European Commission e-evidence proposals presented at Cullen International briefing

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Cullen International organised a briefing on the electronic evidence (e-evidence) proposals with Tjabbe Bos, policy officer at the European Commission cybercrime unit and member of the joint task force of DG Home Affairs and DG Justice dedicated to the proposal.

Mr Bos presented the draft text and answered participants' questions. The event took place on 14 November 2018.

Negotiations are taking place among EU member states on the Commission proposals and the Austrian Presidency of the Council plans to adopt a general approach before the end of the year. In the European Parliament, the lead Civil Liberties, Justice and Home Affairs (LIBE) committee only started its work in September and will organise a formal hearing on 27 November 2018.

The European Commission however remains hopeful for an agreement between the co-legislators before the Parliament elections in May 2019.

Background for the proposal

Mr Bos explained that more than half of all criminal investigations today involve a cross-border request to obtain electronic evidence.

The current mechanisms to obtain e-evidence from providers located in other countries are regulated under the European Investigation Order (EIO) Directive (between EU countries) and Mutual Legal Assistance (MLA) treaties (between EU and non-EU countries).

The Commission considers that both systems are too slow and burdensome. While metadata is usually retained by service providers for a period of five to seven days, a MLA procedure can take up to 10 months. An EIO could take up to 120 days to be addressed.

In parallel, voluntary cooperation between law enforcement authorities and US-based service providers has developed as an alternative path to access e-evidence. It can take as little as a few hours or several days for requests to be answered. However, the procedure lacks a harmonised framework, especially to clarify the obligations of service providers, and many requests end up not being addressed.

The proposal in brief

The European Commission proposed on 17 April 2018 a regulation to ease access by judicial authorities to e-evidence stored in other countries. See Tracker for more details.

The regulation would oblige providers of electronic communications, messaging apps and social media to share e-evidence directly with judicial authorities in other EU countries within ten days in the context of criminal proceedings.

This obligation would also apply to companies established outside the EU that offer their services in the EU, and regardless of the country where the data is stored.

Judicial authorities (a prosecutor or in some cases a judge) could request e-evidence through:

- production orders, which compel a provider to produce e-evidence; and
- preservation orders, which compel a provider to preserve e-evidence but not to hand it over.

The proposals include a draft directive to ensure that all service providers offering services in the EU designate a legal representative in charge of receiving requests

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from the authorities.

Although the two proposals are self-standing and can be adopted independently, Mr Bos highlighted that they complement each other and that the application of the regulation would be easier with the existence of a legal representative.

Liability of service providers

Participants to the briefing raised several concerns regarding the liability of service providers, when answering production and preservation orders.

Gintare Pazereckaite (Telia Company) asked whether service providers should review and analyse every order received, to make sure that it complies with national and EU laws.

Mr Bos insisted on the fact that the proposal is not intending to impose on service providers some checks that should rather be performed by the judicial authorities before issuing an order, such as the assessment of the proportionality or necessity of a request.

Answering another question from Agnieska Skorupinska (Vodafone), Mr Bos added that a specific "comity clause" allows service providers to challenge the order before their own national courts in case of conflicting obligations under the different rules of a third country involved.

Victoria Ferrera Lopez (Orange) called for a non-liability clause to be explicitly included in an article of the proposal, rather than in its recitals (Recital 46). She explained that providers do not want to be liable and compromise their reputation by sending information that is illegal in one of the member states involved in the procedure.

Mr Bos made it very clear that there is "no blanket exclusion of liability for service providers giving access to e-evidence" as they have to comply with other obligations, e.g. under data protection rules. The proposal provides a harmonised set of rules which should be sufficient to guide providers when answering orders.

Alexa Veller (T-REGS) suggested the introduction of a kind of centralised platform which could check and approve every order before they are sent to service providers.

Mr Bos explained that the Commission sees the benefits of such platforms, which exist in some member states, for a better cooperation between judicial authorities. The Commission is currently considering implementing it in the context of its work on the EIO. It may consider extending the platform to the scope of the proposal on cross-border e-evidence.

Compensation of service providers

Timea Susanova (Hutchison) highlighted the cost incurred by providers to be able to answer all orders received.

Mr Bos stressed that service providers are entitled to compensation when responding to a production or preservation order, when such a compensation scheme is in place in the country of the issuing authority.

The Commission however did not go as far as proposing to harmonise compensation mechanisms across member states. Cullen International research shows that in December 2017, seven member states were offering such a compensation scheme for requests to access retained electronic communications data.

Data retention

Yulia Kulikova (Echostar) asked how the proposal is addressing the issue of different electronic communications data retention periods in the EU.

The Data Retention Directive defined the conditions under which providers of electronic communications services had to retain metadata to ensure their availability for the investigation, detection and prosecution of serious crimes, but was invalidated by the

Court of Justice of the EU in April 2014. In a second ruing in 2016, the Court ruled that "*general and indiscriminate*" retention of electronic communications data is illegal. As a result, data retention requirements are very mixed across the EU. (Table)

Mr Bos clarified that the text does not include any data retention obligation, and that the proposal is not the Commission's way of reintroducing a European framework for data retention. "*When a production order is sent, you're not always sure that the data is still there*", he said. However, he believes that ensuring faster procedures to obtain access to data is becoming even more important in the context of a lack of harmonised EU rules on data retention.