Eticas Foundation's Oral Intervention on informal group D on Articles 40 and 47-49 Delivered By Thomas Lohninger on behalf of Eticas Foundation Fourth Session - 9 January to 20 January 2023

Honourable Co-facilitators,

Thank you for hosting this session and taking the perspective of the multistakeholders into account in this important process.

Article 40: We are concerned about the overly broad scope of this provision and the potential it creates for extra-territorial application of law enforcement measures. In this regard, the provision might also be contradicting with Article 4 on the protection of sovereignty.

Article 47: Our recommendation on this provision on real-time collection of traffic data is to delete it.
Blanket, indiscriminate measures that provide for generalised interception, storage or retention of the content of communications or accompanying metadata have been found to fail to satisfy the principle of necessity and proportionality. We would point to several high court decisions which declared such measures to be incompatible with human rights law. (ECtHR, ECJ, UN human rights experts). Particularly the cross-border dimension of this provision is a drastic shift on a global level.

If retained:

para 2: We recommend adding a reference to only „such data associated with specified information in the territory of that State Party" (as per para. 1) to avoid any risks that this provision may be interpreted to justify the imposition of indiscriminate data retention obligations on service providers. It is well established that blanked, indiscriminate data retention is illegal according to high-court jurisprudence and this treaty shouldn't be seen as mandating such a surveillance practice.

para 3: This provision can be read a gag-orders for service providers. Such limitations can have a negative effect on the protection of rights of the affected person and the possibility to seek redress against overly broad surveillance orders.

Article 48: We recommend deleting this provision.
The same arguments as on Article 47 apply to this provision. Furthermore are all those concerns exasperated because content data will also undermine the essence of the rights of affected persons. Here one has to ask themselves if the negotiations want to risk implementation of this treaty to see wide-spread annulment by constitutional and other high courts all around the world?

If retained:
Para 2 & para 3: same concerns as for Art. 47

para 1: limited to investigation of crimes under this Convention
We recommend clarifying that the interception of content data is only conducted when „there is reasonable belief that a criminal offense was committed or is being committed".

Article 49: We recommend deleting this provision, as it should be up to national criminal law to set out rules and domestic courts to decide on admission of evidence!

If retained:

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- The provision currently has a very broad wording with no meaningful safeguards to ensure that the evidence collected and admitted complies with international human rights law. This also has to include the right to a fair trial and the right to privacy.
- There are ways in which some states extract evidence from personal devices and use such data which is very worrying. These extraction methods can apply to suspects, witnesses or even victims of a crime (often without their knowledge and consent). In this regard, just to highlight the most prominent case of the Pegasus spyware. This provision needs to be clarified to prevent admissibility of information obtained by such means.

Thank you and we look forward to further discussion!

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