

Improving criminal justice in cyberspace

Incorporates the Position of the Maltese Government

Fields marked with * are mandatory.

QUESTIONNAIRE for EU MEMBER STATES following the 9 June 2016 Conclusions of the JHA Council on improving criminal justice in cyberspace¹

This questionnaire is designed to provide further information to the European Commission Task Force on Cross-border Access to Electronic-Evidence, in order to facilitate swift progress of our work. We would be grateful for receiving your replies by Friday 16 September 2016.

Whereas some of the questions mainly refer to the legal framework, other questions are more related to current (working) practices in your Member State. The diversity in questions may require you to involve multiple organisations, including e.g. your responsible ministry, prosecutors and / or your national or regional police.

We are aware that you receive many questionnaires, including on these issues. Therefore, where you have provided information already under GENVAL or the Council of Europe, please feel free to simply refer us to answers already provided elsewhere. As the picture is not yet complete across Member States we could not altogether avoid certain questions. If you would like to share existing documents or responses to other questionnaires with us, please feel free to upload them here or to email them to us at **home-cybercrime@ec.europa.eu**.

If you prefer to respond to all or parts of the questionnaire in a separate document, you can download a PDF of this questionnaire by clicking on the link to the right and email your response to **home-cybercrime@ec.europa.eu**. You can also contact us at that email address for a Word version.

We very much appreciate your time and efforts and would like to thank you for your participation. Your contribution is a key element in our effort to address the existing problems.

The E-Evidence Task Force

¹ The electronic version of the questionnaire is available at: <https://ec.europa.eu/eusurvey/runner/eevidence>

Administrative questions

I. Please indicate on behalf of which EU Member State you are responding to the questionnaire*

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☒ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom

II. Please indicate which organisation you are representing *

Attorney General's Office

III. Please provide your contact details (name, e-mail address, phone number)*

IV. Did you coordinate your response to the questionnaire amongst different organisations in your Member State? *

- ☒ Yes
- ☐ No

IVa. If yes, could you please indicate amongst which organisations you coordinated your response to the questionnaire?

Malta Police Force - Cybercrime Unit
Office of the Information and Data Protection Commissioner

Optional inclusion of files

V. Please provide any details about the file(s) you are including

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Va. Please upload your file(s)

[please use the EU Survey website (<https://ec.europa.eu/eusurvey/runner/eevidence>)]

1. Direct cooperation with service providers for obtaining access to electronic evidence

Part 1 of the questionnaire only concerns direct cooperation between law enforcement authorities and private sector service providers (e.g. providers of telecommunications services or providers of cloud services).

It may concern both mandatory and voluntary cooperation, depending on whether there is (i.e. search warrant) or there is no legal title for compelling the service provider to disclose the electronic evidence.

It does not cover situations where requests are made between authorities from a requesting and a receiving state, e.g. in the framework of a mutual legal assistance or mutual recognition procedure (see Part 2 of the questionnaire).

1.1 Normal practice within your domestic jurisdiction

1. What is the relevant legal framework for direct cooperation requests in your Member State? Could you please copy or include reference to the relevant provision(s) in your legislation?

Part II of Subsidiary Legislation 440.01 titled 'Processing of Personal Data (Electronic Communications Sector) Regulations', available at:
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11052&l=1>

2. For these direct cooperation requests, is there a difference in your legal framework between providers of telecommunications services and providers of information society services (e.g. cloud service providers)?

Subsidiary Legislation 440.01 regulates service providers of publicly available electronic communications services or of a public communication network, within the meaning of Directive 2002/58/EC as amended by Directives 2006/26/EC and 2009/136/EC.

3a. How many domestic requests for direct cooperation are made per year by your authorities? Could you please specify the number of requests per section of the applicable legal framework and type of service provider?

N/A

3b. Which are the "top" service providers in terms of numbers of domestic requests for direct cooperation? Please include the names of the "top" 5 service providers.

The three major service providers in Malta are GO plc, Melita plc, and Vodafone Malta Limited. Periodically, requests are also sent to the Malta Information Technology Agency (MITA) and Ozone Malta Ltd.

1.2. Practice when the service provider is outside your domestic jurisdiction

4. How do you distinguish between domestic and foreign service providers when making a request?

☒ Main seat of the service provider in question

☐ Place where services are offered

- ☐ Place where data is stored
- ☐ Other criteria

4a. If you selected "Other criteria", please specify:

5. Do authorities from your Member State make direct requests to service providers in another EU Member State or in third countries?

☒ Yes, both in EU Member States and third countries

☐ Yes, but only in other EU Member States

☐ Yes, but only in third countries

☐ No, none of the above

5a. If yes, please indicate which third countries (i.e. outside the EU) are most relevant for you in this context:

United States of America

6. Does your domestic law address such direct requests from your authorities across borders specifically? Or do you apply the same framework as for domestic requests?

☐ The same legal framework

☒ Regulated specifically

6a. If regulated specifically, please copy or reference the relevant article(s):

The current legal framework does not provide for similar requests. Having said this, national authorities managed to reach informal collaboration agreements with some service providers established in other jurisdictions, which have accepted to **voluntarily** assist the authorities by providing the necessary data for investigation purposes.

Where no such agreements exist, the mutual assistance procedure will have to be triggered by the national bodies and the request channelled through the foreign authorities having jurisdiction on the private parties.

The data protection instrument applicable to the Police on a national level, S.L. 440.05 'Data Protection (Processing of Personal Data in the Police Sector)', enables the exchange of such data by virtue of Regulation 9 - <http://idpc.gov.mt/en/Legislation/SL%20440.05.pdf>

7. Are direct requests sent from your country directly to a service provider in another country considered mandatory or voluntary for the provider to comply with?

☐ Mandatory

☒ Voluntary

7a. In case they are mandatory, can and do you enforce them, legally and in practice? Could you please explain how?

Requests can only be enforced through authorities based in the same territory where the private party is established.

8. Does your domestic law allow service providers established in your Member State to respond to direct requests from law enforcement authorities from another EU Member State or third countries?

- ☐ Yes, both from EU Member States and third countries
☐ Yes, but only from other EU Member States
☐ Yes, but only from third countries
☒ No, this is not covered / allowed

8a. Please copy or reference the relevant article(s) providing for the legal basis to allow / prohibit service providers to do so:

Regulation 19(1) of SL 440.01 which provides that "Data retained under this Part shall be disclosed only to the Police or to the Security Service, as the case may be, where such data is required for the purpose of investigation, detection or prosecution of serious crimes".

9. Do you have a definition (legal or administrative/practical) of different types of data for law enforcement requests? Does your legal framework distinguish between different types of electronic evidence (e.g. subscriber data, traffic data, content data)?

- ☒ Yes
☐ No

9a. If yes, please provide us with the definition(s):

Please vide definitions in SL 440.01

10. What kind of data can be requested directly from service providers according to your domestic law / the law applicable to the service provider?

- ☒ Subscriber data
☒ Traffic data
☐ Content data
☒ Other data

10a. If you selected "Other data", please explain which type or category of data:

Location Data

11. Do you limit direct requests to cases with specific (e.g. exigent) circumstances or to specific (e.g. serious) crimes?

- ☒ Yes
☐ No

11a. If yes, please explain:

Cases involving the investigation, detection or prosecution of serious crimes. Having said this, the Police use their powers under Article 355AD of the Criminal Code to request any data which may be necessary for the purpose of an investigation.

12. What is the typical process in your Member State for making a direct request? Which authority typically initiates a request? Which other authorities are involved in processing the request?

Requests are made by the Police and sent directly to the Service Providers.

13. Are these requests made in electronic form (e.g. by e-mail or sent through an online portal)? How are these requests tracked? Is there a central repository of requests that is managed by one single authority?

In terms of the Memorandum of Understanding signed between the Malta Police Force and the three main service providers in Malta, requests are made by a police officer, not below the rank of an inspector, and sent to the service providers by means of an electronic mail. In cases of urgency, the request is made over the phone but must, at the earliest opportunity, be followed by an official request through an email. Service providers retain internal records of all the requests received from the Police. There is no central depository for all requests.

14. Do any specific agreements on direct requests exist (or are currently being negotiated) between your authorities and foreign service providers?

☒ Yes

☐ No

14a. If yes, could you disclose which service providers your authorities have such an agreement with? How are these agreements established? What is included in these agreements? Could you please explain?

Microsoft, Google, Facebook, eBay, Paypal, Ask.fm

Police officers from the Cyber Crime Unit usually look up law enforcement manuals issued by the service providers themselves and attempt to establish direct contact with the same. The aim is to have such service providers disclose information to us voluntarily upon receiving a written request which is acceptable for them.

15. For these requests that go beyond your domestic jurisdiction, what is the current practice of your authorities? How many requests are made per year? Which are the "top" service providers in terms of numbers of requests? For these questions, could you please make a distinction between requests within the EU and request outside the EU?

Kindly refer to previous answer for 'top' service providers. Statistics are not available.

16. What is the average timeframe to obtain data through direct requests to service providers? Are there any fixed deadlines that you include in your request? Do service providers commit to respect certain deadlines?

Average timeframe is 2-3 weeks. There are no agreed deadlines with the service providers. We do, however, inform them of the request if it is of an urgent nature (such as in life-threatening cases).

17. What are the means of transmission of evidence gathered in response to direct request?

☐ Paper (letter)

☐ Disks (optical or magnetic)

☒ Fax

☒ Normal email

☒ Web portal

☒ Secure channel (encrypted email, special ftp, etc.)

☐ Other

17a. If you selected "Other", please specify:

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18. Is information gathered through direct requests admissible as evidence in court in your Member State?

☒ Yes

☐ No

☐ It depends on other conditions

18a. If you selected "Yes", could you please provide any article(s) that (either implicitly or explicitly) provide for that? In addition, if addressed by case law, could you please include references to relevant decision(s)?

N/A

18b. If you selected "No" or "It depends on other conditions", please explain:

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2. Mutual Legal Assistance

Part 2 of the questionnaire concerns requests for electronic evidence between authorities of a requesting and a receiving state (Mutual Legal Assistance or Mutual Recognition procedures).

19. What is the legal framework in your Member State for Mutual Legal Assistance requests for third countries?

- ☒ Budapest Cybercrime Convention
- ☒ Other multilateral conventions
- ☐ Bilateral agreements

19a. If you selected "Other multilateral conventions", please specify:

Palermo Convention 2000 – “United Nations Convention against Transnational Organized Crime and the Protocols Thereto”

EU MLA Convention 2000 based on the Principle of Mutual Recognition – “Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto”

19b. If you selected "Bilateral agreements", please specify with which countries:

20. How many Mutual Legal Assistance requests for electronic evidence to third countries are made by your authorities per year? Which are the "top" third countries that you send requests to (outside the EU)?

Most requests would be sent to USA. Very few MLAs, however, have been made given the long turnaround for a reply.

21. What is the typical process in your Member State for making a Mutual Legal Assistance request to a third country? Which authority initiates such a request? Which other authorities are involved?

First it needs to be established whether there are any international agreements between the countries involved. In the case where the proceedings in question are at the arraignment stage, Article 399 of the Criminal Code of Malta (detailing the system of evidence by commission or letters rogatory) shall apply, otherwise the request has to be made ex officio either by the prosecutor or the investigative officer and duly transmitted to the Attorney General. The authorities involved are therefore the Attorney General, the Police and the Court, while the request has to be sent through official diplomatic channels.

22. What kind of electronic evidence do you usually request on the basis of Mutual Legal Assistance?

- ☒ Subscriber data
- ☒ Traffic data

- x Content data
- x Other data

22a. If you selected "Other data", please explain the type or category of data:

Any means leaving a written trace

23. Could you explain the situation for incoming Mutual Legal Assistance requests from third countries? How many requests are received per year? Which are the "top" countries that you receive requests from? What kinds of data are usually requested? Which authorities are involved when processing such a request?

MLA requests from third countries are first received through the channels of the Ministry of Foreign Affairs. These are then transmitted to the Attorney General's Office. The request is either transmitted to Court or otherwise to the Police Officer entrusted with such an investigation. Over a 100 requests are processed each year. The 'top country' that Malta receives MLA requests from is Turkey. The type of data that is usually requested includes subscriber data, bank account details and company information.

24. What is the average timeframe for obtaining electronic evidence through Mutual Legal Assistance from your main destination countries outside the EU? Are there any fixed deadlines provided for in your agreement with the countries? Are these deadlines usually respected?

There are no fixed deadlines in our outgoing requests. From experience, a reply is usually received several months later; even over a year later.

25. When a Mutual Legal Assistance request is refused by a foreign authority, what are the main grounds for refusal (e.g. your main destination country)?

Requests sent to USA regarding cases of defamation have been turned down due to the fact that this is not a crime in the USA.

26. What are the means of transmission of Mutual Legal Assistance requests to other EU Member States (how you send it)?

- ☒ Regular mail (letter)
- ☒ Fax
- ☒ Normal email
- ☒ Web portal
- ☒ Secure channel (encrypted email, special ftp, etc.)
- ☒ Other means

26a. If you selected "Other means", please explain:

Any means leaving a written trace

27. What are the means of transmission of Mutual Legal Assistance requests to third countries (how you send it)?

- ☐ Regular mail (letter)
- ☐ Fax
- ☐ Normal email
- ☐ Web portal
- ☒ Secure channel (encrypted email, special ftp, etc.)
- ☒ Other means

27a. If you selected "Other means", please explain:

Diplomatic Channel

28. What are the means of transmission of electronic evidence gathered in response to Mutual Legal Assistance requests to other EU Member States (how you receive it)?

- ☐ Regular mail (letter)
- ☐ Fax
- ☐ Normal email
- ☐ Disks (optical or magnetic)
- ☐ Web portal
- ☒ Secure channel (encrypted email, special ftp, etc.)
- ☒ Other means

28a. If you selected "Other means", please explain:

Registered Mail, international courier services (such as TNT and DHL)

29. What are the means of transmission of electronic evidence in response to Mutual Legal Assistance requests to third countries (how you receive it)?

- ☐ Regular mail (letter)
- ☐ Fax
- ☐ Normal email
- ☐ Disks (optical or magnetic)
- ☐ Web portal
- ☒ Secure channel (encrypted email, special ftp, etc.)
- ☒ Other means

29a. If you selected "Other means", please explain:

Registered Mail, international courier services (such as TNT and DHL)

3. Jurisdiction in cyberspace / other issues

Part 3 of the questionnaire concerns other measures that law enforcement authorities could use to obtain electronic evidence in cases where:

- a) it is not clear that they would stay within their own jurisdiction, e.g. because it is not possible to determine where evidence is stored, or
- b) it is clear that they would operate beyond their jurisdiction without using the measures covered under part 1 and 2 of the questionnaire.

30. Can your law enforcement authorities still access electronic evidence when it is unclear what the location of the electronic evidence is / when it is impossible to establish the location of electronic evidence (e.g. when it may be stored beyond your own jurisdiction)?

☐ Yes

☐ No

☒ It depends on circumstances

30a. If you selected "Yes", or if "It depends on circumstances", please explain how and make reference to the relevant article(s) in your domestic legislation:

If the person who has access to the specific data consents, granting the Police access to this data, this is carried out. No legal provisions exist to this effect.

31. Can your law enforcement authorities still access electronic evidence when it is impossible to obtain electronic evidence that is stored in another country through direct cooperation with a service provider or a request based on Mutual Legal Assistance or Mutual Recognition (e.g. the service provider refuses to cooperate and there is no legal basis for a Mutual Legal Assistance or Mutual Recognition request)?

☐ Yes

☐ No

☒ It depends on circumstances

31a. If you selected "Yes" or "It depends on circumstances", please explain how and make reference to the relevant article(s) in your domestic legislation:

If the person who has access to the specific data consents, granting the Police access to this data, this is carried out. No legal provisions exist to this effect.

32. In the above two situations (see questions 30 and 31), does your domestic law make a distinction between the framework for obtaining access to stored data and the real-time collection of data?

☐ Yes

☐ No

☒ Not applicable

32a. If you selected "Yes", please explain how the difference is framed and how this works out in practice:

33. To what extent do your authorities use police-to-police cooperation for obtaining cross-border access to electronic evidence? What is the legal framework for such cooperation and what are current practices (e.g. how often, what data, for which purpose)?

When it comes to incoming requests the Police are the contact point for conservation of data. They have investigative and also prosecution powers in relation to Criminal activities taking place in Malta. Moreover the Judicial Authorities can appoint them as experts in certain fields. As regards outgoing requests the Police still request the preservation/conservation of electronic evidence and can whenever required support this with a mutual legal assistance request. The legal frameworks in question are the Budapest Convention, provisions in the Criminal Code relevant to preservation of evidence, Subsidiary legislation 440.01 relating to retention and acquisition of certain electronic data, Police Act, Subsidiary Legislation 440.05 and 440.06 relating to processing of personal data (which may also be electronic), Interpol, Europol and other forms of multilateral and bilateral agreements.

34. Is information obtained through police-to-police cooperation admissible as evidence in court in your Member State?

☐ Yes

☐ No

☒ It depends on circumstances

34a. If you selected "Not" or "It depends on circumstances", please explain:

Admissibility of evidence in Court is a prerogative of the Judicial Authorities. However, when information/intelligence/evidence is obtained from abroad, prior authorisation from the Member State supplying such information is sought. Only with such authorisation can such documents be presented in Court. Whenever the Maltese authorities are requested to send an MLA request for this purpose this would be sent.

[end of the questionnaire]