

Brussels, 27 April 2022

CCBE Open letter on the signature and ratification of the Second additional protocol of the Budapest Convention

To whom it may concern,

On 17 November 2021, the Committee of Ministers of the Council of Europe adopted the 2nd additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence (hereafter “the Protocol”), the so-called Budapest Convention. On 25 November 2021, the European Commission presented two proposals for a Council decision on the signature and on the ratification of the Protocol by Member States in the interest of the EU.

The CCBE recalls that on 8 November 2019 it adopted comments on the draft 2nd additional Protocol to the Budapest Convention¹. The CCBE reiterated its 2019 comments in April 2021. CCBE comments were shared with the Cybercrime Convention Committee which prepared the Protocol.

In particular, the CCBE made the following recommendations regarding the establishment of direct cooperation instruments for international production orders concerning electronic evidence, urging for the establishment of minimum requirements in the Protocol:

- **Establish a general prior judicial review mechanism including a framework for the protection of legal professional privilege and professional secrecy.**
- **Ensure that following a production order, data will be transferred to the requesting (third) country only after notification had been given to a competent and independent Member State authority.**
- **Ensure that the addressed service provider which is processing the requested data is informed by the competent Member State authority about existing legal remedies.**
- Ensure **sufficient safeguards and grounds for refusal** to execute international production orders, including the **absence of double criminality or the fact that the requested data are covered by professional secrecy/legal professional privilege**. The latter should be stated explicitly and constitute an absolute ground for refusal to execute an order.
- Ensure that the imposition of **confidentiality restrictions on production orders must be subject to the approval of an independent judicial authority and in each case be duly motivated and justified** by the issuing authority on the basis of meaningful and documented assessments.
- Ensure that **confidentiality restrictions do not continue any longer than is strictly necessary**. When confidentiality restrictions cease, the data subjects should be informed and have available to them appropriate legal remedies.

¹ CCBE written comments on the draft 2nd Additional Protocol to the Convention on Cybercrime (8 November 2019), which are themselves based on the CCBE recommendations on the establishment of international rules for cross border access to e-evidence (28 February 2019).

- Ensure that **suspected or accused persons, or their lawyers are able to request the issuing of international production or preservation orders in an equally efficient way as is possible for law enforcement authorities**, so as to ensure the observance of the principle of equality of arms between the prosecution and defence, without which the defendant is placed at a significant disadvantage.

On 25 November 2021, the European Commission presented two proposals for a Council decision authorising Member States to sign, on one hand, and ratify, on the other hand, in the interest of the EU, the Protocol². On 20 January 2022, the European Data Protection Supervisor (“EDPS”) adopted its Opinion 1/2022 on the two proposals³. **The CCBE supports the conclusions of the EDPS but believes that EU Institutions shall go further to preserve the fundamental rights guaranteed by EU Law.**

Concerning the reservations, declarations and notifications

In its proposals, the Commission proposed a common EU approach regarding the possibility for Member States to avail themselves of certain reservations, and, to make declarations, notifications and communications in relation to certain articles of the Protocol. **In this regard, the CCBE considers that Member States shall :**

- **make the declaration pursuant to *Article 7, paragraph 2, point b* of the Protocol indicating that orders issued to service providers in their territory must be issued by, or under the supervision of, a prosecutor or other judicial authority, or otherwise be issued under independent supervision, as proposed by the Commission;**
- **make the notification pursuant to *Article 7, paragraph 5, point a* of the Protocol providing that when an order is issued under Article 7, paragraph 1, to a service provider in their territory, it requires simultaneous notification of the order, supplemental information and a summary of the facts related to the investigation or proceeding to their authorities, as proposed by the Commission ; Such authorities should be independent judicial authorities ; Furthermore, with regard to *Article 7, paragraph 5, points b to e*, Member States shall designate a judicial authority, to be consulted by service providers prior to disclosure, which may instruct service providers not to disclose the subscriber information;**
- **make the reservations pursuant to *Article 7, paragraph 9, point b* of the Protocol permitting Parties to reserve the right not to apply the Article 7 on disclosure of subscriber data by service providers in particular if disclosure of certain types of access numbers under this article would be inconsistent with the fundamental principles of their domestic legal system, contrary to the proposal of the Commission⁴;**
- **make the declaration pursuant to *Article 8, paragraph 4*, providing that additional supporting information is required to give effect to orders under Article 8, paragraph 1.**

Preliminary finalisation of EU law on access to e-evidence

In any case, **the CCBE considers that the signature and ratification of the Protocol shall not take place before the EU adopts its own legislation on access to electronic evidence** (the “e-evidence proposal”, which is currently under negotiations between the Council of the EU and the European Parliament.

² COM(2021) 718 final and COM(2021) 719 final, and their Annexes, 25 November 2021.

³ Opinion 1/2022 on the two Proposals for Council Decisions authorising Member States to sign and to ratify, in the interest of the European union, the Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence, 20 January 2022.

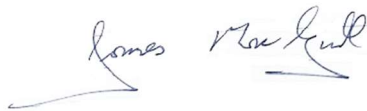
⁴ See the EDPS Opinion 1/2022.

Member States shall not apply an International instrument which may, eventually, contradict an EU legislation providing for higher standards⁵.

Requesting the opinion of the Court of Justice

Furthermore, according to article **218(11) TFEU**, “A Member State, the European Parliament, the Council or the Commission may obtain **the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties**. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised”. **According to the CCBE, the opinion of the Court of Justice on the compatibility of the 2nd additional protocol of the Budapest Convention with the EU Treaties shall be obtained in order to ensure the respect of fundamental rights, freedoms and general principles of Union law**. Indeed, while the European Commission, which represented the EU in the negotiations, states in its proposals that the Protocol respect EU Law and fundamental rights safeguarded by the treaties, precising that it took into account the Opinion and Statements made by the EDPS and the EDPB, the CCBE considers, on the contrary, that the Protocol lacks the minimum requirements mentioned above. In this regards, at the end of the consultation period, the EDPB raised that the provisions of the Protocol (Article 14) should be carefully assessed to ensure that the level of protection of personal data guaranteed under Union law is not undermined⁶. **Therefore, the CCBE invites the Member States, the European Parliament, the Council or the Commission to request the opinion of the Court of Justice on the compatibility of the Protocol with EU Law.**

Yours sincerely,



James MacGuill SC
President

⁵ See CCBE position on the Commission proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, 19 October 2018.

⁶ EDPB contribution to the 6th round of consultations on the draft Second Additional Protocol to the Council of Europe Budapest Convention on Cybercrime Brussels, 4 May 2021.