

Strasbourg, 2 May 2017

T-CY (2017)13

## Cybercrime Convention Committee (T-CY)

T-CY 17 (7-9 June 2017)

### Item 8 - Functioning of the network of 24/7 points of contact

#### Note by the T-CY Bureau regarding the competent authority for issuing a preservation request under Article 29 Budapest Convention

In January 2017, the T-CY Secretariat received a communication from one Party to the Budapest Convention ("Party A") seeking clarification on the following issue:

The 24/7 contact point of Party A is a police authority. It issued and sent a request for data preservation to the 24/7 contact point of Party B (also a police authority) with specific reference to Article 29 Budapest Convention. The request met the formal requirements of Article 29.2.

The contact point of Party B forwarded the request to the prosecution service of the Party. The prosecution service responded to the requesting contact point of Party A that it cannot execute a preservation request issued by a police authority but only from a prosecutor.

The explanation given to Party A was:

*The request was issued by the police authority. According to our understanding of the Convention on Cybercrime, even the process of preservation is a judicial one. Therefore as a minimum, we would be grateful if a request was provided with an approval, signature and a stamp of the prosecutor.*

The contact point of Party A, therefore, had the request for preservation signed by a prosecutor and resent it via the EUROJUST network.

The contact of Party A was nevertheless seeking clarification of whether the interpretation of Party B is correct.

The T-CY Bureau discussed the matter in its meeting of 30-31 January 2017 with the following considerations:

- Article 29 Budapest Convention is to ensure the expedited preservation of data so as to permit sufficient time to obtain the data via mutual legal assistance. According to the Explanatory Report, the request for expedited preservation of stored computer data is

a “provisional measure intended to take place much more rapidly than the execution of a traditional mutual request” (paragraph 282) and should specify “the authority that is seeking for the preservation of request” (paragraph 283). Thus, the request for expedited preservation of stored computer data does not have to fulfil the formal conditions of a traditional mutual legal assistance request, and neither to be issued by the same authority that will subsequently send the MLA request for the data preserved.

- Article 29 Budapest Convention leaves it to each Party to determine the authority competent to issue a preservation request.
- Under Article 35 Budapest Convention, Parties are required to establish a 24/7 point of contact. Again, Article 35 leaves it to each Party to determine the authority to serve as 24/7 contact point.
- An important function of such contact points is “the preservation of data pursuant to Articles 29 and 30.”
- The authority for issuing and transmitting preservation requests is thus subject to the domestic law of the requesting Party (here Party A).
- The actual execution of the preservation request is subject to the domestic law of the requested Party (here Party B).
- Article 29.4 and 5 provide grounds for refusal to the execution of a preservation request. Issuance of a request by a police authority is not among the grounds.

The T-CY Bureau is, therefore, of the opinion that:

- Party B was not permitted to refuse the execution of a preservation request by the 24/7 contact point of Party A which had issued and transmitted the request according to its domestic law;
- the requirement of a Party, namely, that an Article 29 request can only be accepted if issued by a judicial authority in the understanding of that Party, would hinder the functioning of the 24/7 network of the Budapest Convention, given that the majority of contact points are police authorities.

The T-CY is invited to discuss this matter in view of arriving at an opinion of the T-CY.

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