

Council of Europe  
Cybercrime Convention Committee (T-CY)  
Avenue de l'Europe 1  
67000 Strasbourg  
France

Vienna, 14 December 2020

## **ISPA AUSTRIA'S CONTRIBUTION TO THE 5<sup>th</sup> ROUND OF CONSULTATIONS ON THE PROVISIONAL TEXT OF THE SECOND ADDITIONAL PROTOCOL TO THE BUDAPEST CONVENTION ON CYBERCRIME**

[ISPA – Internet Service Providers Austria](#) welcomes the opportunity to provide comments to the draft provisions of the Second Additional Protocol to the Budapest Convention on Cybercrime. We are a voluntary business representation and act as the voice of over 220 internet service providers from various fields all along the internet value chain. ISPA Austria's members have long worked with judicial and law enforcement authorities and thus have valuable insights in the functioning of existing forms of cooperation. Moreover, the majority of ISPA members are small and medium-sized enterprises (SMEs) which face novel challenges from any new legal regime. We have followed the work of the Council of Europe with great interest over the years and value its expertise in the field of cybercrime and other internet related topics. In our role as the voice of the Austrian internet industry we would like to address the following aspects of the draft text and provide recommendations where appropriate.

### **General remarks**

ISPA Austria in principle welcomes the approach the Council of Europe has taken in the new draft provisions, focusing on voluntary cooperation in the form of cross-border requests and accelerating the communication between state parties by making use of the 24/7 network established by Article 35 of the Budapest Convention, which was exactly created to ensure immediate assistance in the collection of electronic evidence. The use of this network ensures not only expedited processing of data requests but at the same time legal certainty for the service provider, who receives a production order in accordance with the requirements under national criminal procedural law from a domestic law enforcement authority. Despite our further suggestions for improvements, ISPA Austria clearly prefers this approach compared to direct cross-border production orders such as foreseen in the draft of Article 4 ('Direct disclosure of subscriber information'). The latter would constitute a severe renunciation from traditional forms of international cooperation and moreover bring upon a wide range of problems which ISPA Austria has illustrated in detail in our last

response to the 4<sup>th</sup> round of consultations. Yet, unfortunately, most of the concerns and recommendations raised therein have so far not been taken into account.

Considering the extensive criticism Article 4 has faced in the course of the last round of consultations not just from ISPA Austria but equally from experts in academia, civil society and affected companies, ISPA Austria thus urges the Convention Committee to reconsider this provision and align it with the approach in the new draft provisions. *In concreto* this would mean to change the system of cross-border production orders in Article 4 to cross-border requests such as provided in Article 6 and evaluate an extension of the use of the 24/7 network to cross-border data requests in non-emergency situations. Indeed, this would require additional resources to be provided by the state parties in order to have sufficient trained and equipped personnel available to handle requests. Nevertheless, it would lead to a solution that satisfies both the need for rapid cross-border access to electronic evidence while at the same time securing legal certainty and due process.

### **Section 6 - Requests for domain name registration information**

Despite the general advantages of a request system over a system of direct cross-border orders, ISPA Austria would like to provide additional recommendations to the Convention Committee to ensure the frictionless functioning of the system.

#### **1) The mandatory use of Single Points of Contacts would significantly enhance cross-border cooperation**

According to the draft, requests for domain name registration information could be issued by any law enforcement authority of a party which has the competency under domestic law, potentially leading to a situation where hundreds of different authorities send requests to foreign companies, not all of which have the necessary experience in filing such requests. However, one of the most crucial aspects to ensure a speedy and efficient system of cooperation between law enforcement authorities and service providers is to have people involved on both sides which have the legal and technical know-how and experience in dealing with such requests.

Several states have therefore already installed single points of contact (SPOCs) for cross-border requests, which are specialized persons or units which are alone responsible for submitting requests and receiving the response of the service provider. In these states, the level of satisfaction in the cooperation between law enforcement agencies (LEAs) and foreign service providers has significantly improved. This is illustrated amongst others in a recent report by Europol, which shows that for those LEAs with a SPOC in place, the level of satisfaction in the engagement with foreign service providers is significantly above average (78 % vs. 63 %). Europol explains this with the fact that SPOCs have a higher level of specialization in working with different companies' processes and requirements which contributes to faster and smoother processes of

cross-border data requests.<sup>1</sup> Law enforcement officers who regularly submit requests to foreign service providers are more familiar in formulating a request and know which data may be requested in a particular case and which additional information may need to be provided. Moreover, SPOCs also facilitate the centralised elaboration of statistics on cross-border requests. In such statistics, existing challenges could be much easier identified and overcome and transparency on the number of requests would be enhanced. Ultimately, the establishment of a SPOC would also alleviate many of the other concerns raised in this contribution, in terms of legal certainty, trackability of the orders and security of the transmission.

ISPA Austria therefore recommends including a further requirement in Article 6 to name a single point of contact (SPOC) for requests to foreign entities providing domain name services.

## **2) The lack of ex-ante review by a judge or other independent authority creates legal uncertainty**

Article 6 leaves the procedural requirements for issuing a cross-border request for domain name registration information entirely to the discretion of the state parties. ISPA Austria understands that the procedures for requesting information in criminal investigations on a national level differ significantly among the state parties which is why it might appear to be difficult to agree on a common standard.

Yet, without any requirement of an ex-ante review of a cross-border request by a judge or other independent authority, the entity receiving the request would not be sure whether it is lawful or not, requiring them to assess the legality of the requests autonomously in order to avoid that they are held liable for disclosing information unlawfully. This effort and the nevertheless remaining legal uncertainty would leave most companies, in particular those without their own legal counsel, reluctant to respond to any foreign request and thus endanger the whole concept.

Therefore, ISPA Austria recommends stipulating an obligatory ex-ante review by an independent authority of any cross-border request in the requesting state as well as to include an option, that allows companies to consult the competent national authority before responding to a request similarly to what is already provided in Article 4.1.5 of the draft protocol.

## **3) A unified model for the transmission of requests is needed**

As already included in our response to the previous rounds of consultations, we believe that it is imperative to foster the use of templates for cross-border orders and requests. Templates can help accelerating the requesting process and minimize the risk of mistakes and legal uncertainty.

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<sup>1</sup> SIRIUS EU Digital Evidence Situation Report 2019, Europol (December 2019) 18.  
<[https://www.europol.europa.eu/sites/default/files/documents/sirius\\_eu\\_digital\\_evidence\\_report.pdf](https://www.europol.europa.eu/sites/default/files/documents/sirius_eu_digital_evidence_report.pdf)>

Such a template should in particular specify the voluntary nature of a response to such a request, in order to avoid confusion on the legal nature on the side of a receiving entity, and advise the company to check with their local laws if and how to respond to such a request. Otherwise, the reference to an international treaty such as the Budapest Convention could easily imply an obligatory nature of such a request.

Furthermore, precise specifications on language requirements are desirable, in particular, in which languages entities covered should receive such orders, in which languages they can raise questions for clarifications to the ordering authority, etc. Unfortunately, it is not clear whether the language requirements in Article 1 sub-paragraph 2 would already be applicable as the wording only address 'direct disclosure', 'preservation' and 'emergency disclosure'. Requests under Article 6 should therefore be explicitly included as well.

Finally, in order to support the secure and efficient transmission of information between LEAs and entities providing domain name registration information, a voluntary data exchange system should be established, that would also serve to facilitate the authentication process and thus allow entities providing domain name services to respond more rapidly to foreign requests. Where such companies already have a secure system for data transmission in place such a system could be used instead as long as their systems enable the identification and authentication of sender and receivers and ensure data integrity.

#### **4) The need for an additional legal basis for voluntary requests within EEA states must be assessed**

According to Article 6 sub-paragraph 2, parties to the protocol shall adopt the necessary legal basis to permit an entity in its territory to disclose domain name registration information in response to a request by a foreign authority under the protocol. For companies that fall under the scope of the General Data Protection Regulation (GDPR), it should first be assessed to what extent the GDPR already provides a legal basis to respond to cross-border requests and if it does not, what conditions such a legal basis would need to fulfil.

Considering that many state parties to the Budapest Convention also are subject to the GDPR, ISPA Austria advises the convention committee to consolidate the European Data Protection Board (EDPB) on this important aspect to ensure legal certainty for the companies concerned.

#### **5) A provision on cost reimbursement is necessary**

The draft text does not include any reference to the financial and personnel investments incurred by the entity providing domain name services. Rather, it seems that it will stay at the discretion of the parties to provide cost reimbursement if provided so under their national law. This will not only lead to an unbalanced system, where states without national provisions on cost reimbursement can benefit from the assistance of foreign entities without having to come up for their expenditures

but also to practical uncertainties. For instance, even if there is a cost reimbursement provision in the legal framework of the requesting state, it would remain unclear how a foreign company could receive cost reimbursement, which language it must use etc.

Besides, experience in states which have a cost reimbursement system in place has shown that it works as an efficient barrier against unjustified bulk requests for data and will thus limit the number of requests to what is strictly necessary which in turn ensures that requests can be handled by the companies in due time.

ISPA therefor suggests that an explicit provision on cost reimbursement is added to article 6 which clarifies the aspects mentioned above.

ISPA would like to reiterate that it is very thankful for this opportunity to contribute. For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Maximilian Schubert

Secretary General