



EUROPEAN
COMMISSION

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Proposal for a

COUNCIL DECISION

determining the criteria and the procedure for establishing the position to be taken on behalf of the European Union within the Council of Europe as regards the requests for accession of third parties to the Council of Europe Convention on Cybercrime ('Budapest Convention')

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The present proposal concerns the position to be taken on behalf of the European Union, with regard to requests for accessions to the Council of Europe Convention on Cybercrime ('the Budapest Convention') by States which are not members of the Council of Europe and which have not participated in its elaboration to accede to the Budapest Convention, pursuant Article 37 of that convention.

2. CONTEXT OF THE PROPOSAL

2.1. The Budapest Convention

The Budapest Convention (CETS 185) was signed on 23 November 2001 in Budapest, Hungary and entered into force on 1 July 2004. All Member States of the European Union are contracting parties to that convention except Ireland, which has signed but not yet ratified the Convention. The relations between the Union and the Council of Europe are based on the 2007 Memorandum of Understanding between the Council of Europe and the European Union¹; the Union has an observer status in the Cybercrime Convention Committee (T-CY).

The Budapest Convention contains 48 articles providing for (i) the criminalisation of relevant conducts – ranging from illegal access, data and systems interference to computer-related fraud and child sexual abuse material; (ii) procedural powers to investigate cybercrime and secure electronic evidence in relation to any crime, and (iii) for efficient international cooperation. The Budapest Convention is supplemented by a First Additional Protocol covering the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189) and a Second Additional Protocol on enhanced international co-operation and disclosure of electronic evidence (CETS 224).

2.2. The Committee of Ministers of the Council of Europe and its preparatory bodies and the Cybercrime Convention Committee

The Committee of Ministers of the Council of Europe is the statutory decision-making body of the Council of Europe. Its role and functions are defined in detail in Chapter IV of the Statute of the Council of Europe. It is composed of the Ministers for Foreign Affairs of the Member States. The Committee of Ministers of the Council of Europe meets once a year at ministerial level and weekly at the level of deputies (the Permanent Representatives of the member states to the Council of Europe).

The Committee of Ministers of the Council of Europe is assisted by a bureau and by subsidiary groups which meet regularly to consider certain issues in depth before decisions are taken. These subsidiary groups are informal working structures of the deputies and have no decision-making power. They prepare decisions for the Committee of Ministers of the Council of Europe for adoption, ideally without debate. Decisions regarding invitations to accede to the Budapest Convention are prepared by the GR-J (Rapporteur Group on Legal Cooperation).

The Cybercrime Convention Committee (T-CY) represents the Parties to the Budapest Convention. Based on Article 46 of the Budapest Convention, the consultation of that committee aims at facilitating the effective use and implementation of the Budapest Convention, the exchange of information and consideration of any future amendments.

¹ https://www.eeas.europa.eu/sites/default/files/mou_2007_en.pdf

2.3. The envisaged act by the Committee of the Ministers of the Council of Europe and the Cybercrime Convention Committee (T-CY) having legal effects in the Union

According to Article 37(1) of the Budapest Convention, the Committee of Ministers of the Council of Europe, after consulting with and obtaining the unanimous consent of the Contracting States to the Convention – via the Cybercrime Convention Committee (T-CY) –, may invite any State which is not a member of the Council, and which has not participated in its elaboration, to accede to the Budapest Convention.

3. POSITION TO BE TAKEN ON BEHALF OF THE UNION

It is proposed that the position to be adopted on behalf of the Union at the Committee of Ministers of the Council of Europe and in its preparatory bodies as well as the Cybercrime Convention Committee (T-CY) as regards the accession by States to the Budapest Convention be established according to a two-tier approach. First, by this Decision, which sets out in its Annex the guiding principles and criteria to be applied when proposing, in a second step, the Union's position regarding specific accession requests made by third States. In that second step, the Commission will propose a detailed position on each request for accession of States that are not Parties to the Budapest Convention in accordance with the guiding principles and criteria laid out in the Annex to this Decision. The Commission will transmit such detailed position to the Council, in the form of a written document, for discussion and approval.

The Union is currently applying such an approach in the context of the internal decision-making procedures of certain other international organisations, notably in the transport sector within the Port State Control Committee of the Paris Memorandum of Understanding on Port State Control² and the Council of the International Civil Aviation Organization³.

The Commission proposes the above-described procedure due to the characteristics of the process in the Council of Europe as regards requests to accede to the Budapest Convention by States which are not members of the Council of Europe and which have not participated in its elaboration to accede to the Budapest Convention, pursuant Article 37 of that convention.

In particular, the internal rules of Council of Europe allow the States Parties to the Budapest Convention typically two months to express their objections to a request to accede to that convention, after the T-CY Secretariat has circulated the request to all States Parties. The very short timeframe between the moment States Parties receive a request for accession to the Budapest Convention and the moment they are required to take a decision on the matter can put at risk the timely preparation and adoption by the Council of a Decision on the Union's position pursuant to Article 218(9) of the Treaty.

To ensure coherence of the Union position throughout the process, the proposed two-tier process should apply to decisions regarding requests for accession to the Budapest Convention, pursuant to Article 37 of that convention.

² Council Decision (EU) 2016/381 of 14 March 2016 on the position to be adopted, on behalf of the European Union, within the Port State Control Committee of the Paris Memorandum of Understanding on Port State Control (OJ L 72, 17.3.2016, p. 53).

³ Council Decision (EU) 2023/746 of 28 March 2023 establishing the criteria and the procedure for establishing the position to be taken on the European Union's behalf within the International Civil Aviation Organization as regards the adoption of, or amendments to, international standards and recommended practices, and the notification of differences with respect to adopted international standards.

It is therefore hereby proposed to adopt a Council Decision on the basis of Article 218(9) TFEU, establishing the position to be taken on behalf of the European Union for the adoption of such decisions.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) TFEU provides for Decisions establishing ‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement at issue⁴.

The notion of ‘*acts having legal effects*’ includes acts that have legal effects by virtue of the rules of international law governing the body in question.

4.1.2. Application to the present case

The acts which the Committee of Ministers of the Council of Europe in conjunction with its preparatory bodies and the Committee of the Parties to the Budapest convention are called upon to adopt, i.e. a decision on the invitation of a State which is not a member of the Council of Europe and which has not participated in the elaboration of the Budapest Convention to accede to this convention, constitute acts having legal effects. Moreover, and without prejudice to Union competence in other areas covered by the Budapest Convention such as the criminalisation of certain types of conduct, in accordance with the provisions of Article 23 of Chapter III (‘International co-operation’) of the Budapest Convention, the Parties shall co-operate with each other, in accordance with the provisions to the widest extent possible for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence. This implies an obligation imposed on Member States in areas falling within the Union’s competence.

The envisaged act does not supplement or amend the institutional framework of the Budapest Convention.

The procedural legal basis for the proposed Decision, therefore, is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a Decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is adopted on behalf of the Union. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the Decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

⁴ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64

4.2.2. Application to the present case

The envisaged act pursues objectives and has components in the area of judicial cooperation in criminal matters and the establishment of minimum rules concerning the definition of criminal offences and sanctions in the area of cybercrime.

The substantive legal basis of the proposed Decision, therefore, is Articles 82(1) and 83 (1) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Articles 82(1) and 83(1) TFEU, in conjunction with Article 218(9) TFEU.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 82(1) and 83(1) in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Council of Europe Convention on Cybercrime ('the Budapest Convention') entered into force on 1 July 2004.
- (2) The Member States are Members of the Council of Europe; all Member States except Ireland are Parties to the Budapest Convention. The Budapest Convention does not provide for the possibility for the Union to become a Party to that convention.
- (3) According to Article 37(1) of the Budapest Convention, the Committee of Ministers of the Council of Europe, after consulting with and obtaining the unanimous consent of the Contracting States to the Convention, may invite any State which is not a member of the Council of Europe, and which has not participated in its elaboration, to accede to the Budapest Convention.
- (4) The procedure followed in the Council of Europe sets out a consultation of the Parties to the Budapest Convention on decisions concerning requests for accession to that convention. The Parties' unanimous consent is to be obtained, via the Cybercrime Convention Committee (T-CY), before the Committee of Ministers of the Council of Europe decides on these matters. The decisions of the Committee of Ministers of the Council of Europe are prepared by a preparatory body referred to as the GR-J (Rapporteur Group on Legal Cooperation). In order to fully involve Parties that are not members of the Council of Europe in the procedure concerning the accession of other States to the Budapest Convention, it is usual practice that the Parties to the Budapest Convention are invited to raise any objection or question related to decisions concerning requests for accession at the stage of consultation of the Parties. The Committee of Ministers of the Council of Europe subsequently approves such decisions without debate in case of consensus.
- (5) Pursuant to that procedure, any State that is Party to the Budapest Convention can express an objection against a request for accession to that convention, thus effectively preventing a requesting State to join the Budapest Convention. The reasons for expressing an objection do not need to be explained.
- (6) Internal rules established informally in the Council of Europe typically allow the Parties to the Budapest Convention two months to express their objections to a request

to accede to that convention, after the Secretariat of the Cybercrime Convention Committee (T-CY) has circulated the request to all Parties. The very short timeframe between the moment State Parties receive a request for accession to the Budapest Convention and the moment they are required to take a decision on the matter can put at risk the timely preparation and adoption by the Council of a Decision on the Union's position pursuant to Article 218(9) of the Treaty.

- (7) It is appropriate to establish the position to be taken on the Union's behalf in the Committee of Ministers of the Council of Europe and the Cybercrime Convention Committee (T-CY) regarding requests for accession to the Budapest Convention as that convention covers matters of Union competence.
- (8) In the light of the short period of time that is available between receiving an accession request and the decision to be taken on that request by the Committee of Ministers of the Council of Europe and the Cybercrime Convention Committee (T-CY), an efficient procedure and the objectives and criteria to be applied should be put in place in order to establish the position to be taken on the Union's behalf with regard to requests for accession to the Budapest Convention, without prejudice to the rights and obligations of Member States as Parties to the Budapest Convention.
- (9) The position to be taken on the Union's behalf should be based on a document submitted by the Commission to the Council in due time to allow for discussion and approval. The Commission should prepare this document based on the objectives and criteria set out in the Annex and should take into account the materials provided by the Council of Europe, as well as the information provided by the European Union Agency for Law Enforcement Cooperation (Europol) and the European Union Agency for Criminal Justice Cooperation (Eurojust), where applicable.
- (10) The Commission should endeavour to start preparing such document as soon as it receives confirmation from the Secretariat of the Cybercrime Convention Committee (T-CY) that a request for accession has been received to allow also for any appropriate consultations in the Council. The Commission's document should indicate if the Member States, on behalf of the Union, are invited to support or to object against a request for accession from a State that is not a Party to the Budapest Convention, thus expressing a position on whether the Council of Europe may send an invitation to accede to the Budapest Convention to that State, and should be submitted in due time so as to allow for discussion and approval. Based on that Commission document, the Council should establish the Union's position as regards requests for accession to the Budapest Convention.
- (11) The position to be taken on the Union's behalf as regards requests for accession to the Budapest Convention is to be expressed by the Member States of the Union that are Parties to the Budapest Convention in the Cybercrime Convention Committee (T-CY), acting jointly in the interest of the Union, and by the Member States of the Union that are members of the Council of Europe in the Committee of Ministers of the Council of Europe and its preparatory bodies, acting jointly in the interest of the Union.
- (12) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (13) [In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed

to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified [, by letter of ...] its wish to take part in the adoption and application of this Decision]. OR

[In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Decision and is not bound by it or subject to its application.]

- (14) This Decision is without prejudice to the possibility for the Council to adopt, upon a Commission proposal, decisions based on Article 218(9) of TFEU establishing the position to be taken on the Union's behalf within the Council of Europe, in particular in areas falling outside the scope of this Decision, including where the shared competence of the Union has not yet been exercised.
- (15) For the purposes of the implementation of this Decision, Member States and the Commission act in close cooperation in accordance with their duty of sincere cooperation,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the Union in the Cybercrime Convention Committee (T-CY) and in the Committee of Ministers of the Council of Europe and its preparatory bodies, when those bodies are called upon to adopt decisions with regard to requests for accession to the Budapest Convention by States that are not yet Party to that convention shall be established in accordance with the procedure set out in Article 2 of this Decision and the objectives and criteria set out in the Annex attached to this Decision.

Article 2

1. Where the Cybercrime Convention Committee (T-CY) is consulted, in accordance with Article 37 of the Budapest Convention, in conjunction with the adoption by the Committee of Ministers of the Council of Europe of a decision with regard to requests for accession to the Budapest Convention by States as referred to in Article 1, the Commission shall, in due time before the end of that consultation, submit to the Council, for discussion and approval, a document setting out the draft position to be taken on the Union's behalf as referred to in Article 1.

2. The documents submitted by the Commission pursuant to paragraph 1 shall be based on the objectives and criteria set in the Annex to this Decision and take into account all relevant information and materials provided by the Council of Europe ahead of any deliberations and, as appropriate, any information provided by the European Union Agency for Law Enforcement Cooperation (Europol) and the European Union Agency for Criminal Justice Cooperation (Eurojust).

3. The position to be taken on the Union's behalf as referred to in Article 1 shall be expressed by the Member States of the Union that are Parties to the Budapest Convention in the Cybercrime Convention Committee (T-CY), acting jointly in the interest of the Union, and by the Member States of the Union that are members of the Council of Europe in the Committee of Ministers of the Council of Europe and its preparatory bodies, acting jointly in the interest of the Union.

Article 3

This Decision is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the Council
The President