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Draft Opinion of the Cybercrime Convention Committee (T-CY)

Accession criteria and procedure

to be followed, in conformity with Article 37 of the Convention on Cybercrime (ETS No. 185), as regards accession of non-members of the Council of Europe to the Convention

1. The Committee of Ministers (Deputies), at its 1095th meeting on 13 October 2010, decided:

"to mandate the T-CY, in close co-operation with the European Committee on Crime Problems (CDPC), to provide advice to the Committee of Ministers on the criteria and procedure to be followed, in conformity with Article 37 of the Convention, as regards the accession of non-members of the Council of Europe to the Budapest Convention."

2. Given the potential global application of the Convention, the T-CY considers the issue of how best to assess and process requests for accession by non-member states to be of the highest importance, and consequently the T-CY welcomes the above invitation from the Committee of Ministers.

3. The T-CY is of the opinion, that the broadest possible implementation of the Budapest Convention, including accession by non-member states, will serve the aim of effective international cooperation against cybercrime. Accession by countries meeting the minimum requirements of the Convention should therefore be facilitated. The purpose of the criteria and procedure proposed below is to make the accession process more transparent and predictable, and to encourage States that are committed to implement the Budapest Convention and to cooperate against cybercrime to seek accession.

4. The T-CY sees it as its primary task to provide the Committee of Ministers and the Parties to the Convention with a technical assessment by cybercrime experts regarding the ability of a non-member state requesting accession to fully co-operate with the other Parties under the Budapest Convention, including whether the aims of the Convention would be served by the requesting non-member state acceding to it.

5. The T-CY is furthermore of the opinion that an invitation to accede will encourage further legislative reforms and institution building in the country invited, and facilitate technical assistance if necessary.

6. Under this procedure, the T-CY is tasked by the Committee of Ministers to assess all requests for accession to the Budapest Convention, and make a recommendation on the basis of this assessment.

7. On the basis of such a recommendation and technical assessment, the Committee of Ministers can then complete the procedure foreseen by Article 37 of the Convention.

Criteria

8. Given that the Budapest Convention has always been open, accession by states meeting the minimum requirements of the Convention will be welcomed and facilitated. An assessment in the light of these criteria is meant to build mutual trust and ensure effective implementation of the Convention.

9. The T-CY, having consulted the European Committee on Crime Problems (CDPC), believes that a state that meets the minimum requirements of the Budapest Convention and that is committed to cooperate with the other Parties should be invited to accede. The assessment of the request will be based on the following criteria:

- a. The requesting non-member state has the necessary legal framework in place to apply the minimum standards of the Convention or has expressed its firm commitment to have in place such a framework by the time of accession. Indicators may include, for example:
 - the enactment of legal provisions and/or administrative guidelines implementing the Convention in domestic law.
- b. The requestor ensures in its domestic law that the procedural law powers and procedures provided for in Section 2 of Chapter II of the Budapest Convention are subject to safeguards and conditions which shall provide for the adequate protection of human rights and liberties as stipulated by Article 15 of the Convention.
- c. The requestor has expressed its firm commitment to put in place the mechanisms necessary to enforce the Convention and co-operate with other Parties to the widest extent possible. Indicators may include, for example:
 - the existence of efficient administrative infrastructures;
 - the availability of trained staff; or
 - the requestor has indicated its willingness to work with other Parties and/or the Council of Europe on training of its staff.
- d. The requestor is committed to participate actively in the Consultations of the Parties in line with Article 46 of the Convention, and thus to realise the aims of the Convention. Indicators may include, for example:
 - the commitment to contribute actively to the international cooperation under the Convention is expressed firmly in the request for accession; or
 - the requestor has a record of co-operation relevant for the fight against cybercrime with one or more Parties to the Convention; or
 - the requestor has received technical assistance from the Council of Europe and/or from other Parties.

Procedure

10. In terms of procedure, the T-CY recommends the following pursuant to Article 37. This procedure shall establish a transparent framework and replace the current practice of informal consultations:

11. When approached by a non-member state with a request to be invited to accede to the Budapest Convention, the Secretary General shall simultaneously inform the member States of the Council of Europe and the T-CY, consisting of the representatives of the Parties to the Convention, about the request.

12. The Secretariat shall provide the T-CY with all information relevant for the assessment of the request and seek additional information from the requesting state, if necessary.

13. On receipt of a request, the T-CY will assess the request according to the criteria. If a T-CY member does not give its opinion within 60 days, it shall be deemed to not object to a T-CY recommendation in favour of accession.

14. The T-CY shall provide the Committee of Ministers with its assessment and recommendation as soon as possible, and not later than three months after the receipt of the request by the Secretary General.

15. Where the T-CY unanimously supports the request, it will recommend to the Committee of Ministers to invite this state to accede to the Convention.

16. Where an agreement could not be reached in the T-CY on the request, the opinion of the T-CY shall set out the views of the majority, as well as the dissenting views.

17. The assessment by the T-CY should omit any reference to the position taken by individual Parties or member states.

18. The T-CY recommends that the aforesaid list of criteria is made available through the Secretariat to non-member states requesting to be invited to accede in order to improve the level of transparency as regards the assessment of requests for accession.

19. If a Party is aware that a non-member State may be interested in acceding, the Party may ask for an assessment for that State. Should this assessment be positive, the T-CY may invite the Secretary General to encourage the non-member state in question to seek accession to the Budapest Convention.

20. The request by the non-member state will be examined, in the light of the T-CY recommendation, by the Committee of Ministers or, where appropriate, by one of its rapporteur groups. Once the Committee of Ministers and the Parties to the convention that are not members of the Council of Europe have agreed to give a positive reply to the request, the decision to invite the non-member State in question shall become definitive. An invitation to accede to the instrument in question will be sent to the State concerned by the Secretary General.
