E-evidence and access to data in the cloud

Issues and options
under consideration by the Cloud Evidence Group of the Cybercrime Convention Committee

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

Budapest Convention on Cybercrime:

- 49 Parties + 17 States signatories or invited to accede = 66 States
- Follow up by Cybercrime Convention Committee (T-CY) = Committee of the Parties

T-CY: How to ensure the rule of law in cyberspace through more efficient access to 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.)

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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" on the territory of a State?
  - "offering a service" on the territory of a State?
- Therefore, when is a service provider subject to a <u>domestic</u> 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%
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%
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 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 in exceptional situations
  - From service provider to LEA ► Unclear legal basis ► providers to assess lawfulness, legitimate interest ► risk of being held liable

= Clearer framework for private to public disclosure transborder required

Option 1: More efficient MLA

- Implement legal and practical measures ► Recommendations 1 – 15 of T-CY assessment report on MLA at <u>domestic</u> 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 <u>domestic</u> 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

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

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

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

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 (23 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