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Cybercrime Convention Committee (T-CY)

Opinion of the T-CY on  
the competent authority for issuing a  
preservation request under Articles 29 and 35 Budapest Convention

Draft prepared by the T-CY Bureau for consideration by T-CY 18 (November 2017)

1. The 17th Plenary of the T-CY (7-9 June 2017) decided to prepare an opinion on the question of the authority competent for issuing an international request for the expedited preservation of data, that is, whether such a request may be issued by a police authority. [The present opinion was adopted by the 18<sup>th</sup> Plenary of the T-CY (27-28 November 2017).]
  2. The T-CY considers that:
    - a under Article 35 Budapest Convention, Parties are required to establish a 24/7 point of contact. According to paragraph 35.2.b, the point of contact does not have to be part of that Party's authority responsible for international mutual assistance and paragraph 300 of the Explanatory Memorandum specifies that "Each Party is at liberty to determine where to locate the point of contact within its law enforcement structure".
    - b Article 35 allows the point of contact to assist and facilitate the preservation of data pursuant to Article 29 or to carry out preservation requests if permitted under the domestic law of the requested Party;
    - c Articles 27 and 29 Budapest Convention leave it to each Party to determine the authority competent to issue a request, including a preservation request, and the authority for issuing and transmitting such requests is subject to the domestic law of the requesting Party;
    - d Article 29 Budapest Convention ensures 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 the preservation of request. 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 must it be issued by the same authority that will subsequently send the MLA request for the disclosure of the data preserved;
    - e the actual execution of the preservation request is subject to the domestic law of the requested Party;
    - f Article 29.4 and 5 provide grounds for refusal to the execution of a preservation request. Issuance of a request by a police authority of another Party is not among the grounds.
  3. The T-CY is, therefore, of the opinion that:
    - a a Party may not refuse the execution of a request pursuant to Article 29 solely on the ground that it has been issued by a police authority of the requesting Party acting in accordance with its domestic law, particularly when that authority is the designated 24/7 point of contact;
    - b the requirement by a Party, namely, that a request under Article 29 can only be accepted if issued by a judicial authority in the understanding of the requested Party, would jeopardise the functioning of the 24/7 network of the Budapest Convention, given that the majority of contact points are police authorities.
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