

# **Criminal justice access to evidence in the cloud**

## **Issues and options currently under consideration by the Cloud Evidence Group**

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# **Context:** Criminal justice access to evidence in the cloud – options and issues

**T-CY:**

**How to ensure the rule of law in cyberspace through more efficient access to electronic evidence for criminal justice purposes?**

- **Assessment of mutual legal assistance provisions ► 24 recommendations to make MLA more efficient (Dec 2014)**
- **Transborder access to data (T-CY Transborder Group 2012-2014)**
  - **Clarification of Article 32b Budapest Convention ► Guidance Note (Dec 2014)**
  - **Additional options for transborder access ► necessary but politically not feasible in 2014**
- **T-CY Cloud Evidence Group (2015-2016): issues and options (Feb 2016 / prov.)**



# Cloud Evidence Group: Issues identified

- **Differentiating subscriber versus traffic versus content data**
- **Effectiveness of MLA**
- **Loss of location and transborder access jungle**
- **Provider present or offering a service in the territory of a Party**
- **Voluntary disclosure by US-providers**
- **Emergency procedures**
- **Data protection**



# Issue: Subscriber vs traffic vs content data

- **Subscriber information most often required in criminal investigations.**
- **Less privacy-sensitive than traffic or content data. Rules for access to subscriber information not harmonised.**
- **Subscriber information held by service providers and obtained through production orders. Lesser interference in rights than search and seizure.**



# Issue: Mutual legal assistance

- **Mutual legal assistance remains a primary means to obtain electronic evidence for criminal justice purposes**
- **MLA needs to be made more efficient**
- **Often subscriber information or traffic data needed first to substantiate or address an MLA request**
- **MLA often not feasible to secure volatile evidence in unknown or multiple jurisdictions**



# Issue: “Loss of location”

- In “loss of location” situations (unknown source of attack, servers in multiple or changing locations, live forensics, etc.) MLA not feasible ► principle of territoriality not always applicable
- Direct transborder access to data may be necessary
- What conditions and safeguards?
- Article 32b Budapest Convention limited ► Absence of international legal framework for lawful transborder access
- Unilateral solutions by governments / jungle ► risks to rights of individuals and state to state relations



## **Issue: A service provider offering a service on the territory of a State**

- **When is a service provider**
  - **“present” in the territory of a State?**
  - **“offering a service” in the territory of a State?**
- **Therefore, when is a service provider subject to a domestic production or other type of coercive order?**
- **If domestic production orders for subscriber information ► reduction of pressure on MLA system**



## **Issue: “Voluntary” disclosure by private sector entities**

- **More than 100,000 requests/year by European States to major US providers**
- **Disclosure of subscriber or traffic data (ca. 60%)**
- **Providers decide whether or not to respond to lawful requests and whether to notify customers**
- **Provider policies/practices volatile**
- **Data protection concerns**
- **No disclosure by European providers**
- **No admissibility of data received in some States**
- ▶ **Clearer / more stable framework required**



	Requests for data sent to Apple, Facebook, Google, Microsoft, Twitter and Yahoo in 2014		
Parties	Received	Disclosure	%
Albania	24	7	29%
Armenia	11	2	18%
Australia	6 438	4,236	66%
Austria	246	73	30%
Azerbaijan	-	-	
Belgium	1,804	1,316	73%
Bosnia and Herzegovina	13	8	62%
Bulgaria	5	3	60%
Canada	850	477	56%
Croatia	45	34	76%
Cyprus	38	21	55%
Czech Republic	333	204	61%
Denmark	362	225	62%
Dominican Republic	54	30	56%
Estonia	35	19	54%
Finland	144	102	71%
France	21,772	12,863	59%
Georgia	1	0	0%
Germany	25,519	13,801	54%
Hungary	345	159	46%
Iceland	3	2	67%
Italy	9,365	4,620	49%
Japan	1,617	1,010	62%
Latvia	2	2	100%
Liechtenstein	5	1	20%
Lithuania	49	28	57%
Luxembourg	153	117	76%
Malta	377	197	52%
Mauritius	-	-	
Moldova	13	7	54%
Montenegro	7	1	14%

	Requests for data sent to Apple, Facebook, Google, Microsoft, Twitter and Yahoo in 2014		
Parties	Received	Disclosure	%
Netherlands	1,099	856	78%
Norway	363	238	65%
Panama	88	68	77%
Poland	1,747	550	31%
Portugal	2,223	1,356	61%
Romania	80	40	50%
Serbia	16	9	56%
Slovakia	107	36	34%
Slovenia	11	6	55%
Spain	4,462	2,391	54%
Sri Lanka	1	-	0%
Switzerland	462	266	58%
"The former Yugoslav Republic of Macedonia"	-	-	
Turkey	8,405	5,625	67%
Ukraine	8	2	25%
United Kingdom	20,127	13,894	69%
USA	80,703	63,147	78%
Total excluding USA	108,829	64,901	60%
Total including USA	189,532	128,048	68%



# Issue: “Voluntary” disclosure by private sector entities

**The six providers cooperate in a very inconsistent manner with different Parties. In terms of disclosure rates, for example:**

- **Google cooperates above average with Finland (83%), Netherlands (81%) and Japan (79%) but below average with Poland (29%) and Slovakia (8%) and not at all with Hungary (0%) or Turkey (0%).**
- **Microsoft on the other hands cooperates rather well with Hungary (83%) and Turkey (76%).**
- **Facebook also responds well to Hungary (83%) and Turkey (66%), but less to Poland (29%), Portugal (38%) and Spain (37%).**
- **Yahoo cooperates rather well with Australia (51%) but responds not at all to Netherlands, Norway, Portugal and Switzerland.**
- **Microsoft on the other hand cooperates very well with Netherlands (83%), Norway (82%), Portugal (85%) and Switzerland (74%).**
- **Twitter cooperates above average with Australia (58%), Japan (36%) and Norway (50%) but not at all with Turkey (0%) and below average with France (11%), Germany (16%) or Spain (12%).**



# Issue: Emergency procedures

- **Emergency procedures needed to obtain evidence located in foreign jurisdictions through**
  - **Mutual legal assistance****and through**
  - **Direct cooperation with a service provider**



# Issue: Data protection and other safeguards

- **Data protection requirements normally met if powers to obtain data defined in domestic criminal procedure law and/or MLA agreements**
- **MLA not always feasible**
- **Increasing “asymmetric” disclosure of data transborder**
  - **From LEA to service provider ► Permitted with conditions**
  - **From service provider to LEA ► Unclear legal basis**
    - **providers to assess lawfulness, legitimate interest**
    - **risk of being held liable** ■ **Confidentiality requirements**
- = Clearer framework for public to private to public disclosure transborder required**



# Cloud Evidence Group: Solutions

**Four options to be pursued in parallel:**

- 1. More efficient MLA**
- 2. Guidance Note on Article 18**
- 3. Cooperation with providers: practical measures**
- 4. Protocol to Budapest Convention**



# Option 1: More efficient MLA

- **Implement legal and practical measures**
  - ▶ **Recommendations 1 – 15 of T-CY assessment report on MLA at domestic levels**
    - More resources and training
    - Electronic transmission of requests
    - Streamlining of procedures
    - Etc.
- **Parties to establish emergency procedures for obtaining data in their MLA systems**
- **Parties to facilitate access to subscriber information in domestic legislation (full implementation of Article 18 Budapest Convention)**



## Option 2: Guidance Note on Article 18

### **Guidance Note on Article 18 Budapest Convention on production of subscriber information:**

- **Domestic production orders if a provider is in the territory of a Party even if data is stored in another jurisdiction (Article 18.1.a)**
- **Domestic production orders for subscriber information if a provider is NOT in the territory of a Party but is offering a service in the territory of the Party (Article 18.1.b)**





# Option 3: Cooperation with providers

Pending longer-term solutions:

**Practical measures to facilitate transborder cooperation between service providers and criminal justice authorities**

- Focus on disclosure of subscriber information upon lawful requests in specific criminal investigations
- Emergency situations
- Consideration of legitimate interests and data protection requirements

## In practice:

- ▶ Regular meetings between T-CY and providers (1 x year prior to a T-CY Plenary?)
- ▶ Online tool
  - Part A: Provider policies/procedures,
  - Part B: Legal basis and procedures for production orders in Parties
- ▶ Standard multi-language template for requests for subscriber information
- ▶ Support through capacity building programmes



# Option 4: Protocol to Budapest Convention

## **A. Provisions for more efficient MLA**

- International production orders or simplified MLA for subscriber information
- Direct cooperation between judicial authorities in MLA
- Joint investigations and joint investigation teams
- Requests in English
- Emergency procedures

## **B. Provisions for direct transborder cooperation with providers**

- Disclosure of data by LEA to a service provider abroad in specific situations
- Disclosure of subscriber information by service providers to LEA abroad with conditions and safeguards
- Direct preservation requests to providers abroad
- Admissibility of data obtained directly in domestic proceedings
- Emergency procedures



## Option 4 cont'd: Protocol to Budapest Convention

### **C. Framework and safeguards for transborder access to data**

- **Transborder access to data with lawfully obtained credentials**
- **Transborder access in good faith or in exigent circumstances**
- **The power of disposal as connecting legal factor**

### **D. Data protection**

- **Requirements for transfer transborder by LEA to a service provider abroad**
- **Requirements for transfer transborder by a service provider to LEA abroad**



# Issues and options: What next?

## **Agenda of Cloud Evidence Group**

- Meetings with providers (Brussels 25 April 2016) ✓
- Exchange of views with data protection organisations (May 2016) ✓
  
- Discussion at T-CY Plenary 24-25 May 2016
- Presentation of final recommendations to T-CY on 14-15 November 2016
- Octopus Conference, Strasbourg, 16-18 November 2016

## **Options proposed to be pursued in parallel**

1. Legal and practical measures for more efficient MLA
2. Guidance Note on Article 18 Budapest Convention
3. Practical measures to facilitate cooperation with service providers
4. Protocol to Budapest Convention

**Note:** Similar issues are also discussed within the European Union