 June 2010:

1. The CDPC invited the Committee of Ministers:
  - b. to mandate the CDPC to provide advice to the Committee of Ministers on the criteria and procedure to be followed as regards the accession of non-members to the Council of Europe Conventions in the criminal law field in order to contribute to the extension of these Conventions beyond Europe;