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LSG interim report

attachment: MLA draft v 1

The Legal Subgroup, established by the 6th eHN on 18 November 2014 started its' work in February 2015. The LSG has produced the first draft of the MLA, based on the principles presented to the 7th eHN in Riga. The main object of the current draft is to set the possible structure and frame for the agreement, set the legal topics that need to be part of the agreement and also identify possible barriers for the work.

During 2016 the LSG will work on setting the final contents of the MLA. This part of the work will be done in close alignment with other JAseHN WP as well as in close contact with MS national legal experts in LSG.

MLA draft v. 1

The draft sets the structure and frame for the agreement to be used during the next phase of the work and, if possible also for the final text. The draft is based on the guiding principles which were presented in Riga to the 7th eHN thus describing the identified main legal areas that must be addressed during 2016.

The MLA is divided into three main areas; the preamble, the main legal body and the annexes.

1. The Preamble

The preamble describes the background, the expected outcome and the legal basis for the MLA. It will also state who the parties to the Agreement are, i.e. the MS of EEA and Switzerland. As one of the principles for the MLA is to act between EU law and national legislations the LSG must produce an agreement that can include this principle which may be a challenge as EU law can only be an absolute demand for EU MS.

2. The main legal body

This is the part of the MLA which all Contracting parties to the agreement must sign and fulfil all the clauses as this part sets the legal scope, the general obligations and relationship between the parties. It also establishes a system for pin-pointing the applicable jurisdiction for each moment during a transmission of data in a cross-border exchange. It also sets the general (technical) requirements for the exchange which must be fulfilled by each MS. Some requirements will be connected to Annexes which will contain more detailed requirements, e.g. clause 22 describes “ a secure gateway” which means that each MS must have one NCP per country for all the cross-border exchange, however the technical requirements for the set-up of NCPeH will be set down in Annex 1.

3. The Annexes

The third part of the MLA is for setting more detailed requirements e.g. the details on how an eP has to be constructed to be deemed legal in the country of dispensation.

This part of the MLA is also planned to include a different system for future changes (compared to the system used for the main body of the MLA). It may be also be used for a possible further flexibility in the system by letting MS participate only for part of the exchange, e.g. a MS can choose to sign the Annex for the exchange of eP but not participate in the exchange of PS.

Potential barriers for the MLA

The LSG has so far been able to identify the following main potential legal barriers:

1. The status of the agreement

At this stage of the work it is not possible to know the final status of the agreement as this will partly depend on the final text of the MLA as well as the constitutions of the participating MS. The agreement may be an international agreement (treaty) which must include a parliamentary process or it may be a contractual agreement which can be signed by e.g. the heads of Ministries involved. This question has different answers in different MS and can therefore only be solved in close connection with the different MS legal experts involved in LSG.

2. Who will sign the MLA?

The aim is to have the signing done by the same function in each Contracting party, e.g. Ministers or Administrative Heads of Ministry. For the sake of stability of the agreement it is preferable to have the signing done as high up in the state hierarchy as possible and between the same levels in the state hierarchy. As the different MS have different national requirements for signing this question needs to be

solved in close connection with the different MS legal experts involved.

3. Differentiated level of participation

MS wishing to participate in the exchange may not be able to participate fully in all parts of the exchange, e.g. a MS may be able to participate in the exchange of eP but not in the exchange of PS due to e.g. technical reasons or constitutional reasons. A possible solution to this problem is to allow for a possible degree of flexibility in the MLA by using the Annexes. This matter will need to be solved in close co-operation with other JAsEHN WP e.g. on technical solution and data security.

4. A process for change and termination

The stability of the MLA during its' execution will partly depend on having a slow process for change and termination in the main body of the MLA as all Contracting parties will need to have ample time for adjusting to a changed situation. Terminating participation can be used in e.g. when a Contracting party wants to terminate its' participation, when one or more Contracting parties wants to make an essential change of the MLA or when a Contracting party ceases to fulfil necessary requirements thus endangering the exchange. This question on the process for termination and change has to be solved in close co-operation with national legal experts.

5. MLA sets requirements on Contracting parties in their capacity as states

The MLA is an agreement between states. All requirements in the MLA can therefore only be fulfilled by MS ("the contracting parties") in their capacity as states. However, it is for each Contracting party to decide on how it will chose to fulfil the set requirements.

This principle is important in order to avoid interference with national legislation, but it is also a principle which can easily come into conflict with the contents in other JAsEHN document as several WP work on setting very specific details for the exchange. To avoid conflicts of such nature there need to be alignment between the MLA and other eHN documents. The alignment process has already started between WP 5 and LSG with the alignment between the MLA and the OFW. This work will continue but we may also need to align with some other JAsEHN WPs during 2016.

Timeline

The final deliverable is for decision in May 2017. Until then the T6.2 will deliver an interim report for each eHN. The report will include the current state-of-play and potential barriers which have arisen since the last interim report.