

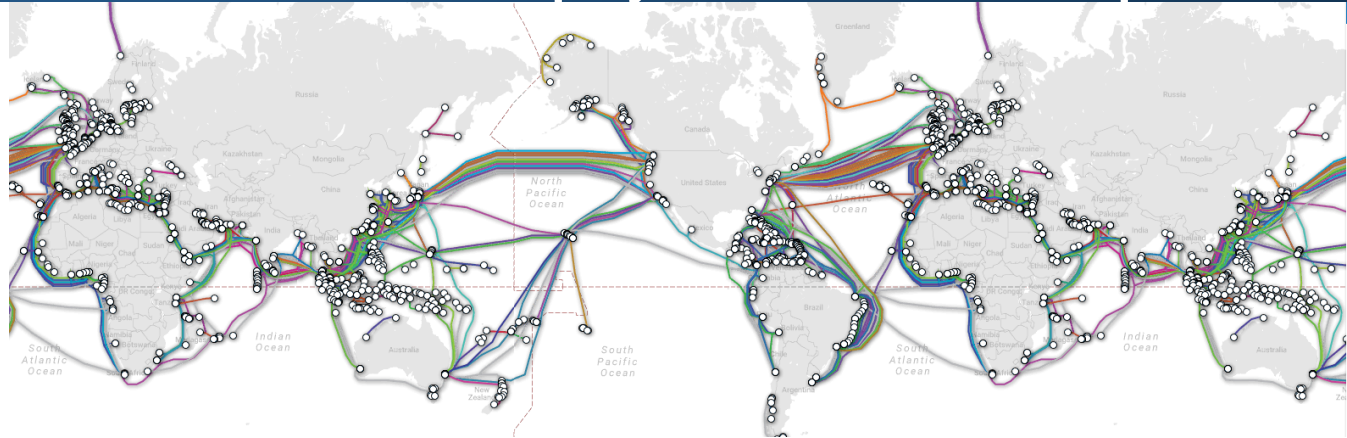
## Consultations with civil society, data protection authorities and industry on the 2<sup>nd</sup> Additional Protocol to the Budapest Convention on Cybercrime

- **Context: Rationale for the Protocol – state of play and recent developments**
- **Update on work underway**
- **Draft provision: “Giving effect to orders from another Party for expedited production of data”**
- **Draft provision: “Direct disclosure of subscriber information” by providers in other Parties**



- **Protocol prepared by the Cybercrime Convention Committee (T-CY)**
  - **Protocol Drafting Group**
  - **Protocol Drafting Plenary**
  - **Sep 2017 – Dec 2020**
  
- **Elements under consideration**
  - **Provisions for more efficient MLA**
  - **Direct cooperation with providers in other jurisdictions**
  - **Framework for practices on extended searches**
  - **Data protection and other safeguards**
  
- **Objective of consultations**
  - **to seek views of and benefit of experience from with civil society, data protection organisations and industry**

## Problem to be addressed



- The scale and quantity of cybercrime, devices, users and victims
- Cloud computing, territoriality and jurisdiction
  - Where is the crime?
  - Where is the data, where is the evidence?
  - Who has the evidence?
  - What legal regime applies to order / disclose data?
- The challenge of mutual legal assistance
- No data ► no evidence ► no justice (the “0.01% problem”)

## Setting the scene

- **Criminal justice scope of the Protocol**
  - ▶ **Specific criminal investigations and proceedings on cybercrime and e-evidence (article 14 and 25.1 Budapest Convention)**
  
- **Specific issues to be considered in Protocol**
  - **Differentiating subscriber versus traffic versus content data**
  - **Limited effectiveness of MLA**
  - **Loss of (knowledge of) location and transborder access jungle**
  - **Voluntary disclosure by US-providers**
  - **Emergency procedures**
  - **Data protection**

## Draft text available on:

### Common provisions

- ✓ Languages

### Enhanced cooperation

Mutual assistance procedures in the absence of other agreements

- ✓ Video conferencing

### Additional procedures for international cooperation

- ✓ Emergency mutual assistance
- ✓ Disclosure of subscriber information
- ✓ Giving effect to orders from another Party for expedited production of data

Provisions subject to data protection safeguards ► Work underway

## Related developments

- **EU e-evidence proposals**
- **US/UK “CLOUD agreement”**

## **European Union e-evidence proposals**

- **April 2018 legislative proposals of the European Commission to improve cross-border access to e-evidence:**
- **Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European Production and Preservation Orders for electronic evidence in criminal matters (COM/2018/225 final)**
- **Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings (COM/2018/226 final)**

## **State of play of EU legislative process**

### **Council General Approach**

- **On proposal for Regulation on 7 December 2018 (10206/19)**
- **On proposal for Directive on 8 March 2019 (6946/19)**


### **The European Parliament position?**

- **Draft report discussed in LIBE committee on 11 November 2019**
- **Further deliberations**
- **Next steps**



## **International negotiations of the EU on e-evidence**

- **COUNCIL DECISION authorising the European Commission to participate, on behalf of the European Union, in negotiations on a Second Additional Protocol to the Council of Europe Convention on Cybercrime (6.6.2019, 9116/19)**
- **COUNCIL DECISION authorising the opening of negotiations with a view to concluding an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters (6.6.2019, 9114/19)**



# Context: Rationale for the Protocol – state of play and recent developments

**General context/rationale/state of play:**

**Discussion/questions/interventions?**



# Update on work underway

- **Language**
- **Emergency mutual legal assistance**
- **Video conferencing**
- **Safeguards**



# Update on work underway

## Article [ ] – Langue

- **Objet: déterminer la langue à utiliser pour adresser des demandes d'entraide aux parties ou des injonctions aux fournisseurs de services.**
- **Les actes de coopération convertis:**
  - Les demandes d'entraide classique;
  - les demandes d'entraide d'urgence;
  - Les demandes d'utilisation de la vidéoconférence;
  - Les injonctions adressées directement à un fournisseur de services;
  - Les injonctions notifiées à une partie qui l'exige;
  - les informations complémentaires accompagnant la demande ou l'injonction.



# Update on work underway

## ■ Les rapports de coopération entre les Etats parties

### Trois options ouvertes:

- La langue acceptée par la partie requise;
- La langue acceptée par la partie à laquelle est notifiée l'injonction de divulgation des données;
- La traduction des actes de coopération dans l'une de ces langues.

## • Les rapports de coopération entre les Etats parties et les fournisseurs de services

### Trois options possibles:

- La langue de la partie dans laquelle le fournisseur de services accepte un processus national comparable;
- La langue acceptée par le fournisseur de services;
- La traduction des actes dans l'une de ces langues.



# Update on work underway

## Emergency Mutual Assistance

### [Government to government]

- 1 ... an emergency means a situation in which there is a significant and imminent risk to the life or safety of any natural person.**
- 2... each Party may seek mutual assistance on a rapidly expedited basis where it is of the view that an emergency exists...**
- 3 ... a requested Party shall accept such request in electronic form... Security and authentication....**



# Update on work underway

## Emergency Mutual Assistance

**5 ... Once satisfied that an emergency exists and the other requirements for mutual assistance are satisfied, the requested Party shall respond to the request on the most rapidly expedited basis possible.**

**6 ... Each Party shall ensure that a person from its authority responsible for responding to MLA requests is available 24/7.**

**7 ... may agree to send advance copies or use alternate channels to respond.**

.....

# Update on work underway

## Video conferencing

- **In some cybercrime cases, it is necessary to take testimony from a witness residing in another country.**
- **However, it is difficult to get cooperation.**



**Video conferencing provision aims to provide a solution to this problem by using technology.**



## Video conferencing / Features

**The provision ensures flexibility.**

- **Requested Party has discretion as to whether or not to accept the request.**
- **Requested Party may set conditions for accepting the request.**
- **Requesting Party and requested Party shall consult in advance.**
- **Video conference shall be conducted in a manner that does not violate domestic laws of a requested Party.**



# Update on work underway

## Video conferencing / Features

- **Requested Party may also take measures to protect the rights of witness.**
  - **Presence of its official**
  - **Safeguards**



# Update on work underway

## Video conferencing / Relationship to the 2<sup>nd</sup> Additional Protocol to the Convention on MLA (ETS 182)

- **Differences between the two Additional Protocols:**
  - Information regarding the content of a request
  - Motivation conferencing can be used
  - Presence of a judicial authority of a requested Party
  - Consent of a suspect or accused person



# Update on work underway

## Video conferencing / Relationship to the 2<sup>nd</sup> Additional Protocol to the Convention on MLA (ETS 182)

- **The provision shall be applied in the absence of a mutual legal assistance treaty in force between the Parties.**
- **The provision has more flexibility and adaptability for use by many countries.**



# Update on work underway

## Additional work underway:

- Data protection safeguards
- Joint investigations and joint investigation teams
- Undercover investigations

## Under consideration (but no conclusion yet as to feasibility):

- Extending searches
- Direct preservation of data by service provider
- Disclosure of data by service providers in emergency situations
- Access to information related to registered Internet domains

# Update on work underway

**Discussion/questions/interventions?**



# Draft provision: Giving effect to orders from another Party for expedited production of data

## Issue to address

- **How to get timely access to non-content data (subscriber information and/or traffic data) that is held in another territory?**
  - Traditional MLA
  - Voluntary cooperation
- **Traditional MLA**
  - Seen as too cumbersome for the type of data sought
  - Not designed for a digital environment or for swift response
  - Maintains the checks and balances a requested State needs in order to ensure that its domestic requirements have been met
  - Provides for an enforcement mechanism – must be complied with
- **Voluntary cooperation**
  - Can be fast but cooperation is inconsistent from service provider to service provider
  - Not enforceable



# Draft provision: Giving effect to orders from another Party for expedited production of data

## Improving on existing mechanisms

- **Making MLA more efficient – Giving effect article**
  - Creates a model that will provide improved efficiencies over existing MLA
  - Retains the benefits of MLA:
    - Enforceable;
    - Addresses the domestic legal requirements of the requested Party (constitutional and human rights);
    - Flexible/robust so that it can accommodate different legal traditions and the variety of ways Parties obtain subscriber information and traffic data;
- **Making Voluntary cooperation more reliable – Direct cooperation article**
  - Creates a more stable framework
  - Providing for an enforcement mechanism





# Draft provision: Giving effect to orders from another Party for expedited production of data

## Giving effect provision

- **Requires that Parties have the ability to issue an order that will be directed to a person in the territory of another Party (requested Party);**
- **Establishes a process for a requested Party to respond to those orders by giving them effect in its territory and enforcing them if required;**
- **Provides a request process that is *pro forma* and abbreviated as compared to traditional MLA requests;**
- **The contents of the order and supporting information have been negotiated to give every Party the information it requires to satisfy its respective legal and human rights requirements; and**
- **Parties should take reasonable steps to proceed expeditiously with requests.**



# Draft provision: Giving effect to orders from another Party for expedited production of data

## MLA v. Giving Effect

### MLA

- Initiated through Central Authority (may or may not involve judicial authority);
- Requested Party must issue its own order for the evidence;
- No time periods stipulated.

### Giving effects

- Initiated through designated competent authority (may be Central Authority)
- **Requesting Party's order used as a basis for the production of data;**
- Requested Party may give effect to order in a variety of ways;
- **Reasonable efforts to meet deadlines.**



# Draft provision: Giving effect to orders from another Party for expedited production of data

## Giving effect provision

### ✓ Legal issues:

- Legal traditions
- Frameworks
- Laws – statute and jurisprudence
- Constitutional, Privacy and Human Rights

### ✓ Enforceability

### ✓ Reciprocity

- Provides flexibility between cooperating Parties
- Allows each Party to ensure that its domestic legal requirements have been met
- Provides increased efficiencies for many Parties
- Incorporates safeguards of requested Party
- Relies on requested Party's enforcement regime



# Draft provision: Giving effect to orders from another Party for expedited production of data

**Discussion/questions/interventions?**



# Draft provision: Direct disclosure of subscriber information

## Background

Subscriber information most often sought information in criminal investigation

Voluntary disclosure of subscriber information by service providers

### Current practices:

- More than 170,000 requests/year by BC Parties/Observers to major US providers
- Disclosure of subscriber information (ca. 64%)
- Providers decide whether to respond to lawful requests and to notify customers
- Provider policies/practices vary
- No admissibility in some Parties of data received



# Draft provision: Direct disclosure of subscriber information

## Objectives

- ▶ **Facilitate efficient electronic evidence collection**
- ▶ **Stable framework for disclosure of subscriber information**
- ▶ **Harmonization of orders used to obtain subscriber information**
- ▶ **Appropriate protection for rights**



# Draft provision: Direct disclosure of subscriber information

## Article [ ] – Direct disclosure of subscriber information

- 1. Each Party shall ... empower its competent authorities to issue an order to be submitted directly to a service provider in the territory of another Party, to obtain the disclosure of specified, stored subscriber information in that service provider's possession or control, where the information is needed for the issuing Party's specific criminal investigations or proceedings.**
- 2. Each Party shall adopt such legislative or other measures ... for a service provider ... to disclose subscriber information...**
- 3. Specifies necessary contents of the order**
- 4. Requires provision of additional information (domestic legal grounds, return information, special procedural instructions, etc.)**



# Draft provision: Direct disclosure of subscriber information

## Article [ ] – Direct disclosure of subscriber information

### 5. Option to require notification:

- a. Parties may require simultaneous notification
- b. Parties may require domestic providers to consult authorities
- c. Authorities notified or consulted may instruct provider not to disclose
- d. Authorities notified or consulted may request additional information
- e. Single authority for notification and for consultations





# Draft provision: Direct disclosure of subscriber information

## Article [ ] – Direct disclosure of subscriber information

**6. Submission of order**

**7. Enforcement only possible via giving effect article and mutual assistance**

**8. Party may declare that use of direct cooperation must precede use of giving effect article**

**9. Reservations**



# Draft provision: Direct disclosure of subscriber information

**Discussion/questions/interventions?**