European Parliament LIBE Committee Hearing Cross-Border Access to Electronic Evidence

27th November 2018, Brussels, European Parliament

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Vice-President, Chair Cybersecurity Committee, EuroISPA
General Secretary, ISPA Austria

EuroISPA

Agenda

- About EuroISPA
- E-Evidence Proposal: A significant shift in cross-border access to electronic evidence
- Legal Uncertainty for Service Providers
- Notification Procedures
- Further Concerns
- Towards a European Solution

EuroISPA

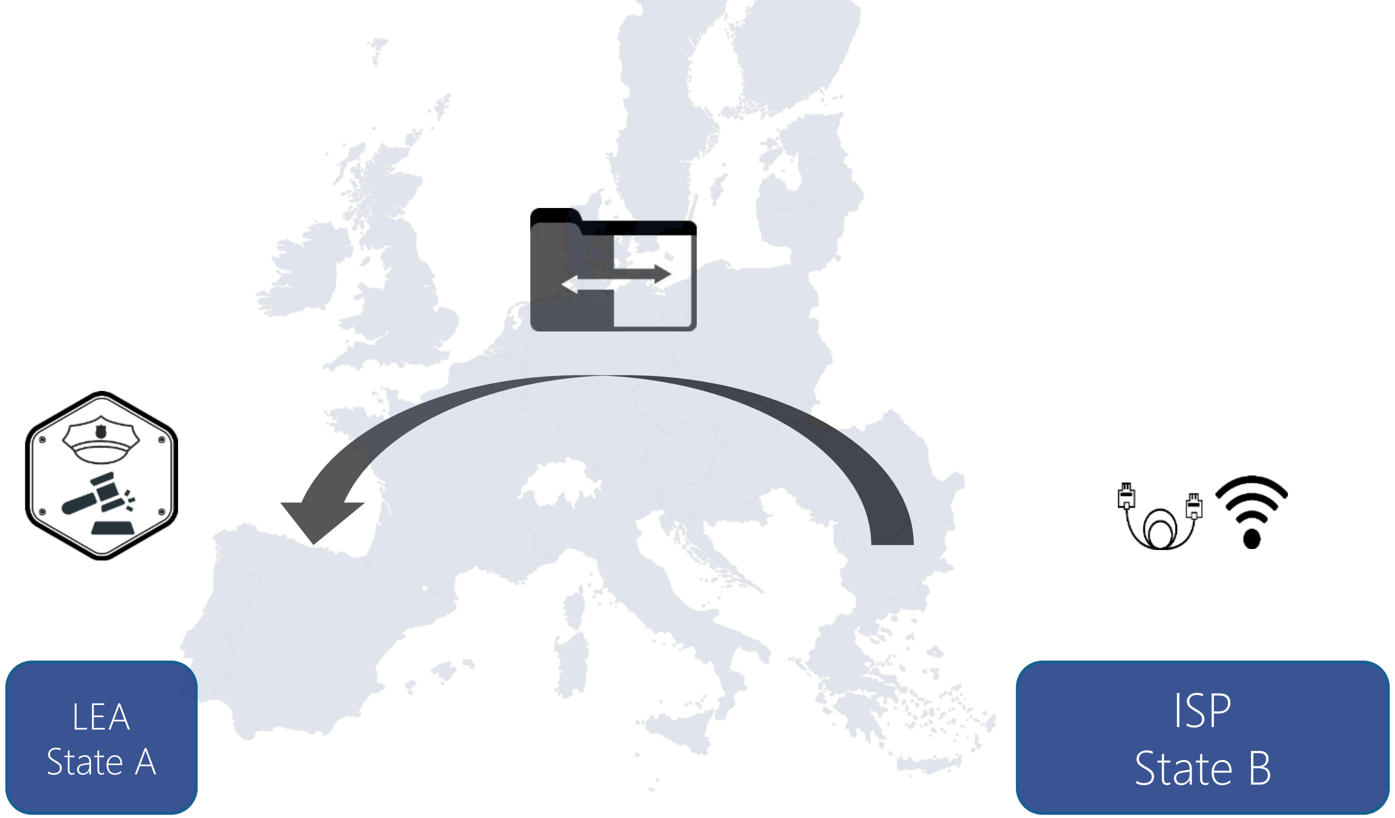
About EuroISPA

EuroISPA: The Voice of ISPs in Europe

- Established in 1997
- The world's largest association of Internet Service Providers (ISPs), representing over 2.500 ISPs across the EU and EFTA countries
- Representing many SME-ISPs
- Reflects the views of ISPs of all sizes from across its member base

E-Evidence Proposal: A significant shift in cross-border access to electronic evidence

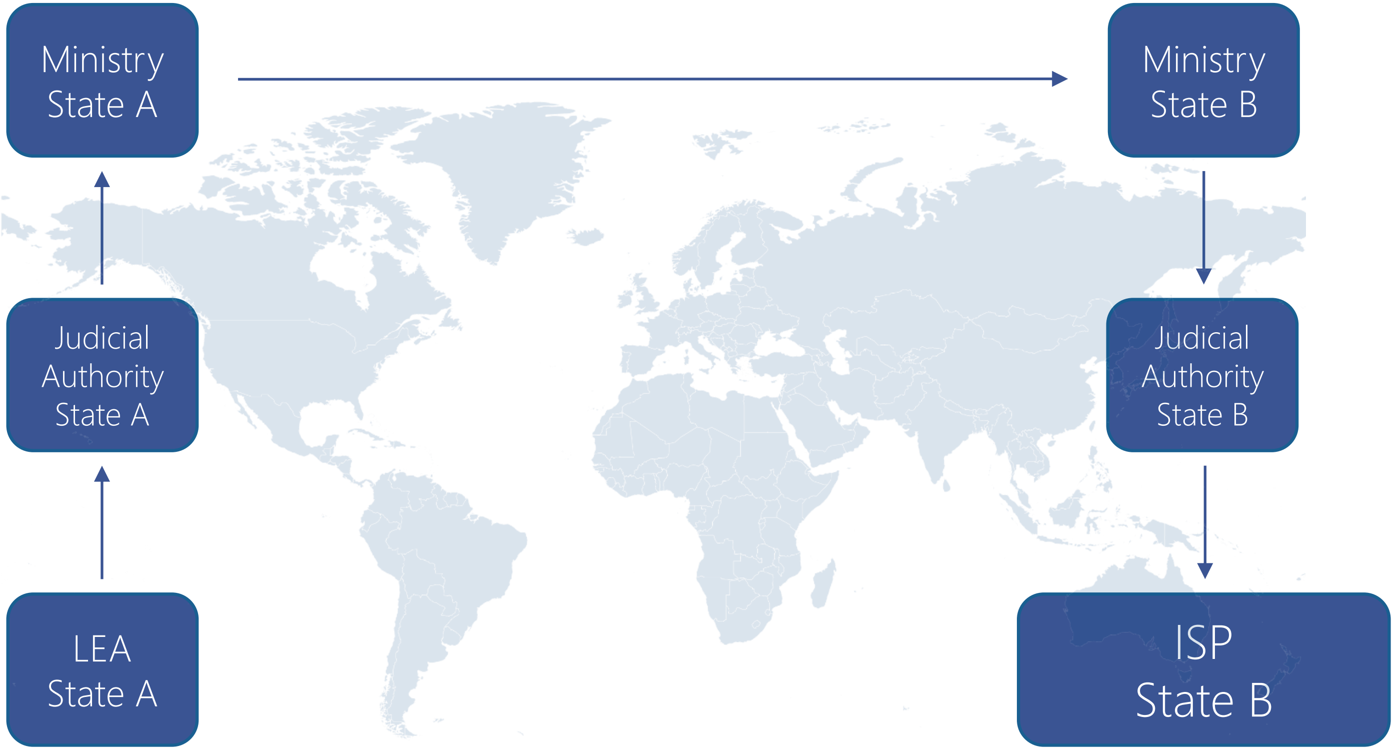
Law Enforcement data requests to an ISP



LEA
State A

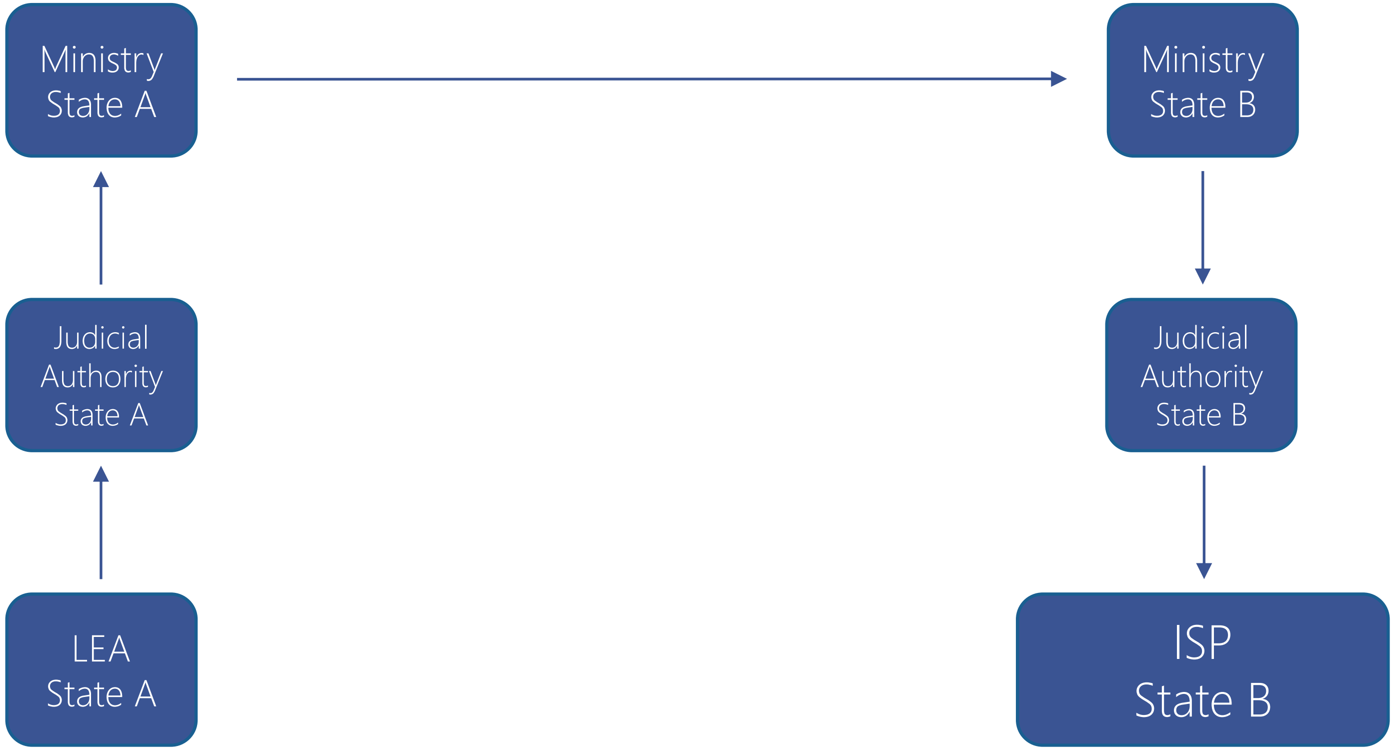
ISP
State B

Law Enforcement data requests to an ISP in a third country



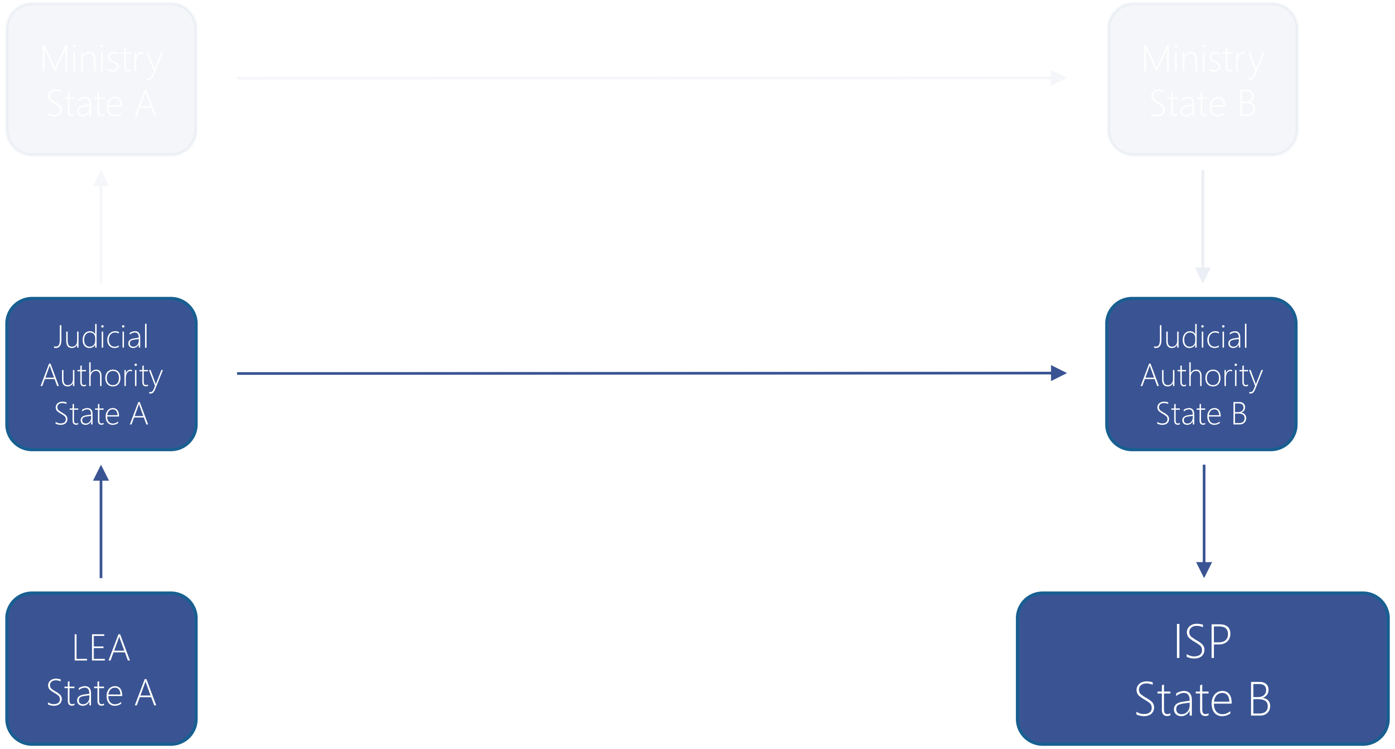
Current MLAT Procedure

Law Enforcement data requests to an ISP in a third country



Current MLAT Procedure

Law Enforcement data requests to an ISP in another EU Member State



Ministry State A

Ministry State B

Judicial Authority State A

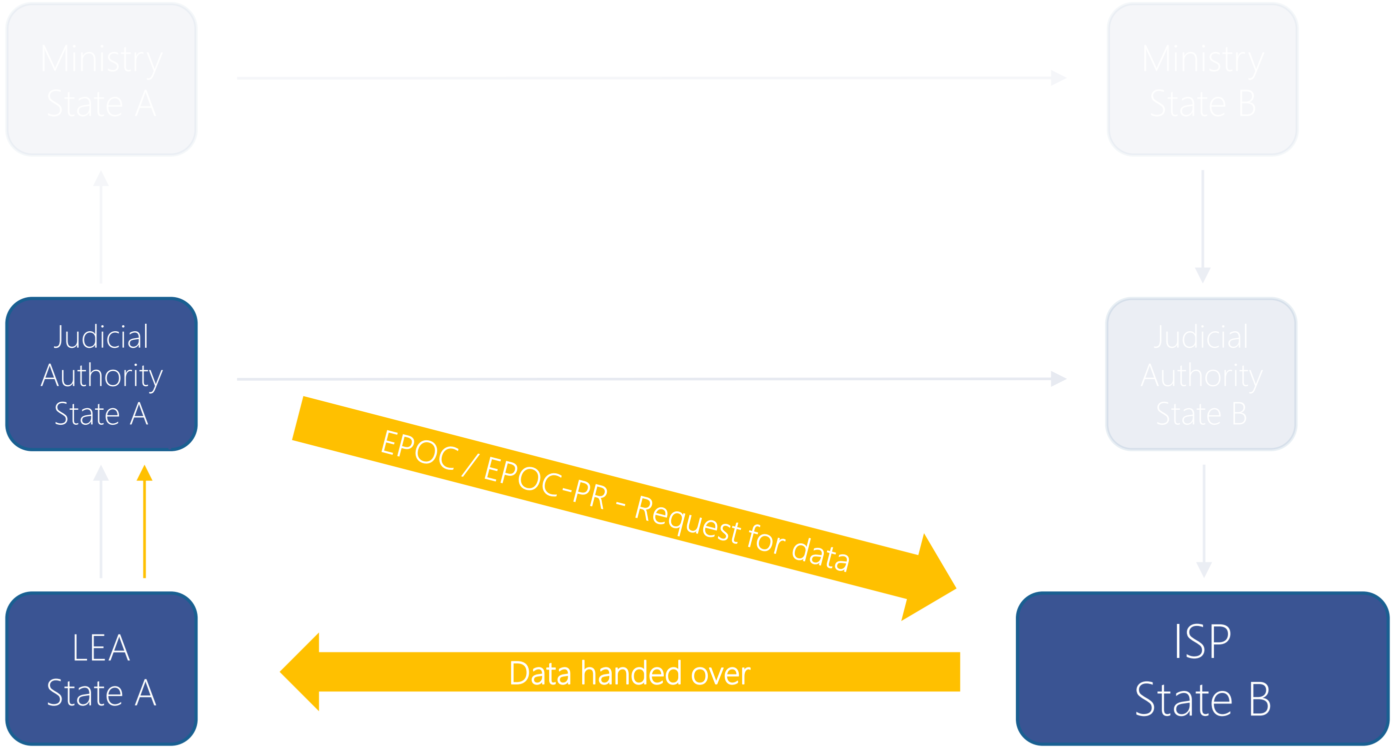
Judicial Authority State B

LEA State A

ISP State B

Current MLAT Procedure

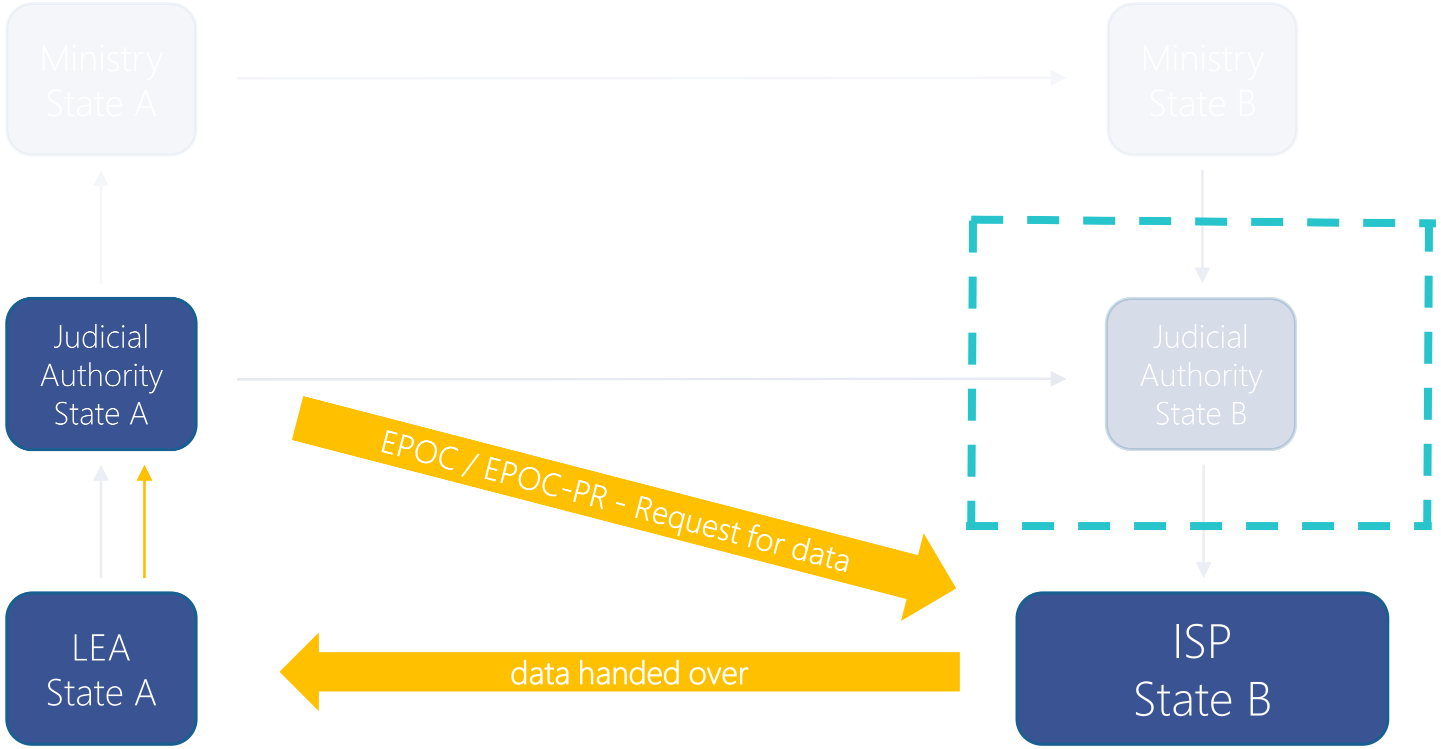
Law Enforcement data requests to an ISP in another EU Member State



Ministry State A
Ministry State B
Judicial Authority State A
Judicial Authority State B
EPOC / EPOC-PR - Request for data
LEA State A
Data handed over
ISP State B

E-Evidence Proposal

Law Enforcement data requests to an ISP in another EU Member State



Transition from MLAT
to e-evidence system
will lead to substantial
changes in respect to
the exchange of data

Lack of Integrated *Procedural* Safeguards

- **Judicial review:** according to CJEU jurisprudence, access to retained data by national authorities should be subject to **prior review** by a court or independent administrative authority (*Tele2, point 120)*
- **Necessity and proportionality assurances:** sufficient information should be provided to service providers to have the *option* to raise concerns over Production Orders
- A certain degree of **authority involvement**: greater safeguards further to those of the issuing authority- either of the country of the affect data subject or the executing country

Lack of Integrated *Material* Safeguards

- Criminal offence threshold: significant disparity across Member States for crimes entailing a three-years sentence
- A list of prescribed offences such as in the EIO is still very broad, providing little further clarity
- Necessity and proportionality tests should be bolstered
- Threshold of proof: the more intrusive the data category requested, the higher the threshold of proof to request access to the data should be

Legal Uncertainty for Service Providers

Legal Uncertainty for Service Providers

The issue of dual criminality is key to guarantee legal certainty for Internet Service Providers

Insufficient authentication of Order Certificates

- ISPs unable to **verify the authenticity** of each national judicial authorities' stamp and signature
- Conditions for **security and integrity** in executing a Production Order (data transfer)
- Reservations against **downgrading** to existing **information exchange routines** to e.g. fax transmissions
- **Single Points of Contact** (SPOC) on side of LEA would improve communication process

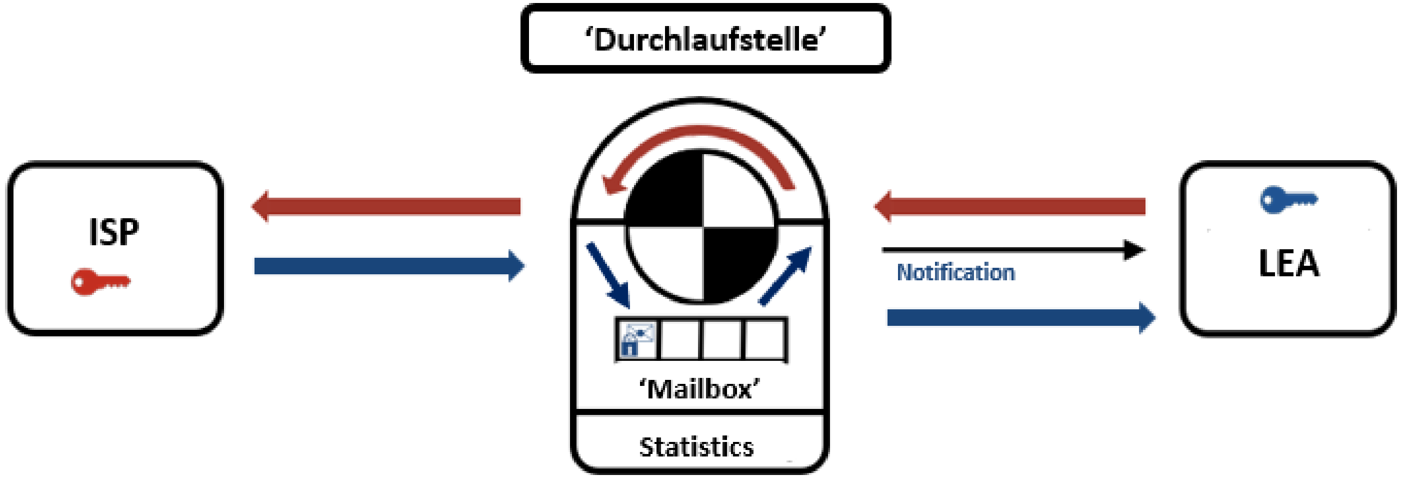
Legal Uncertainty for Service Providers

The issue of dual criminality is absolutely essential to guarantee legal certainty for Internet Service Providers

Insufficient authentication of Order Certificates

- [illegible] verify the authenticity [illegible]
- [illegible] security and integrity [illegible]
- [illegible] downgrading [illegible] information exchange routines [illegible]

Austrian Example for Safe DataTransfer between LEAs and ISPs: ‘DLS’

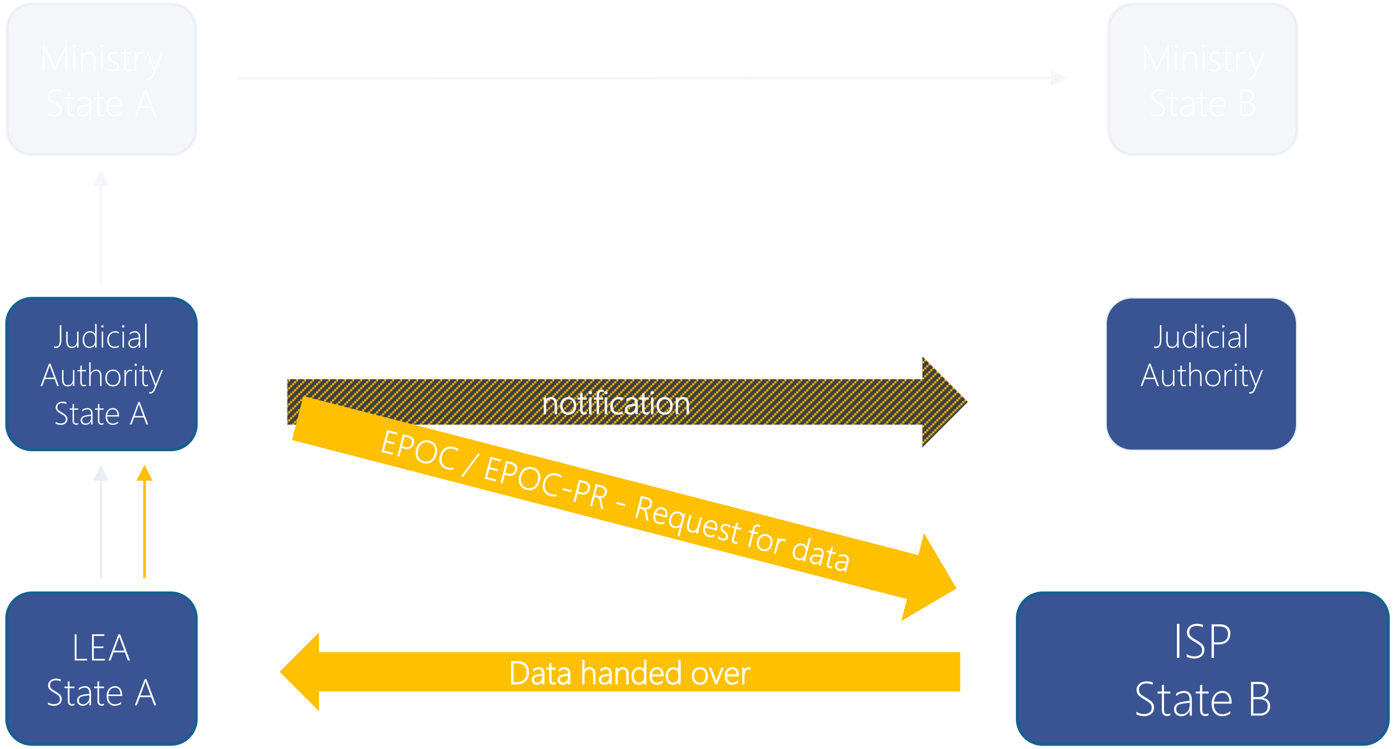


Notification Procedures

Notification of User and Judicial Authority

- Notification to the user: notification of request to access data to be obligation of issuing authority
  - CJEU jurisprudence: transparency, not confidentiality, should be the rule
- Notification to judicial authorities: notification system to the respective judicial authority alongside Production Orders
  - Notification to be undertaken by the issuing authority: greater legal clarity for service providers with judicial authorities' awareness of Order

Notification of Judicial Authority



Further Concerns

E-Evidence Proposal: Further Concerns

Lack of an MSME exemption

- SME exemptions should be included to offset the considerable administrative, legal and financial burden incurred by the proposed e-evidence mechanism

Fragmentation of data categorisation

- Coherence in data categories across different legislation

Coherence with international standards

- Data transfers to LEAs in third-countries should be in line with international standards (i.e. Budapest Convention and EU-US MLAT)

E-Evidence Proposal: Further Concerns

Timeframes are not feasible

- Execution of a Production Order should be undertaken “expeditiously” rather than under a prescriptive deadline

Sanctions mimicking the GDPR are disproportionate

- Such draconian measures would create an environment of disclosure without consideration

E-Evidence Proposal: Further Concerns

Transparency

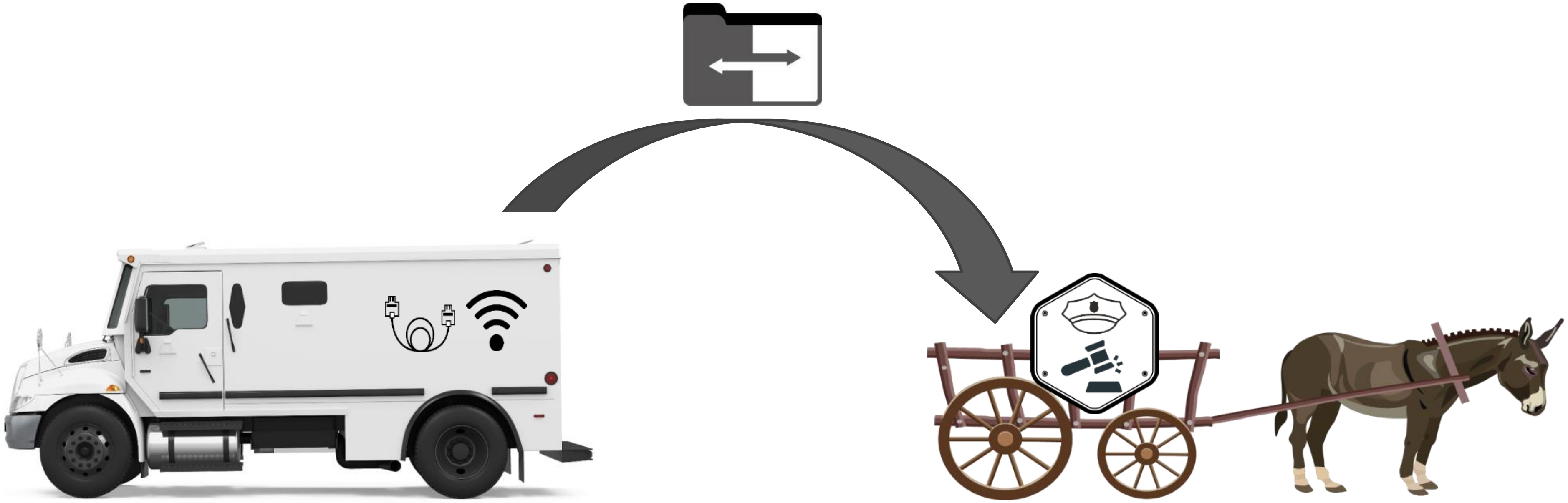
- Proposal lacks an enforcement mechanism securing the provision of statistics on issued orders
- ISPs should be free to publish voluntary transparency reports

Protection of encrypted data

- Clarification needed that ISPs are not required to decrypt data
- Transfer of encrypted data bears risk that more data is handed over than necessary

Danger of weakening the high level of trust and security

Maintaining an EU-wide high level of transparency and security



Towards a European Solution

- EuroISPA has longstanding experience in cooperating with judicial authorities

For a practical and secure e-evidence mechanism:

- Maintain the high level of safeguards
- Greater legal certainty
- Security and integrity in data request and transmission
- A solution which works for all players in the European Internet ecosystem

Thank You!

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EU Transparency Register No. 54437813115-56

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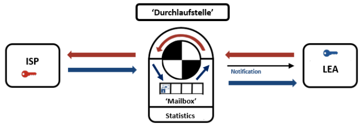
EU Transparency Register No. 56028372438-43

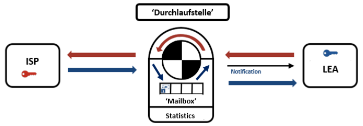
BACKUP

Description of Austrian DLS Model I



- DLS resembles a blind mailbox system
- DLS provides a web-client
- DLS ensures traceability of all requests and responses, augmented with statistical data
- DLS acts as Certificate Authority

Description of Austrian DLS Model II



Independent layers of security

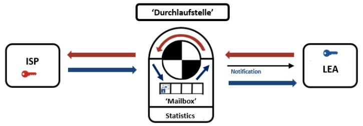
- Checks-and-Balances-Architecture
- Transport layer encryption
- Client controlled data encryption and signing
- Access Control

Independent methods of verification

- Request form verifiable independently of DLS
- Transmitted data verifiable via DLS (-Client)

CSV… Comma separated value (Technology neutral standard)

Description of Austrian DLS Model III



Advantages

- Not bound to particular technical requirements or products (Neither for providers nor for authorities)
- Can be utilized within all common databases
- Nearly no costs for implementation

Requirements

- Syntax and semantic of the CSV-file for data transmission must be defined
- All stakeholder have to agree on the interface