

Strasbourg, 14 April 2011
cdpc-bu/docs 2011/cdpc-bu (2011) 2 - e

CDPC-BU (2011) 2

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Bureau
(CDPC-BU)

**LEGAL OPINION ON DRAFT OPINION OF THE T-CY ON THE CRITERIA
AND PROCEDURE FOR THE ACCESSION OF NON-MEMBER STATES
TO THE CONVENTION ON CYBERCRIME**

OF

THE LEGAL ADVICE DEPARTMENT OF THE COUNCIL OF EUROPE

I. Criteria

1. The first and third criteria refer to the commitments expressed by the non-member State, but do not indicate how these commitments will have to be formalised. In order to facilitate the task of the T-CY, it might be useful to specify (as is the case for the fourth criteria) which indicators will be used to assess whether these criteria are fulfilled or not.
2. As regards the third criteria, reference is made to the “mechanisms necessary to enforce the Convention”. For the sake of clarity, I would suggest being more specific by giving some examples of such mechanisms.
3. Both the third and fourth criteria refer to the commitment to co-operate with other Parties. This repetition seems quite redundant and I would recommend inserting this commitment to co-operate in one of the criteria only (preferably, in the fourth one).

II. Procedure

4. With a view to facilitating the assessment of the criteria set up by the T-CY, it could be useful to specify, in the first paragraph, that the non-member State interested should express, in its letter to the Secretary General, its commitments to undertake certain measures or actions (to be clearly defined in the criteria) in relation to the Convention on Cybercrime.
5. The drafting of the fifth paragraph raises serious legal concerns. In accordance with Article 37 of the Convention on Cybercrime, the decision-making body entitled to invite a non-member State to accede to the Convention is the Committee of Ministers. The latter will base its decision on the technical analysis provided for by the T-CY, but also on political or diplomatic considerations. Thus, it should not be written in this paragraph that the Committee of Ministers will follow the opinion of the T-CY, unless it has specific objections. In addition, it is clearly indicated in the draft opinion that the task of T-CY is to provide the Committee of Ministers “with a technical review by experts”, and its role should not go beyond this one. For this reason, I would also recommend not referring in the fifth and sixth paragraphs to “the Parties of the Convention, as represented in the T-CY”, as it seems to imply that the T-CY would have more legitimacy to take decisions related to the operation of the Convention than the Committee of Ministers. Once again, the decision to invite a State to accede to the Convention on Cybercrime is taken at the political level (the Committee of Ministers), and not at expert level. This should be duly reflected in the draft opinion of the T-CY.
6. It follows that the fifth and sixth paragraphs could, for example, be redrafted as follows:

“Where the T-CY unanimously agrees on the review of the request for accession of a non-member State, it will recommend the Committee of Ministers to invite this non-member State to accede to the Convention on Cybercrime.”

“Where an agreement could not be reached in T-CY on the review of the request for accession of a non-member State, the opinion of the T-CY shall set out the views of the majority, as well as the dissenting views.”
7. The seventh paragraph states that: “the review by the T-CY should always be treated as confidential and information about its content should only be transmitted to a requesting non-member state in a general form without any reference to the position taken by individual Parties or member states.” Bearing in mind that the review prepared by the T-CY will be transmitted to the Committee of Ministers, it seems rather difficult to ensure the strict confidentiality of this document. The Council of Europe rules on the declassification of documents should, in this context, be kept in mind (see in particular Resolution (2001) 6 of the Committee of Ministers on access to Council of Europe

documents). For this reason, it should be made clear in the draft opinion of the T-CY that the review transmitted to the Committee of Ministers should always be presented in a general form without any reference to the position taken by individual Parties.

8. In order to describe the procedure in full, I would recommend adding a final paragraph on the procedure before the Committee of Ministers once it has received the review of the T-CY. Such a paragraph could read as follows:

“The request by the non-member State will be examined, in the light of the T-CY review, by the Committee of Ministers or, where appropriate, by one of its rapporteur groups. Once there is agreement in principle within the Committee of Ministers to give a positive reply to a request, the Committee of Ministers shall instruct the Secretariat to consult the other non-member States which are Parties to the Convention in question. Following this consultation, and if there are no objections, the decision to invite the non-member State shall become definitive. An invitation to accede to the Convention on Cybercrime will be sent to the State concerned by the Secretariat General.”

9. Lastly, as regards the right of initiative of the Secretariat to review a non-member State without any prior request by this State or by the Committee of Ministers, I agree with you that such a right of initiative does not enter in the remit of the Secretariat. Article 46, paragraph 5, of the Convention on Cybercrime clearly provides that the task of the Secretariat is to assist the Parties, not to participate as a stakeholder in the monitoring process.