



**Intervention on Procedural Measures:
Fourth Session of the Ad Hoc Committee
to Elaborate a Comprehensive
International Convention on Countering
the Use of ICT for Criminal Purposes**

Chair, Excellencies, distinguished delegates, good afternoon.

We support the statements made by ICC as a whole and Microsoft and we highlight our [written statement](#) for the fourth session given that three minutes only allows us to partially address our concerns.

The procedural measures chapter is a major opportunity to foster public-private sector collaboration to address cybercrime. For that opportunity to be seized, and to avoid unintended negative consequences to commerce and human rights, we believe significant amendments are required.

- 1. The convention should embed principles of proportionality and necessity regarding data collection, retention, and production provisions.** It should also create a right of refusal to cooperate – particularly when the protection of human rights might be at stake - and it should recognise that not all types of access are technically possible. These last two elements would sit well in Article 42.
- 2. The Convention should provide for custodial requirements on State Parties transmitting, or holding, personal data in Article 42.** While this introduces complexity, it is of fundamental importance to ensuring effective cooperation. Systematic failure by a party over time to effectively protect such data should be grounds for refusal of future requests as well.
- 3. The convention should avoid establishing conflicting rules that raise barriers for international criminal cooperation, and explicitly recognise and address conflicts of law situations.** This is not a theoretical problem; it is a major obstacle the private sector faces routinely. The convention needs to provide that a request can be denied on such grounds, referring the requesting state to the jurisdiction where the legal problem has arisen. This could be provided through amendments to Article 42 as well.

Madame Chair we have several specific initial comments additional to those above:

Article 40 should be amended to delete paragraph 2(e) due to the extraterritorial issues that many other delegations have also referenced, and paragraph five amended to be congruent with the Budapest Convention provision on the same subject.

Article 41 should make clear that the scope is for serious crimes, not all crimes, and that it applies only to the crimes in this Convention. We understand the interest of some member-states to extend this to other crimes, but we see that as deeply problematic given the other issues with respect to the current document.

Article 42 should be amended:

- To ensure that third parties to which requests for assistance are made may challenge those requests on the basis of legality, proportionality or necessity;
- To allow third parties to initiate a review of decisions made in relation to the immediately-previous point adjudicated independently of the organ of the State responsible for the initial decision;
- The right for custodians of data to disclose to the legal or natural persons that their data has been disclosed provided that doing so does not prejudice an ongoing investigation;
- An obligation on State Parties to address requests for data to the custodian of the data who is the proximate source and rights holder. This is consistent with the [Trusted Cloud Principles](#) and represents international best practices critical to maintaining trust in global data flows - and for requests to be successful.

Articles 43 and 44 should be amended to set a 90 day limit on preservation of data, renewable for a maximum total of one year.

Given the absence of robust safeguard provisions, the very expansive nature of the crimes in the text, the lack of clarity on the level of intent with respect to those crimes, and the other issues we've raised **we agree with the many other delegations who have said they cannot support inclusion of Articles 47 and 48, the provisions on real-time access to content and traffic data.**

Madame Chair, distinguished delegates, thank you for your attention.