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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**
**(CDPC)**

**COMMITTEE OF EXPERTS**
**ON THE OPERATION OF EUROPEAN CONVENTIONS**
**ON CO-OPERATION IN CRIMINAL MATTERS**
**(PC-OC)**

# Questions on the compatibility between the European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime

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## INTRODUCTION

During its 67th PC-OC meeting (18-20 November 2014), the PC-OC examined a request by the CDPC Bureau "that the PC-OC consider, in its forthcoming work and meetings, the question of compatibility between the European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime with regard to the exchange of requests for international co-operation in matters related to electronic evidence and report back to the CDPC on the outcome of this exercise".

Further to this request, all PC-OC experts were invited to reply to the following questions:

1. Do you see an incompatibility between the European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime with regard to the exchange of requests for international co-operation in matters related to electronic evidence? If you do, please explain.
2. If you see no incompatibility, please explain how you use/articulate these conventions at national level.

*Durant sa 67ème réunion (18-20 novembre 2015), le PC-OC a examiné une demande qui lui est faite par le Bureau du CDPC "d'aborder dans ses travaux et réunions à venir la question de la compatibilité entre la Convention européenne d'entraide judiciaire en matière pénale et la Convention sur la cybercriminalité concernant l'échange de demandes de coopération internationale en matière de collecte de preuves sous forme électronique , et de rendre compte au CDPC des résultats de cet exercice".*

*Suite à cette demande, les experts du PC-OC ont été invités à répondre aux questions suivantes:*

1. *Voyez-vous une incompatibilité entre la Convention sur l'entraide judicaire et la Convention sur la cybercriminalité concernant l'échange de demandes de coopération internationale en matière de collecte de preuves sous forme électronique? Si tel est le cas, merci d'expliquer.*
2. *Si vous ne voyez pas d'incompatibilité, merci d'expliquer comment vous utilisez/articulez ces conventions dans votre pays.*

## ANDORRA / ANDORRE

Pour ce qui est de l'Andorre, notre gouvernement a signé la convention sur la cybercriminalité le 23 avril 2013 mais elle n'est pas encore en vigueur, raison pour laquelle nous n'avons aucune incompatibilité effective.

## AUSTRIA / AUTRICHE

1. Do you see an incompatibility between the European Convention on Mutual Assistance in Criminal matters and the Convention on Cybercrime with regard to the exchange for request for international co-operation in matters related to electronic evidence? If you do please explain.

   *No.*

2. If you see no incompatibility, please explain how you use/articulate this convention at national level.

   *In practice also with regard to electronic evidence MLA is requested or obtained on the basis of the European Convention on Mutual Assistance. No cases submitted to the Central Authority can be remembered where the application of the Budapest Convention was preferred, because it provides for more comprehensive possibilities with regard to obtaining electronic evidence.*

## BOSNIA AND HERZEGOVINA / BOSNIE ET HERZEGOVINE

Bosnia and Herzegovina ratified the European Convention on Mutual Assistance in Criminal Matters in 2005 (Official Gazette of Bosnia and Herzegovina - International Treaties No. 04/2005). Its Second Additional Protocol was ratified by Bosnia and Herzegovina in 2007 (Official Gazette of Bosnia and Herzegovina - International Treaties No. 10/2007), whereas the Third Additional Protocol to this Convention was ratified in 2014 (Official Gazette of Bosnia and Herzegovina - International Treaties No. 17/14). The subject-matter Convention entered into force for Bosnia and Herzegovina on 24 July 2005, and the Second Additional Protocol to the Convention on 1 March 2008. The Third Additional Protocol to the Convention should enter into force for Bosnia and Herzegovina on 1 April 2015.

The European Convention on Mutual Assistance in Criminal Matters has been entirely implemented into the legal system of Bosnia and Herzegovina based on the Law on Mutual Legal Assistance in Criminal Matters (Official Gazette of Bosnia and Herzegovina No. 53/09) and the Law on Amendments to the Law on Mutual Legal Assistance in Criminal Matters (Official Gazette of Bosnia and Herzegovina No. 58/13).

Central authority to act upon the respective Convention is the Ministry of Justice of Bosnia and Herzegovina, within which, in the Sector for International and Inter-Entity Legal Assistance and Cooperation - Department for Legal Assistance in Criminal Matters, contact persons have been designated to act upon the Convention, namely, to receive and submit requests for legal assistance, and to act upon them. It should be noted that cooperation on interstate level, in accordance with the Convention, is done formally, through the request for legal assistance. Submission of a request for assistance, together with accompanying documentation, can be done electronically, however the final execution of the request is conditioned by the submission of the original or certified copies or photocopies of case files or documents. Moreover, in accordance with Article 15 of the Convention and Article 4 of the Law on Mutual Legal Assistance in Criminal Matters, communication on the international level, as a rule, takes place between the Ministries of justice, as central authorities. In urgent cases, communication is possible through the INTERPOL that will send the request for assistance to the competent judicial authorities, again through the Ministry of Justice of Bosnia and Herzegovina.

The Convention on Cybercrime of the Council of Europe, as well as the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, were ratified by Bosnia and Herzegovina in 2006 (Official Gazette of BiH - International Treaties No. 06/2006) and they entered into force for Bosnia and Herzegovina on 1 September 2006.

The Central authority to act upon the Convention on Cybercrime with the Additional Protocol is the Ministry of Security of Bosnia and Herzegovina - Directorate for Coordination of Police Bodies of Bosnia and Herzegovina - Sector for International Operative Police Collaboration - Department NCB INTERPOL. In accordance with Article 35 of this Convention, a 24/7 contact person has been designated from the Department NCB INTERPOL for provision of legal assistance in cases of emergency regarding the computer crimes. The requested data, evidence, records or other documentation are submitted in electronic form when this cooperation is concerned. Specifically, it is a type of informal cooperation, as opposed to formal cooperation through formal request for assistance. Cooperation through the 24/7 contact person does not substitute the request for legal assistance. Hence, the information that is collected through the 24/7 contact person in the framework of the Convention on Cybercrime cannot be used as evidence in court proceedings. According to Article 25 of the Convention on Cybercrime, the Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a

criminal offence. One of the main objectives to be met during this cooperation is to ensure protection of electronic data from destruction or manipulation, or until receipt of formal request for assistance.

Based on past analysis of the implementation of the Convention on Cybercrime in Bosnia and Herzegovina there were no incompatibilities or nonconformities found in terms of the application of this Council of Europe instrument. Furthermore, the Committee of the Convention on Cybercrime / T-CY /, at its 12th meeting held in December 2014, adopted a Report on the assessment of the implementation of the said Convention relating to the field of international cooperation and mutual legal assistance in access to stored computer data, in which also, no problems in practice have been identified due to possible non-compliance with other conventions of the Council of Europe, including the Convention on Mutual Assistance in Criminal Matters.

Further to the above, we do not find an incompatibility between the Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime.

## CYPRUS / CHYPRE

I have forwarded the two questions to the competent Ministry of Justice and Police colleagues responsible for the submission and execution of requests relating to both Conventions and their position is:

1. That there is no incompatibility between the two.

2. Every effort is made to execute all requests taking into account the offence being investigated and the nature of the evidence requested.

## CZECH REPUBLIC / REPUBLIQUE TCHÈQUE

The Czech Republic does not see any incompatibility between the European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime with regard to the exchange of requests for international co-operation in matters related to electronic evidence. As appears from the practice of its competent judicial authorities, there has been no significant case where the Convention on Cybercrime would be applied since its entry into force on 1 December 2013. However, should the Convention on Cybercrime be applied, the competent judicial authority would firstly apply Article 39 Paragraph 1 of the Convention on Cybercrime which stipulates that „the purpose of the present Convention is to supplement applicable multilateral or bilateral treaties or arrangements as between the Parties, including the provisions of […] the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 20 April 1959 (ETS No. 30)“ hence apply the Convention on Cybercrime as lex specialis.

Furthermore, attention would be drawn to Article 27 Paragraph 4 Letter a of the Convention on Cybercrime which provides grounds for refusal of mutual legal assistance, which could be that of concerning an offence which the requested Party considers a political offence or an offence connected with a political offence, in addition to Article 25, Paragraph 4, of the Cybercrime Convention. On the contrary, according to the European Convention on Mutual Assistance in Criminal Matters the ground for refusal of mutual legal assistance constitutes not only an offence which the requested Party considers a political offence or an offence connected with a political offence, but also a fiscal one (Article 2 Letter a of the European Convention on Mutual Assistance in Criminal Matters).

## DENMARK / DANEMARK

1. There is no incompatibility between the European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime with respect to Danish law.

2. There is no specific Danish legislation relating to mutual legal assistance in criminal matters. In all cases where assistance from Denmark is required, the Danish authorities apply national legislation by analogy. This implies that Danish authorities can comply with requests for mutual legal assistance even though no bilateral or multilateral agreement exists between Denmark and the requesting country. This also implies that Danish authorities can comply with a request if the investigative measure(s) covered by the request could be carried out in a similar national case. Therefore, requests are executed in accordance with national law concerning criminal procedure (The Administration of Justice Act) and – if applicable - in accordance with relevant international instruments such as the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and the 2001 Convention on Cybercrime.

## FINLAND / FINLANDE

1. No incompatibility at all, on the contrary, the Cybercrime Convention supplements the 1959 Convention. The supplementary role of the Cybercrime Convention is expressly stated in its preamble.

2. The importance of the Cybercrime Convention lies in the fact that it harmonizes the substantive and procedural law on cybercrime in the Parties to the extent of making mutual assistance possible. For example, the lack of dual criminality, where such is needed, can no longer be an obstacle to executing an MLA request pursuant to the 1959 Convention. Another important aspect of the convention is that it can be used as a self-standing instrument in the absence of applicable international instruments.

## GERMANY / ALLEMAGNE

I don't think that we should create new rules for MLA outside the MLA convention. At first, it could become much more complicate for practitioners to find the applicable rules for the special cases of MLA. Furthermore it seems to be incompatible with the system of MLA in the CoE conventions.

We would prefer to insert new provisions that deal with electronic evidence, in the MLA convention. Certainly there's a need for some new provisions because since 1959 there have been many changes relating to electronic devices and the use of the www.

## ITALY / ITALIE

I do not see any incompatibility. Possible –and indeed existing- differences between the two conventions are depending on the different domain they lead to regulate. As a matter of fact the cyber world is a “separate world” that deserve to be treated in specific ways that might vary from the mother convention of 1959.

It is for that very reason that PC-OC, several times, stated that Cyber convention was entitled to regulate in proper manner mutual assistance; likewise the Protocol and any other possible future instruments related to the Budapest convention. At the same time PC-OC maintained the point that any amendment should follow an exchange of views with PC-OC, in order to check possible discrepancies.

To the best of my knowledge –after having questioned cyber experts- no relevant problems came at stake. I was told that according to the experience of people working at the 7days-24hours group no problems were encountered.

## THE REPUBLIC OF MOLDOVA / LA REPUBLIQUE DE MOLDOVA

I don't see any incompatibilities between the European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime with regard to the exchange of requests for international co-operation in matters related to electronic evidence.

The European Convention on Mutual Assistance in Criminal Matters is a general one but the Convention on Cybercrime is a particular one. And there are no problems to use the MLA Convention in cases related to electronic evidence.

## NETHERLANDS / PAYS-BAS

The Cybercrime Convention and the Convention on Mutual Assistance are compatible. They are complementary/supplementary to each other. The Cybercrime Convention can be used to prevent the loss of important information and data. Goal of the Convention on Cybercrime: to facilitate acceleration of the process of obtaining mutual assistance so that critical information or evidence is not lost (explanatory report 256).

The Cybercrime Convention is very clear on the purpose of the Convention. Article 39 clearly states that the Convention is supplementary applicable to multilateral (..) treaties, including the European Convention on Mutual Assistance in Criminal Matters. This means in practice that requests that have to be executed without delay, can be based on the Convention on Cybercrime. The 24/7 network can be used to freeze this data and take other necessary measures.

To receive and use this information as evidence in a criminal matter, the use of the European Convention on Mutual Assistance (or another convention) is necessary.

Explanatory Report

254. Other provisions of this Chapter will clarify that the obligation to provide mutual assistance is generally to be carried out pursuant to the terms of applicable mutual legal assistance treaties, laws and arrangements. (..)

## NORWAY / NORVÈGE

**Regarding question #1:**

Norway is party to both the European Convention on Mutual Assistance in Criminal Matters (The 1959 Convention) and the Convention on Cybercrime (the Budapest Convention).

Article 39 in the Budapest Convention states:

> ***Article 39 – Effects of the Convention***
>
> *1 The purpose of the present Convention is to supplement applicable multilateral or bilateral treaties or arrangements as between the Parties, including the provisions of:*
>
> > *– the European Convention on Extradition, opened for signature in Paris, on 13 December 1957 (ETS No. 24);*
> > *– the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 20 April 1959 (ETS No. 30);*
> > *– the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 17 March 1978 (ETS No. 99). (…)*

The Budapest Convention does not have provision regarding mutual legal assistance. The processes for international co-operation in cases where the Budapest Convention is applicable, is described in Chapter III. Article 23 states the general principles relating to international co-operation:

> ***Article 23 – General principles relating to international co-operation***
> *The Parties shall co-operate with each other, in accordance with the provisions of this chapter, and through the application of relevant international instruments on international co-operation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, to the widest extent possible for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.*

Article 27 describes mutual assistance request in situations where no applicable international agreement exists, and article 15 regulates conditions and safeguards.

In our view, these articles from the Budapest Convention illustrates the fact that the Budapest Convention is a supplement to other agreements of international co-operation in criminal matters, including the European Convention on Mutual Assistance in Criminal Matters.

The Explanatory Report for the Budapest Convention is also clear regarding this issue. Part of the text is highlighted.

*241. Article 23 sets forth three general principles with respect to international co-operation under Chapter III.*

*242. Initially, the article makes clear that international co-operation is to be provided among Parties "to the widest extent possible." This principle requires Parties to provide extensive co-operation to each other, and to minimise impediments to the smooth and rapid flow of information and evidence internationally.*

*243. Second, the general scope of the obligation to co-operate is set forth in Article 23: co-operation is to be extended to all criminal offences related to computer systems and data (i.e. the offences*

*covered by Article 14, paragraph 2, litterae a-b), as well as to the collection of evidence in electronic form of a criminal offence. This means that either where the crime is committed by use of a computer system, or where an ordinary crime not committed by use of a computer system (e.g., a murder) involves electronic evidence, the terms of Chapter III are applicable. However, it should be noted that Articles 24 (Extradition), 33 (Mutual assistance regarding the real time collection of traffic data) and 34 (Mutual assistance regarding the interception of content data) permit the Parties to provide for a different scope of application of these measures.*

*244. Finally, co-operation is to be carried out both "in accordance with the provisions of this Chapter" and "through application of relevant international agreements on international co-operation in criminal matters, arrangements agreed to on the basis of uniform or reciprocal legislation, and domestic laws."* ***The latter clause establishes the general principle that the provisions of Chapter III do not supersede the provisions of international agreements on mutual legal assistance and extradition, reciprocal arrangements as between the parties thereto (described in greater detail in the discussion of Article 27 below), or relevant provisions of domestic law pertaining to international co-operation.*** *This basic principle is explicitly reinforced in Articles 24 (Extradition), 25 (General principles relating to mutual assistance), 26 (Spontaneous information), 27 (Procedures pertaining to mutual assistance requests in the absence of applicable international agreements), 28 (Confidentiality and limitation on use), 31 (Mutual assistance regarding accessing of stored computer data), 33 (Mutual assistance regarding the real-time collection of traffic data) and 34 (Mutual assistance regarding the interception of content data).*

*(…)*

*Title 4 – Procedures pertaining to mutual assistance requests in the absence of applicable international agreements*

*Procedures pertaining to mutual assistance requests in the absence of applicable international agreements (Article 27)*

*262. Article 27 obliges the Parties to apply certain mutual assistance procedures and conditions where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties. The Article thus reinforces the general principle that mutual assistance should be carried out through application of relevant treaties and similar arrangements for mutual assistance.* ***The drafters rejected the creation of a separate general regime of mutual assistance in this Convention that would be applied in lieu of other applicable instruments and arrangements, agreeing instead that it would be more practical to rely on existing MLAT regimes as a general matter, thereby permitting mutual assistance practitioners to use the instruments and arrangements they are the most familiar with and avoiding confusion that may result from the establishment of competing regimes.*** *As previously stated, only with respect to mechanisms particularly necessary for rapid effective co-operation in computer related criminal matters, such as those in Articles 29-35 (Specific provisions – Title 1, 2, 3), is each Party required to establish a legal basis to enable the carrying out of such forms of co-operation if its current mutual assistance treaties, arrangements or laws do not already do so.*

*263.* ***Accordingly, most forms of mutual assistance under this Chapter will continue to be carried out pursuant to the European Convention on Mutual Assistance in Criminal Matters (ETS N° 30) and its Protocol (ETS N° 99) among the Parties to those instruments.*** *Alternatively, Parties to this Convention that have bilateral MLATs in force between them, or other multilateral agreements governing mutual assistance in criminal cases (such as between member States of the European Union), shall continue to apply their terms, supplemented by the computer- or computer-related crime-specific mechanisms described in the remainder of Chapter III, unless they agree to apply any or all of the provisions of this Article in lieu thereof. Mutual assistance may also be based on arrangements agreed on the basis of uniform or reciprocal legislation, such as the system of co-operation developed among the Nordic countries, which is also admitted by the European Convention on Mutual Assistance in Criminal Matters (Article 25, paragraph 4), and among members of the Commonwealth. Finally, the reference to mutual assistance treaties or arrangements on the basis of uniform or reciprocal legislation is not limited to those instruments in force at the time of entry into force of the present Convention, but also covers instruments that may be adopted in the future.*

The provisions on procedural law in Article 14 to Article 21 regulate processes to secure electronic evidence, such as production orders (Article 18), search and seizure of stored computer data (Article 19), real-time collection of traffic data (Article 20) and interception of content data (Article 21). In all

these instances, the processes are regulated on a national level; for Norway by several provisions in the Criminal Procedure Act. The 1959-Convention does not have provisions on these matters.

The 1959 Convention has a provision about other agreements and conventions:

*Article 26*

1. *Subject to the provisions of Article 15, paragraph 7, and Article 16, paragraph 3, this Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing mutual assistance in criminal matters between any two Contracting Parties.*
2. ***This Convention shall not affect obligations incurred under the terms of any other bilateral or multilateral international convention which contains or may contain clauses governing specific aspects of mutual assistance in a given field.***
3. *The Contracting Parties may conclude between themselves bilateral or multilateral agreements on mutual assistance in criminal matters only* ***in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.***
4. *Where, as between two or more Contracting Parties, mutual assistance in criminal matters is practised on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system. Contracting Parties which, in accordance with this paragraph, exclude as between themselves the application of this Convention shall notify the Secretary General of the Council of Europe accordingly.*

The Norwegian view is that the European Convention on Mutual Assistance in Criminal Matters and the Budapest Convention are compatible with regards to the exchange of requests for international co-operation in matters related to electronic evidence, and that the Budapest Convention works as a supplement to the 1959 Convention, in accordance with Article 26.

In our view, we see the importance of specific provisions regarding electronic evidence. Electronic evidence is volatile, can be deleted or altered quickly, and often lead to point-to-point searches from one service provider to another, from one jurisdiction to another. Several of the provisions in the Budapest Convention regulate securing evidence, for example by expedited preservation (Article 29). However, in most cases there still is a need for a mutual legal request to hand over the requested evidence from the requested to the requesting country.

**Regarding question #2:**

The provisions in the Budapest Convention, such as expedited preservation of stored computer data (Article 29), offer mechanisms for securing evidence quickly. Request for expedited preservation and other request go through the national 24/7 contact points (Article 35). In Norway, NCIS Norway (Kripos) is the national contact point. These requests are typically sent by e-mail, and usually with information that a mutual legal request will be sent in case evidence is available and secured.

If others means of co-operation exist, such as Europol, SIS, The G8 network or INTERPOL, these channels may supplement information secured and/or exchanged based on the Budapest Convention.

After the evidence is secured, the MLA process begins, in accordance with the relevant agreements and provisions, such as the 1959 Convention, as well as local laws and practices.

## PORTUGAL

1. Do you see an incompatibility between the European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime with regard to the exchange of requests for international co-operation in matters related to electronic evidence? If you do, please explain.

   **The answer is no, we don't see any incompatibility. We don't see any incompatibility between the two instruments. In fact article 23 of the Budapest Convention recognises the legal basis coming from other instruments, more generic, to cooperate and his an added value to the MLA Convention for instance when it comes to cooperation with other States that are not State Parties to that instrument or when it rules forms of cooperation that were not ruled when the Mother Convention was negotiated.**

2. If you see no incompatibility, please explain how you use/articulate these conventions at national level.

   **Again, very frankly, requests are drafted at a local level and very few Magistrates do have the knowledge and the sensibility to identify the two Conventions and meditate on how they should be articulated. They tend to use the domestic Law on international cooperation and, in few cases, the open rules of the Mother Convention.**

## ROMANIA / ROUMANIE

Considering the goal of the Council of Europe to achieve - through its treaties - a greater unity between its member states, as well as to share its values and standards at the global level, it is assumed that standards and values would not conflict between treaties.

According to the Treaty Office's website:

- The *Council of Europe Treaty Series* groups together all the conventions concluded within the Organisation since 1949. Whatever they are called ("agreement", "convention", "arrangement", "charter", "code", etc.), all these texts are international treaties in the sense of the Convention of Vienna of 1969 on the law of treaties.

- Since it was founded in 1949, the Council of Europe has contributed to achieving greater unity between its 47 member States and to creating a pan-European legal area by concluding more than 200 treaties in all areas of its competence. These treaties constitute the concrete applications of the three fundamental principles that underlie the work of the Organisation: democracy, human rights and the rule of law.

- Almost all Council of Europe treaties are open to States which are not members of the Organisation. To date, 26 non-member States, mainly American and African (for example the United States of America, Costa Rica, South Africa or Senegal), have signed and/or ratified Council of Europe treaties in the fields of legal co-operation in criminal matters, environment, culture, education or sports.

Having in mind the assumption that ALL treaties concluded at the level of the Council of Europe are and should be compatible, the purpose of the Convention on Cybercrime as stipulated in Article 39 should be recalled:

***Article 39 – Effects of the Convention***

*1 The purpose of the present Convention is to supplement applicable multilateral or bilateral treaties or arrangements as between the Parties, including the provisions of:*

*– the European Convention on Extradition, opened for signature in Paris, on 13 December 1957 (ETS No. 24);*
*– the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 20 April 1959 (ETS No. 30);*
*– the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 17 March 1978 (ETS No. 99).*

The entire process of MLA under the Convention on Cybercrime is based on the application of relevant international agreements on international co-operation in criminal matters, arrangements agreed to on the basis of uniform or reciprocal legislation, and domestic laws (see the extracts from the Explanatory Report in the Appendix 1).

The fact that the Convention provides for specific measures for investigations of cybercrime offences, as well as for the collection of electronic evidence do not affect the above-mentioned principles. The provisions laid down in Section 2 (Specific provisions) are aimed at providing for adequate mechanisms in order to take effective and concerted international action in cases involving computer-related offences and evidence in electronic form. Such provisions are unique considering that the Convention on Cybercrime is the only international treaty dealing with cybercrime matters.

In conclusion, there is no incompatibility between the European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime with regard to the exchange of requests for international co-operation in matters related to electronic evidence, but on the contrary, the two treaties complement and reinforce each other.

Please find attached in the Appendix 2 information about Romania.

## SERBIA / SERBIE

As regards to international cooperation in criminal matters related to electronic evidence, there is no incompatibility between European Convention on Mutual Assistance in Criminal Matters and the Convention on Cybercrime.

Public Prosecutions of the Republic of Serbia cooperate with other countries in accordance with the Law on mutual assistance in criminal matters of the Republic of Serbia and ratified EU Convention on mutual legal assistance in criminal matters and its Second additional Protocol and Council of Europe Convention on Cybercrime.

The Law on mutual assistance in criminal matters is harmonized with the EU Convention on mutual legal assistance in criminal matters and its Second additional protocol.

It governs mutual assistance in criminal matters in cases in which no ratified international treaty exists or certain subject matters are not regulated under it.

The authorities competent to exercise mutual assistance are courts and Public Prosecutor's offices.

This Law, in addition to ordinary forms of mutual legal assistance, also prescribes other forms of mutual assistance that, among others, include computer search and automatic data processing, exchange of information and delivery of writs and objects related to criminal proceedings pending at the requesting party, delivery of data without the letter rogatory etc.

Also, there is a standard possibility that requests for mutual assistance and other annexed documents of the national judicial authority can be submitted in the form of letters rogatory and transmitted to foreign authorities through the Ministry of Justice.

According to the aforementioned Law, under the condition of reciprocity, national judicial authorities may transmit, without letter rogatory, information relating to known criminal offences and perpetrators to the competent authorities of the requesting party if this is considered to be of use to criminal proceedings conducted abroad. This way, the process of obtaining data is hasten and the efficiency of the criminal proceedings is increasing.

Also, it is possible to receive/submit letters rogatory directly form/to the foreign Prosecution Office or through established contact persons of European or Regional Judicial Networks (EUROJUST, SEEPAG, etc).

With regard to the Cybercrime Convention, International 24/7 network for expedite and urgent cooperation between member states of Convention was established.

24/7 contact points in Serbia are Ministry of Interior - Special Police Unit for Combating High-Tech Crime for police line of work and Special Prosecutor for High-Tech Crime for conducting investigation and criminal proceedings.

Public Prosecution is closely cooperating for the subject matter within existing bilateral treaties and Memoranda of Understanding between Republic Public Prosecutor’s Office and other respective Prosecutor’s Offices in EU and world. This kind of cooperation is also based on 24/7 principle, meaning that if necessary, on call, prosecutor is available and can provide additional support to fulfillment of received request.

## SLOVAK REPUBLIC / RÉPUBLIQUE SLOVAQUE

We do not see any incompatibility between the European Convention on Mutual Assitance in Criminal Matters and the Convetion on Cybercrime with regards to the exchange of requests for international co-operation in matters related to electronic evidence. Article 23 of the Convention on Cybercrime sets up the general principles related to the international co-operation, which reads as follow:

„The Parties shall co-operate with each other, in accordance with the provisions of this chapter, and through the application of relevant international instruments on international co-operation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, to the widest extent possible for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence."

The wording of the Article makes clear that the co-operation is based on various instruments, including international instruments on international co-operation in criminal matters. Therefore there is a clear reference to the application of other Treaties in this field, including the European Convention on Mutual Assistance in Criminal Matters.

Although the scope of Conventions differs, both Conventions may be used as legal basis for international co-operation in the area of cybercrime either separately, or together. The Convention on Cybercrime contains a mechanism for requesting the expedited preservation of stored computer data that is not covered by the European Convention on Mutual Assistance in Criminal Matters.

Taking into account the variety of legal instruments applied on the basis of Article 23, it is, for instance difficult to follow Rec 17 (page 127) of the T-CY assessment report: The mutual legal assistance provisions of the Budapest Convention on Cybercrime Adopted by the T-CY at its 12th Plenary (2-3 December 2014), but also other recommendations contained in the said document related to the international co-operation. As regards the Rec 17 ("The Council of Europe should – under capacity building projects – develop or link to standardised, multi-language templates for Article 31-requests") we believe that the model form and guidelines of PC-OC could serve the purpose at least for those Parties to the Convention on Cybercrime, who are also Parties to the European Convention on Mutual Assistance in Criminal Matters. In relation to this issue we refer to point 5c of the List of decisions from the 67$^{th}$ plenary meeting of the PC-OC.

It seems to be clear that there is no incompatibility between the said Conventions. However, any future activities in the field of international co-operation in criminal matters related to the electronic evidence should be duly consulted with the PC-OC.

## SWEDEN / SUÈDE

As Sweden has not yet ratified the Convention on Cybercrime, our practitioners have no experience of the application in practice of the convention. Against this background I am afraid we cannot add any useful information to this discussion.

## SWITZERLAND / SUISSE

1. *Voyez-vous une incompatibilité entre la Convention sur l'entraide judiciaire (CEEJ) et la Convention sur la cybercriminalité concernant l'échange de demandes de coopération internationale en matière de collecte de preuves sous forme électronique? Si tel est le cas, merci d'expliquer.*

   Nous pensons qu'il n'y a pas d'incompatibilité entre les deux conventions car la CEEJ est une convention-cadre formulée de manière large (« All crimes approach »). Les exigences spécifiques de la Convention sur la cybercriminalité doivent être remplies par le droit national de chaque Etat membre (à titre d'exemple : art 18a et b de la Loi suisse sur l'entraide pénale internationale du 20 mars 1981)

2. *Si vous ne voyez pas d'incompatibilité, merci d'expliquer comment vous utilisez/articulez ces conventions dans votre pays.*

   En pratique, la Convention sur la cybercriminalité sera appliquée en Suisse lorsque les infractions sont commises avec des moyens électroniques pour obtenir les informations/preuves y relatives. Pour l'obtention de moyens de preuve «classiques », comme la documentation bancaire, la CEEJ est aussi applicable. Selon notre appréciation, il n'y a pas de dispositions qui entrent en concurrence, ni le moindre problème apparaissant dans la pratique quant à savoir quelle convention s'applique, dans la mesure où les critères de délimitation de chacun des deux instruments sont clairement déterminés.

## APPENDIX 1 (ROMANIA/ROUMANIE)

Extracts from the Explanatory Report:

244. Finally, co-operation is to be carried out both "in accordance with the provisions of this Chapter" and "through application of relevant international agreements on international co-operation in criminal matters, arrangements agreed to on the basis of uniform or reciprocal legislation, and domestic laws." The latter clause establishes the general principle that the provisions of Chapter III **do not supersede the provisions of international agreements on mutual legal assistance and extradition, reciprocal arrangements as between the parties thereto** (described in greater detail in the discussion of Article 27 below), or relevant provisions of domestic law pertaining to international co-operation. This basic principle is explicitly reinforced in Articles 24 (Extradition), 25 (General principles relating to mutual assistance), 26 (Spontaneous information), 27 (Procedures pertaining to mutual assistance requests in the absence of applicable international agreements), 28 (Confidentiality and limitation on use), 31 (Mutual assistance regarding accessing of stored computer data), 33 (Mutual assistance regarding the real-time collection of traffic data) and 34 (Mutual assistance regarding the interception of content data).

**Title 2 – Principles relating to extradition**

**Extradition (Article 24)**

245. Paragraph 1 specifies that the obligation to extradite applies only to offences established in accordance with Articles 2-11 of the Convention that are punishable under the laws of both Parties concerned by deprivation of liberty for a maximum period of at least one year or by a more severe penalty. The drafters decided to insert a threshold penalty because, under the Convention, Parties may punish some of the offences with a relatively short maximum period of incarceration (e.g., Article 2 - illegal access – and Article 4 – data interference). Given this, the drafters did not believe it appropriate to require that each of the offences established in Articles 2-11 be considered per se extraditable. Accordingly, **agreement was reached on a general requirement that an offence is to be considered extraditable if – as in Article 2 of the European Convention on Extradition (ETS N° 24) – the maximum punishment that could be imposed for the offence for which extradition was sought was at least one year's imprisonmen**t. The determination of whether an offence is extraditable does not hinge on the actual penalty imposed in the particular case at hand, but instead on the maximum period that may legally be imposed for a violation of the offence for which extradition is sought.

246. At the same time, in accordance with the general principle that international co-operation under Chapter III should be carried out pursuant to instruments in force between the Parties, Paragraph 1 also provides that **where a treaty on extradition or an arrangement on the basis of uniform or reciprocal legislation is in force between two or more Parties (see description of this term in discussion of Article 27 below) which provides for a different threshold for extradition, the threshold provided for in such treaty or arrangement shall apply**. For example, many extradition treaties between European countries and non-European countries provide that an offence is extraditable only if the maximum punishment is greater than one year's imprisonment or there is a more severe penalty. In such cases, international extradition practitioners will continue to apply the normal threshold under their treaty practice in order to determine whether an offence is extraditable. Even under the European Convention on Extradition (ETS N° 24), reservations may specify a different minimum penalty for extradition. Among Parties to that Convention, when extradition is sought from a Party that has entered such a reservation, the penalty provided for in the reservation shall be applied in determining whether the offence is extraditable.

247. Paragraph 2 provides that the offences described in paragraph 1 are to be deemed extraditable offences in any extradition treaty between or among the Parties, and are to be included in future treaties they may negotiate among themselves. This does not mean that extradition must be granted on every occasion on which a request is made but rather that the possibility of granting extradition of persons for such offences must be available. Under paragraph 5, Parties are able to provide for other requirements for extradition.

248. Under paragraph 3, a Party that would not grant extradition, either because it has no extradition treaty with the requesting Party or because the existing treaties would not cover a request made in respect of the offences established in accordance with this Convention, may use the Convention itself as a basis for surrendering the person requested, although it is not obligated to do so.

249. Where a Party, instead of relying on extradition treaties, utilises a general statutory scheme to carry out extradition, paragraph 4 requires it to include the offences described in Paragraph 1 among those for which extradition is available.

250. Paragraph 5 provides that the requested Party need not extradite if it is not satisfied that all of the terms and conditions provided for by the applicable treaty or law have been fulfilled. It is thus another example of the principle that **co-operation shall be carried out pursuant to the terms of applicable international instruments in force between the Parties, reciprocal arrangements, or domestic law. For example, conditions and restrictions set forth in the European Convention on Extradition (ETS N° 24) and its Additional Protocols (ETS N°s 86 and 98) will apply to Parties to those agreements, and extradition may be refused on such bases (e.g., Article 3 of the European Convention on Extradition** provides that extradition shall be refused if the offence is considered political in nature, or if the request is considered to have been made for the purpose of prosecuting or punishing a person on account of, *inter alia*, race, religion, nationality or political opinion).

251. Paragraph 6 applies the principle "*aut dedere aut judicare*" (extradite or prosecute). Since many States refuse extradition of their nationals, offenders who are found in the Party of which they are a national may avoid responsibility for a crime committed in another Party unless local authorities are obliged to take action. Under paragraph 6, if another Party has sought extradition of the offender, and extradition has been refused on the grounds that the offender is a national of the requested Party, the requested Party must, upon request of the requesting Party, submit the case to its authorities for the purpose of prosecution. If the Party whose extradition request has been refused does not request submission of the case for local investigation and prosecution, there is no obligation on the requested Party to take action. Moreover, if no extradition request has been made, or if extradition has been denied on grounds other than nationality, this paragraph establishes no obligation on the requested Party to submit the case for domestic prosecution. In addition, paragraph 6 requires the local investigation and prosecution to be carried out with diligence; it must be treated as seriously "as in the case of any other offence of a comparable nature" in the Party submitting the case. That Party shall report the outcome of its investigation and proceedings to the Party that had made the request.

252. In order that each Party know to whom its requests for provisional arrest or extradition should be directed, paragraph 7 requires Parties to communicate to the Secretary General of the Council of Europe the name and address of its authorities responsible for making or receiving requests for extradition or provisional arrest in the absence of a treaty. This provision has been limited to situations in which there is no extradition treaty in force between the Parties concerned because **if a bilateral or multilateral extradition treaty is in force between the Parties (such as ETS N° 24), the Parties will know to whom extradition and provisional arrest requests are to be directed without the necessity of a registration requirement**. The communication to the Secretary General must be made at the time of signature or when depositing the Party’s instrument of

ratification, acceptance, approval or accession. It should be noted that designation of an authority does not exclude the possibility of using the diplomatic channel.

**Title 3 – General principles relating to mutual assistance**

**General principles relating to mutual assistance (Article 25)**

253. The general principles governing the obligation to provide mutual assistance are set forth in paragraph 1. Co-operation is to be provided "to the widest extent possible." Thus, as in Article 23 ("General principals relating to international co-operation"), mutual assistance is in principle to be extensive, and impediments thereto strictly limited. Second, as in Article 23, the obligation to co-operate applies in principle to both criminal offences related to computer systems and data (i.e. the offences covered by Article 14, paragraph 2, litterae a-b), and to the collection of evidence in electronic form of a criminal offence. It was agreed to impose an obligation to co-operate as to this broad class of crimes because there is the same need for streamlined mechanisms of international co-operation as to both of these categories. However, Articles 34 and 35 permit the Parties to provide for a different scope of application of these measures.

254. Other provisions of this Chapter will clarify that the obligation to provide mutual assistance is generally **to be carried out pursuant to the terms of applicable mutual legal assistance treaties, laws and arrangements**. Under paragraph 2, each Party is required to have a legal basis to carry out the specific forms of co-operation described in the remainder of the Chapter, if its treaties, laws and arrangements do not already contain such provisions. The availability of such mechanisms, particularly those in Articles 29 through 35 (Specific provisions – Titles 1, 2, 3), is vital for effective co-operation in computer related criminal matters.

255. Some Parties will not require any implementing legislation in order to apply the provisions referred to in paragraph 2, since provisions of international treaties that establish detailed mutual assistance regimes are considered to be self-executing in nature. It is expected that Parties will either be able to treat these provisions as self executing, already have sufficient flexibility under existing mutual assistance legislation to carry out the mutual assistance measures established under this Chapter, or will be able to rapidly enact any legislation required to do so.

57. Paragraph 4 sets forth the **principle that mutual assistance is subject to the terms of applicable mutual assistance treaties (MLATs) and domestic laws**. These regimes provide safeguards for the rights of persons located in the requested Party that may become the subject of a request for mutual assistance. For example, an intrusive measure, such as search and seizure, is not executed on behalf of a requesting Party, unless the requested Party's fundamental requirements for such measure applicable in a domestic case have been satisfied. Parties also may ensure protection of rights of persons in relation to the items seized and provided through mutual legal assistance.

**Spontaneous information (Article 26)**

260. This article is derived from provisions in earlier Council of Europe instruments, such as Article 10 of the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS N° 141) and Article 28 of the Criminal Law Convention on Corruption (ETS N° 173). More and more frequently, a Party possesses valuable information that it believes may assist another Party in a criminal investigation or proceeding, and which the Party conducting the investigation or proceeding is not aware exists. In such cases, no request for mutual assistance will be forthcoming. Paragraph 1 empowers the State in possession of the information to forward it to the other State without a prior request. The provision was thought useful because, under the laws of some States, such a positive grant

of legal authority is needed in order to provide assistance in the absence of a request. A Party is not obligated to spontaneously forward information to another Party; it may exercise its discretion in light of the circumstances of the case at hand. Moreover, the spontaneous disclosure of information does not preclude the disclosing Party, if it has jurisdiction, from investigating or instituting proceedings in relation to the facts disclosed.

261. Paragraph 2 addresses the fact that in some circumstances, a Party will only forward information spontaneously if sensitive information will be kept confidential or other conditions can be imposed on the use of information. In particular, confidentiality will be an important consideration in cases in which important interests of the providing State may be endangered should the information be made public, e.g., where there is a need to protect the identity of a means of collecting the information or the fact that a criminal group is being investigated. If advance inquiry reveals that the receiving Party cannot comply with a condition sought by the providing Party (for example, where it cannot comply with a condition of confidentiality because the information is needed as evidence at a public trial), the receiving Party shall advise the providing Party, which then has the option of not providing the information. If the receiving Party agrees to the condition, however, it must honour it. It is foreseen that conditions imposed under this article would be consistent with those that could be imposed by the providing Party pursuant to a request for mutual assistance from the receiving Party.

**Title 4 – Procedures pertaining to mutual assistance requests in the absence of applicable international agreements**

**Procedures pertaining to mutual assistance requests in the absence of applicable international agreements (Article 27)**

262. Article 27 obliges the Parties to apply certain mutual assistance procedures and conditions where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties. The Article thus reinforces the general principle that mutual assistance should be carried out through application of relevant treaties and similar arrangements for mutual assistance. The drafters rejected the creation of a separate general regime of mutual assistance in this Convention that would be applied in lieu of other applicable instruments and arrangements, agreeing instead that it would be more practical to rely on existing MLAT regimes as a general matter, thereby permitting mutual assistance practitioners to use the instruments and arrangements they are the most familiar with and avoiding confusion that may result from the establishment of competing regimes. As previously stated, only with respect to mechanisms particularly necessary for rapid effective co-operation in computer related criminal matters, such as those in Articles 29-35 (Specific provisions – Title 1, 2, 3), is each Party required to establish a legal basis to enable the carrying out of such forms of co-operation if its current mutual assistance treaties, arrangements or laws do not already do so.

263. Accordingly, **most forms of mutual assistance under this Chapter will continue to be carried out pursuant to the European Convention on Mutual Assistance in Criminal Matters (ETS N° 30) and its Protocol (ETS N° 99) among the Parties to those instruments**. Alternatively, Parties to this Convention that have bilateral MLATs in force between them, or other multilateral agreements governing mutual assistance in criminal cases (such as between member States of the European Union), shall continue to apply their terms, supplemented by the computer- or computer-related crime-specific mechanisms described in the remainder of Chapter III, unless they agree to apply any or all of the provisions of this Article in lieu thereof. Mutual assistance may also be based on arrangements agreed on the basis of uniform or reciprocal legislation, such as the system of co-operation developed among the Nordic countries, which is also admitted by the European Convention on Mutual Assistance in Criminal Matters (Article 25, paragraph 4), and among members of the Commonwealth. Finally, the reference to mutual assistance treaties or arrangements on the basis of uniform or reciprocal legislation is not limited to those

instruments in force at the time of entry into force of the present Convention, but also covers instruments that may be adopted in the future.

264. Article 27 (Procedures pertaining to mutual assistance requests in the absence of applicable international agreements), paragraphs 2-10, provide a number of rules for providing mutual assistance in the absence of an MLAT or arrangement on the basis of uniform or reciprocal legislation, including establishment of central authorities, imposing of conditions, grounds for and procedures in cases of postponement or refusal, confidentiality of requests, and direct communications. With respect to such expressly covered issues, in the absence of a mutual assistance agreement or arrangement on the basis of uniform or reciprocal legislation, the provisions of this Article are to be applied in lieu of otherwise applicable domestic laws governing mutual assistance. At the same time, Article 27 does not provide rules for other issues typically dealt with in domestic legislation governing international mutual assistance. For example, there are no provisions dealing with the form and contents of requests, taking of witness testimony in the requested or requesting Parties, the providing of official or business records, transfer of witnesses in custody, or assistance in confiscation matters. With respect to such issues, Article 25, paragraph 4 provides that absent a specific provision in this Chapter, the law of the requested Party shall govern specific modalities of providing that type of assistance.

265. Paragraph 2 requires the establishment of a central authority or authorities responsible for sending and answering requests for assistance. The institution of central authorities is a common feature of modern instruments dealing with mutual assistance in criminal matters, and it is particularly helpful in ensuring the kind of rapid reaction that is so useful in combating computer- or computer-related crime. Initially, direct transmission between such authorities is speedier and more efficient than transmission through diplomatic channels. In addition, the establishment of an active central authority serves an important function in ensuring that both incoming and outgoing requests are diligently pursued, that advice is provided to foreign law enforcement partners on how best to satisfy legal requirements in the requested Party, and that particularly urgent or sensitive requests are dealt with properly.

266. Parties are encouraged as a matter of efficiency to designate a single central authority for the purpose of mutual assistance; it would generally be most efficient for the authority designated for such purpose under a Party’s MLATs, or domestic law to also serve as the central authority when this article is applicable. However, a Party has the flexibility to designate more than one central authority where this is appropriate under its system of mutual assistance. Where more than one central authority is established, the Party that has done so should ensure that each authority interprets the provisions of the Convention in the same way, and that both incoming and outgoing requests are treated rapidly and efficiently. Each Party is to advise the Secretary General of the Council of Europe of the names and addresses (including e-mail and fax numbers) of the authority or authorities designated to receive and respond to mutual assistance requests under this Article, and Parties are obliged to ensure that the designation is kept up-to-date.

267. A major objective of a State requesting mutual assistance often is to ensure that its domestic laws governing the admissibility of evidence are fulfilled, and it can use the evidence before its courts as a result. To ensure that such evidentiary requirements can be met, paragraph 3 obliges the requested Party to execute requests in accordance with the procedures specified by the requesting Party, unless to do so would be incompatible with its law. It is emphasised that this paragraph relates only to the obligation to respect technical procedural requirements, not to fundamental procedural protections. Thus, for example, a requesting Party cannot require the requested Party to execute a search and seizure that would not meet the requested Party’s fundamental legal requirements for this measure. In light of the limited nature of the obligation, it was agreed that the mere fact that the requested Party’s legal system knows no such procedure is not a sufficient ground to refuse to apply the procedure requested by the requesting Party; instead, the procedure must be incompatible with the requested Party’s legal principles. For example, under the law of the

requesting Party, it may be a procedural requirement that a statement of a witness be given under oath. Even if the requested Party does not domestically have the requirement that statements be given under oath, it should honour the requesting Party's request.

268. Paragraph 4 provides for the possibility of refusing requests for mutual assistance requests brought under this Article. Assistance may be refused on the grounds provided for in Article 25, paragraph 4 (i.e. grounds provided for in the law of the requested Party), including prejudice to the sovereignty of the State, security, ordre public or other essential interests, and where the offence is considered by the requested Party to be a political offence or an offence connected with a political offence. In order to promote the overriding principle of providing the widest measure of co-operation (see Articles 23, 25), grounds for refusal established by a requested Party should be narrow and exercised with restraint. They may not be so expansive as to create the potential for assistance to be categorically denied, or subjected to onerous conditions, with respect to broad categories of evidence or information.

270. Paragraph 5 permits the requested Party to postpone, rather than refuse, assistance where immediate action on the request would be prejudicial to investigations or proceedings in the requested Party. For example, where the requesting Party has sought to obtain evidence or witness testimony for purposes of investigation or trial, and the same evidence or witness are needed for use at a trial that is about to commence in the requested Party, the requested Party would be justified in postponing the providing of assistance.

271. Paragraph 6 provides that where the assistance sought would otherwise be refused or postponed, the requested Party may instead provide assistance subject to conditions. If the conditions are not agreeable to the requesting Party, the requested Party may modify them, or it may exercise its right to refuse or postpone assistance. Since the requested Party has an obligation to provide the widest possible measure of assistance, it was agreed that both grounds for refusal and conditions should be exercised with restraint.

272. Paragraph 7 obliges the requested Party to keep the requesting Party informed of the outcome of the request, and requires reasons to be given in the case of refusal or postponement of assistance. The providing of reasons can, *inter alia*, assist the requesting Party to understand how the requested Party interprets the requirements of this Article, provide a basis for consultation in order to improve the future efficiency of mutual assistance, and provide to the requesting Party previously unknown factual information about the availability or condition of witnesses or evidence.

273. There are times when a Party makes a request in a particularly sensitive case, or in a case in which there could be disastrous consequences if the facts underlying the request were to be made public prematurely. Paragraph 8 accordingly permits the requesting Party to request that the fact and content of the request be kept confidential. Confidentiality may not be sought, however, to the extent that it would undermine the requested Party's ability to obtain the evidence or information sought, e.g., where the information will need to be disclosed in order to obtain a court order needed to effect assistance, or where private persons possessing evidence will need to be made aware of the request in order for it to be successfully executed. If the requested Party cannot comply with the request for confidentiality, it shall notify the requesting Party, which then has the option of withdrawing or modifying the request.

274. Central authorities designated in accordance with paragraph 2 shall communicate directly with one another. However, in case of urgency, requests for mutual legal assistance may be sent directly by judges and prosecutors of the requesting Party to the judges and prosecutors of the requested Party. The judge or prosecutor following this procedure must also address a copy of the request made to his own central authority with a view to its transmission to the central authority of the requested Party. Under *littera b*, requests may be channelled through Interpol. Authorities of the requested Party that receive a request falling

outside their field of competence, are, pursuant to *littera c*, under a two-fold obligation. First, they must transfer the request to the competent authority of the requested Party. Second, they must inform the authorities of the requesting Party of the transfer made. Under *littera d*, requests may also be transmitted directly without the intervention of central authorities even if there is no urgency, as long as the authority of the requested Party is able to comply with the request without making use of coercive action. Finally, *littera e* enables a Party to inform the others, through the Secretary General of the Council of Europe, that, for reasons of efficiency, direct communications are to be addressed to the central authority.

**Confidentiality and limitation on use (Article 28)**

275. This provision specifically provides for limitations on use of information or material, in order to enable the requested Party, in cases in which such information or material is particularly sensitive, to ensure that its use is limited to that for which assistance is granted, or to ensure that it is not disseminated beyond law enforcement officials of the requesting Party. These restrictions provide safeguards that are available for, *inter alia*, data protection purposes.

276. As in the case of Article 27, Article 28 only applies where there is no mutual assistance treaty, or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties. **Where such treaty or arrangement is in force, its provisions on confidentiality and use limitations shall apply in lieu of the provisions of this Article, unless the Parties thereto agree otherwise**. **This avoids overlap with existing bilateral and multilateral mutual legal assistance treaties (MLATs) and similar arrangements, thereby enabling practitioners to continue to operate under the normal well-understood regime rather than seeking to apply two competing, possibly contradictory, instruments**.

277. Paragraph 2 allows the requested Party, when responding to a request for mutual assistance, to impose two types of conditions. First, it may request that the information or material furnished be kept confidential where the request could not be complied with in the absence of such condition, such as where the identity of a confidential informant is involved. It is not appropriate to require absolute confidentiality in cases in which the requested Party is obligated to provide the requested assistance, as this would, in many cases, thwart the ability of the requesting Party to successfully investigate or prosecute crime, e.g. by using the evidence in a public trial (including compulsory disclosure).

## APPENDIX 2 (ROMANIA/ROUMANIE)

**Mutual Legal Assistance (MLA) on cybercrime under Romanian legislation**

MLA requests for cybercrime cases are executed based on the law on international judicial cooperation in criminal matters (Law no. 302/2004) and the provisions of the Law no. 161/2003 (Chapter 5). In addition, bearing in mind the constitutional provisions that state that treaties once ratified become part of the domestic law, various regional and international treaties can be used as legal basis for cooperation with EU or third countries.

Law No. 302/2004 on international judicial cooperation in criminal matters provides in art. 4 the pre-eminence of international law, stipulating that Law No. 302/2004 is applied on the basis and for the execution of norms related to international judicial cooperation in criminal matters included in international legal instruments to which Romania is a party to, which completes those instruments in those situations which are not regulated. Therefore, the domestic law comes only to establish norms when those norms have not been already been regulated by the international treaty or to complete them as the case may be.

Law No. 302/2004 on international judicial cooperation in criminal matters represents the general framework in relation to international judicial cooperation in criminal matters while Law No. 161/2003 (Title III-Prevention and combatting cybercrime-Chapter 5) implements the Convention on cybercrime providing specific provisions related to cybercrime requests.

Depending on the legal instrument applicable, different authorities can be competent for receiving or sending MLA requests in cybercrime investigations.

At the EU level direct contact between issuing and executing judicial authorities is encouraged regardless of the stage when the request is issued (investigation, prosecution, trial or execution). Thus prosecutors or judges can and are communicating directly.

Nevertheless in case of third countries, usually based on the legal treaty applicable, two situations can be encountered in relation to central authorities competent to send/received the MLA request:

- two central authorities: the Public Ministry for MLA requests issued during investigation and criminal prosecution stage and the Ministry of Justice for requests issued trial and execution stage or
- one central authority: the Ministry of Justice if the request has been issued in the absence of a treaty and based on reciprocity or if the treaty applicable designates the Ministry of Justice as the single central authority.

In addition, for requests related to criminal records, which are registered differently than MLA, the central authority is the Ministry of Internal Affairs.

The competences of each central authority are established in the domestic law through Art. 10 of Law no. 302/2004 on the international judicial cooperation in criminal matters.

As regards the actual decisions on such requests, the execution of the requests is in charge of the judiciary depending on the type of request and the stage of the trial (investigation and prosecution, or trial/execution stage).

With reference to the channels of communication, usually, at EU level there is a direct channel used between the issuing and executing judicial authorities.

In some cases, the transmission through central authorities is preferable, especially by those countries that although party to EU 2000 MLA Convention continue to make use of central authorities. Otherwise, in relation with third countries the transmission takes place between central authorities or even through the diplomatic missions.

The specific requirements reside from the international instruments applicable and the domestic law in the field, especially the criminal procedural code.

The cybercrime requests are dealt urgently due to volatility of data. The average response time depends on the type of request and the urgent character. Some requests are dealt within the same day or couple of days, while others require an average response of one-two months. When Romania is the issuing state the average response is much higher (sometimes surpassing even one year-this situation being encountered especially with third countries).

The EU instrument applicable mostly as regards international judicial cooperation requests in criminal matters is the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (EU 2000 MLA Convention), adopted in Strasbourg on 20 April 1959, ratified by Law No. 236/1998. Also in relation to some countries that are not party to the EU 2000 MLA Convention, the Council of Europe Convention of 1959 -The European Convention on Mutual Assistance in Criminal matters and its two additional protocols are applicable.

In conclusion, at the multilateral level Romania is using the EU 2000 in conjunction with 1959 CoE Convention or UNTOC or/and Cybercrime Convention, as the case may be.

Various forms of cooperation can be requested via MLA in respect of cybercrime offences. The type of cooperation required depends upon the type of cybercrime that represents the illegal conduct. Most of the requests refer to computer-related fraud and forgery, credit card offences and most recently infringements of copyrights by means of computer systems.

Consequently, many of the requests refer to providing subscribing information, log in data, content data (to a lesser extent), search and seizure of computer systems, production of documents, interviewing witnesses etc.

As regards the legal basis invoked, it has been either bilateral (mostly with USA and Canada), or multilateral (2001 Budapest Convention, Council of Europe 1959 Convention and its two additional protocols, UNTOC, EU-Japan MLA Agreement) or bilateral in conjunction with multilateral (Bilateral Treaty with USA in conjunction with 2001 Budapest Convention or Bilateral Treaty with USA in conjunction with UNTOC and 2001 Budapest Convention).

The difficulties residing from the execution of such request emerge in general from the differences of legal systems, duration until the request is being executed. On many occasions the legal instrument applicable or the lack of treaty applicable requires transmission through diplomatic channels which requires additional time and leads to obvious delays.

Being part of the Council of Europe Convention on Cybercrime adopted in Budapest on 23 November 2001, Romania was evaluated[1] by the Convention Committee (T-CY) in what regards the implementation of the relevant provisions of the Convention.

[1] See report at: http://www.coe.int/t/dghl/cooperation/economiccrime/Source/Cybercrime/TCY/TCY%202013/T-CY(2013)17_Assess_report_v46.pdf