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Cybercrime Convention Committee (T-CY)

(DRAFT) Terms of Reference for the
Preparation of a Draft 2nd Additional Protocol to the Budapest
Convention on Cybercrime

Proposal prepared by the Cloud Evidence Group as well as Canada, France, Germany, Japan,
Liechtenstein, Slovakia and USA for consideration by the T-CY

As revised by the Secretariat further to comments received by 1 June 2017

Background

T-CY 16 (November 2016) reviewed a set of [Recommendations](#) proposed by the Cloud Evidence Group.

With regard to Recommendation 5 on the preparation of a Draft Protocol to the Budapest Convention, the T-CY [decided that](#)

... the T-CY agrees in principle on the need for an Additional Protocol. In order to facilitate a formal T-CY decision by June 2017 on initiating the drafting of a Protocol, the T-CY extends the mandate of the Cloud Evidence Group and requests the CEG to submit draft Terms of Reference for the drafting process and additional information on possible elements to the T-CY in spring 2017.

The Cloud Evidence Group prepared the draft Terms of Reference below in its meeting on 31 January/1 February 2017.

It is recalled that the preparation of an additional Protocol to the Budapest Convention, in principle, involves the following steps:

- a. T-CY to start the drafting of a Protocol on its own initiative under Article 46.1.c Budapest Convention.
- b. T-CY to keep the Committee of Ministers (CM) informed of this initiative.
- c. T-CY to seek the opinion of the European Committee on Crime Problems (CDPC) on the draft Protocol before finalizing the draft (on the basis of Article 46.3 and 44.2 Budapest Convention).
- d. T-CY to submit the final draft to the CM for onward transmission and an opinion of the Parliamentary Assembly of the Council of Europe (PACE).
- e. CM to examine the draft Protocol in the light of the PACE opinion and in view of formal adoption and decision to open the Protocol for signature. The CM may consider inviting Parties to the Budapest Convention other than member States of the Council of Europe to participate in this examination.

Terms of Reference for the preparation by the Cybercrime Convention Committee of a draft Second Additional Protocol to the Convention on Cybercrime (ETS 185)

Duration

Terms of reference valid from 1 September 2017 until 31 December 2019.

Main tasks

Having regard to:

- Article 46.1.c Budapest Convention on Cybercrime;
- [the decision adopted by the Cybercrime Convention Committee (T-CY) at its 17th Plenary (June 2017)];
- Parliamentary Assembly [Recommendation 2077 \(2015\)](#) on “Increasing co-operation against cyberterrorism and other large-scale attacks on the Internet” and the [response of the Committee of Ministers](#) of 27 April 2016;
- the Programme and Budget of the Council of Europe for 2016/2017 as adopted by the Committee of Ministers on 24/25 November 2015 referring to follow up to be given to the work of the T-CY on access to evidence in the cloud;
- agreement in principle by the T-CY at its 16th Plenary (November 2016) on the need for an additional Protocol, and drawing from the [Final Report and Recommendations](#) of the T-CY Cloud Evidence Group and, in particular Section 4.5 with possible elements of a Protocol;

the T-CY will prepare – seeking the opinion of the European Committee of Crime Problems – a draft 2nd Additional Protocol to the Convention on Cybercrime (ETS 185) and submit it to the Committee of Ministers in view of adoption.

Expected results

A draft Second Additional Protocol to the Convention on Cybercrime (ETS 185) – including an Explanatory Report – is prepared and finalised by the T-CY by December 2019.

Elements may include the following. It is understood that these elements – as proposed by the Cloud Evidence Group in its Final Report – are elements for reflection. Their feasibility would need to be determined during the negotiation of the Protocol. Other elements may also be considered in the course of the process.

- Provisions for more effective mutual legal assistance:
 - a simplified regime for mutual legal assistance requests for subscriber information;
 - international production orders;
 - direct cooperation between judicial authorities in mutual legal assistance requests;
 - joint investigations and joint investigation teams;
 - requests in English language;
 - audio/video hearing of witnesses, victims and experts;
 - emergency MLA procedures.
- Provisions allowing for direct cooperation with service providers in other jurisdictions with regard to requests for subscriber information, preservation requests, and emergency requests.

- Clearer framework and stronger safeguards for existing practices of transborder access to data.
- Safeguards, including data protection requirements.

Working methods

The draft Protocol will be prepared and finalised by the T-CY.

The regular T-CY Plenary meetings (5 Plenaries scheduled from 2017-2019) will be extended by one day each for work on the Additional Protocol.

The meetings will be held in closed sessions (Article 4.3 T-CY Rules of Procedure).

Articles 4.4 and 4.5 T-CY Rules of Procedure will apply to decision-making.

A Drafting Group will assist the Plenary in the preparation of the Additional Protocol. The Drafting Group will meet back-to-back with the T-CY Bureau.

Composition of the Plenary

Members

State Parties to the Convention on Cybercrime as represented in the T-CY and as per Article 3 of the [T-CY Rules of Procedure](#).

Further to the provisions of Article 3.1 regarding the defrayal of expenses, the cost of one additional per diem of one representative per State Party will be borne by the Council of Europe within the limits of budgetary appropriations.

Observers

States with observer status in the T-CY may send representatives, without the right to vote and without defrayal of expenses.

The following Council of Europe bodies may send one or more representatives, without the right to vote but with defrayal of expenses at the charge of their respective administrative Budgets:

- European Committee on Crime Problems (CDPC);
- Consultative Committee of Data Protection Convention 108 (T-PD);
- European Committee on Legal Co-operation (CDCJ);
- Steering Committee on the Media and Information Society (CDMSI);
- Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC).

Organisations with observer status in the T-CY may send representatives without the right to vote and without defrayal of expenses.

The T-CY may invite individual subject-matter experts on an ad-hoc basis.

The T-CY may hold public hearings, publish drafts of its work, and invite public comments.

Composition of the Drafting Group

The Drafting Group will consist of representatives of State Parties as appointed by T-CY Heads of Delegation.

The T-CY shall elect five representatives of State Parties (appointed by T-CY Heads of Delegation) taking into account expertise, geographical distribution, gender balance and legal systems, whose cost for travel and per diem will be borne by the Council of Europe within the limits of budgetary appropriations.

T-CY Bureau Members shall participate ex-officio and their additional per diems will be borne by the Council of Europe within the limits of budgetary appropriations.

The Drafting Group will be chaired by the Chair of the T-CY and in his/her absence by the Vice-Chair.

Individual experts may be invited to participate in meetings of the Group ad-hoc.

Meetings

- 5 T-CY Protocol Plenary meetings in 2017-2019;
- 7 T-CY Protocol Drafting Group meetings in 2017-2019.

Budgetary information

	Meetings	Units	Unit cost (EUR)	Cost (EUR)
Plenaries	5	55	175	48125
Drafting Group	7	15	175	18375
Travel	7	5	900	31500
Interpretation	12	1	5000	60000
Other cost	12	1	3000	36000
			Total	194000

of which in

2017	27000
2018	83500
2019	83500

These figures take into consideration cost in addition to the cost for regular Plenary and Bureau meetings (per diem, interpretation, translation and document printing). Cost will increase to the extent that additional States become Parties.