

The provisions of the Convention on Cybercrime and their implementation in practice



*Cristina Schulman - Legal Adviser
Ministry of Justice - Romania*

C h a l l e n g e s

- transnational character of computer crimes
- anonymity and high speed at which crimes can be committed
- lack of appropriate legislation on cybercrime
- insufficient legal powers for investigation and access to computer systems
- inapplicability of seizure powers to intangibles such as computer data
- lack of harmonization between the different national procedural laws concerning the investigation of computer crimes
- lack of specialised personnel and equipment

The Convention aims:

- Harmonize the domestic criminal substantive law elements of offences and related provisions in the area of cybercrime
- Provide for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system
- Establish a fast and effective framework for international cooperation

Art 23 of the Convention: General principles on international cooperation

- Art 23 General principles on international cooperation
- Art 24 Principles related to extradition
- Art 25 Principles related to mutual legal assistance
- Art 26 Spontaneous information
- Art 27 MLA in the absence of applicable international instruments
- Art 28 Confidentiality and limitation on use

General principles

- International co-operation will be provided “to the widest extent possible
- Co-operation is to be extended to all criminal offences related to computer systems and data as well as to the collection of evidence in electronic form
- Co-operation in accordance with Chapter III and applying the relevant international agreements on international co-operation in criminal matters, arrangements agreed to on the basis of uniform or reciprocal legislation, and domestic laws

Art 24 of the Convention: Extradition

- the criminal offences established in accordance with Articles 2 -11 are to be extraditable
- criminal offences shall be deemed to be included as extraditable offences in any extradition existing treaty and Parties will include such offences as extraditable offences in any future extradition treaty
- if a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any criminal offence referred to in paragraph 1 of this article
- Parties that do not make extradition conditional on the existence of a treaty shall recognise the criminal offences referred to in paragraph 1 of this article as extraditable offences between themselves.
- Extradite or prosecute
- authority responsible for making or receiving requests for extradition or provisional arrest in the absence of a treaty.

Art 25 of the Convention: General principles relating to mutual assistance

- assistance to the widest extent possible for the purpose 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.
- obligations set forth in Articles 27 through 35
- in urgent circumstances, make requests for mutual assistance or communications related thereto by expedited means of communication
- the requested Party shall not exercise the right to refuse mutual assistance in relation to the offences referred to in Articles 2 through 11 solely on the ground that the request concerns an offence which it considers a fiscal offence
- if the requested Party is permitted to make mutual assistance conditional upon the existence of dual criminality, that condition shall be deemed fulfilled, irrespective of whether its laws place the offence within the same category of offence or denominate the offence by the same terminology as the requesting Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under its laws

Art 26 of the Convention: Spontaneous information

- within the limits of its domestic law and without prior request, forward information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party
- 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

- Article 27 of the Convention - Procedures pertaining to mutual assistance requests in the absence of applicable international agreements

Art.28 - Confidentiality and limitation on use

- limited to that for which assistance is granted or it is not disseminated beyond law enforcement officials
- applies where there is no mutual assistance treaty, or arrangement on the basis of uniform or reciprocal legislation in force
- 2 conditions:
 - kept confidential where the request for mutual assistance could not be complied with in the absence of such condition
 - not be used for investigations or proceedings other than those stated in the request with 2 exceptions:
 - the evidence is exculpatory to an accused person
 - it is intended for use at trial, normally a public proceeding
- inform that cannot comply
- require explanations

Section 2 - Specific provisions

- Art. 29 - Expedited preservation of stored computer data
- Art. 30 - Expedited disclosure of preserved traffic data
- Art. 31- Mutual assistance regarding accessing of stored computer data
- Art. 32 - Trans-border access to stored computer data with consent or where publicly available
- Art. 33 - Mutual assistance in the real-time collection of traffic data
- Art. 34 - Mutual assistance regarding the interception of content data

Art. 29 - Expedited preservation of stored computer data

- A Party requests for the expeditious preservation of data stored in the territory of the requested Party by means of a computer system
- contents of a request:
 - a. the authority
 - b. the offence subject of the criminal investigation or proceedings and a brief summary of the facts
 - c. the stored computer data to be preserved and its relationship to the offence
 - d. information identifying the custodian of the stored computer data or the location of the computer system
 - e. the necessity of the preservation;
 - f. the Party intends to submit a request for mutual assistance for the search or similar access, seizure or similar securing, or disclosure of the stored computer data.

Art. 29 - Expedited preservation of stored computer data

- the principle that dual criminality shall not be required
- reserve the right to refuse to preserve where it has reasons to believe that at the time of disclosure the condition of dual criminality cannot be met
- request for preservation may only be refused if:
 - a the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence, or
 - b the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests
- Inform about the risk that will threaten the confidentiality of, or otherwise prejudice, the requesting Party's investigation
- held for at least 60 days

Article 30 – Expedited disclosure of preserved traffic data

- a service provider in another State was involved in the transmission of the communication
- disclose to the requesting Party a sufficient amount of traffic data to identify that service provider and the path through which the communication was transmitted
- Disclosure of traffic data can be refused:
 - a the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence; or
 - b the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests

Article 31 - Mutual assistance regarding accessing of stored computer data

- request to search or similarly access, seize or similarly secure, and disclose data stored by means of a computer system, including data that has been preserved pursuant to Article 29
- terms and conditions for providing such co-operation should be those set forth in applicable treaties, arrangements and domestic laws governing mutual legal assistance in criminal matters
- on an expedited basis where
 - (1) there are grounds to believe that relevant data is particularly vulnerable to loss or modification, or
 - (2) otherwise where such treaties, arrangements or laws so provide

Article 32 – Trans-border access to stored computer data with consent or where publicly available

- A Party may, without the authorisation of another Party:
 - a access publicly available (open source) stored computer data, regardless of where the data is located geographically; or
 - b access or receive, through a computer system in its territory, stored computer data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system

Article 33 –Mutual assistance in the real-time collection of traffic data

- each Party is under the obligation to collect traffic data in real time for another Party
- the terms and conditions by which such co-operation is to be provided are set forth in applicable treaties, arrangements and laws governing mutual legal assistance in criminal matters
- assistance at least with respect to criminal offences for which real-time collection of traffic data would be available in a similar domestic case

Article 34 –Mutual assistance regarding the interception of content data

- provide mutual assistance in the real-time collection or recording of content data of specified communications transmitted by means of a computer system
- to the extent permitted under their applicable treaties and domestic laws

Art 35 of the Convention: 24/7 Network

Each Party shall designate a point of contact available on a twenty-four hour, seven-day-a-week basis, in order to ensure the provision of immediate assistance for the purpose 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. Such assistance shall include facilitating, or, if permitted by its domestic law and practice, directly carrying out the following measures:

- a the provision of technical advice;
- b the preservation of data pursuant to Articles 29 and 30;
- c the collection of evidence, the provision of legal information, and locating of suspects.

CONCLUSIONS

The fight against cybercrime requires increased, rapid, and well-function international cooperation in criminal matters

Effective combating of crimes committed by means of a computer system and effective collection of evidence in electronic form require a very rapid response

Mutual assistance regarding provisional measures or regarding investigative powers might be essential for an investigation

Convention - contains provisions that are meant to establish the framework for a expedited and reliable international cooperation



THANK YOU FOR YOUR
ATTENTION

cschulman@just.ro