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## **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 consideration by the 23<sup>rd</sup> Plenary of the T-CY (30 November 2020)**

# Content

<b>1</b>	<b>Background .....</b>	<b>3</b>
<b>2</b>	<b>Progress made .....</b>	<b>4</b>
2.1	Measures foreseen for the Protocol .....	4
2.2	Measures put aside or pursued in a different form .....	5
2.3	Operational and policy value of the Protocol.....	6
<b>3</b>	<b>The way ahead .....</b>	<b>7</b>

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# 1 Background

The purpose of this note on the state of play regarding the [2<sup>nd</sup> Additional Protocol to the Convention on Cybercrime](#) is to facilitate consideration by the T-CY at its 23<sup>rd</sup> Plenary on 30 November 2020 of extending the Terms of Reference (TOR) for the preparation of the draft 2<sup>nd</sup> Additional Protocol to May 2021.

The 17<sup>th</sup> Plenary of the T-CY (7-9 June 2017) had adopted the [terms of reference](#) for the preparation of the draft Protocol, and these were [extended to December 2020](#) by the 21<sup>st</sup> Plenary on 8 July 2019. Elements to be considered in the drafting process included:

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

It was understood that these were “elements for reflection. Their feasibility would need to be determined during the negotiation of the Protocol. Other elements may also be considered in the course of the process”.

Between September 2017 and November 2020, the T-CY held six Drafting Plenaries, 15 Drafting Group meetings, numerous subgroup and ad-hoc Group meetings, and four [stakeholder consultations](#). From March 2020 onwards, all meetings were held in virtual format and using written procedures. Following the T-CY Plenary on 30 November 2020, the 7<sup>th</sup> Protocol Drafting Plenary is scheduled for 1 to 3 December 2020:

<a href="#">1<sup>st</sup> Meeting of the T-CY Protocol Drafting Group</a>	Strasbourg, 19-20 September 2017
<a href="#">1<sup>st</sup> Meeting of the T-CY Protocol Drafting Plenary</a>	Strasbourg, 28-29 November 2017
<a href="#">2<sup>nd</sup> Meeting of the T-CY Protocol Drafting Group</a>	Strasbourg, 1-2 February 2018
<a href="#">3<sup>rd</sup> Meeting of the T-CY Protocol Drafting Group</a>	Vienna, 11-13 May 2018
<a href="#">2<sup>nd</sup> Meeting of the T-CY Protocol Drafting Plenary</a>	Strasbourg, 10-11 July 2018
<a href="#">4<sup>th</sup> Meeting of the T-CY Protocol Drafting Group</a>	Strasbourg, 17 – 19 September 2018
<a href="#">3<sup>rd</sup> Meeting of the T-CY Protocol Drafting Plenary</a>	Strasbourg, 28 – 29 November 2018
5 <sup>th</sup> Meeting of the Protocol Drafting Group	Strasbourg, 11-13 February 2019
6 <sup>th</sup> Meeting of the Protocol Drafting Group	Vienna, 25 – 26 March 2019
7 <sup>th</sup> Meeting of the Protocol Drafting Group	Strasbourg, 13 – 15 May 2019
<a href="#">4<sup>th</sup> Meeting of the Protocol Drafting Plenary</a>	Strasbourg, 9 – 11 July 2019
8 <sup>th</sup> Meeting of the Protocol Drafting Group	Paris, 16 – 18 September 2019
9 <sup>th</sup> Meeting of the Protocol Drafting Group	Strasbourg, 15 – 18 October 2019
<a href="#">5<sup>th</sup> Meeting of the Protocol Drafting Plenary</a>	Strasbourg, 19 – 20 November 2019
<a href="#">10<sup>th</sup> Meeting of the Protocol Drafting Group</a>	Strasbourg, 21 – 24 January 2020
<a href="#">11<sup>th</sup> Meeting of the Protocol Drafting Group</a>	Virtual meeting, 2, 4 and 9 June 2020
<a href="#">12<sup>th</sup> Meeting of the Protocol Drafting Group</a>	Virtual meeting, 30 June – 2 July 2020
<a href="#">13<sup>th</sup> Meeting of the Protocol Drafting Group</a>	Virtual meeting, 3, 4, 8 and 9 September 2020
6 <sup>th</sup> Meeting of the Protocol Drafting Plenary	Virtual meeting, 22 – 25 September 2020
14 <sup>th</sup> Meeting of the Protocol Drafting Group	Virtual meeting, 22 – 28 October 2020
15 <sup>th</sup> Meeting of the Protocol Drafting Group	Virtual meeting, 16 November 2020
7 <sup>th</sup> Meeting of the Protocol Drafting Plenary	Virtual meeting, 1 – 3 December 2020

## 2 Progress made<sup>1</sup>

### 2.1 Measures foreseen for the Protocol

The issues on the agenda of the Protocol Drafting Group and Plenaries 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, and in that solutions need to be compatible with the legal systems of and be of benefit to all – currently 65 – Parties to the Budapest Convention.

Nevertheless, much progress was made, and the above meetings resulted in the provisional adoption by the Protocol Drafting Plenary of draft articles on:

- Languages;
- Video conferencing;
- Joint investigation teams and joint investigations;
- Requests for domain name registration information;
- Expedited disclosure of stored computer data in an emergency;
- Emergency mutual assistance;
- Direct disclosure of subscriber information;
- Giving effect to orders from another Party for the expedited disclosure of data.

Good progress was also made with regard to the “common and final provisions” and these are on the agenda of the 7<sup>th</sup> Protocol Drafting Plenary. However, some complex matters require further negotiations.

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 draft articles of the Second Additional Protocol adopted so far contain different types of such safeguards, and the measures are only available for specific criminal investigations and proceedings as foreseen in the Convention.

The question of data protection is of critical importance for the Protocol. Several of the draft articles provisionally adopted by the Protocol Drafting Plenary are subject to appropriate data protection safeguards.

Following consultations of the Protocol Drafting Group with data protection experts in November 2018, the PDG held initial discussions on the approach to data protection in February and March 2019. From June 2019 onwards, the PDG subgroup on data protection met regularly and provided updates to the Protocol Drafting Group and Plenary. Between May and November 2020, the Protocol Drafting Group, and in particular the subgroup on data protection, held 18 virtual meetings. This intense work schedule underlines the attention given to this question but also the challenge of achieving a strong set of data protection safeguards that works for different legal systems and permits effective cooperation on cybercrime and electronic evidence at the same time.

While progress was made, more time is required to finalise the operative text and explanatory report of the article on data protection.

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<sup>1</sup> Many of the meetings and much of the progress were feasible due to generous voluntary contributions to the project Cybercrime@Octopus, including specific contributions for the Protocol drafting process.

## 2.2 Measures not included in the Protocol or pursued in a different form

Several provisions had been under discussion by the PDG and PDP but were not considered to be feasible or to provide sufficient added value, or were or are intended to be pursued in a different form:

- "Direct cooperation between judicial authorities in mutual legal assistance requests". Given Articles 25.3 and 27.9 of the Convention and other agreements available to Parties (such as the 2<sup>nd</sup> Additional Protocol to the Convention on MLA in Criminal Matters, ETS 182), given that such direct cooperation is not possible under some non-European legal systems and in the light of the draft article on "emergency mutual assistance", this measure was put aside.
- "Direct preservation requests to service providers". Work on this provision was discontinued given questions over its added value beyond what is already available under Article 29 of the Convention.
- "International production orders". The discussion of this measure led to the Articles on "disclosure of subscriber information" and "giving effect to orders from another Party for expedited production of data".
- "Direct disclosure by a service provider in an emergency". This measure was replaced by "expedited disclosure of stored computer data in an emergency" via the channel of 24/7 points of contact.

The Protocol Drafting Group and Plenaries have been considering two other provisions that were found important but requiring additional work and thus not feasible within the timeframe set for the preparation of this Protocol:

- "Undercover investigations by means of a computer system". With regard to this provision, experts considered that such a measure is already widely available in Parties, but that a strict notification regime, required by some Parties, would risk limiting current practices. Moreover, concerns have been raised as to the material scope of such an article. Given the importance of this measure, it is proposed that the issue of undercover investigations by means of a computer system be put on the agenda of the T-CY for future consideration and guidance to Parties.
- "Extension of searches". As underlined by the T-CY for many years, this type of measure is available in an increasing number of States. Thus, providing a clear framework with adequate safeguards in an international instrument, would be desirable. However, the Protocol Drafting Group, at its 14<sup>th</sup> meeting (22-28 October 2020) determined that:
  - inclusion of such a provision in the Protocol would entail the risk that some Parties may not be able to join the Protocol once it is opened for signature;
  - further consultations with stakeholders would be needed to increase understanding and obtain support for such a provision;
  - regulating the extension of searches in an international instrument would need to be carefully considered as such rules may limit measures currently available

- in many Parties, while other Parties' laws prohibit such measures in their territories;
- finalisation of an article on this complex issue would be difficult to accomplish in the short term.

Noting the interest by delegations to continue work on this topic, the Protocol Drafting Group "agreed to recommend to the T-CY the establishing of a working group or to further extend the terms of reference of the present negotiations beyond April/May 2021 to prepare a proposal for an article on the extension of searches in a separate instrument based on efforts undertaken and proposal made so far while taking into account the above considerations." The T-CY may, therefore, consider follow up to these recommendations in the near future. The 24<sup>th</sup> Plenary of the T-CY (tentatively scheduled for May 2021) may provide an opportunity.

### 2.3 **Operational and policy value of the Protocol**

The provisions to be retained in the Protocol will provide much added value to the Protocol, both from operational and policy perspectives:

- Criminal justice authorities all over the world underline the need for direct cooperation with service providers. With the article on the "direct disclosure of subscriber information" the Protocol will establish such cooperation with safeguards for the first time in an international legal instrument.
- The article on "giving effect to production orders from another Party" for subscriber information and traffic data will become an effective means to obtain such data where other forms of cooperation with service providers may not be available.
- Regarding access to "WHOIS" (domain name registration) information, the Protocol will provide a legal basis for direct requests to and disclosure of such information by registrars and registries ("entities") in other Parties, thus complementing procedures being developed in the ICANN context.
- The articles on "expedited disclosure of stored computer data in an emergency" and "emergency mutual assistance" will permit immediate cooperation in situations where lives are at risk.
- The articles on joint investigation teams and video conferencing will permit the use of such measures between Parties that do not have other applicable agreements in place.
- And finally, data protection safeguards will ensure that personal data received under this Protocol will be protected.

The Protocol is also of value from policy perspective:

- The Protocol will keep the Convention on Cybercrime highly relevant and effective for years to come.
- With its focus on specific criminal investigations and proceedings for which specified data is needed and with its rule of law and data protection safeguards, the Convention

and this Protocol will continue to stand for an Internet built on the free flow of information where restrictions are only permitted in limited circumstances of criminal abuse.

- In the context of international developments, including the forthcoming UN treaty process, the Convention and its Protocols may assist Parties determine their positions.

The negotiation of the Second Additional Protocol should be concluded soon, and preferably the new instrument would be ready for the opening for signature at the 20<sup>th</sup> anniversary of the Convention in November 2021.

### 3 The way ahead

Negotiations continue on the common and final provisions, as well as on data protection safeguards. In addition, the text and concepts of the draft Protocol will need to be consolidated.

Once a consolidated draft of the Protocol is available, additional consultations with civil society, data protection experts and industry but also with relevant Council of Europe bodies will need to be held and their feedback may need to be incorporated prior to adoption of draft Protocol by the T-CY and its submission to the Committee of Ministers.

The tasks ahead (and approximate timing) towards completion of the draft Protocol would include:

1-3 December 2020	Consideration of a first interim draft Protocol by the Protocol Drafting Plenary
December 2020/January 2021	Finalisation of the common and final provisions Finalisation of the article on data protection safeguards, including its explanatory report
January/February 2021	Consolidation of the full text of the Protocol
February/March 2021	Consultations with stakeholders Consultations with Council of Europe bodies
April 2021	Revised version of the draft Protocol based on feedback received
May 2021	T-CY adoption of the draft Protocol and submission to the Committee of Ministers

The 14<sup>th</sup> meeting of the Protocol Drafting Group (22-28 October 2020) concluded that an extension of the terms of reference of the negotiations would be required to complete these tasks.

The T-CY is invited, therefore, to consider an extension of these TOR to May 2021.