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**NOTE**

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From:	General Secretariat of the Council
To:	Delegations
Subject:	UN Convention on Cybercrime - Preparation of the 4th session of the UN AHC - European Commission non-paper

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Delegations will find in annex the non-paper from the Commission on the above-mentioned subject.

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### **EUROPEAN COMMISSION NON-PAPER**

In the context of the negotiations for a potential Convention on Cybercrime under the auspices of the UN, the preparations for the next session to take place in January are already starting.

Specifically, the Chair of the Ad-Hoc Committee (AHC) indicated that she will share with the EU and with the other key players an advanced copy of her draft negotiating document for the upcoming fourth session in Vienna, probably around early October, in order to gather preliminary feedback on that draft. The Chair intends to have the negotiating document ready by mid-November.

As the EU will have to react quickly once it receives the draft, the European Commission would like to anticipate some of the issues that may arise and already provide an opportunity for discussion with and input from the Member States, so as to be better prepared. To that end, the present non-paper outlines the main issues for the first three chapters to be discussed in January 2023 in Vienna and the options that the Chair may include, based on bilateral exchanges with the Chair.

In terms of the overall approach that the Chair intends to take, it is likely that she will not make use of bracketed blocks of text but rather include a range of options where UN Member States have diverging positions. The Chair also seems keen to limit the number of options and may try to disregard proposals made by some UN Member States, when those proposals have not been supported by other Members.



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In terms of the objectives for the EU and its Member States, it is important that our key positions are adequately reflected in the draft, at least as an option. At the same time, it will be difficult to refuse text that is not aligned with the EU position as long as it is only presented as an option, so the feedback to the informal consultation, where there is a need to push back against certain aspects, should focus on core text provisions that cross EU red lines.

This non-paper does not constitute the formal position of the EU and its Member States for the fourth session of the negotiations. It does not prejudge the possibility for the EU and its Member States to reject part of the text, to amend it or to add new provisions during the fourth session itself.

## 1. General provisions

### a) Scope of cooperation on electronic evidence

- Issue: three main options can be identified:
  - Cooperation limited to crimes defined in the convention (EU)
  - Cooperation extended to all serious crimes (US)
  - Cooperation extended to all crimes (majority of other UNMS)
- The Chair may decide to reflect the three options in her draft or opt for one only (most likely cooperation extended to all serious crimes in that case).
- *Question: What arguments should be used by the EU to ensure that all three options are adequately reflected in the draft at this stage if this is not the case (notably in view of the arguments used by some UN members that an extended scope of cooperation on e-evidence would limit the discussion on the definition of crimes)?*

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## 2. Criminalisation

### a) Sexual exploitation of children online

- Issue: virtually all UN Member States who are engaged in the process have proposed to include in the scope of the Convention the sexual exploitation of children online, except the EU and its Member States. Some have also proposed to include grooming.
- It is therefore likely that the Chair will include a provision related to sexual exploitation of children online (i.e. not as an option).
- *Question: Should the EU show openness to including sexual exploitation of children online in the scope of the future convention (i.e. not as an option)?*

### b) Infringement of copyright and computer related fraud and forgery

- Issue: many delegations have made a proposal in respect of those cyber-enabled crimes that are included in the Budapest Convention, but a number of delegations have also expressed some concerns (notably the diverging domestic legal frameworks regarding offences related to fraud and forgery).
- The Chair is likely to include provisions in relation to those crimes, but only as an option.
- *Question: What in the view of Member States are the main arguments in favour of or against having those crimes in the draft, if they are in line with the provisions of the Budapest Convention?*

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c) Other cyber-enabled crimes (including terrorism-related offences)

- Issue: several UN Member States have proposed including a number of other crimes. Some of those crimes, such as terrorism-related offences or hate speech, have been supported by a significant number of delegations but opposed by at least as many UN Member States.
- It is likely that the Chair will include provisions in relation to those crimes, but only as an option.
- *Question 1: Do Member States see any arguments in favour of including any of the proposed crimes in the text?*
- *Question 2: Would Member States see the inclusion of some of these crimes, such as terrorism-related offences or hate speech, as crossing a red line for the EU and its Member States?*

**3. Procedural measures and law enforcement**

a) Conditions and safeguards

- Issue: a significant number of UN Member States have included a provision on conditions and safeguards inspired directly by Article 15 of the Budapest Convention.
- It is therefore very likely that the Chair will include at least as an option an article on conditions and safeguards but as several versions have been proposed by the delegations, it is unlikely that the Chair's proposal will fully reflect the proposal submitted on behalf of the EU and its Member States.
- *Question: What should be the minimal conditions and safeguards to be included in the draft at this stage?*

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b) Real-time collection of traffic data and interception of content data and expedited preservation and partial disclosure of traffic data

- Issue: many UN Member States have included provisions inspired from Article 17, 20 and 21 of the Budapest Convention in their written contributions.
- The Chair therefore might include provisions in relation to those procedural powers, perhaps as an option.
- *Question: What in the view of Member States would be the arguments in favour of or against including such provisions?*

c) Freezing, seizure and confiscation of property

- Issue: some UN Member States (Colombia, El Salvador, Ghana, US, RSA) have proposed to include provisions inspired from the UN Convention against Transnational Organised Crime (UNTOC) or the UN Convention against Corruption (UNCAC).
- The Chair may include those proposals but in that case, most likely as an option. That being said, as there is agreed language in existing UN conventions in relation to those crimes, the Chair could also include provisions in the core part of the text.
- *Question: Should those provisions appear only as an option or would it be acceptable to have them as core part of the draft if they are in line with the provisions of UNTOC/UNCAC?*

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d) Recovery, disposal and return of confiscated proceeds of crime or property / assets

- Issue: some UN Member States (El Salvador, US, RSA) have proposed to include provisions inspired from UNTOC.
- The Chair may include those proposals but in that case, most likely as an option. That being said, as there is agreed language in existing UN convention in relation to those crimes, the Chair could also include provisions in the core part of the text.
- *Question: Should those provisions appear only as an option or would it be acceptable to have them as the core part of the draft if they are in line with the provisions of UNTOC?*

e) Other measures

- Issue: several other measures (protection of witnesses, assistance to and protection of victims, etc.) have been proposed by some UN Member States.
  - The Chair may include those proposals but in that case, most likely as an option. Again, the possibility remains that (some of) these measures could be included in the core part of the draft.
  - *Question: Should those provisions appear only as an option or would it be acceptable to have them as core part of the draft?*
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