

Assessing Article 13 on Sanctions and Measures

**Initial observations on replies received
(prepared by the T-CY Bureau)**



Questionnaire on Sanctions and Measures (Article 13)

Replies received

46 Parties and Observers replied by 27 November 2015:

Albania, Armenia, Australia, Austria, Azerbaijan, Belgium, Bulgaria, Bosnia and Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Estonia, Finland, France, Georgia, Germany, Hungary, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mauritius, Moldova, Montenegro, Netherlands, Norway, Panama, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Switzerland, “The Former Yugoslav Republic of Macedonia”, United Kingdom, United States of America, Morocco, Philippines and South Africa.



Questionnaire on Sanctions and Measures (Article 13)

General Provisions

A –

3.1. Intention, negligence and recklessness

3.2. Aggravating circumstances

3.3. Conditions for suspended sentences

3.5. Alternative or cumulative sanctions

3.6. Multiple crimes, recidivism

IN GENERAL, SIMILAR STANDARDS

MOST PARTIES HAVE

EVEN IF WITH SOME PARTICULARITIES

B –

3.4. Minimum term of imprisonment

SOME PARTIES DON'T HAVE A MINIMUM: IS THAT A PROBLEM?

3.7. Incitement, aiding, abetting and attempt

RULES VARY, EVEN IF WITH A MINIMUM STANDARD



Questionnaire on Sanctions and Measures (Article 13)

Article 2 Budapest Convention on illegal access

- **Sanctioned when committed with intent**
- **Attempt to commit this offence is sanctioned in most of the countries**
- **Alternative sanctioning system, with possibility of the court to apply a pecuniary measure, imprisonment, or alternative sanctions like community service**
- **Most frequent aggravating circumstances are the subsequent use of data illegally accessed, the result of grave consequences, the offence being committed against a specific computer system, or pecuniary advantage obtained by the perpetrator**



Questionnaire on Sanctions and Measures (Article 13) Article 3 Budapest Convention on illegal interception

- Sanctioned when committed with intent
- Most frequent aggravating circumstances: interception of sensitive data, considerable damages being caused, subsequent use of intercepted data and official quality of the offender
- Alternative sanctioning system(deprivation of liberty, fine, or alternative measures)
- The average maximum sanction is from two to three years of deprivation of liberty
- Not all the countries are sanctioning the attempt with regard to this offence
- Some countries do not prescribe deprivation of liberty as a sanction with regard to this crime



Questionnaire on Sanctions and Measures (Article 13)

Article 4 Budapest Convention on Data interference

- Welcome that many countries have decided to go beyond the minimum standard of the Budapest Convention and adopted higher standards**
- A small number of countries are sanctioning this offence when committing with both types of guilt , intent and negligence (Armenia, Denmark, Netherlands, Spain, United Kingdom, USA and Philippines). For the rest, liability just when the offence is committed with intent**
- The requirement that the conduct results on serious harm is considered an aggravating circumstance in most of the countries**
- Other most frequent aggravating circumstances: interference with important or sensitive data, official quality of the offender or commission of crime in an organised group**
- Aggravating circumstances, in particular government information systems and critical infrastructure as targets, as well as large scale attacks, show commitment of many countries to address seriously fight against cybercrime**



Questionnaire on Sanctions and Measures (Article 13)

Article 4 Budapest Convention on Data interference

- **Most of the countries use alternative sanctioning system for data interference(imprisonment, fine, custodial sentence, community work)**
- **Some of the countries do not sanction the attempt**
- **Legal persons are sanctioned pecuniary when committing this crime. Nevertheless, some countries do not sanction legal person, as provisioned by article 13.2 Budapest Convention on Cybercrime**
- **All the countries include deprivation of liberty as a sanction with regard to this offence**
- **Still a relatively large discrepancy between maximum sentences in different countries**



Questionnaire on Sanctions and Measures (Article 13)

Article 5 Budapest Convention on System interference

- **Welcome that many countries have decided to go beyond the minimum standard of the Budapest Convention and adopted higher standards**
- **With few exceptions, sanctioned when committed intentionally;**
- **Most of the countries use alternative sanctioning system for system interference, deprivation of liberty being included;**
- **Aggravating circumstances, in particular government information systems and critical infrastructure as targets, as well as large scale attacks, show commitment of many countries to address seriously fight against cybercrime**
- **Attempt not always sanctioned as provisioned by article 11 paragraph 2 Budapest Convention on Cybercrime**
- **Legal person not criminally sanctioned in some countries**
- **Some countries use the same legal dispositions to incriminate the offences prescribed by Articles 4 and 5 Budapest Convention on Cybercrime**



Questionnaire on Sanctions and Measures (Article 13)

Article 6 Budapest Convention on Misuse of devices

- **Sanctioned when committed with intent**
- **All countries set out for the offence of misuse of devices sanctions that include deprivation of liberty (article 13 Budapest Convention on Cybercrime)**
- **Some countries do not sanction the legal person or do not provide the information regarding this issue, when other countries do not have any corresponding domestic legislation to implement article 6 Budapest Convention on Cybercrime**
- **It seems that some countries have tried to bridge misuse of devices with some other criminal acts like damage to computer information and programs, unauthorized access, introduction of viruses and similar, what can be deceiving and can lead to wrong approach to the possible criminal case**
- **Most of the countries are sanctioning perpetration of this criminal act with sentencing between 6 months and 3 years of the imprisonment, rarely having maximum set to 5 years or above**
- **If the conduct consists in possession of devices, some countries require a minimum number of devices(USA)**



Questionnaire on Sanctions and Measures (Article 13)

Article 7 Budapest Convention on Computer-related forgery

- **Lack of Sanctions for Legal Persons;**
- **Most countries criminalize computer-related forgery as a standalone measure;**
- **There is not common practice regarding aggravating circumstance- some countries use specific provisions, some - regulations from general part of national criminal law and the rest does not apply aggravating circumstances;**
- **Some countries use several provisions in conjunction while criminalizing computer-related forgery;**



Questionnaire on Sanctions and Measures (Article 13)

Article 8 Budapest Convention on Computer-related fraud

- Intent is required for imposing criminal responsibility;
- Some countries provide aggravated fraud as a standalone crime;
- Volume of financial damage is considered as an aggravating circumstance in most of the countries;
- Attempt is sanctioned (not all the countries provided information on this issue)
- All countries use deprivation of liberty as a sanction with regard to this offence;
- Some countries qualify fraud as a special case of counterfeiting official documents.



Questionnaire on Sanctions and Measures (Article 13)

Article 9 Budapest Convention on Offences related to child pornography

- Missing information
- Very few countries provided statistics and examples
- Countries could review this section
- Only few countries provided some **STATISTICS** e.g. Australia, Bosnia and Herzegovina (without indicating the penalty), Croatia, Czech Republic (general), Denmark, Japan, Romania (general), Serbia, Italy (decreasing in number of convictions for child pornography?), US
- Switzerland: Not available, at this stage. A collection of case studies may be provided, later on, depending on resources
- No analysis of the level of implementation of article 9
- **What CRITERIA to be used to assess the IMPLEMENTATION of article 13 (effective, proportional and dissuasive sanctions)?**



Questionnaire on Sanctions and Measures (Article 13)

Article 9 Budapest Convention on Offences related to child pornography

- **Article 11 paragraph 3: criminalisation of attempt to commit any of the offences established in accordance with Articles 3 through 5, 7, 8, and 9.1.a and c of this Convention is subject to reservation**
 - ✓ Finland made a reservation for criminalisation of attempt, to petty criminal damage and petty forgery
 - ✓ Germany - attempt to commit the acts specified under Article 3
 - ✓ Japan reserved the right not to apply Article 11, paragraph 2 to the offences established pursuant to Article 4, Article 5, Article 7 and Article 9, paragraph 1.a and c, except for the offences set forth in Article 168-2 (Creation of electromagnetic record of unauthorised commands) or Article 234-2 (Obstruction of business by damaging a computer) of the Penal Code) the implementation is compulsory.
- **Some answers are unclear/do not implement article 11**



Questionnaire on Sanctions and Measures (Article 13)

Article 9 Budapest Convention on Offences related to child pornography

Article 12 – Corporate liability

- No reservation possible, but *subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative* e.g. administrative liability for legal persons under Bulgarian legislation.
- Few clear answers if the relevant provisions specifically apply to each of the offences provided by the Convention e.g. Slovenia (not applicable to art. 9)
- Seem to criminalise legal person:
 - Albania, Austria, Australia, Azerbaijan, Belgium, Croatia, Czech Republic, Denmark, Dominican Republic, Finland, France, Germany, Japan, Lithuania, Mauritius, Moldova, Montenegro, Netherlands, Norway, Panama, Poland, Portugal, Romania, Serbia (if stipulated by the Law on Criminal Liability of Legal Persons?), Spain, Switzerland, UK, Slovenia (not for article 9), US (unclear for article 9), Morocco
- NO/unclear answers e.g. Armenia, BiH (for all territory?), Cyprus (high rank officials of the legal person), Italy, Slovakia (law in the Parliament) etc.



Questionnaire on Sanctions and Measures (Article 13)

Article 9 Budapest Convention on Offences related to child pornography

Aggravating circumstances

- ✓ aggravating circumstances provided by the Lanzarote Convention
- ✓ child with mental impairment or under care (Australia)
- ✓ large amount of possession of child pornography (Italy)
- ✓ makes a profession or habit of committing the respective offences (Netherlands)
- ✓ commits the acts professionally or with profit purposes (Portugal)
- ✓ committed in a criminal organization (Slovenia)
- ✓ via a computer system or other means of data storage(Romania), publication on internet (Albania)
- ✓ 1) the number of images/videos of child pornography involved in the offense, (2) if any of the images/videos of child pornography involved a prepubescent child/child under 12-years-old, and (3) if any of the images/videos involved sadistic or masochistic conduct or other depictions of violence (United States)

Maximum

- ✓ **1 year (Dominican Republic)**, 3 years (Estonia, Moldova, Norway), 5 years (Albania, Switzerland, Morocco) 6 years (Finland) 7 years (Romania) 8 years (Bulgaria, Czech Republic, Hungary, Portugal, Serbia, Slovenia) 10 years (Austria, Cyprus, France, Germany, Montenegro) 12 years (Croatia, Italy, Poland), 15 years (Lithuania, Panama) 20 Years (Slovakia) 25 years (Australia), 30 years (Mauritius, where the victim is mentally handicapped), 10 years (Cyprus, UK), **50 years (US)**

Minimum

- ✓ fine, 30 days imprisonment (Portugal, Serbia), 6 months (Panama), 0 (?) Slovakia, Czech Republic
- ✓ Dutch law does not include minimum penalties



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Article 9 Budapest Convention on Offences related to child pornography

Good practices

- **Australia:** Numerous judgments establish a range of sentencing principles for child pornography related offences (Article 9 of the Convention).
- **UK**
 - ✓ UK cybercrime statistics are published quarterly by the Office for National Statistics
 - ✓ The Ministry of Justice also publishes statistics
 - ✓ Examples on the Crown Prosecution Service Sentencing Guidelines section of the website
- **US**
 - ✓ Department of Justice press releases in cyber cases
<http://www.justice.gov/criminal-ccips/ccips-press-releases-2015>
- **Denmark**
 - ✓ Guidelines for the prosecution service on child pornography cases - available
 - ✓ Guidelines on cybercrime - planned
- **Examples provided (e.g. Australia, Denmark, Romania, Japan and United States)**



Questionnaire on Sanctions and Measures (Article 13)

Article 10 Budapest Convention on Offences related to infringements of copyright and related rights

- **Provided by national criminal codes, laws or acts, or stipulated by specialized copyright infringement laws or acts**
- **Typical acts are described as violation of moral rights of the author or performer, unauthorized use of copyright and related rights, unauthorized removal or altering of electronic information on copyright and related rights, violation of patent rights, unauthorized use of design and similar**
- **In most of the cases intent is required while in some, perpetration is possible by negligence/recklessness.**
- **Aggravating circumstances are mostly connected with the amount of the financial damage**
- **Liability for the legal persons/entities is possible in most of the countries.**
- **In most cases minimum and maximum penalty varies between some months and two or three years of imprisonment**
- **Question arise about balance between criminal act and the sanction**



Questionnaire on Sanctions and Measures (Article 13)

Article 12 Liability of legal person

- With few exceptions countries have legislation that permits sanctioning of legal persons with regard to the offences provisioned by Budapest Convention on Cybercrime. Monetary sanctions for legal person are included.
- In some countries, criminal liability is based on general provisions, while in other countries the legal framework depends on specific provisions for different crimes
- Some countries have corporate criminal liability for some, but not all of the offenses described in Articles 2-11 in the Convention
- Several countries have measures that include dissolution of a convicted legal person. For other countries, this is not an option.
- Most frequent alternative or additional sanctions for fine are prohibit of activity, dissolution of legal person, exclusion from participating in public tenders and publication of the sentence



Questionnaire on Sanctions and Measures (Article 13)

Confiscation

- **All countries have domestic legislation with regard to confiscation**
- **General requirements for confiscation of goods:**
 - the commission of a crime
 - ordered by a court ruling
 - goods used or in connection with the commission of a crime or goods resulted from the commission of the crime
- **Other properties that can be the object for confiscation:**
 - objects acquired through the crime
 - objects forbidden by law
- **Confiscation from third person prescribed by all states**