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Strasbourg, 21 June 2012

T-CY (2012) 14 E

**Cybercrime Convention Committee (T-CY)**

**Seventh Plenary**

**Strasbourg, 4-5 June 2012**

**Abridged meeting report**

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## **1 Introduction**

The T-CY Committee, meeting in Strasbourg on 4 and 5 June 2012, was chaired by Markko Künnapu (Estonia). More than 90 representatives of State Parties and observers participated.

The meeting was opened by Jan Kleijssen (Director of Information Society and Action against Crime, DG1, Council of Europe), who briefed the Committee on recent and forthcoming developments and issues (Internet Governance Strategy for 2012 – 2015 of the Council of Europe, European Dialogue on Internet Governance, Internet Governance Forum, Octopus) and who welcomed in particular the assessment of the Budapest Convention that is now being undertaken by the T-CY.

## **2 Decisions**

The T-CY decided:

### **Agenda item 2: Status of signatures, ratifications, accessions to the Budapest Convention and its Protocol**

- To welcome the recent ratification by Malta, information provided on the imminent ratification and accession of the Budapest Convention by Austria, Belgium, Dominican Republic, Georgia and Japan, as well as efforts underway in Argentina, Chile, Costa Rica, Ireland, Mexico and the Philippines.

### **Agenda item 4: Workplan 2012-13: progress made and activities undertaken by the T-CY**

- To take note of the progress made in the implementation of the T-CY workplan.

### **Agenda items 5 & 9: Assessment of articles 16, 17, 29 and 30**

- To adopt the preliminary conclusions and recommendations as contained in document T-CY(2012)15
- To encourage current and new Parties to provide additional information to the T-CY Secretariat by 15 July so as to allow for the preparation of a final draft for consideration at the 8<sup>th</sup> Plenary of the T-CY.

### **Agenda item 6: Dialogue with international organisations (T-CY observers)**

- To welcome the cooperation with the African Union Commission, the Commonwealth (Secretariat, Cybercrime Initiative, Telecommunications Organisation), European Union (including European Commission and ENISA), the Organisation for Security and Cooperation in Europe, the Organisation of American States, the United Nations Office on Drugs and Crime, as well as ICANN.
- To invite the African Union Commission and the Organisation of American States to participate as observers in future T-CY meetings.
- To consider the possibility of engaging in cooperation with the Shanghai Cooperation Organisation and the Commonwealth of Independent States.

**Agenda item 7: Ad-hoc Group on Transborder Access**

- To take note of the work underway by the T-CY Ad-hoc Group on Transborder Access and Jurisdiction.

**Agenda item 8: Criteria and procedure for accession to the Budapest Convention on Cybercrime (update)**

- To take note of the update provided regarding accession procedures and criteria.
- To reiterate the need for a transparent, efficient and welcoming procedure of accession involving Parties to the Convention.

**Agenda item 10: Assessments: Further provisions to be assessed**

- To complete the assessment of articles 16, 17, 29 and 30 before commencing the assessment of further provisions.
- To focus the next round of assessments on international cooperation provisions, in particular article 31

**Agenda item 11: Cooperation with capacity building projects**

- To take note of the activities of the Global Project on Cybercrime, the CyberCrime@IPA and Cybercrime@EAP projects.
- To welcome voluntary contributions by Estonia, Japan, Romania, United Kingdom and Microsoft to permit the launch of the Global Project on Cybercrime (Phase 3).
- To welcome the Octopus 2012 conference organised with the support of these projects.

**Agenda item 12: Review of the financial resourcing of the T-CY for 2012/13**

- To take note that Ordinary Budget funding of the T-CY in 2012 is similar to that of 2011 but that additional activities are foreseen for 2012, and that therefore co-funding through the Global Project on Cybercrime (Phase 3) is required.
- To encourage, therefore, Parties and observers to provide additional voluntary contributions to this project to ensure that T-CY activities can take place as foreseen.

**Agenda item 13: Elections**

- To re-elect the chair, vice-chair and members of the Bureau for a further period of two years.
- To consider a possible enlargement of the Bureau in the light of additional Parties in one of the next plenaries.

**Agenda item 15: Next meeting of the T-CY**

- To hold the 8<sup>th</sup> Plenary of the T-CY on 5 and 6 December in Strasbourg (subject to availability of resources).

### 3 Appendix

#### 3.1 Appendix 1: Agenda

### Annotated agenda

Monday, 4 June, 10h00 – Tuesday, 5 June, 18h00

(Please note that agenda items marked with \* are for decision by the members representing contracting Parties to the Budapest Convention)

1.	Opening of the meeting and adoption of the agenda
2.	Status of signatures, ratifications, accessions to the Budapest Convention and its Protocol  Participants are invited to discuss the status of signature, ratification or accession by specific countries
3.	Information provided by parties and observers – Tour de table  Participants are invited to present information on legislative developments, major cases, important events, training provided to other countries etc.
4.	Workplan 2012-13: progress made and activities undertaken by the T-CY  The chair will inform members of progress made in the implementation of the T-CY workplan. Participants are invited to discuss next steps.
5.	Assessment (1st reading: Discussion of report, presentations, exchange of views)*  Based on replies to the questionnaire sent to Parties on 15 February 2012 and a report prepared by the Bureau, T-CY members will assess the level of implementation of articles 16, 17, 29 and 30 by the contracting Parties and recommendations contained in this report.
6.	Dialogue with international organisations (T-CY observers)  Representatives of international organisations with observer status in the T-CY are invited to present relevant activities and engage in a dialogue with T-CY members.
7.	Ad-hoc Group on Transborder Access: presentation of work underway and exchange of views  The Ad-hoc Group on Transborder Access will inform participants on the work underway and seek their views.
8.	Criteria and procedure for accession to the Budapest Convention on Cybercrime (update)  Further to the opinion adopted by the T-CY at the 6th Plenary (November 2011, document T-CY(2011)3) regarding accession criteria and procedures, the Secretariat will inform participants on the follow up.

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9. Assessment Part II (2nd reading and adoption of report)\*

T-CY members are invited to undertake a second reading of the assessment report in view of adoption.

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10. Assessments: Further provisions to be assessed\*

T-CY members are invited to decide which provisions of the Budapest Convention are to be assessed in the next round of assessments.

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11. Cooperation with capacity building projects on cybercrime

The Secretariat will inform participants on capacity building projects undertaken by the Council of Europe. Participants are invited to share relevant information on relevant projects in view of synergies.

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12. Review of financial resourcing of the T-CY for 2012/13

The Secretariat will inform participants on the state of financial resources available for the T-CY in 2012/13, and on the feasibility of a 2nd plenary session in 2012.

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13. Elections\*

T-CY members are invited to elect the Chair, Vice-chair and members of the Bureau.

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14. Any other business

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15. Next meeting of the T-CY

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**3.2 Appendix 2: Assessment – preliminary conclusions**

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Strasbourg, 5 June 2012

T-CY (2012)15

**Cybercrime Convention Committee (T-CY)**

**Assessment**

**Implementation of  
preservation provisions of the  
Budapest Convention on Cybercrime**

**Preliminary conclusions and recommendations**

## Introduction

The Cybercrime Convention Committee (T-CY), at its 6th Plenary Session (23-24 November 2011), decided:

“To review at the first Plenary in 2012 the implementation by the Parties of articles 16, 17, 29 and 30 (Action 3.1 of the Plan), and to encourage Parties to cooperate with the Bureau and the Secretariat in this respect.”

The Bureau of the T-CY prepared a questionnaire at its meeting on 30-31 January 2012. This questionnaire was sent to T-CY Representatives with copy to Permanent Representations on 15 February 2012.

Following consultations with the European Commission (DG Home) and the T-CY Bureau, it was agreed to add an additional questionnaire with questions on the relationship between data preservation and data retention to the T-CY questionnaire. The deadline for both questionnaires was 15 April 2012.

By 25 May 2012, 24 replies to the T-CY questionnaire and 19 replies to the questionnaire of the European Commission had been received.

A draft report compiling replies received was discussed by the T-CY at its 7th Plenary on 4-5 June 2012.

During this meeting, the T-CY adopted the following preliminary recommendations and conclusions:

### **(Preliminary) conclusions and recommendations**

The T-CY,

- considers that the assessment of the implementation of specific provisions of the Budapest Convention will enhance the effectiveness of this treaty;
- welcomes the replies to the T-CY questionnaire received from 24 State Parties and encourages the remaining Parties to submit their replies to the Secretariat by 15 July;
- encourages all Parties, as appropriate, to consult with practitioners and provide the Secretariat with additional information, in particular with respect to practical experience in the use of articles 16, 17, 29 and 30 by 15 July at the latest;
- instructs the Bureau and Secretariat to prepare a consolidated assessment report including conclusions and recommendations for consideration and adoption by the 8<sup>th</sup> Plenary of the T-CY.

The T-CY adopts the following preliminary conclusions and recommendations, pending the finalisation and adoption of the assessment report at its 8<sup>th</sup> Plenary:

1. The expedited preservation provisions of the Budapest Convention, in particular articles 16 and 29, are highly relevant tools to secure volatile evidence in an international context.
2. A number of Parties have adopted specific legal provisions in line with Articles 16, 17, 29 and 30.



3. A considerable number of Parties refer to general powers, or search or seizure or production orders, often in combination with data retention, to preserve electronic evidence in an expedited manner. Some Parties, in this way, seem to be able to meet most of the requirements of Articles 16, 17, 29 and 30.
  4. However, such powers may not represent full substitutes for preservation, particularly as to international requests. Search, seizure or production orders may be slower and harder to obtain as they require stricter safeguards and conditions (Article 15 Budapest Convention) than preservation, or may be visible to the suspect.
  5. Furthermore, greater legal certainty for preservation requests may help improve cooperation between law enforcement and service providers. Therefore, even if current systems allow for securing electronic evidence in an expedited manner, Parties should consider the adoption of specific provisions in their domestic legislation. Legislation should foresee that preservation requests are kept confidential by service providers or other legal or physical persons requested to preserve data.
  6. The T-CY underlines in particular that preservation and data retention may be complementary tools but serve different purposes, and that data retention is therefore no substitute for data preservation.
  7. The T-CY notes that in a number of Parties conditions for access to retained data are such that it is more difficult to obtain the disclosure of traffic data than more privacy-sensitive content data.
  8. Some Parties are not in a position to preserve electronic evidence in an expedited manner and do therefore not comply with the relevant Articles of the Budapest Convention. These Parties are encouraged to take urgent steps to enable their competent authorities to preserve electronic evidence in domestic and international proceedings.
  9. While replies to the questionnaire confirm the importance of preservation powers, these powers are largely underused. Parties should therefore undertake appropriate measures to enhance their use by competent authorities. This also applies to Articles 17 and 30 on the partial disclosure of traffic data.
  10. 24/7 points of contact established under Article 35 of the Budapest Convention are a practical means to enable the sending and receiving of preservation requests (Articles 29 and 30). Replies to the questionnaire suggest that little use is made of contact points. Parties should take steps to inform all domestic authorities on the option of using 24/7 points of contact for urgent international cooperation in matters related to cybercrime and electronic evidence.
  11. The T-CY takes note that one reason for limited use of the provisional measures of articles 29 and 30 is related to difficulties in the subsequent mutual legal assistance procedure. Therefore, the T-CY should focus the next round of assessment in 2013 on article 31 on mutual assistance regarding accessing of stored computer data.
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**3.3 Appendix 3: Assessment - presentation by the Secretariat**

**Cybercrime Convention Committee (T-CY)  
7th Plenary (4-5 June 2012)**

**Items 5 + 9:  
Assessment of implementation of Budapest Convention**

*Domestic level*

Article 16 – Expedited preservation of stored computer data

Article 17 - Expedited preservation and partial disclosure of traffic data

*International level*

Article 29 - Expedited preservation of stored computer data

Article 30 - Expedited disclosure of preserved computer data

**Preservation provisions of the Budapest Convention**

**1. Provisional measures to preserve stored data**

Article 16 – Expedited preservation of stored computer data

Article 17 - Expedited preservation and partial disclosure of traffic data

Article 29 - Expedited preservation of stored computer data

Article 30 - Expedited disclosure of preserved computer data

**2. Formal measures to obtain preserved data**

Article 18 – Production order

Article 19 – Search and seizure

Article 31 – Mutual assistance regarding accessing of stored computer data

Article 23 – Use of other MLA arrangements

**Replies to the T-CY Questionnaire**

**Received: 24 Parties**

**Not received: 8 Parties**

**Implementation of Article 16**

Parties with specific legal provisions	Parties referring to other powers (search, seizure, production order, general powers or data retention)	
Albania	Armenia	Slovenia
Finland	Azerbaijan	Spain
France	Bosnia and Herzegovina	”The former Yugoslav Republic of Macedonia”
Italy (traffic data only?)	Bulgaria	Ukraine
Latvia	Croatia	United Kingdom
Moldova	Estonia	
Netherlands	Germany	
Norway	Lithuania	
Portugal	Montenegro	
Romania	Serbia	
USA		

Preservation vs data retention		
	Expedited preservation	Data retention (EU Directive)
<b>Aim</b>	Provisional measure to preserve volatile electronic evidence to allow for time for formal measures to obtain evidence	Ensure that data is available for investigation, detection and prosecution of serious crime
<b>Specific/ automated</b>	Specific order for specified data	Automatic retention of data
<b>Type of Data</b>	Any data (including content data)	Traffic and location data and subscriber information (not content data, nor destination IP addresses, URLs, email headers, or list of cc recipients)
<b>Purpose limitation</b>	Any crime involving electronic evidence	Serious crime
<b>Addressee</b>	Any physical or legal person (not limited to service providers)	Service providers
<b>Time period</b>	Flexible: 90 days (renewable)	Specific retention period (6 to 24 months as specified in domestic law)

### Implementation of Article 16 + 29

#### Are Parties able to preserve electronic evidence

- In an expedited manner [*within 24 hours*]?
- In relation to any crime?
- Any type of stored computer data [traffic, content, other]?
- Based on an international request?

**3.4 Appendix 4: Update on accession procedure**

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Strasbourg, 28 May 2012

T-CY (2012)12 E

**Cybercrime Convention Committee (T-CY)**

**Criteria and procedures for accession to the  
Budapest Convention on Cybercrime - Update**

**Note by the Secretariat**

The T-CY at its 6<sup>th</sup> Plenary (November 2011) decided:

**Agenda item 6: Accession criteria and procedure under Article 37 of the Convention on Cybercrime**

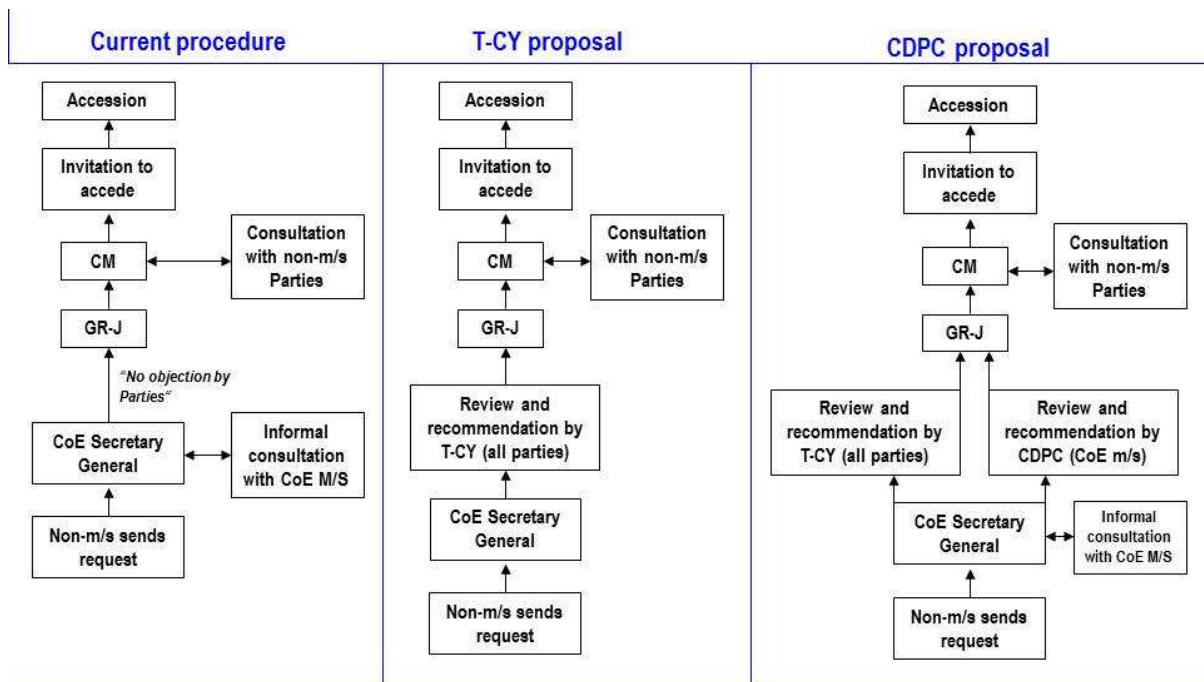
- To review and adopt the Opinion on accession criteria and procedure to be followed, in conformity with Article 37 of the Convention, as regards accession of non-member States (document T-CY(2011)3E rev as attached in Appendix 4).
- To instruct the Secretariat to share it with the CDPC in view of further consultations.
- To request the Bureau to subsequently finalise the opinion, and to instruct the Secretariat to submit it, thereafter, to the Committee of Ministers.

Following consultations with the CDPC Plenary (December 2011), the Secretariat submitted the T-CY opinion to the Committee of Ministers as instructed.

The Rapporteur Group on Legal Co-operation (GR-J) discussed both opinions on 21 February and on 3 April 2012 without coming to a conclusion.

The item is again on the agenda of the GR-J on 7 June 2012.

The current procedure as well as the T-CY and CDPC proposals may be illustrated as follows:



Article 37 – Accession to the Convention


**Budapest Convention on Cybercrime:**

**Accession procedure**

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 Statute 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.

Version Feb 2012/AS

### 3.5 Appendix 5: Ad-hoc Group on Transborder access - Update



**Cybercrime Convention Committee (T-CY)**  
**7th Plenary (4-5 June 2012)**


**Item 7:**  
**Ad-hoc Group on Transborder access and jurisdiction**

**T-CY decided (Nov. 2011):**

a. To set up, from among its members, an ad hoc sub-group to examine the following issues:

- the use of Article 32 (b), of the Convention on Cybercrime;
- the use of transborder investigative measures on the Internet;
- the challenges to transborder investigations on the Internet posed by applicable international law on jurisdiction and state sovereignty.

b. To instruct the ad hoc sub-group to develop an instrument – such as an amendment to the Convention, a Protocol or Recommendation – to further regulate the transborder access to data and data flows, as well as the use of transborder investigative measures on the Internet and related issues, and to present a report containing its findings to the Committee



**Issues under examination:**

- ▶ **Justification**
  - Need for transborder access
  - Concerns
- ▶ **Current provisions of the Budapest Convention**
  - Article 32
  - Article 19
  - Article 22
- ▶ **Scenarios for transborder access**
  - Direct LEA transborder access: current practices
  - Access via providers and other private sector entities
- ▶ **Options**

**3.6 Appendix 6: List of participants****T-CY PLENARY****Strasbourg, 4-5 June 2012****LIST OF PARTICIPANTS****Bureau members**

<b>Country</b>	<b>Name</b>	<b>Institution</b>
ESTONIA	Mr Markko KÜNNAPU* <sup>1</sup>	Adviser Ministry of Justice Tonismagi 5A EST-15191 Tallinn
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SERBIA	Mr Branko STAMENKOVIC*	Head of the Special Department for High-Tech Crime of HPPO Belgrade Office of the Public Prosecutor of Serbia Nemanjina 22-26 str. RS-11000 Belgrade
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<sup>1</sup> \* marks head of delegation.

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USA	Ms Betty SHAVE*	Assistant Deputy Chief for International Computer Crime Computer Crime and Intellectual Property Section US Department of Justice Washington DC

### Observers

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