



Brussels, 7 April 2016
(OR. en)

7403/16

JAI 240
COPEN 91
USA 10
EUROJUST 38

NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Review of the 2010 EU-US MLA Agreement
- Examination of draft texts

Delegations will find attached documentation provided by the Commission services in the context of the review of the EU-US MLA agreement, which is currently being carried out on the basis of Article 17 of this Agreement (OJ L 181, 19.7.2003, p. 34).

The documentation comprises three sections:

- I) An introduction to the EU-US MLA Agreement (ANNEX I);
- II) An assessment of the key provisions of the Agreement (ANNEX II);
- III) Recommendations for improving the practical functioning of the Agreement (ANNEX III).

The Presidency intends discussing this documentation at the COPEN meeting on 13 April 2016. After passage through the appropriate bodies it is the intention of the Presidency that these documents will be agreed at the high level EU-US meeting in June.

Section I – An introduction to the EU-US MLA Agreement

Legal Context

The Agreement on Mutual Legal Assistance ('MLA') between the European Union and the United States ('the Agreement') was signed on 25 June 2003 and entered into force on 1 February 2010. The idea for the Agreement grew out of the realisation, in the aftermath of the 11 September 2001 terrorist attacks in the United States, that improving further the provision of mutual legal assistance between European Union Member States and the United States was critical for both sides¹.

Role of the Agreement

The Agreement is a key transatlantic mechanism for ensuring effective co-operation in the field of criminal justice and combating organised crime and terrorism. The Preamble indicates the aims of the parties, which are to facilitate cooperation between the European Union Member States and the United States, and to combat crime in a more effective way as a means of protecting their respective democratic societies and common values.

The 'Contracting Parties' to this Agreement are the United States (U.S.) and the European Union (EU). While practical mutual legal assistance is provided by individual Member States and the U.S., the Agreement allocates specific tasks to the Contracting Parties, notably to carry out a common review of the Agreement (Article 17).

¹ The Agreement was negotiated on the basis of Articles 24 and 38 of the Former Treaty on the European Union, which allowed the European Union (EU) to negotiate collectively on behalf of its Member States in the field of external relations. It was the first MLA agreement in the area of Justice and Home Affairs based on Article 24. Subsequently, the entry into force of the Lisbon Treaty created a framework that replaces the former third pillar.

The Agreement adds value to the EU-US MLA relationship in that it makes available to Member States the ability to obtain information on bank accounts, form Joint Investigation Teams ('JITS'), transmit requests (and responses to requests) using faster means of communication, obtain witness evidence by video conferencing, and secure evidence for use by administrative authorities where subsequent criminal proceedings are envisaged, through a formal process, thus ensuring that the resulting evidential product is admissible. The main driver of the current review is to identify common means to overcome any existing obstacles in the practical functioning of the Agreement and to strengthen judicial cooperation between the United States and the European Union in the field of criminal justice.

Article 3 of the Agreement clarifies the relationship between the EU and its Member States as regards its application: the Agreement amends bilateral mutual legal assistance treaties between the U.S. and Member States, by adding provisions and replacing some corresponding provision of the bilateral mutual legal assistance treaties. Indeed, most EU Member States already had bilateral treaties in place with the U.S. At the same time, there is a significant European Union law dimension in that, while the Agreement supplements bilateral agreements, the latter do not operate in isolation from European Union law. For instance, the EU is obligated to ensure that the provisions of the Agreement are applied to bilateral mutual legal assistance treaties between Member States and the U.S. and for ensuring that the provisions of the Agreement are applied in the absence of a bilateral treaty. Moreover, the standard set by the Agreement is a benchmark for the conclusion of future bilateral agreements in the field between Member States and the U.S.

The review of the Agreement

Article 17 commits the EU and the U.S. to carry out a common review of the Agreement no later than five years after its entry into force. It states that the review must address in particular the practical implementation of the Agreement and may also include issues such as the consequences of further development of the European Union relating to the subject matter of the Agreement. As part of the review process, input was sought from EU Member States and U.S. administration and practitioners on a number of occasions. Most recently, EU Member States and U.S. authorities were

invited by the European Commission to complete a questionnaire and to discuss the issues in a number of Council Working Groups in 2015, as well as to attend a Joint EU-US Seminar which took place the 8-9 October 2015 at Eurojust. Also present at the Eurojust Seminar, given the significance of e-evidence, were representatives of Internet Service Providers ('ISPs'). Previous meetings on the implementation of the Agreement were held in 2008, 2010, and 2012.

Main issues identified for the review

During these consultations, the following main issues have been identified: increasing the speed and number of successfully executed EU requests, in particular in cases of electronic evidence including computer-related crime; improving direct access of EU Member States to, and preservation of, data held by ISPs where provided for by U.S. law successfully meeting the U.S. "probable cause"² requirement in order to obtain the execution of EU Member States' requests for the content of communications; obtaining the execution of EU Member State requests related to hate speech, which may constitute conduct protected by the U.S. constitutional provision protecting freedom of speech; and overcoming legal and practical obstacles to the creation of joint investigation teams.

Usage

Precise statistics on the use of MLA requests are difficult to obtain as transactions may be recorded in Member States and in the U.S. in different ways. Nevertheless, the information maintained by the parties provides an indication of the volume of MLA traffic.

The U.S. records opening slightly over 7000 files that include incoming MLA requests from the Member States during 2010 – 2014. That correlates well with a Commission survey, wherein Member States reported that in 2014, they made approximately 1700 requests to the U.S. The Commission survey reports that the U.S. sent fewer than 400 requests to the Member States in 2014; the U.S. records disclose it opened slightly over 2000 files containing outgoing MLA requests to the Member States during the five year period.

² Definition of "probable cause" (PM).

According to the survey, the five EU Member States from which the greatest number of requests went to the U.S. in 2014 were Greece, the Netherlands, the Czech Republic, Poland, and Portugal. U.S. records disclose that over the five year period the greatest number of incoming files (potentially with multiple requests) originated from Greece, the Netherlands, the United Kingdom, Spain and Poland. According to the Commission survey, the number of annual requests sent to the U.S. by individual Member States ranged from several hundred to fewer than 10. That corresponds with U.S. figures.

According to the Commission survey, the five EU Member States that received the largest number of requests from the U.S. in 2014 were the Netherlands, Germany, the Czech Republic, Bulgaria and France. The U.S. figures, covering the five year period, show a slightly different pattern, identifying the Netherlands, Germany, the United Kingdom, and France receiving the greatest number of requests.

Both the Commission survey and records maintained by the U.S. suggest that several Member States send relatively few requests to the U.S.: e.g. Malta, Estonia, Cyprus, and others receive relatively few from the U.S.: e.g. Slovenia, Malta, Slovakia and Croatia. Some countries, such as France, have reported that their outgoing requests to the U.S. have decreased over the five year period, while others report increases and some have remained stable.

The overall ratio of outgoing to incoming requests is fairly consistent over the years, revealing an approximately 4:1 ratio of requests going to the U.S. compared to requests coming from the U.S. That ratio also tends to be consistent with each country, with a few exceptions where the ratio is much higher, or where the overall numbers are small and anomalies can occur. For example, Estonia, Luxembourg and Cyprus have roughly equal incoming and outgoing requests, but the numbers are relatively low, relative to the MLA practice between the U.S. and the Netherlands, the United Kingdom, Germany or Greece respectively.

Offences in respect of which requests were sent

Requests were sent in relation to a wide range of serious offences. Most countries that provided responses on this issue stated that they asked for assistance in cases where offences related to terrorism and other transnational organised crime, money-laundering as well as homicide or where offenses were committed with the aid of the internet, notably fraud and child pornography as well as computer hacking. That assistance is being sought in cases of such gravity indicates that the Agreement continues to add value.

Types of assistance sought

With regard to requests from the EU to the U.S., a very significant proportion sought e-evidence, reflecting the preponderance of ISPs with head-quarters located in the U.S. A large number also asked for the provision of witness statements. Of the measures provided for expressly in the Agreement, the provision of witness evidence, including expert witness evidence, through video-link is by far the most requested. This is a welcome development because the Agreement provided, for the first time, a regulated way for witnesses to give their evidence remotely, with the attendant savings in terms of financial resources and time; it is evident that its availability has been a success for both EU Member States and the U.S.. Banking information has been sought by a number of countries but this provision has been used only rarely. There has been one JIT agreement thus far.

Eurojust

Eurojust plays an important role as a facilitator of casework, training and policy discussions in the context of judicial co-operation between EU Member States and the U.S., and there has been an Agreement between the US and Eurojust since 6 November 2006, which puts this relationship on a formal footing. Eurojust has added particular value in situations in which a number of EU Member States are involved in the same case with the U.S. According to information received from Eurojust, between 2010 and 2015, it opened a total of 135 cases involving the U.S. and organised a total of 56 co-ordination meetings. The most common offence dealt with was fraud and the types of assistance provided by Eurojust included clarification of US requirements such as "probable cause", co-ordinating the division of labour where a number of EU Member States sought assistance in the same case and providing support in translating requests.

Unexecuted Requests

The main reasons for requests being refused centre on the different legal systems of the U.S. and EU Member States. With regard to requests from EU Member States to the U.S., the most frequent reasons given for refusals to certain types of requests, were firstly, the failure to demonstrate "probable cause" in support of a request to order an ISP to disclose the contents of communications, secondly, the U.S.'s *de minimis*³ policy and, thirdly, a possible conflict with the principle of freedom of speech (particularly where the offence being investigated was a hate speech crime). With regard to requests from the U.S. to EU Member States, refusals were generally less common. In the cases that were refused, however, the reasons included the absence of dual criminality, a failure to demonstrate a nexus between the evidence sought and the criminal conducted alleged and refusals on essential interest grounds⁴.

³ The policy of refusing to execute requests relating to offences considered trivial.

⁴ US to provide definition (PM).

Section II – An Assessment of the Key Provisions of the Agreement

ARTICLE 4 – Banking Information

In recognition of the complexity of contemporary banking systems and the difficulty investigators face when they are aware that money involved in the commission of a crime has been transferred to third countries where the account number, bank or branch concerned is not known, Article 4 of the Agreement provides a way to supply a requesting State with sufficient information concerning bank accounts to allow the subsequent formulation of adequately focused requests.

Experience under the Article

Despite the innovative character of this provision and the expectations at the moment of the negotiations of the Article, it is seldom used. This reduced usage does not appear to result from a lack of need.

There appear to be a number of practical reasons why the provision is not being used frequently. Some EU Member States maintain a comprehensive list of bank accounts established in their country. Others have other methods for effectuating a centralized query. A number of Member States, however, have yet to establish a process that would allow them to respond to a request for banking information as contemplated in this Article. For its part, the lack of use on the U.S. side seems to come from the lack of successful results achieved to date. Thus, it is unused, in part, because it is not widely known, and it is not widely known, in part, because it is unused.

Secondly, an optional standard form designed by the US for the purpose of obtaining banking information and offered to the EU Member States has not always been used. The EU Member States have preferred to send conventional mutual legal assistance requests.

Finally, the designation of contact points between the U.S. and EU Member States are not matched well. The Central Authorities of EU Member States are accustomed to interacting with the U.S. Central Authority - the Office of International Affairs, Criminal Division, U.S. Department of Justice ('DOJ') - and the lines of communication are good. However, the U.S. designated a number of national authorities ((a) the Federal Bureau of Investigation, (b) the Drug Enforcement Administration or (c) the Immigration and Customs Enforcement), depending on the nature of the investigation or proceeding giving rise to the request. The U.S. reasoned that this would be the most rapid channel for the exchange of information for handling requests and sending them to EU Member States. Locating the U.S. contact points within the U.S. investigative agencies was intended to make them more available and more responsive during the critical stages early in an investigation, but they and Member State Central Authorities generally are not accustomed to working with each other, rendering communications less efficient.

ARTICLE 5 – Joint Investigation Teams

Article 5 of the MLA establishes that the parties may create Joint Investigative Teams ('JIT's) and thereby in some cases enhance efficiencies in gathering evidence without the need for international requests for mutual legal assistance. JITs are a form of cooperation not provided for in then-existing U.S. bilateral mutual legal assistance treaties. Article 5(4) states that where the joint investigative team needs investigative measures to be taken in one of the States involved in the team, a member of the team of that State may request its own competent authorities to take those measures without the other State having to submit a separate mutual legal assistance request. The legal standard for obtaining the measure is the applicable domestic standard. In other words, where an investigative measure is to be carried out in the U S, for example, a U.S. team member would do so by invoking existing domestic investigative authority, and would share resulting information or evidence seized pursuant to existing authority to share with foreign authorities. In a case in which there were no domestic U.S. jurisdiction and consequently a compulsory measure could not be carried out based on domestic authority, the other provisions of the bilateral Mutual Legal Assistance Treaty ('MLAT') in force (or, absent an MLAT, the provisions of 18 U.S.C. Section 3512 or other provisions) may furnish a separate legal basis for carrying out such measure. This is a good example of the complementarity of bilateral MLATs between the U.S. and individual EU Member States and the Agreement.

Experience under the Article

JITs have the potential to enhance significantly multilateral coordination and accelerated cooperation in appropriate cases. The single greatest issue in the U.S. and EU context is whether the terms of the JIT agreement could be considered to provide for such a degree of cohesiveness between the U.S. and foreign investigations, that evidence gathered by foreign investigators, then provided to the U.S for use in U.S. criminal proceedings, might be viewed as meeting U.S. legal requirements that would not ordinarily be applicable to foreign authorities. In JITs between EU Member States, a model JIT

agreement has been developed that does not need to take such considerations into account. Finding common ground with the U.S. on the basis of that model had been elusive for some time. Recently, however, the U.S. and one Member State successfully concluded a JIT agreement and the U.S. and Member State investigators are currently coordinating their respective investigations. The practical experience gathered from that case will be instructive in future situations in which the use of this measure is being considered.

ARTICLE 6 – Video Conferencing

Article 6 provides the legal authority for the use of videoconferencing technology in criminal matters, and supplements the terms of existing bilateral mutual legal assistance treaties. It requires the Parties to provide for the necessary legal authority to use video transmission technology between the U.S. and EU Member States for the purpose of taking witness testimony. The procedures to be applied in taking such testimony are as otherwise set forth in the applicable mutual legal assistance treaty in force (e.g., provisions governing execution of requests, or procedures for the taking of testimony in the requested State) or, either in the absence of a treaty or where the terms of the treaty so provide, under the law of the requested State. Here too, general provisions of bilateral MLATs already in force and 18 U.S.C. Section 3512⁵ already enable the U.S. to provide this form of cooperation on behalf of a foreign State, but a separate provision was deemed useful to enable a number of EU Member States to provide the same cooperation to the U.S.. Under this article, the requested State may also permit the use of video conferencing technology for purposes other than providing testimony, including for purposes of identification of persons or objects.

⁵ U.S. to provide short summary of this stat provision (PM).

Experience under the Article

This provision is used with increasing frequency and effectiveness between the U.S. and EU Member States. While time differences between the U.S. and Europe can raise logistical challenges, it is generally possible to agree on times to enable the video-conference to be carried out successfully. Among the key advantages this tool offers is the ability of the requesting State authorities to participate in real time without having to travel to the requested State and thus avoiding substantial costs and delays. This enhances the utility of the assistance, in that the authorities who know the case best are able to participate in eliciting the testimony, prior to or even during trial. At the same time as the quality of assistance is improved, the cost is decreased.

ARTICLE 7 – Expedited Transmission of Requests

This Article supplements the terms of existing mutual legal assistance treaties in force and also applies in the absence of a treaty. It provides that requests for mutual legal assistance, and communications related thereto, may be made by expedited means of communications, including fax or email, with formal confirmation to follow where required by the requested State.

Experience under the Article

The U.S. uses this provision frequently, and an ever increasing number of Member States do as well. No significant problems have been reported in its implementation and use.

ARTICLE 8 – Mutual Legal Assistance to Administrative Authorities

Article 8 supplements the terms of existing treaties, and also applies in the absence thereof. The novelty of this article is that it covers requests for mutual assistance by administrative authorities insofar as they are investigating conduct that may develop into referrals for criminal prosecution. If, however, the administrative authority anticipates that no prosecution or referral will take place, assistance is not available under this agreement. By the terms of Article 8(1), there is an obligation to afford assistance to "national" (i.e., in the U.S. federal) authorities. With respect to assistance to "other" administrative authorities (i.e., at the State, provincial or regional level), the requested State may provide assistance at its discretion.

Experience under the Article

For countries in which administrative authorities may launch investigations of conduct that potentially constitutes criminal offenses, and in which the results of administrative investigations can be used in resulting criminal prosecutions, or be used for purposes of referring the matter to criminal investigative or prosecution authorities, this article offers the availability of mutual legal assistance tools at an early stage of investigation. The article has been successfully utilized and no significant problems have been reported in this regard.

ARTICLE 9 – Limitations on Use to Protect Personal and Other Data

This provision focuses on the limitations of use when personal data was transmitted through MLA channels and replaces the use limitation provision of existing bilateral mutual legal assistance treaties (subject to paragraphs 4 and 5, described further below). It also applies where the existing treaty has no use limitation article (i.e. the U.S.-Belgium treaty), as well as where there is no treaty in force.

Experience under the Article

The U.S. and EU Member States have reported that this provision has assisted in streamlining mutual legal assistance. No significant problems of implementation have been reported. In the future, the EU-U.S. Data Protection Umbrella Agreement will provide greater protection for the subjects of data exchanges between the EU and the U.S. and this is addressed in Section III.

ARTICLE 10 – Requesting States' Request for Confidentiality

This Article, like similar provisions in many modern U.S. MLA agreements, addresses requests to maintain the confidentiality of MLA requests and the responses to those requests. It requires the requested State, if asked, to use its best efforts to keep confidential a request and its contents, and to inform the requesting State if the request cannot be executed without breaching confidentiality. The article applies where the existing MLAT does not already contain such a provision, or in the absence of a treaty.

Experience under the Article

Criminal investigations are not carried out in public. For both legal and operational reasons, it may be necessary to keep the investigations confidential. This confidentiality may also apply to the mere fact that MLA has been sought. Therefore, it is not unusual for requesting States to seek confidential treatment of their requests for mutual legal assistance. It needs to be borne in mind that confidentiality should be sought expressly in the request, together with an explanation of the reasons for seeking it since confidential treatment is not always automatic under the domestic law of the requested State. Experience by Member States and the U.S. reveals that there has been steady progress in avoiding misunderstandings in this regard since the entry into force of the Agreement.

Section III – Recommendations for Improving the Practical Functioning of the Agreement

There is a consensus between EU Member States and the U.S. that the Agreement adds value to the EU-U.S. MLA relationship and generally works well. In many Member States, the Agreement complements the existing bilateral Treaties. In other Member States, its existence inspired the negotiation of a bilateral Treaty. In a few Member States it provides a framework for the mutual provision of MLA for the first time and remains the only formal way in which MLA is regulated between the U.S and particular EU Member States.⁶ The evidence from EU Member States and the US makes clear that there is no need for the Agreement itself to be changed. Where the *functioning* of the Agreement could be improved, the parties believe they could enhance practice under the agreement and concrete solutions have been identified and are presented below.

At the last EU-US Ministerial meeting in November 2015, informed by feedback obtained from EU Member States and the U.S. throughout the year, the EU and the U.S. agreed that efforts should be focussed on 6 priority areas, namely (1) enhancing the use of electronic means of communication (including videoconference) under the MLA where possible in order to speed up the transmission of requests and evidence; (2) facilitating the use of joint investigation teams ('JITs'); (3) facilitating the identification of bank accounts; (4) speed up access to electronic evidence, in the framework of the respect of fundamental rights and especially the protection of personal data; (5) increasing the effectiveness of freezing and confiscation of proceeds of crime and finally (6) generally improving the success rate of MLA requests overcoming legal and practical obstacles for the execution of requests. The recommendations below address each of these 6 areas. The Contracting Parties should be able to measure the progress achieved on these recommendations before the next review.

⁶ According to available information, these are BG, HR and SK (US to confirm)

The following concrete solutions are proposed to improve the functioning of the Agreement:

I. **Sharing Knowledge and the Deployment of Human Resources**⁷

Both Contracting Parties to the Agreement have emphasized that increasing the speed and number of successfully executed EU Member State requests could be promoted by, inter alia, advocating that personnel in EU Member States, become familiar with U.S. legal standards and provide guidance to requesting officials before submitting requests and communicating directly with the U.S. central authority to facilitate rapid obtaining of any additional information necessary to execute a request. Developing the expertise of personnel in both EU Member States and in the U.S. is also essential for ensuring that the regimes for asset recovery and sharing, [are better understood thus reducing the chances of MLA being refused and, importantly, reducing the number of requests in cases of minor importance so that scarce resources can be devoted to the most deserving cases.

Recommendations:

- Depending on the national circumstances, EU Member States should consider and put in place by 31 December 2017, a method to improve expertise on US MLA requests. Such methods include:
 - The deployment of Liaison Magistrates ('LMs') in the United States (Washington, DC), to be in close contact with the U.S. Department of Justice. These LMs would have the responsibility of facilitating the execution in the U.S. of requests from their home countries.
 - The sharing of a U.S.-based LM by several EU Member States.
 - The deployment of LMs according to subject matter.
- Identifying a Single Point of Contact ('SPOC') with particular responsibility for developing expertise on EU-U.S. MLA practice, particularly such specialist areas as asset recovery, and, importantly, for sharing best practice with practitioners in their EU Member State. EU Member States should ensure that details of the new SPOC is communicated to the U.S.
- The U.S. has produced a number of subject specific guides⁸. By 31 January 2018, these should be made more readily available on the website of the Department of Justice and Office for International Affairs and other appropriate locations easily accessible to practitioners in EU Member States and, provided to the appointed LMs or SPOCs.

⁷ Addresses all priority areas

⁸ Including one on asset recovery entitled "U.S. Asset Recovery Tools and Procedures: A Practical Guide for International Cooperation". US to provide a list?

- The U.S. has a network of legal attachés in a number of EU Member States. They are ideally placed to share their expertise with EU practitioners face-to-face, by video link, or using other modern technological tools such as webinars, on a wide range of subjects including those particularly identified by EU Member States as causing the greatest problems such as asset recovery, the U.S. principle of "probable cause", the obtaining of electronic evidence and freedom of speech requirements. By 30 June 2018, all LMs or SPOCs should have taken part in sessions at which best practice is shared on these subject areas.

II. Use of Technology⁹

EU Member States stress the need to improve the time taken for requests to be executed. However, in many cases, requests are sent in hard copy, meaning that the fastest and most modern means of communication are not being harnessed to increase efficiency.

Recommendations:

- It is recommended that there be close liaison at a technical level to ensure that those electronic channels of transmission are secure to maintain the confidentiality and security of criminal investigations and proceedings as well as the exchange of data. One source of delay would be removed if requests and evidence gathered were transmitted more swiftly using modern electronic means. This is particularly important with time-critical requests such as those seeking the freezing of assets or the securing of electronic evidence. Secure email is one example. This would have the benefit of cutting unnecessary delay at the beginning and end of the MLA process.
- It is recommended that, in cases where the parties involved in a request require close liaison, consideration be given to holding virtual meetings via video conferencing, thus establishing face-to-face communication.

⁹ Addresses priorities 1, 4, 5 and 6

III. Joint Investigation Teams¹⁰

Please see Section 2 for an exposition of the issue.

Recommendations:

- Both EU Member States and the US should develop model clauses in line with the legal requirements of the participating countries.
- Lessons learnt from the JIT which is currently being agreed between the U.S. and one Member State should be shared with all Member States through the LMs and SPOCs within 6 months of the final conclusion of the case.

IV. Collection of electronic evidence in the MLA context¹¹

The need to improve the process of obtaining electronic evidence from the U.S. is a recurring theme in feedback from EU Member States. The two problems identified by EU Member States are that their requests are not being actioned, on the grounds of inadequacy (particularly that their exposition of probable cause is insufficient) and then, once accepted for execution, delay occasioned during the execution phase. The issue has particular impact on both the EU Member States and the US firstly because of the need for electronic evidence in a significant proportion of criminal investigations, and not only where cybercrime is alleged¹²; this means that the volume of requests is high. Secondly, because of the preponderance of Internet Service Providers ('ISPs') located in the U.S.; this means that the U.S. is the recipient of large proportion of worldwide requests for electronic evidence.

Electronic evidence can be divided into 3 technical categories and different considerations apply to each. For this reason, different recommendations are proposed for each.

Subscriber Data – this consists of information on the identity of the account in question, and the information provided by them when the account was set up. This is considered the least intrusive category of electronic evidence.

¹⁰ Addresses priority 2

¹¹ Addresses priorities 4 and 6

¹² For example, a murder case in which emails were exchanged by the perpetrator and the victim

Traffic Data – this consists of information on the identities of the senders and recipients of electronic messages, and metadata including the timing, frequency and duration of the exchanges. This category of evidence is more intrusive than subscriber data so the justification for it needs to be examined by the U.S. Department of Justice ('DOJ'). For this type of material, the U.S. needs to receive a request for this material (rather than direct contact with the ISP) and, in that request, the requesting State has to demonstrate that the evidence sought is "relevant" to its case.

Content Data – this consists of the content of the electronic exchange. This is considered the most intrusive category of electronic evidence and the decision as to whether to provide it is made at a court, which applies the "probable cause" test, on receipt of a request sent to the U.S. DOJ. The "probable cause" test is a high threshold¹³ in recognition of the level of intrusion occasioned by the provision of the evidence and is a concept with which Member States, who are unfamiliar with it, often struggle, leading to their requests being considered incapable of immediate execution by the U.S.

All three categories of data constitute personal data. Once the EU-U.S. Umbrella Agreement¹⁴ comes into effect, it will provide additional data protection guarantees when personal data is exchanged between the competent authorities of EU Member States and the U.S or otherwise transferred in accordance with an agreement between the US and the EU or its Member States, for the prevention, detection, investigation and prosecution of criminal offences, including terrorism.

¹³ The "probable cause" threshold is that applied in applications for searches of premises

¹⁴ The EU-U.S. Umbrella Agreement was initialled on 8 September 2015 and the procedure for its signature will be set in motion shortly. It will set a common data protection framework for the data exchanged between the EU and the U.S. Once in force, it will provide for a comprehensive set of data protection safeguards and individual rights, notably the right of access to, and rectification of, the personal data which has been shared. Any onward transfer to a third country will require the prior consent of the competent authorities of the supplying state. EU citizens will also have the right to seek judicial redress before US courts if the US authorities deny access or rectification, or unlawfully disclose their personal data.

There has been an informal practice of the provision, by the U.S., of electronic evidence (including content data) in emergency cases such as those involving terrorism or imminent risk of serious injury or death, where there is a pressing investigative need or where there is a real risk of the loss of evidence. The usual process is that EU Member States' law enforcement authorities liaise with the U.S. authorities who, in turn, facilitate the provision by ISPs of the required material. This arrangement has worked very well and, in the most exceptionally serious and urgent cases, the U.S. has assisted in the obtaining of evidence in under 24 hours, without the need to meet the probable cause test.

Recommendations:

- In respect of both the preservation and provision of subscriber and traffic data (collectively called "non-content data"), EU Member States would benefit from a common approach towards ISPs on the voluntary disclosure of such data by such ISPs, as permitted by US law. Where a request for disclosure involves a transfer of personal data by a private entity (for example, an ISP) in the US to an authority of an EU Member State, relevant data protection law has to be complied with¹⁵.
- For such direct access to function optimally there needs to be standardisation of the access, retention and provision criteria applied by the ISPs, rather than the current position in which there are as many criteria as there are ISPs. The EU will pursue a dialogue with the major ISPs to urge them to agree between themselves a common set of criteria. The EU approach, will be supported by the U.S. authorities, in the task of convincing such ISPs to co-operate voluntarily; success in this regard will have the advantage to the US of alleviating the pressure of the volume of incoming MLA requests for this category of material.
- EU Member States are working towards the establishment of a Judicial Cybercrime Network with which US DOJ can liaise.

¹⁵ Under the future Data Protection Directive (to be transposed by 2018), the requirements of Article 36aa have to be met for transfers to private entities in 3rd countries, such as ISPs. As stated in paragraph 2 of that Article, those requirements are without prejudice to bilateral or multilateral agreements between Member States and third countries (in the case, US) in the field of judicial co-operation in criminal matters and police co-operation.

- In order to increase the chances of requests from EU Member States for traffic and content data to be accepted on initial submission, the raising of the awareness of practitioners from EU Member States (such as SPOCs and LMs) in US legislation in this area can be achieved by the sharing of best practice by U.S. experts as well as by the provision by the U.S. of specific guidance notes.¹⁶
- In respect of exceptionally serious and urgent cases as described above, the practice described above, which has already been used in some urgent cases with excellent results, should be used for requests from EU Member States.

V. Facilitating the identification of bank accounts¹⁷

EU Member States and the U.S. agree that, though potentially very useful, Article 4 is underused. The reasons for this have already been identified in Section 2.

Recommendations:

- The U.S. should consider whether to replace the multiplicity of designated national authorities with one, the DOJ, with which EU Member States are familiar and have well-established channels of communication.
- By 30 June 2017, EU Member States who have not already put in place processes for executing requests from the U.S. for banking information should have done so.
- By 30 June 2017, both EU Member States and the U.S. should have produced a simplified standardised form *and* shared best practice with their respective practitioners on the use of the form to encourage familiarisation by 30 June 2018.
- Through the raising of the awareness of LMs and SPOCs and appropriate U.S. personnel by 30 June 2018 by both EU Member States and the U.S., a concerted effort should be made to raise the awareness of practitioners regarding the possibilities offered by Article 4.

¹⁶ Please see paragraph I above for the recommendation on training and the dissemination of subject specific guides.

¹⁷ Addresses priority 3