

Item 8

Second Protocol on enhanced cooperation and disclosure of electronic evidence

Towards ratification of the Second Protocol:

- Status, experience, issues, lessons
- Reservations and declarations

Second Protocol: reservations and declarations – Summary

Reservations

- Article 7.9.a on direct cooperation
- Article 7.9.b on direct cooperation
- Article 8.13 on giving effect
- Article 17.1 on Federal clause

Declarations

- Article 6.6 on WHOIS
- Article 7.2.b on direct disclosure
- Article 7.5.a on direct disclosure
- Article 7.5.e on direct disclosure ► Mandatory if 5.a declaration
- Article 7.8 on direct disclosure
- Article 8.4 on giving effect
- Article 8.10.a and b. on giving effect ► Mandatory at deposit
- Article 8.11 on giving effect
- Article 9.1.b on emergency disclosure
- Article 9.5 on emergency disclosure
- Article 10.9 on emergency MLA
- Article 12.3 on JITs
- Article 14.7.c on data protection – data security and incidents ► Mandatory at deposit
- Article 14.10.b on data protection – onward transfer ► Mandatory at deposit
- Article 17.2 on Federal clause
- Article 18.2 on territorial application

Article 6 – Request for domain name registration information

1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities, for the purposes of specific criminal investigations or proceedings, to issue a request to an entity providing domain name registration services in the territory of another Party for information in the entity's possession or control, for identifying or contacting the registrant of a domain name.

5 In the event of non-co-operation by an entity described in paragraph 1, a requesting Party may request that the entity give a reason why it is not disclosing the information sought. The requesting Party may seek consultation with the Party in which the entity is located, with a view to determining available measures to obtain the information.

Declaration:

6 Each Party **shall**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, or at any other time, communicate to the Secretary General of the Council of Europe the authority designated for the purpose of consultation under paragraph 5.

Article 7 – Disclosure of subscriber information

- 1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to issue an order to be submitted directly to a service provider in the territory of another Party, in order to obtain the disclosure of specified, stored subscriber information in that service provider's possession or control, where the subscriber information is needed for the issuing Party's specific criminal investigations or proceedings.

Reservation:

Article 7.9. At the time of signature of this Protocol or when depositing its instrument of ratification, acceptance, or approval, a Party **may**

- a. reserve the right not to apply this article; or
- b. if disclosure of certain types of access numbers under this article would be inconsistent with the fundamental principles of its domestic legal system, reserve the right not to apply this article to such numbers.

Article 7 – Disclosure of subscriber information

- 1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to issue an order to be submitted directly to a service provider in the territory of another Party, in order to obtain the disclosure of specified, stored subscriber information in that service provider's possession or control, where the subscriber information is needed for the issuing Party's specific criminal investigations or proceedings.

Declaration:

Article 7.2.b At the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, a Party **may** – with respect to orders issued to service providers in its territory – make the following declaration:

“The order under Article 7, paragraph 1, must be issued by, or under the supervision of, a prosecutor or other judicial authority, or otherwise be issued under independent supervision”.

Article 7 – Disclosure of subscriber information

5 a A Party may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, and at any other time, notify the Secretary General of the Council of Europe that, when an order is issued under paragraph 1 to a service provider in its territory, the Party requires, in every case or in identified circumstances, simultaneous notification of the order, the supplemental information and a summary of the facts related to the investigation or proceeding. .

Declaration:

Article 7.5.

a. A Party **may**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, and at any other time, notify the Secretary General of the Council of Europe that, when an order is issued under paragraph 1 to a service provider in its territory, the Party requires, in every case or in identified circumstances, simultaneous notification of the order, the supplemental information and a summary of the facts related to the investigation or proceeding.

e. A Party **shall** designate a single authority to receive notification under paragraph 5.a and perform the actions described in paragraphs 5.b, 5.c and 5.d. The Party **shall**, at the time when notification to the Secretary General of the Council of Europe under paragraph 5.a is first given, communicate to the Secretary General the contact information of that authority.

Article 7 – Disclosure of subscriber information

- 1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to issue an order to be submitted directly to a service provider in the territory of another Party, in order to obtain the disclosure of specified, stored subscriber information in that service provider's possession or control, where the subscriber information is needed for the issuing Party's specific criminal investigations or proceedings.

Declaration:

Article 7.8 A Party **may**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that an issuing Party shall seek disclosure of subscriber information from the service provider before seeking it under Article 8, unless the issuing Party provides a reasonable explanation for not having done so.

Article 8 – Giving effect to orders from another Party for expedited production of subscriber information and traffic data

- 1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to issue an order to be submitted as part of a request to another Party for the purpose of compelling a service provider in the requested Party's territory to produce specified and stored
 - a subscriber information, and
 - b traffic datain that service provider's possession or control which is needed for the Party's specific criminal investigations or proceedings.

Reservation:

Article 8.13 At the time of signature of this Protocol or when depositing its instrument of ratification, acceptance, or approval, a Party **may reserve** the right not to apply this article to traffic data.



Second Protocol: reservations and declarations – Article 8

Article 8 – Giving effect to orders from another Party for expedited production of subscriber information and traffic data

- 1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to issue an order to be submitted as part of a request to another Party for the purpose of compelling a service provider in the requested Party's territory to produce specified and stored
 - a subscriber information, and
 - b traffic datain that service provider's possession or control which is needed for the Party's specific criminal investigations or proceedings.

Declarations:

Article 8.4 A Party may declare at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, and at any other time, that additional supporting information is required to give effect to orders under paragraph 1.

Article 8.10 Each Party **shall**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, communicate to the Secretary General of the Council of Europe and keep up to date the contact information of the authorities designated:

- a. to submit an order under this article; and
- b. to receive an order under this article.

Article 8 – Giving effect to orders from another Party for expedited production of subscriber information and traffic data

- 1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to issue an order to be submitted as part of a request to another Party for the purpose of compelling a service provider in the requested Party's territory to produce specified and stored
 - a subscriber information, and
 - b traffic datain that service provider's possession or control which is needed for the Party's specific criminal investigations or proceedings.

Declarations:

Article 8.11 A Party **may**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that it requires that requests by other Parties under this article be submitted to it by the central authority of the requesting Party, or by such other authority as mutually determined between the Parties concerned..



Second Protocol: reservations and declarations – Article 9

Article 9 – Expedited disclosure of stored computer data in an emergency

- 1 a Each Party shall adopt such legislative and other measures as may be necessary, in an emergency, for its point of contact for the 24/7 Network referenced in Article 35 of the Convention (“point of contact”) to transmit a request to and receive a request from a point of contact in another Party seeking immediate assistance in obtaining from a service provider in the territory of that Party the expedited disclosure of specified, stored computer data in that service provider’s possession or control, without a request for mutual assistance.

Declarations:

Article 9.1.b A Party **may**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that it will not execute requests under paragraph 1.a seeking only the disclosure of subscriber information.

Article 9.5. A Party **may**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that it requires requesting Parties, following the execution of the request, to submit the request and any supplemental information transmitted in support thereof, in a format and through such channel, which may include mutual assistance, as specified by the requested Party.

Article 10 – Emergency mutual assistance

- 1 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.

Declaration:

Article 10.9 Each Party **may**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that requests may also be sent directly to its judicial authorities, or through the channels of the International Criminal Police Organization (INTERPOL) or to its 24/7 point of contact established under Article 35 of the Convention.

Article 12 – Joint investigation teams and joint investigations

1 By mutual agreement, the competent authorities of two or more Parties may establish and operate a joint investigation team in their territories to facilitate criminal investigations or proceedings, where enhanced coordination is deemed to be of particular utility. The competent authorities shall be determined by the respective Parties concerned.

Declaration:

Article 12.3 A Party may declare at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance, or approval that its central authority must be a signatory to or otherwise concur in the agreement establishing the team.

Article 14 – Protection of personal data

7 Data security and security incidents

a Each Party shall ensure that it has in place appropriate technological, physical and organisational measures for the protection of personal data, in particular against loss or accidental or unauthorised access, disclosure, alteration or destruction (“security incident”).

b Upon discovery of a security incident in which there is a significant risk of physical or non-physical harm to individuals or to the other Party, the receiving Party shall promptly assess the likelihood and scale thereof and shall promptly take appropriate action to mitigate such harm. Such action shall include notification to the transferring authority

Declaration:

Article 14.7.c Each Party **shall**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, communicate to the Secretary General of the Council of Europe the authority or authorities to be notified under paragraph 7.b for the purposes of chapter II, section 2; the information provided may subsequently be modified.

Article 14 – Protection of personal data

10 Onward transfer to another State or international organisation

- a The receiving Party may transfer the personal data to another State or international organisation only with the prior authorisation of the transferring authority or, for purposes of Chapter II, section 2, the authority or authorities designated pursuant to paragraph 10.b.

Declaration:

Article 14.10.b Each Party **shall**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, communicate to the Secretary General of the Council of Europe the authority or authorities to provide authorisation for purposes of chapter II, section 2; the information provided may subsequently be modified.

Second Protocol: reservations and declarations – Article 17

Article 17 – Federal clause

1 A federal State may reserve the right to assume obligations under this Protocol consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities, provided that:

Reservation:

Article 17.1 A federal State **may** reserve the right to assume obligations under this Protocol consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities, provided that:

a this Protocol shall apply to the central government of the federal State;

b such a reservation shall not affect obligations to provide for the co-operation sought by other Parties in accordance with the provisions of Chapter II; and

c the provisions of Article 13 shall apply to the federal State's constituent States or other similar territorial entities.

Second Protocol: reservations and declarations – Article 17

Article 17 – Federal clause

1 A federal State may reserve the right to assume obligations under this Protocol consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities, provided that:

Declaration:

Article 17.2 Another Party may prevent authorities, providers or entities in its territory from co-operating in response to a request or order submitted directly by the constituent State or other similar territorial entity of a federal State that has made a reservation under paragraph 1, unless that federal State **notifies** the Secretary General of the Council of Europe that a constituent State or other similar territorial entity applies the obligations of this Protocol applicable to that federal State. The Secretary General of the Council of Europe shall set up and keep updated a register of such notifications.

Article 18 – Territorial application

1 This Protocol shall apply to the territory or territories specified in a declaration made by a Party under Article 38, paragraphs 1 or 2, of the Convention to the extent that such declaration has not been withdrawn under Article 38, paragraph 3.

Declaration:

Article 18.2 A Party **may**, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that this Protocol shall not apply to one or more territories specified in the Party's declaration under Article 38, paragraphs 1 and/or 2, of the Convention.