



Council of the
European Union

Brussels, 20 September 2016
(OR. en)

12368/16

LIMITE

**CYBER 102
JAI 764
ENFOPOL 295
GENVAL 95
COSI 138
COPEN 269**

NOTE

From: Presidency
To: Delegations
Subject: Encryption of data
- Questionnaire

Over lunch during the informal meeting of the Justice Ministers (Bratislava, 8 July 2016) the issue of encryption was discussed in the context of the fight against crime. Apart from an exchange on the national approaches, and the possible benefits of an EU or even global approach, the challenges which encryption poses to criminal proceedings were also debated. The Member States' positions varied mostly between those which have recently suffered terrorist attacks and those which have not. In general, the existence of problems stemming from data/device encryption was recognised as well as the need for further discussion.

To prepare the follow-up in line with the Justice Ministers' discussion, the Presidency has prepared a questionnaire to map the situation and identify the obstacles faced by law enforcement authorities when gathering or securing encrypted e-evidence for the purposes of criminal proceedings.

On the basis of the information be gathered from Member States' replies, the Presidency will prepare the discussion that will take place in the Friends of the Presidency Group on Cyber Issues and consequently in CATS in preparation for the JHA Council in December 2016.

Delegations are kindly invited to fill in the questionnaire as set out in the Annex and return it by **October 3, 2016** to the following e-mail address: **cyber@consilium.europa.eu**.

1. How often do you encounter encryption in your operational activities and while gathering electronic evidence/evidence in cyber space in the course of criminal procedures?

- **almost always**
- **often (in many cases)**
- rarely (in some cases)
- never

2. What are the main types of encryption mostly encountered during criminal investigations in cyberspace?

- online encryption
 - **e-mail (PGP/GPG)**
 - SFTP
 - HTTPS
 - SSH Tunnelling
 - **TOR**
 - P2P / I2P
 - **e-data stored in the cloud**
 - **e-communications (through applications such as Skype, WhatsApp, Facebook, etc.)**
 - others?
- offline encryption
 - **encrypted digital devices (mobile phone / tablet /computer)**
 - **encrypting applications (TrueCrypt / VeraCrypt / DiskCryptor, etc)**
 - others?

3. Under your national law, is there an obligation for the suspects or accused, or persons who are in possession of a device/e-data relevant for the criminal proceedings, or any other person to provide law enforcement authorities with encryption keys/passwords? If so, is a judicial order (from a prosecutor or a judge) required? Please provide the text of the relevant provisions of your national law.

- yes
- **no**

Cooperation on a voluntary basis.

4. Under your national law, are service providers obliged to provide law enforcement authorities with encryption keys/passwords? If so, is a judicial order (from a prosecutor or a judge) required? Please provide the text of the relevant provisions.

- yes
- no**

Cooperation on a voluntary basis.

5. Under your national law, is it possible to intercept/monitor encrypted data flow to obtain decrypted data for the purposes of criminal proceedings? If so, is a judicial order (from a prosecutor or a judge) required?

- yes**
- no

Judicial order is required.

6. What are the main issues typically encountered while intercepting/monitoring encrypted data flow in order to obtain decrypted data?

- Legal limitations (no specific regulation on intercepting/monitoring encrypted data flow)
- With regard to operational information – cooperation with the service providers

7. What other approaches/techniques do you use for decrypting encrypted e-evidence and securing it so that it is admissible as evidence in the criminal proceedings? Do your authorities use e.g. the services of foreign companies or assistance from Europol for the purposes of decryption? If so, please provide examples of assistance.

LV does use assistance from Europol.

LV sees as clear added value of EC3's encryption/decryption platform; LV also highly values the availability of the Europol Platform for Experts.

8. Do you consider that your current national law allows sufficiently effective securing of e-evidence when encrypted? If not, why?

- yes
- no**

There is no specific legal regulation on securing e-evidence (for instance, with regard to the cloud).

9. What main issues do you typically encounter when seizing encrypted evidence and decrypting it?

- financial
- personal**
- technical**
- legal/legislative**
- others

With regard to the personal factor – one of the central challenges is the limited capacity of the law enforcement personnel (both with regard to a number of specialists on the ground and their knowledge/skills which, due to the ongoing technological developments, has to be continuously advanced).

When it comes to the technical issues, LV alike other Member States, do encounter a challenge to deal with fast developing and increasingly sophisticated technological novelties. Also technical equipment limitations (for instance, for seizing the encrypted evidence) is an issue.

With regard to the legal/legislative challenges – please, see answers to Q 3 and 4 above. There are considerable challenges with regard to access of encrypted information/data, especially if stored *ex territorially* (e-data stored in the cloud, e-communications).

10. In your view, will measures in this regard need to be adopted at EU level in the future?

- no EU measures are necessary
- dedicated new legislation**
- practical (e. g. development of practical tools for police and judicial authorities)**
- improve exchange of information and best practices between police and judicial authorities**
- create conditions for improving technical expertise at EU level**

- improve the (legislative) conditions of communication with service providers, including through the establishment of a legislative framework.
- other

With regard to a dedicated new legislation, LV finds it crucial to first carry out a comprehensive assessment *inter alia* entailing an analysis on the current situation in the Member States (the encountered challenges, good practice etc.) which, in turn, would provide for a clearer picture whether and – what – challenges should and could be addressed in a harmonized way at the EU level.

11. Are there other issues that you would like to raise in relation to encryption and the possible approach to these issues? Please share any relevant national experience or considerations arising from your practice that need to be taken into account.

N/A
