

Cybercrime Convention Committee (T-CY)

Working group on undercover investigations and extension of searches:

Terms of Reference¹

Name	T-CY working group on undercover investigations and extension of searches.
Origin	T-CY Working Group under Article 1.1.j of the Rules of Procedure established by decision of the T-CY adopted at [the 25 th Plenary (15 November 2021)]
Duration	1 January – 31 December 2022
Main tasks	<p>To prepare a report containing draft options and recommendations for further action by the T-CY on:</p> <ol style="list-style-type: none">1. Undercover investigations by means of a computer system;2. Extension of searches. <p>The Group shall take into account and build on work carried out by the Protocol Drafting Group between 2017 and 2020 as reflected in documents T-CY(2017)28 and T-CY(2017)33 and consider in particular the added value, risks and safeguards of possible solutions and options for each of these topics, such as, for example, recommending the drafting of guidance notes, documenting experiences and best practices, or negotiation of a binding instrument. However, the purpose of this Working Group is not to draft or negotiate text of a new instrument.</p> <p>The Group shall provide an update to the T-CY at its 26th Plenary and a final report for consideration by the 27th Plenary of the T-CY.</p>
Working methods	<p>The Working Group shall hold its meetings in camera in virtual format or back-to-back with meetings of the T-CY Bureau or Plenary.</p> <p>The Working Group may hold public hearings, invite other experts and consult other stakeholders.</p>
Composition	<ul style="list-style-type: none">• Bureau members ex-officio with defrayal of cost².• Up to 10 additional T-CY members or experts appointed by State Parties with defrayal of cost³.

¹ Adopted by the 25th Plenary of the T-CY (15 November 2021)

² Subject to the availability of funds.

³ Subject to the availability of funds.

Background

The T-CY when drafting the 2nd Additional Protocol to the Convention on Cybercrime between 2017 and 2021, considered in detail provisions on “undercover investigations by means of computer systems” and “extension of searches” which, however, were not retained in the Protocol. As noted in paragraph 24 of the Explanatory Report to the [draft] Protocol, these measures “were of high interest to the Parties but were found to require additional work, time and consultations with stakeholders, and were thus not considered feasible within the timeframe set for the preparation of this Protocol. The drafters proposed that these be pursued in a different format and possibly in a separate legal instrument”.

With respect to these measures, the T-CY Protocol Drafting Group in October 2020 and the 23rd Plenary of the T-CY on 30 November furthermore:

- with regard to **Undercover investigations by means of a computer system**
 - Noted the importance of such a provision, but determined that an article that would regulate undercover investigations by means of a computer system accompanied by a strict notification regime and that at the same time would not limit current practices, does not appear to reach consensus;
 - Proposed that the issue of undercover investigations by means of a computer system be put on the agenda of the T-CY for future consideration and guidance to Parties;

 - with regard to **Extension of searches**
 - Noted the importance of such a provision as underlined by the T-CY for many years and the interest by delegations to continue working on this topic based on efforts undertaken and proposals made so far;
 - Determined that:
 - inclusion of such a provision in the Protocol would entail the risk that some Parties may not be able to join the Protocol once it is opened for signature;
 - further consultations with stakeholders would be needed to increase understanding and obtain support for such a provision;
 - regulating the extension of searches in an international instrument would need to be carefully considered as such rules may limit measures currently available in many Parties, while other Parties’ laws prohibit such measures in their territories;
 - finalisation of an article on this complex issue would be difficult to accomplish in the short term;
 - in the light of the above, and to prevent risks to the adoption of the Protocol in 2021, other ways would need to be considered to continue work on this issue, including a separate instrument.
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