

Item 6: Guidance Notes

Proposal to develop a guidance note on Article 26 - Spontaneous information



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T-CY 30/Item 6: Guidance Notes

Article 26 – Spontaneous information

1 A Party may, within the limits of its domestic law and without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request for co-operation by that Party under this chapter.

2 Prior to providing such information, the providing Party may request that it be kept confidential or only used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them.

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Explanatory report: Article 26 – Spontaneous information

260. This article is derived from provisions in earlier Council of Europe instruments, such as Article 10 of the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS N° 141) and Article 28 of the Criminal Law Convention on Corruption (ETS N° 173). More and more frequently, a Party possesses valuable information that it believes may assist another Party in a criminal investigation or proceeding, and which the Party conducting the investigation or proceeding is not aware exists. In such cases, no request for mutual assistance will be forthcoming. Paragraph 1 empowers the State in possession of the information to forward it to the other State without a prior request. The provision was thought useful because, under the laws of some States, such a positive grant of legal authority is needed in order to provide assistance in the absence of a request. A Party is not obligated to spontaneously forward information to another Party; it may exercise its discretion in light of the circumstances of the case at hand. Moreover, the spontaneous disclosure of information does not preclude the disclosing Party, if it has jurisdiction, from investigating or instituting proceedings in relation to the facts disclosed.

261. Paragraph 2 addresses the fact that in some circumstances, a Party will only forward information spontaneously if sensitive information will be kept confidential or other conditions can be imposed on the use of information. In particular, confidentiality will be an important consideration in cases in which important interests of the providing State may be endangered should the information be made public, e.g., where there is a need to protect the identity of a means of collecting the information or the fact that a criminal group is being investigated. If advance inquiry reveals that the receiving Party cannot comply with a condition sought by the providing Party (for example, where it cannot comply with a condition of confidentiality because the information is needed as evidence at a public trial), the receiving Party shall advise the providing Party, which then has the option of not providing the information. If the receiving Party agrees to the condition, however, it must honour it. It is foreseen that conditions imposed under this article would be consistent with those that could be imposed by the providing Party pursuant to a request for mutual assistance from the receiving Party.

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T-CY assessment report:

The mutual legal assistance provisions of the Budapest Convention on Cybercrime

Adopted by the T-CY at its 12th Plenary (2-3 December 2014)

2.4 Spontaneous information

Replies suggest that this possibility is used or understood by States to a very different extent:

- Never or rarely used or no experience: Estonia, France, Hungary, Japan, Lithuania, Malta, Netherlands, Slovakia, Slovenia, Spain, The former Yugoslav Republic of Macedonia
- Not very often: Albania, Armenia, Bosnia and Herzegovina, Georgia, Romania, Slovakia.
- Often/very often: Cyprus (sending: 50/year, receiving: 35/year), Germany (daily), Latvia, Philippines, Portugal, Serbia, Switzerland (sending: 5-10/week, receiving: 1/month), Turkey, Ukraine, USA (all the time).

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Advantages:

- Spontaneous information triggers domestic investigations in the State receiving such information (Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Costa Rica, Croatia, Norway, Portugal, and USA).
- It can lead to multi-country operations (Dominican Republic).
- It can lead to MLA requests (Croatia).
- It may be used for direct agency-to-agency cooperation (Australia).
- Can be shared through foreign law enforcement liaison officers (Philippines).
- Reduces the need for MLA (USA).
- Spontaneous information on infected IP addresses allows law enforcement of the Receiving country to contact service providers which will then inform their clients (France).
- Valuable information for analysis and investigation of complex organised crime (Cyprus, Georgia, Philippines, Switzerland).
- Useful for very urgent situations such as threat to life (Turkey).

Preliminary conclusion:

- Article 26 Budapest Convention seems to be underused. Those who exchange spontaneous information seem to make use of other agreements or are permitted by their own law to act without reference to an agreement.

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Assessment report on Mutual Legal Assistance: Follow up given by Parties and Observers **Adopted by T-CY 18 (27-28 November 2017)**

2.10 Rec 10 – Opening of domestic investigations: Parties may consider the opening of domestic investigation upon a foreign request or spontaneous information to facilitate the sharing of information or accelerate MLA.

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2.10.3 Conclusion

Increasingly, investigations entailing electronic evidence involve more than one country. A case may have roots or victims in ten or twenty States and, as a practical matter, investigators in one country may be able radically to shorten the work of others if they share their data. From this survey, it is not clear how often the mechanisms of spontaneous information or opening a domestic case are used and therefore whether they facilitate assistance as much as they could.

The T-CY recommends that Parties share good practices on the use of Article 26 Budapest Convention regarding spontaneous information.

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EUROJUST experience and findings regarding “spontaneous information“ and use of Article 26 Convention on Cybercrime

<https://rm.coe.int/spontaneousexchangeinformation-11-12-2023-octopus/1680addf34>

<https://www.coe.int/en/web/cybercrime/workshop-2-spontaneous-information-sharing-13-december-2023>

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Discussion:

- Would a T-CY Guidance Note be feasible and add value?
- Should the T-CY task the Bureau to develop a draft GN?

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