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Draft Opinion of the Cybercrime Convention Committee (T-CY)
on the criteria and procedure to be followed, in conformity with Article 37 of the
Convention, as regards accession of non-members of the Council of Europe to
the Budapest Convention

Document prepared by the Secretariat

Draft Opinion of the Cybercrime Convention Committee (T-CY) on the criteria and procedure to be followed, in conformity with Article 37 of the Convention, as regards accession of non-members of the Council of Europe to the Budapest Convention

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.”

Given the potential global application of the Convention, the T-CY considers the issue of how best to review 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.

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.

The T-CY sees it as its primary task to provide the Committee of Ministers and the Parties to the Convention with a technical review by experts in the field of combating cybercrime 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.

On the basis of such a technical review, the Committee of Ministers can then complete the procedure, in consultation with the Parties, foreseen by Article 37 of the Convention.

Criteria:

The T-CY, having consulted the European Committee on Crime Problems (CDPC), is of the opinion that a state that meets the minimum requirements of the Budapest Convention and that is committed to cooperate with the other Parties to this treaty should be invited to accede. The review as to whether this is the case will be based on the following criteria:

- 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 legal framework no later than at the time of accession. Indicators may include, for example:
 - the enactment of legal provisions and/or administrative guidelines implementing the Convention in the domestic law of the requesting state.

- The requesting non-member state 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.
- The requesting non-member state has expressed its firm commitment to put in place the mechanisms (e. g. efficient administrative infrastructures, training of staff, ability to reply to requests for assistance from other Parties on a 24/7 basis, cf. Article 35 of the Convention) 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 requesting non-member state has indicated its willingness to work with other Parties on a bilateral basis and/or the Council of Europe on training of its staff.
- The requesting non-member state 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 requesting non-member state has already an established record of co-operation relevant for the fight against cybercrime with one or more Parties to the Convention under bilateral or international treaties and agreements; or
 - the requesting non-member state has received technical assistance from the Council of Europe and/or from other Parties on a bilateral basis, with satisfying results.

Procedure:

In terms of procedure, the T-CY recommends the following:

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 Committee of Ministers and the T-CY, consisting of the representatives of the Parties to the Convention, about the request.

The Committee of Ministers shall task the T-CY to provide it with a review according to the criteria set out above whenever such a request is received, prior to issuing an invitation to a non-member state to accede to the Convention in accordance with the procedure laid down in Article 37.

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

The T-CY shall provide the Committee of Ministers with the results of its review as soon as possible, and not later than three months after the receipt of the request from a non-member state to be invited to accede, or provide an explanation why the deadline could not be met.

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.

Where an agreement could not be reached in the 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.

The review by the T-CY should always be presented in a general form without any reference to the position taken by individual Parties or member states.

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 review of requests for accession.

The T-CY, on the initiative of one or more of the Parties, may carry out a review of a non-member state without having received a request to be invited to accede. Should this review 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.

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. Following this consultation, and if there are no objections, the decision to invite the non-member state in question shall become definitive. An invitation to accede to the Budapest Convention will be sent to the state concerned by the Secretariat General.
