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Strasbourg, 11 July 2018

T-CY (2018)23

## **Cybercrime Convention Committee (T-CY)**

Preparation of a 2<sup>nd</sup> Additional Protocol to the Budapest Convention on Cybercrime

**Provisional draft text of provisions:**

**Language of requests**

**Emergency MLA**

**For comments by stakeholders by 15 September 2018<sup>1</sup>**

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<sup>11</sup> Comments may be sent to [cybercrime@coe.int](mailto:cybercrime@coe.int)

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# 1 Languages of requests<sup>2</sup>

## 1.1 Draft text<sup>3</sup>

### Article [ ] – Languages of requests

Requests to a Party shall be made in a language acceptable to the requested Party or accompanied by a translation into such a language.

## 1.2 Draft Explanatory Report (elements)

1. Inaccurate or costly translations of mutual assistance requests relating to electronic crime are a chronic complaint requiring urgent attention. This impediment erodes legitimate processes to obtain data and protect public safety. While machine translation is expected to improve, it is currently inadequate. For these reasons, the translation problem was mentioned repeatedly in proposals about the articles to include in a protocol.

2. Translation to and from less-common languages is a special problem, since such translations may greatly delay a request or may be effectively impossible to obtain. They may also be critically misleading, and their poor quality can waste the time of both countries. However, the cost and difficulty of translations fall disproportionately on requesting Parties where less-common languages are spoken.

3. Because of this disproportionate burden, a number of non-anglophone countries asked that English be mandated in a potential protocol. They noted that English is usually the cheapest and most-readily-available language for translation and that many requests are handled as a practical matter by providers, who tend to operate in English. Further, as data is moved and stored more widely in the world and more countries become involved in assisting each other, translation may become even more burdensome and impractical. For example, two Parties may use less-common languages, be geographically-distant, and have little contact. If Party A suddenly needs Party B's assistance, it may be unable to find a translator for B's language, or an eventual translation may be less intelligible than non-native English. Drafters particularly emphasized that, to speed assistance, all efforts should be made to accept preservation requests and, in particular, emergency requests under this Protocol, in English or a shared language rather than in translation.

4. The drafters of the Protocol concluded that English should not be mandated in the treaty text. Some countries have official-language requirements that preclude such a mandate; many countries share a language and have no need for English; and, in some countries, officials outside of capitals are less likely to be able to read English but are often involved in executing requests.

5. Thus, the provision is phrased in terms of "a language acceptable to the requested Party." A requested Party may specify as acceptable other languages, for example, widely-spoken languages such as English, Spanish or French, even where those are not provided in its domestic law or applicable treaties.

6. In practice, certain countries may be prepared to accept requests in a language other than a language specified in domestic law or an applicable treaty. Thus, once a year, the T-CY will engage in an informal survey of acceptable languages for requests. They may alter their information at any time and all Parties will be made aware of any such change. They

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<sup>2</sup> Text as agreed provisionally by the PDP, Strasbourg, 11 July 2018. Text may change as the Protocol evolves and comments are received.

<sup>3</sup> **NOTE:** A general provision on scope needs to be included: The provision covers any form of request under Articles 24 through 34, inclusive, of the mother convention and under the two protocols ....

may state that they accept only specified languages for certain forms of assistance. The results of this survey will be visible to all Budapest Parties, not merely Parties to the second protocol.

7. This pragmatic provision demonstrates the extreme importance of speeding up cooperation. It provides a treaty basis for a Party to accept additional languages.

8. This article does not with interfere bi- or multilateral arrangements between countries. "A language acceptable to the requested Party," by definition, would include any languages required by previous arrangements. In many cases, Parties have entered into mutual assistance treaties that specify the language or languages in which requests must be submitted. Unless the requested Party indicates that it is prepared to accept requests in a language different from that set forth in its mutual assistance treaties with other Parties, the requesting Party will continue to apply the applicable mutual assistance treaty provision. In other words, since this Article makes the choice of language at the discretion of the requested Party, the fact that this provision is not grouped together in Article 27 of the Convention with forms of cooperation that apply in the absence of a treaty does not mean that this Article derogates from, restricts or replaces the basic rule that the relevant provision of an existing mutual assistance treaty between the requesting and requested Parties shall apply unless the Parties agree to diverge from it.

9. A Party's willingness to diverge from any such treaty obligation regarding language will be reflected via its indication to the T-CY that it agrees to accept some or all types of requests in another language.

## 2 Emergency mutual assistance<sup>4</sup>

### 2.1 Draft text

#### Article [ ] – Emergency Mutual Assistance<sup>5 6</sup>

1. For the purposes of this Article, 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. A request under this Article shall include, in addition to the other contents required, a description of the facts that demonstrate that there is an emergency and how the assistance sought relates to it.
3. A requested Party shall accept such request in electronic form. However, it may require appropriate levels of security and authentication before accepting the request.
4. The requested Party may seek, on a rapidly expedited basis, supplemental information in order to evaluate the request. The requesting Party shall provide such supplemental information on the most rapidly expedited basis possible.
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 mutual assistance requests under Article 25 or 27 of the Convention is available on a twenty-four hour, seven-day-a-week basis for purposes of responding to a request under this Article.
7. The authorities responsible for mutual assistance of the requesting and requested Parties responsible for mutual assistance may agree to provide that the results of the execution of a request under this Article, or an advance copy thereof, may be provided to the requesting Party through an alternate channel other than that used for the request.
8. a. In the event of an emergency, requests may be sent directly by judicial authorities of the requesting Party to such authorities of the requested Party, or through Interpol or the 24/7 point of contact established under Article 35 of the Convention. In any such cases, a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party. Where a request is sent directly to a judicial authority of the requested Party and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.

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<sup>4</sup> Text as agreed provisionally by the PDP, Strasbourg, 11 July 2018. Text may change as the Protocol evolves and comments are received.

<sup>5</sup> \*\*\*To be added in the Protocol:

- for the purposes of this Article, the scope of mutual assistance shall be identical to that set forth in Article 25 of the Budapest Convention.
- for greater certainty, nothing in this article prevents the sharing of information or the provision of other international assistance through other available avenues of international cooperation.

<sup>6</sup> \*\*\* To be added that this provision does not exclude other options [E.g. "This provision does not preclude the voluntary transmission of data to foreign competent authorities by internet service providers in conformity with their domestic and international applicable rules ".]

- b. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, inform the Secretary General of the Council of Europe that, for reasons of efficiency, requests made under this paragraph are to be addressed only to its central authority.

## **2.2 Draft Explanatory Report (elements)**

1. Protocol Article [ ] (Emergency mutual assistance) is intended to provide a maximally expedited procedure for mutual assistance requests made in emergency situations. An emergency is defined in paragraph 1 as being those in which there is a significant and imminent risk to the life or safety of a natural person. The definition is intended to cover situations in which the risk is imminent, meaning that it does not include situations in which the risk to the life or safety of the person has already passed, or in which there may be a future risk that is not imminent. The reason for this very precise definition is that the article places labor intensive obligations on both the requested and requesting Parties to react in a greatly accelerated manner in emergencies, which consequently requires that emergency requests be given a higher priority than other important but somewhat less urgent cases, even if they had been submitted earlier.

2. Because protocol Article [ ] is limited to the circumstances justifying such rapidly accelerated action, it is distinct from Article 25(3) of the main Convention, in which requests for mutual assistance may be made by expedited means of communications in urgent circumstances that do not rise to the level of emergency as defined. In other words, Article 25(3) is broader in scope than protocol Article [ ], in that 25(3) covers situations not covered in Article [ ], such as ongoing but non-imminent risks to life or safety of persons, potential destruction of evidence that may result from delay, a rapidly approaching trial date, or other types of urgencies. While the mechanism in Article 25(3) provides for a more rapid method of conveying and responding to a request, the obligations in the case of an emergency under protocol Article [ ] are significantly greater; i.e. where MLA is required to prevent significant and imminent risk to life or safety, the process should be even more accelerated. Emergencies involving a significant and imminent risk to the life or safety of a person often involve hostage situations in which there is a credible risk of imminent loss of life, serious injury or other harm to the victim and the suspect is negotiating for ransom via email or social media so that the location of the victim may be determined through data stored by the provider, sexual abuse of a child as evidenced by the discovery of recently produced child sexual exploitation or child sexual abuse materials, or other indicia of abuse, immediate post terrorist attack scenarios in which authorities seek to determine with whom the attackers communicated in order to determine if further attacks are imminent, and threats to the security of critical infrastructure in which there is a significant and imminent risk of danger to life or safety of a natural person.

3. Under paragraph 2, in making an emergency request, the requesting Party must both conclude that an emergency within the meaning of the article exists, and it must include in its request a description of the facts that so demonstrate, and explain the manner in which the assistance sought is necessary to respond to the emergency, in addition to the other information required to be contained in the request under the applicable treaty or domestic law of the requested Party. In this regard, it should be recalled that under Article 25(4) of the Convention, execution of requests for mutual assistance, including emergency requests, generally "shall be subject to the conditions provided for by the law of the requested Party or applicable mutual assistance treaties, including the grounds on which the requested Party may refuse co-operation".

4. Paragraph 3 requires the requested Party to accept the request in electronic form. Before accepting the request, the requested Party may make the acceptance of the request conditional to compliance by the requesting Party with appropriate levels of security and authentication. With respect to the security requirement contained in this paragraph, the

Parties may decide among themselves whether there is a need for special security protections (including encryption) that may be necessary in a particularly sensitive case.

5. Where the requested Party requires additional information to come to the conclusion that there is an emergency within the meaning of paragraph 1, and/or that the other requirements for mutual assistance have been met, it is required by paragraph 4 to seek the additional information as rapidly as possible. Conversely, paragraph 4 requires the requesting Party to provide the supplemental information in the same rapidly expedited manner. Both Parties are thus required to do their utmost to avoid loss of time that could inadvertently contribute to a tragic result.

6. Under paragraph 5, once the needed information has been provided to enable the request to be executed, the requested Party is required to use the same maximally accelerated efforts to do so. This generally means rapidly expediting the obtaining of judicial orders compelling a provider to produce data that is evidence of the offense and the service of the order on the provider. Delays occasioned by provider response times to such orders should not be attributed to the authorities of the requested State, however.

7. Under paragraph 6, all Parties shall ensure that members of its central authority for mutual assistance (or, if Article [ ](8) is applicable, the relevant judicial authorities concerned) are available on a 24 hour a day, seven day a week basis, in case emergency requests must be made outside regular business hours. It should be recalled that in this regard the 24/7 network under Article 35 of the main Convention is available to coordinate with the authorities responsible for mutual assistance. The obligation in this paragraph does not require the authority responsible for responding to mutual assistance requests under Article 25 or 27 of the Convention to be staffed and operational 24/7. Rather, that authority should implement procedures to ensure that staff may be contacted in order to review emergency requests outside normal business hours.

8. Paragraph 7 provides a basis for the Parties concerned to agree upon an alternate channel for transmission of the responsive evidence or information, be it the mode of transmission or the authorities between whom it is transmitted. Thus, rather than the responsive information or evidence being sent back through the central authority channel habitually used to transmit evidence or information provided in [the] execution of the requesting Party's request, they may agree to use a different channel to speed transmission, maintain the integrity of the evidence, or other reason. For example, in an emergency, the Parties may agree to the transmission of evidence directly to an investigating or prosecuting authority in the requesting Party that will be using the evidence, rather than through the chain of authorities through which such evidence would normally travel. The Parties may also agree, for example, to special handling for physical evidence in order to be able to rule out challenges in subsequent judicial proceedings that the evidence may have been altered or contaminated, or the transmission of sensitive evidence.

9. Finally, paragraph 8 is a more compressed version of Article 27(9) of the main Convention, by which Parties to the protocol can provide for requests to be made directly between judicial authorities. In some Parties, such direct judicial authority to judicial authority channels are well-established and may provide an efficient means of further accelerating the making of and execution of requests. The transmission of the emergency request through the Party's 24/7 point of contact or through the International Criminal Police Organisation is useful not only to reduce any delay but also to increase standards of security and authentication. However, in some Parties, the sending of a request directly to a judicial authority in the requested Party without the involvement and approval of the central authority for mutual assistance could be counter-productive in that, without guidance and/or approval from the central authority, the receiving authority may not be empowered to act independently, or may not be familiar with the proper procedure. Therefore, as in Article

25(9)(e), each Party may notify the Council of Europe Secretary General that requests under this Article must be addressed only to its central authority.