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Version 23 June 2019

T-CY(2019)19\_Protocol TOR extension chair note\_v3.docx

T-CY (2019)19

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

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

#### **State of play**

**Note by the Chair  
for the attention of the 21<sup>st</sup> Plenary of the T-CY (8 July 2019)**

# 1 Purpose and background

The purpose of this note is to facilitate consideration by the T-CY of extending the Terms of Reference for the preparation of the Protocol to the Budapest Convention on Cybercrime to December 2020 at its 21th Plenary of 8 July 2019.

The 17<sup>th</sup> Plenary of the T-CY (7-9 June 2017) adopted the [terms of reference](#) for the preparation of the draft 2<sup>nd</sup> Additional Protocol.

According to these TOR, the T-CY was to hold five Protocol Drafting Plenary and seven Protocol Drafting Group meetings between 2017 and 2019.

Elements to be considered included:

- Provisions for more effective mutual legal assistance;
- Provisions allowing for direct cooperation with service providers in other jurisdictions with regard to requests for subscriber information, preservation requests, and emergency requests;
- Clearer framework and stronger safeguards for existing practices of transborder access to data;
- Safeguards, including data protection requirements.

Between September 2017 and May 2019, the T-CY held three Drafting Plenaries, seven Drafting Group meetings, two subgroup and ad-hoc Group meetings, and three stakeholder consultations:

1 <sup>st</sup> Protocol Drafting Group	Strasbourg, 19-20 September 2017
1 <sup>st</sup> Protocol Drafting Plenary	Strasbourg, 28-29 November 2017
2 <sup>nd</sup> Protocol Drafting Group	Strasbourg, 1-2 February 2018
Subgroup meeting	Vienna, 6-7 April 2018
3 <sup>rd</sup> Protocol Drafting Group	Vienna, 11-13 May 2018
2 <sup>nd</sup> Protocol Drafting Plenary	Strasbourg, 10-11 July 2018
Stakeholder consultations	Strasbourg, 12 July 2018
4 <sup>th</sup> Protocol Drafting Group	Strasbourg, 17-19 September 2018
Consultations with data protection experts	Strasbourg, 26 November 2018
3 <sup>rd</sup> Protocol Drafting Plenary	Strasbourg, 28-29 November 2018
5 <sup>th</sup> Protocol Drafting Group	Strasbourg, 11- 13 February 2019
6 <sup>th</sup> Protocol Drafting Group	Vienna, 25-26 March 2019
Ad-hoc Group meeting	Brussels, 9 April 2019
7 <sup>th</sup> Protocol Drafting Group	Strasbourg, 13-15 May 2019

Moreover, subgroups also consulted with each other between sessions.

For the remainder of 2019, the following meetings are scheduled:

4 <sup>th</sup> Protocol Drafting Plenary	Strasbourg, 9-11 July 2019
8 <sup>th</sup> Protocol Drafting Group	Paris, 16-18 September 2019
9 <sup>th</sup> Protocol Drafting Group	Strasbourg, 14-17 October 2019
5 <sup>th</sup> Protocol Drafting Plenary	Strasbourg, 19-20 November 2019
Stakeholder consultations	Strasbourg, 20-22 November 2019

In spite of budgetary limitations that the Council of Europe is faced with, these additional meetings were feasible due to generous voluntary contributions to the project Cybercrime@Octopus, including specific contributions for the Protocol drafting process.

## 2 Progress made

In 2018, the Protocol Drafting Plenary reached [preliminary agreement on the provisions](#) for:

- Languages of requests;
- Emergency mutual assistance;
- Video conferencing.

These may need to be reviewed in the light of the overall structure of the Protocol and of comments received.

Work is in progress in subgroups with regard to:

- Jurisdiction;
- Special investigative techniques;
- Joint investigations and joint investigation teams;
- Extending searches.

Between February and June 2019, much progress was made with regard to direct cooperation with service providers in other Parties ("disclosure of subscriber information") and the provision on giving effect to production orders from other Parties (previously "endorsement model").

It is expected that the forthcoming Protocol Drafting Plenary (9-11 July 2019) will bring a breakthrough with respect to both provisions.

The success and legitimacy of the Budapest Convention is in many ways due to the fact that the measures foreseen reconcile an effective criminal justice response with rule of law safeguards. The T-CY has stressed that this will also need to apply to the 2<sup>nd</sup> Additional Protocol and with regard to new rules regarding the protection of personal data (in particular by the European Union and the Council of Europe).

Several meetings of the Protocol Drafting Group, of subgroups and ad-hoc groups as well as consultations with civil society and data protection experts were dedicated to the question of how provisions on direct cooperation with service providers can be reconciled with data protection requirements.

The draft articles on "direct disclosure of subscriber information" and on "giving effect to production orders" have been prepared with consideration of data protection and rule of law requirements. Preliminary agreement by the Protocol Drafting Plenary on these draft articles will permit the preparation of proposals for specific data protection provisions by the subgroup on safeguards.

Subsequently, it should then also be feasible to consider provisions on:

- Direct disclosure of traffic and content data in emergency situations;
- Access to information related to registered Internet domains and similar databases.

The latter was not among the initial elements for consideration, but it is increasingly felt that the Protocol Drafting Group may consider a solution permitting access to WHOIS information for criminal justice authorities of Parties to the Protocol in the absence of or complementary to other international solutions.

In short, good progress has been achieved and work is well underway with respect to almost all provisions. At the same time, much time was dedicated to ensuring consistency with rule of law and data protection safeguards as well as with the requirements and legal systems of an increasing number of Parties to the Convention.

### 3 The way ahead

The Protocol is addressing urgent needs and is designed to provide solutions for a more efficient criminal justice response to cybercrime and other crime involving electronic evidence in accordance with data protection and other safeguards.

Preliminary agreement<sup>1</sup> by the Protocol Drafting Group in July 2019 on the text of the draft articles on “direct disclosure of subscriber information” and on “giving effect to production orders” will demonstrate major progress with respect to some of the most challenging issues to be covered by the Protocol. The measures as proposed will be of added value to all Parties to the Budapest Convention.

Preliminary agreement will furthermore permit the preparation of additional provisions, including on data protection, and it will permit consultations based on text with other stakeholders later this year.

The issues addressed and solutions being developed under the Protocol are highly complex in that they:

- affect the rights of individuals, the sovereignty and other core interests of States as well as important interests of the private sector;
- need to be compatible with the systems of and be of benefit to all – currently 63 – Parties to the Budapest Convention.

This explains why additional time will be needed to complete the work on the Protocol and why it is proposed to:

- extend the terms of reference until the end of 2020;
- extend the duration of each Drafting Group session to four or five days;
- foresee additional stakeholder consultations.

Important lessons may be drawn from the Budapest Convention. The “mother” Convention as adopted in November 2001 following some thirteen years of preparatory work, represents a mature text that combines precise concepts and provisions with sufficient flexibility to adapt these to emerging needs (see Guidance Notes). The Budapest Convention stood the test of time and after nineteen years remains the most relevant international instrument – the “gold standard” – on cybercrime.

The 2<sup>nd</sup> Additional Protocol will need to have a similar ambition. What is required is a mature text that can make a difference in terms of an effective criminal justice response with human rights and rule of law safeguards.

The Protocol – like the Convention – will need to stand the test of time. It is highly unlikely that another international agreement will be available for many years to come.

Thus, it is worthwhile to permit for an additional year to complete the work on the draft Protocol.

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<sup>1</sup> As for draft provisions preliminarily agreed previously, it is understood that preliminary versions may change considerably as the Protocol evolves. In addition, preliminary agreement on these particular provisions may be subject to data protection safeguards yet to be developed.