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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	7860/22
Subject:	Recommendation for a Council Decision authorising the negotiations for a comprehensive international convention on countering the use of information and communications technologies for criminal purposes

For the explanatory memorandum to this, delegations are referred to document 7860/22.

Recommendation for a

COUNCIL DECISION

No ...

of

authorising the entering into negotiations on behalf of the European Union for the conclusion of a comprehensive international convention on countering the use of information and communications technologies for criminal purposes

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular **Article 82 (1) and Article 83 (1), in conjunction with** Article 218(3) and (4) thereof,

Having regard to the Recommendation from the European Commission,

Whereas:

- (1) On 27 December 2019, the United Nations General Assembly adopted resolution 74/247 on countering the use of information and communications technologies for criminal purposes, deciding to establish an open-ended ad hoc intergovernmental committee of experts, representative of all regions, to elaborate a comprehensive international convention on countering “the use of information and communications technologies for criminal purposes”.¹ ~~The Union should participate in the negotiations on this convention.~~

¹ Resolution adopted by the General Assembly on 27 December 2019 on the report of the Third Committee (A/74/401)], Countering the use of information and communications technologies for criminal purposes, [A/RES/74/247](#). **The terms “the use of information and communications technologies for criminal purposes” have been added pending further discussion and decision by the UN ad hoc committee.**

- (2) The Union has adopted **a set of common** rules that ~~overlap with~~ **cover some but not all** several elements **likely** being considered for such a **that** convention. Those ~~common~~ rules include in particular a **comprehensive** set of instruments on substantive criminal law², on police and judicial cooperation in criminal matters³, on minimum standards of procedural rights⁴, as well as data protection and privacy safeguards⁵. ~~Future common rules~~ **In**

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- ² Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, [OJ L 335, 17.12.2011, p. 1–14](#); Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, [OJ L 218, 14.8.2013, p. 8–14](#); Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, PE/89/2018/REV/3, [OJ L 123, 10.5.2019, p. 18–29](#).
- ³ Council Act of 29.5.2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C197, 12.7.2000, p.1; Regulation (EU) 2018/1727 of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018; Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53; Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ L 162, 20.6.2002, p. 1; Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L328, 15.12.2009, p.42; Directive 2014/41/EU regarding the European Investigation Order in criminal matters, OJ L130, 1.5.2014, p.1.
- ⁴ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1.

addition, legislation has already been proposed and discussed in associated domains⁶
and should also be taken into account to the extent that is is legally certain, does not
preempt autonomous decision making at Union level and has the aim of reinforcing the
effectiveness of the Union legal framework.

⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37–47, amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

⁶ Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, 17 April 2018, COM/2018/225 final; Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, 17 April 2018, COM/2018/226 final

- (3) Therefore, a new **comprehensive** international convention on countering the use of information and communications technologies for criminal purposes may affect ~~common~~ **several** Union rules or alter their scope.
- (4) In order to protect the integrity of Union law and to ensure that the rules of international law and Union law remain consistent, it is necessary that, **alongside Member States, the Commission** ~~Union~~ participate, **for matters falling within the Union competence, as defined by the Treaties, and in respect of which the Union has adopted rules**, in the negotiations on a new **comprehensive** international convention on countering the use of information and communications technologies for criminal purposes.
- (5) **On 22 March 2021, the Council adopted conclusions on the EU cybersecurity strategy for the digital decade.⁷ In these conclusions, and in particular its paragraph 5, point 23 on the negotiations under way at the United Nations on cybercrime, the Council recalls that these negotiations relate to the Common Foreign and Security Policy, by stressing it "SUPPORTS and PROMOTES the Budapest Convention on Cybercrime and the ongoing work on the Second Additional Protocol to this Convention. Furthermore, continues to engage in multilateral exchanges on cybercrime, including in processes related to the Council of Europe, the United Nations Office on Drugs and Crime (UNODC) and the Commission on Crime Prevention and Criminal Justice (CCPCJ), to ensure an enhanced international cooperation to counter cybercrime, including the exchange of best practices and technical knowledge and support for capacity building, while respecting, promoting and protecting human rights and fundamental freedoms;**

⁷ [COM\(2021\) 799 final \(8.12.2021\).](#)

- (6) **This Decision should be without prejudice to the division of competences between the Union and its Member States as defined by the Treaties, to the participation of Member States in the negotiations and, to any subsequent decision to conclude, sign or ratify the convention.**
- (7) **The negotiation directives annexed to this decision should be revised and further developed as appropriate depending on the evolution of the negotiations.**
- (8) **In accordance with the principle of sincere cooperation, the Commission and the Member States should cooperate closely during the negotiation process, including through regular contacts with the Member States' technical experts and their representatives in New-York and Vienna.**
- (9) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council and delivered an opinion on ...
- (10) ~~[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.]~~

~~[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 has notified [, by its letter of ... ,] its wish to take part in the adoption and application of this Decision.]

- (11) 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.

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, **as regards matters falling within the Union's competence, as defined by the Treaties, and in respect of which the Union has adopted rules**, a comprehensive convention on countering the use of information and communications technologies for criminal purposes.

Article 2

The negotiating directives are set out in the ~~Annex~~ **Addendum and shall be revised and further developed as appropriate depending on the evolution of the negotiations.**

Article 3

The negotiations shall be conducted in **close** consultation with a ~~special committee to be designated by the Council~~ **the Working Party on Judicial Cooperation in Criminal Matters which is hereby designated as the special committee with the meaning of article 218 (4) TFEU.**

The Commission shall regularly report to the special committee on the steps undertaken pursuant to this Decision and consult it on a regular basis.

Whenever so requested by the Council, the Commission shall report to the Council on the conduct and the outcome of the negotiations, including in writing.

To the extent that the subject matter of the negotiations falls within the competences of both the Union and its Member States, the Commission and the Member States should cooperate closely during the negotiating process, with a view to ensuring unity in the international representation of the Union and its Member States.

Article 4

This Decision and its ~~attachment~~ **addendum** will be made public immediately after their adoption.

Article 5

This Decision is addressed to the Commission.

Done at Brussels,

For the Council

The President
