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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)**

**Comments
to draft provisions of the future 2nd Additional Protocol
to the Cybercrime Convention (CETS 185)
regarding languages of requests,
emergency MLA and video conferencing**

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Comments by the PC-OC

1. Further to a written consultation procedure, the PC-OC agreed to convey the following comments regarding the draft provisions of the future 2nd Additional Protocol to the Convention on Cybercrime (CETS 185) regarding languages of requests, emergency MLA and video conferencing.
2. In general, the PC-OC notes that these draft provisions, like the existing provisions on procedures for MLA requests in the Cybercrime Convention, will not apply between Parties to the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocols thereto, unless Parties agree otherwise. This basic rule, established in Article 27, paragraph 1 of the Convention on Cybercrime, is recalled in the draft explanatory report to the provision on the use of languages of requests.
3. The PC-OC recognises that MLA procedures related to cybercrime may require special provisions that are either linked to the specific nature of the evidence to be obtained or to the fact that not all Parties to the Cybercrime Convention are or will become Parties to the European Convention on Mutual Assistance in Criminal Matters and the two Additional Protocols thereto. However, the PC-OC also recalls the importance for the Council of Europe and its 47 Member States to ensure that provisions on MLA procedures in Council of Europe Conventions are harmonised and that any difference is duly justified by the specificity of the assistance to be obtained or the legal requirements of the non-European Parties involved.

Languages of requests

4. The PC-OC can support this draft provision. It is compatible with Article 16 paragraph 2 of the European Convention on Mutual Assistance in Criminal Matters and allows State Parties to state the languages necessary for the requests.

Emergency mutual assistance

5. The PC-OC supports the need for an emergency procedure where MLA requests require the use of alternative channels, in particular electronic transmission and direct communication, to obtain a reply without delay to safeguard the life of a person. The draft proposed raised however observations as regards:
 - The definition of emergency insofar as it refers to the “safety” of a person. The term ‘safety’ is not used in the mother convention and is an indeterminate term in the field of international law.
 - Electronic transmission of requests (para 3) requires the existence of secure transmission systems in all Parties to the Budapest Convention. Where this is not the case, should there be a possibility to ask for the transmission of a written record until such arrangements are in place? As it is written right now, paragraph 3 poses several difficulties:

- Security regarding the sending of data: both the email address as well as the content of the email may be problematic (this concerns in particular States in which expeditor or recipient use private email addresses because they do not have professional email addresses. This problem currently exists in practice with for example some African States.)
 - Subsequent validation of documents. Many State Parties of the Budapest Convention are not Parties to the European Convention on Mutual Assistance in Criminal Matters and as such, the exemption of legalisation forms foreseen in its art. 17 is not applicable. Some of the State Parties of the Budapest Convention require high standards regarding legalisation in practice. Such legalisation would not be attainable with electronic communication.
- Direct communication (para 8) seems very difficult to achieve with all State Parties to the Cybercrime Convention and thus potentially ratifying this protocol. Direct communication requires clear information of the competent authorities to which a request must be sent, which is not always available.

Videoconferencing

6. Referring to its general remark in point 3 above, the PC-OC recalls that Article 9 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters [ETS N° 182] contains a comprehensive provision regarding the use of video conferences and that any deviation from this text should be justified by clearly defined reasons. The PC-OC noted no such reasons.
7. It was furthermore argued that some State Parties to the 2nd Additional Protocol [ETS 182] would have difficulties joining the 2nd Additional Protocol to the Budapest Convention if the content of both provisions would not coincide. ETS 182 is a main agreement on mutual assistance in criminal matters and as such has a particular importance in this field. A new article with a content different from the existing one would create a hurdle for responsible criminal prosecution authorities, particularly those with little or very little experience in the field of MLA.
8. Observations on the substance of the draft include :
 - A lack of information regarding the content of a request for a hearing by video conference
 - A lack of motivation when the videoconference can be used: i.e. where a hearing in person is not possible or desirable, so as to avoid that videoconferencing becomes the norm
 - A lack of procedural safeguards for such hearings , including:
 - The presence of a magistrate of the Requested Party during the video conference in order to supervise and ensure that the law of the Requested Party is not violated
 - The consent of the witness or expert concerned.

- A need to introduce a system of declarations to ensure visibility on which State Party would grant the possibility to hear a witness or expert by video conference – (following the model of Article 9 § 9 of ETS 182)