

## REPORT OF OPEN PUBLIC CONSULTATION ON E-EVIDENCE

The public consultation was open to feedback from **any interested party** for a **12 week period**, from 4 August 2017 to 27 October 2017. It included a link to the Commission website on cross border access to e-evidence<sup>1</sup>, which provided further information. The **consultation on the Inception Impact Assessment**<sup>2</sup> was launched at the same time as the open public consultation. Any interested party could provide feedback on the Inception Impact Assessment from 4 August 2017 to 31 August 2017.

### Results of the consultation

The increasing use of information society services was perceived as a challenge to the work of law enforcement and judicial authorities by **nearly half** of the public survey respondents<sup>3</sup>. In their comments, respondents repeatedly identified following aspects relevant to criminal investigation:

- the borderless nature of the internet;
- the use of encryption;
- anonymity;
- ongoing technological development; and
- insufficient technological equipment of law enforcement authorities.

When accessing cross-border e-evidence, law enforcement and judicial authorities face various obstacles. The **lengthy process** to finally receive or access the evidence through judicial cooperation was marked as the most common complication<sup>4</sup> by practitioners from law enforcement and judicial authorities. The respondents have also identified difficulties to determine where data is stored<sup>5</sup>, difficulties to obtain electronic evidence when the service provider in question has outsourced its computing resources<sup>6</sup>, and unpredictability of responses by the service provider when the request is not mandatory<sup>7</sup> as "very relevant" or "relevant" issues complicating investigations where electronic evidence is concerned.

With regard to concerns about a possible negative **impact on rights**, which is a relevant issue for most of the public survey respondents<sup>8</sup>, specific safeguards to guarantee fundamental

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<sup>1</sup> Accessible [here](#).

<sup>2</sup> Accessible [here](#).

<sup>3</sup> Open public consultation feedback: 46.3% yes, 37.8% no, 15.9% no opinion (n=82) of all respondents.

<sup>4</sup> Open public consultation feedback: 96% (n=25) of the respondents from law enforcement, judicial or public authorities directly related to it (e.g. Ministry of Justice, Ministry of Interior) selected "very relevant" or "relevant".

<sup>5</sup> Open public consultation feedback: 88% (n=25) of the respondents from law enforcement, judicial or public authorities directly related to it (e.g. Ministry of Justice, Ministry of Interior).

<sup>6</sup> Open public consultation feedback: 96% (n=25) of the respondents from law enforcement, judicial or public authorities directly related to it (e.g. Ministry of Justice, Ministry of Interior).

<sup>7</sup> Open public consultation feedback: 84% (n=25) of the respondents from law enforcement, judicial or public authorities directly related to it (e.g. Ministry of Justice, Ministry of Interior).

<sup>8</sup> Open public consultation feedback: 82.05% (n=39) respondents answering in their personal capacity selected "very relevant" or "relevant".

rights are perceived as a necessary condition for any cross-border instrument to access electronic evidence. The respondents expect the initiative to provide for higher level of legal certainty<sup>9</sup> and these guarantees. Furthermore, a limited number of offences on which a direct access would apply, notification to the authorities of the other Member State or their approval, necessity and proportionality, prior judicial authorisation, effective oversight, and legal remedies for the person affected are amongst the necessary attributes of this instrument, according to the public survey respondents.

Possible harmonisation of definitions related to cybercrime in the context of judicial cooperation was supported by the vast majority of public survey respondents<sup>10</sup> who are practitioners in law enforcement and judicial authorities or service providers. Nonetheless, the above mentioned legal definitions should be introduced in accordance with the dynamic and complex nature of internet, thus not to limit the law enforcement and judicial authorities and not to establish unnecessary obstacles to effective criminal investigations. Yet, there was no consensus on whether the EU initiative should only set up a legal framework for cases with cross-border dimension or whether it should also cover purely domestic cases.<sup>11</sup>

**Service providers** also experience difficulties when receiving and processing cross-border data access requests. The time-consuming assessment of legality and legitimacy of such requests, a need to contact the issuing authorities in order to obtain further information and lack of common definition of requested data leads to additional costs which are borne by the private entities. Furthermore, in certain cases the verifications necessary to ascertain the authenticity and legitimacy of the request might require contracting an external counsel or other third party vendor. An EU initiative on electronic evidence expected to achieve a higher degree of legal certainty would therefore allow **for more time and cost-efficient way** to provide the requested data. Requests differing in form and content between Member States are also considered a serious driver for costs<sup>12</sup>, yet an EU-wide common request form is not expected from the initiative by service providers<sup>13</sup>.

Practitioners from **law enforcement authorities** or public authorities directly related to it expressed their support to an EU initiative in the area of electronic evidence as they expect the initiative to achieve a higher standard of legal certainty<sup>14</sup> and easier cost-efficient access to the evidence by a streamlined EU-wide approach<sup>15</sup>. They would welcome a framework which would provide for an alternative to existing formal, as well as informal, channels for cross-border access to electronic evidence while guaranteeing sufficient legal safeguards. If the

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<sup>9</sup> Open public consultation feedback: 74.67% (n=75) of all respondents who answered this question.

<sup>10</sup> Open public consultation feedback: 83.3% (n=36) of respondents from law enforcement and service providers.

<sup>11</sup> Open public consultation feedback: 32.9% yes, 45.1% no, 22% no opinion (n=82) of all respondents on question "[...] do you think the possible EU initiative should also cover purely domestic cases?"

<sup>12</sup> Open public consultation feedback: 44.44% very relevant, 44.44% relevant, 11.12% no opinion (n=9) of the service providers.

<sup>13</sup> Open public consultation feedback: 44.44% yes, 11.12% no, 44.44% no opinion (n=9) of the service providers.

<sup>14</sup> Open public consultation feedback: 89% yes, 4% no, 7% no opinion (n=28) of respondents from law enforcement authorities or public authorities directly related to it.

<sup>15</sup> Open public consultation feedback: 100% yes (n=20) of respondents from law enforcement authorities or public authorities directly related to it.

alternative is introduced, it should not harm the effectiveness of these [currently used] mechanisms that may be slower, but can provide the evidence admissible in courts, according to the respondents.

### *Judicial cooperation*

Assertions of extraterritorial jurisdiction could create conflicts of law for foreign providers, unless accompanied by new and sustainable international agreements and approaches, according to the respondents. Thus, conclusion of bilateral treaties with the mainly affected countries, such as United States, Russia, Turkey, and Ukraine<sup>16</sup>, and conclusion of multilateral treaties enjoyed major support amongst the public survey respondents. Nonetheless, the respondents<sup>17</sup> called for development of an EU-wide common approach to establish an efficient framework which would improve criminal investigations with a non-EU country dimension.

**Service providers** consider sharing information with non-EU countries, in particular with strategic partners such as the United States and Canada, essential. They would welcome process standardisation resulting from an EU-wide common approach and an international framework including bi- and multilateral agreements leading to more time- and cost-efficient information exchange. In any case, the possible international precedents, it might set, and the necessity for sufficient legal safeguards guaranteeing respect to fundamental human rights should be taken into consideration.

Practitioners from **law enforcement authorities** and other public authorities currently experience various difficulties when obtaining evidence with a non-EU country dimension. Most of the practitioners see the lack of a common form as a relevant obstacle<sup>18</sup>; considering an EU-wide approach, a common form would simplify the procedure, and therefore provide for operational savings. Additionally, identification of the responsible counterpart in a non-EU country is also perceived as one of the main difficulties accessing e-evidence with a non-EU country dimension<sup>19</sup>.

### *Direct cooperation*

Direct cross-border cooperation of law enforcement and judicial authorities with digital service providers would bring added value in criminal investigation according to the vast majority of public consultation respondents<sup>20</sup>. The respondents identified, inter alia, accelerated cost-efficient access to the electronic evidence and legal certainty as the main attributes of such initiative. The majority of respondents<sup>21</sup> would also welcome direct cooperation of EU law enforcement and judicial authorities with digital service providers

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<sup>16</sup> As identified by the public survey respondents.

<sup>17</sup> Open public consultation feedback: 81.7% (n=82) of all respondents selected "very important" or "important".

<sup>18</sup> Open public consultation feedback: 22.73% very important, 22.73% important (n=22) of practitioners from law enforcement authorities and public authorities directly related to it.

<sup>19</sup> Open public consultation feedback: 40.91% very important, 22.73% important (n=22) of practitioners from law enforcement authorities and public authorities directly related to it.

<sup>20</sup> Open public consultation feedback: 73.2% (n=82) of all respondents.

<sup>21</sup> Open public consultation feedback: 67.1% (n=82) of all respondents.

headquartered in non-EU countries if sufficient safeguards are in place to protect fundamental rights.

The initiative should include a broad range of services in possible direct cross-border cooperation with service providers<sup>22</sup>. Moreover, the respondents called for the broadest possible legal definitions of such services in their comments. As for the two frequently used categories of data, i.e. non-content data and content data, the majority of the public survey respondents supported an EU legal framework for the direct cross-border cooperation with service providers concerning both categories (all types of data) when data is stored in the EU<sup>23</sup>. The data stored outside of the EU should be subject to direct cooperation only when non-content data are concerned, according to slightly more than half of the respondents<sup>24</sup>.

Half of respondents supported an EU initiative to enable law enforcement authorities to directly request a service provider in another Member State to disclose - on a voluntary basis - specific information about a user without having to go through a law enforcement or judicial authority in the other Member State<sup>25</sup>. A direct cross-border production order which would enable law enforcement authorities to directly compel a service provider in another Member State without having to go through law enforcement or judicial authorities in the other Member State met with somewhat less approval<sup>26</sup>. Concerning non-EU countries, a risk that the initiative would cause a conflict of law and non-EU countries would reciprocally impose similar obligations on the European service providers is a serious concern for many of the survey respondents<sup>27</sup>.

A majority of **service providers** believe that direct cross-border cooperation of law enforcement and judicial authorities with digital service providers will bring an added value in criminal investigation<sup>28</sup>. Service providers think an EU initiative could enable law enforcement authorities to directly request a service provider in another Member State to disclose specific information without having to go through a law enforcement or judicial authority in the other Member State<sup>29</sup>. On the other hand, a majority of service providers that responded would not support a direct production order to a service provider in another Member State<sup>30</sup>. Half of the service providers find an increasing volume of requests, which is a considerable driver for costs<sup>31</sup>, a very relevant concern<sup>32</sup>.

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<sup>22</sup> Open public consultation feedback: 84,15% selected information society service providers, 82,93% electronic communication service providers, and 42,68% other digital services providers in a multiple choice question (n=82).

<sup>23</sup> Open public consultation feedback: 69.09% (n=55) of the respondents who answered this question.

<sup>24</sup> Open public consultation feedback: 54.24% (n=59) of the respondents who answered this question.

<sup>25</sup> Open public consultation feedback: 50% yes, 35.37% no, 14.63% no opinion (n=82).

<sup>26</sup> Open public consultation feedback: 43.9% yes, 41.46% no, 14.63% no opinion (n=82) of all respondents.

<sup>27</sup> Open public consultation feedback: 66.7% (n=39) of the respondents answering in their personal capacity selected "very relevant" or "relevant".

<sup>28</sup> Open public consultation feedback: 60% yes, 10% no, 30% no opinion (n=10) of service providers.

<sup>29</sup> Open public consultation feedback: 60% yes, 30% no, 10% no opinion (n=10) of service providers.

<sup>30</sup> Open public consultation feedback: 20% yes, 80% no (n=10) of service providers.

<sup>31</sup> Open public consultation feedback: 55.56% very relevant, 11.12% relevant, 22.23% somewhat relevant, 11.11% no opinion (n=9) of the service providers.

<sup>32</sup> Open public consultation feedback: 55,56% very relevant, 11.12% relevant, 22.23% somewhat relevant, 11.12% not relevant (n=9) of the service providers.

A majority of the practitioners from **law enforcement authorities** and other public authorities would support a possible EU initiative allowing for both a direct production request<sup>33</sup> and a direct production order<sup>34</sup> to a service provider in another Member State. The respondents expect sufficient **safeguards** to be introduced within the limits of the existing framework of the Member States. Furthermore, a non-disclosure clause in the early phases of the criminal investigation would be a necessary measure, which would prevent obstructions in investigations.

The direct production order to the service provider in another Member State, however, did not have much support among the **remaining respondents**<sup>35</sup>. In case the initiative is introduced, it should establish fair, accountable and uniform procedures that govern when and how private companies may be compelled to provide information. Such policies should apply horizontally to all parties that collect and use personal information. In addition, companies should be permitted to challenge in court demands that appear inconsistent.

### *Direct access*

Based on the public consultation survey, there is demand<sup>36</sup> for a common EU framework for situations when a law enforcement authority is in possession of a device which provides for access to data relevant to the criminal investigation without any intermediary (e.g. a service provider), although it might be unclear where the data is actually stored or whether there is a cross-border dimension at all. As for the further attributes, respondents mostly agreed that such a proposal should also provide specific safeguards to ensure fundamental rights<sup>37</sup>, legal remedies for the person affected (including challenging the admissibility of evidence)<sup>38</sup>, notification to another Member State affected<sup>39</sup> by this measure and possibility for the notified State to object the measure.

Hampering customer's trust in services is a very relevant concern for a majority of **service providers**<sup>40</sup>. And therefore specific safeguards to ensure fundamental rights<sup>41</sup> and legal remedies for the person affected<sup>42</sup> would need to be introduced if the European Commission should decide to propose a legal framework covering cases with direct access to data without an intermediary. Additionally, the providers expressed their concerns regarding this option as it might, in their opinion, introduce security risks, loss of customer privacy and the confidentiality of communication.

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<sup>33</sup> Open public consultation feedback: 61% yes (n=28) of practitioners from law enforcement authorities and public authorities directly related to it.

<sup>34</sup> Open public consultation feedback: 68% yes (n=28) of practitioners from law enforcement authorities and public authorities directly related to it.

<sup>35</sup> Open public consultation feedback: 34% yes, 46% no, 20% no opinion (n=44) of citizens and other entities.

<sup>36</sup> Open public consultation feedback: 54.9% yes, 24.4% no, 20.7% no opinion (n=82) of all respondents.

<sup>37</sup> Open public consultation feedback: 80.49% (n=82) of all respondents.

<sup>38</sup> Open public consultation feedback: 80.49% (n=82) of all respondents.

<sup>39</sup> Open public consultation feedback: 71.95% (n=82) of all respondents.

<sup>40</sup> Open public consultation feedback: 89% very relevant, 11% not relevant (n=9) of the service providers.

<sup>41</sup> Open public consultation feedback: 90% yes, 10% no opinion (n=10) of the service providers.

<sup>42</sup> Open public consultation feedback: 90% yes, 10% no opinion (n=10) of the service providers.

Practitioners from **law enforcement authorities** and other public authorities would welcome a common EU framework for a situation where direct access to e-evidence through an information system is possible without any intermediary while it is not clear where the data is actually stored or whether there is a cross border dimension at all<sup>43</sup>. In certain Member States, a legal framework covering these cases already exists. According to the respondents, a common EU-wide approach would ensure judicial control and recognition of directly obtained evidence, legal remedies and other safeguards for fundamental rights.

The **remaining respondents** mostly agreed with the need for a framework covering the abovementioned situations<sup>44</sup> although their responses varied with regards to different aspects of such initiative. Possible misuse by authorities is apparently one of the main concerns for the citizens, who often refer to "government hacking". Court supervision and other guarantees should therefore ensure legitimacy and legality<sup>45</sup>.

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<sup>43</sup> Open public consultation feedback: 79% yes, 14% no, 7% no opinion (n=28) of practitioners from law enforcement authorities and public authorities directly related to it.

<sup>44</sup> Open public consultation feedback: 45% yes, 30% no, 25% no opinion (n=44) of citizens and other entities.

<sup>45</sup> Open public consultation feedback: 82% yes, 2% no, 16% no opinion (n=44) of citizens and other entities.