

8 November 2019

Cybercrime Convention Committee
Council of Europe

By email only: nina.lichtner@coe.int

Dear Committee Members

Re: Comments on Draft Provisions to the Second Additional Protocol to the Budapest Convention on Cybercrime

We are a law firm based in Sydney, Australia, specialising in international financial and cyber crime matters.

On the basis of our experience with the workings of international law enforcement in cybercrime cases, we recognise the need for enhanced regulation and efficiency of cooperation between states in this field.

Our comments are hence based upon our observations from those cases.

Due to the inherent speed of actions taken in cyber space, there is a real need for law enforcement to be properly equipped with the tools, including where necessary those obtained from cooperating with foreign counterparts, to address this activity wherever it occurs and within a fast turnaround time.

Our principal concerns with the current Draft Provisions are: (1) that there is an insufficient focus on human rights implications for persons that may be affected by mutual legal assistance actions, and (2) that significant increases in mechanisms aimed at an ease of international law enforcement collaboration, without regulations on which jurisdictions should properly take primacy in terms of enforcement, leaves affected individuals potentially subject to improper 'jurisdiction shopping' by States.



First, in relation to human rights, we note that in commentary to the Draft Provisions it is indicated that existing human rights requirements will apply to the actions foreshadowed in this new instrument.

However, it is our view that, given the lesser degree of formality and traditional checks that will apply to the actions contemplated in the mutual legal assistance and director disclosure provisions, human rights considerations should be explicitly included in this instrument.

An express inclusion of human rights considerations would reduce the risk that the new powers may be misused against the rights of individuals.

Second, as noted above, increased avenues of cooperation and mutual legal assistance in the field of cyber crime is a logical trend in the development of law enforcement capabilities.

However, in our opinion this carries the risk – particularly in areas such as cyber crime with often limited traditional territorial links – that nations will collaborate to inappropriately ‘jurisdiction shop’.

This occurs where international cooperation is used to select a particular jurisdiction in which a person is prosecuted, based on improper considerations such as the severity of penalty that the person may be subjected to under that jurisdiction’s law. It is particularly made out in cases where another jurisdiction may in fact be the more proper forum – based on a stronger connection to the alleged conduct – in which to pursue the individual in question.

Another issue with alleged offending in cyber space is that persons may also be subjected to multiple subsequent prosecutions in different jurisdictions, arising out of very similar conduct.

This could conceivably occur where information is freely shared between different nations and, although a person may initially confront the relevant legal process in one country, other interested nations may nevertheless pursue them, using small variations of what are essentially the same factual conduct to avoid double jeopardy restrictions.

In our view, both of the above situations are inimical to the interests of justice.

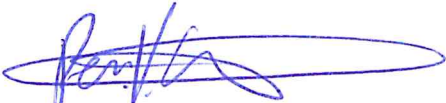
International instruments, particularly those in areas of trans-boundary activity, should regulate the identification of the most legally appropriate jurisdiction in which alleged offending should be prosecuted along with preventing effectively repeat prosecutions for the same conduct in multiple jurisdictions.

These considerations would, in our view, complement the human rights considerations to which we have earlier referred.

We believe that the issues raised in these comments are important to the implementation of fair and balanced legal instruments in this rapidly developing and prominent field of cybercrime.

Thank you for your consideration of our comments.

NYMAN GIBSON MIRALIS

A handwritten signature in blue ink, appearing to read "Dennis Miralis", with a large, sweeping flourish underneath.

Dennis Miralis
Partner