

CTED discussions

**Challenges and good practices in international cooperation concerning digital evidence:
The work of the European Commission**

21/06/2017



Quick Background

9 June 2016 Council Conclusions:

- 1) Cooperation with service providers*
- 2) Mutual legal assistance*
- 3) Enforcement jurisdiction in cyberspace*

Commission work streams:

- 1) Practical improvements*
- 2) New solutions*

Deliverables:

- 1) December 2016 Progress Report*
- 2) May 2017 Non-Papers*

https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/e-evidence_en

Problem definition: Mutual Legal Assistance with 3rd countries

Concerns raised:

- *systematic use of MLA is resource consuming and complex and insufficiently transparent*

In the EU: EIO will improve formal cooperation between authorities of Member States, but has not been developed specifically for improving cross-border access to e-evidence.

Problem definition: Enforcement of jurisdiction in cyberspace

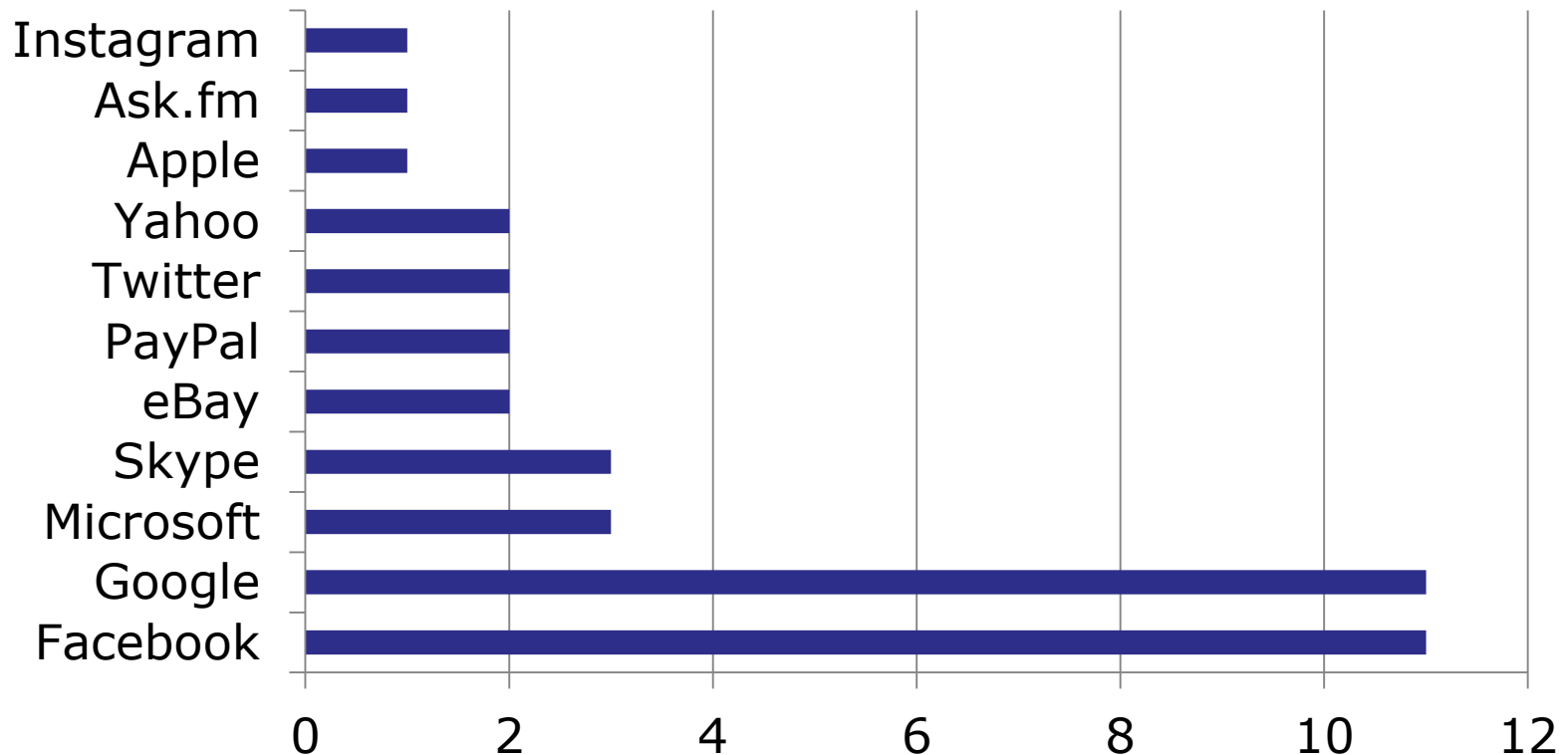
- *Varying conditions for LEAs and judicial authorities to use alternative mechanisms in certain circumstances (i.e. loss of location, when impossible to determine ISP responsible for storage or processing, etc.)*
- *Use of different connecting factors for investigatory measures and production orders (i.e. main establishment of a service provider, place where a service provider is offering services, etc.)*

Problem Definition - Cooperation with ISPs

- *Concerns raised:*
 - ***Lack of transparency***
 - ***Lack of reliability***
 - ***Lack of accountability on both sides***
 - ***Difficult to identify and contact the relevant service provider***
 - ***Dealing with different policies (categories of data, IP addresses, language issues...), unclear rules***
 - ***Service provider has to assess authenticity and legitimacy of request***
 - ***No equal treatment across Member States***
 - ***Admissibility***

Most requested service providers

13 MS responded



Timeframe

- *several days to 2-3 weeks*
- *Record low: 7 minutes for emergency request*
- *Record high: few months or never*

Practical measures

- ❖ **simplify cooperation between judicial authorities**
- ❖ **facilitate the dialogue between judicial authorities and internet service providers**

Simplify cooperation between judicial authorities

❖ **Within the EU, in the framework of the EIO**

- forms annexed to the EIO Directive in electronic and guidance
- secure platform : secure communication channel for digital exchanges of EIOs for electronic evidence and replies between EU judicial authorities (could be operational by the summer of 2019).

❖ **Between Member States' authorities and U.S. authorities**

- Regular technical dialogues with the U.S. Department of Justice
- Regular dialogues with the EU Delegation to the U.S. and liaison magistrates of Member States
- Providing opportunities for exchange of best practice and training for EU practitioners on relevant U.S. law and procedures, notably on the U.S. legal standard of probable cause.
- Online platform with the US to provide information on applicable rules and procedures to facilitate the creation of requests.

Facilitate dialogue

❖ **Side of Member States' authorities:**

- Single Points of Contact
- Standardisation and reduction of forms
- Developing training programmes and exchange of best practice for EU law enforcement and judicial authorities for cooperation with U.S.-based providers.

❖ **Side of service providers:**

- Single points of entry
- Streamlining policies
- Establishing an online information and support portal at EU level to provide support to online investigations, including information on applicable rules and procedures.

Legislative measures

❖ **Two focus areas:**

- investigative measures enabling authorities to request ("production request") or compel ("production order") a service provider in another Member State to disclose information about a user; and
- Measures to address cross-border effects of investigative measures directly executed by law enforcement authorities without any intermediary, allowing access to e-evidence through a device;

Production order/request

- ❖ **Production requests/orders addressed directly to service providers whose main seat is in another Member State,**
- ❖ **Respond to such requests/orders without going through a law enforcement/judicial intermediary in the other Member State.**
- ❖ **Where service providers are headquartered outside the EU, but provide services in the EU, obligation to appoint a legal representative in one of the EU Member States.**
- ❖ **Territoriality and reciprocity will be at heart of further discussion on :**
 - Scope, proceeding, enforceability, common conditions and minimum safeguards
 - The role and the responsibility of such legal representative

Direct Access

❖ **Context:**

- When location of data, infrastructure or a service provider cannot be established (often referred to as "loss of knowledge of location situations"), or
- where there is an immediate risk of losing data

❖ **Some Member States already provide for possibilities to access and in some cases copy the data directly from a computer system. An EU framework could define:**

- common EU conditions and minimum safeguards for such direct access in potential cross-border situations
- mitigating measures (notifications to other possibly affected countries...).

Key considerations

- territorial jurisdiction and addressing sovereignty issues,
- international comity,
- the protection of individuals' rights, in particular in criminal proceedings,
- the protection of fundamental rights such as data protection and privacy,
- avoiding the creation of additional conflicts of law,
- the possibility of instituting a procedure for dealing with conflicts of law,
- data categories and different treatment,
- reciprocity issues.

Council feedback and next steps

❖ June EU Council:

- ❖ Ministers endorsed implementation of practical measures
- ❖ Ministers asked for (swift) preparation of concrete legislative proposals

❖ Next Steps:

- ❖ Implementing practical measures: work plan
- ❖ Legislative proposals to be presented by early 2018

More information

https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/e-evidence_en

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