

COST-REIMBURSEMENT SYSTEM

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1. WHAT IS A COST-REIMBURSEMENT SYSTEM?

Public authorities are currently faced with a growing need for access to electronic evidence (e-evidence) in criminal investigations. This leads to an increase in the number of requests to Online Service Providers (OSPs) for disclosure of user data, both using formal judicial cooperation and voluntary cooperation channels. This high demand for electronic information in criminal investigations causes additional costs for service providers and/or national authorities requesting access to data.¹ In this context, determining which party should bear the costs associated with the process of request and disclosure of electronic information has become a matter of concern for service providers and requesting/receiving public authorities.²

The **cost-reimbursement system** entails that OSPs may seek reimbursement for the expenses (e.g. cost of data storage device, postal fees, human resources, security of data, maintenance of dedicated systems) occurred in responding to authorities' requests for information. Applied mainly by domestic providers of telecommunications services,³ the cost-reimbursement system can be based on domestic legal provisions and/or OSPs' policies.

A- ENACTED LEGISLATION

The **U.S. federal law** (18 U.S.C. §2706), which has been relied on by the major U.S.-based OSPs in their policies,⁴ allows domestic OSPs to charge governmental authorities for their compliance with production orders:

"Except as otherwise provided ... a [US] governmental entity obtaining the contents of communications, records, or other information ... shall pay to the person or entity assembling or providing such information a fee for **reimbursement for such costs as are reasonably necessary and which have been directly incurred** in searching for, assembling, reproducing, or otherwise providing such information ..."

Some **EU Member States** (MSs) have also adopted national legislation, allowing for some form of cost reimbursement of domestic service providers.⁵ They have in general opted either for a system of **reimbursement which is based on pre-defined rates** or a system that allows private entities to claim reimbursement of **any reasonably incurred costs**.

However, as shown in the **SIRIUS EU Digital Evidence Situation Report 2022**, the majority of the EU Member States surveyed (64 % corresponding to 16 out of 25 MSs), **do not have a cost-reimbursement system in place**.⁶

¹ [EU Commission's Impact Assessment](#) (SWD/2018/118 final), p. 195.

² *Ibid.*, pp. 27, 220.

³ *Ibid.*, p. 224.

⁴ See, for example, Facebook, *Information for law enforcement authorities*. Available at: [Safety Center \(facebook.com\)](#); Twitter, *Guidelines for law enforcement*. Available at: [Twitter's guidelines for law enforcement | Twitter Help](#); and Microsoft, *Questions about Microsoft's law enforcement requests practices*. Available at: [Law Enforcement Request Report | Microsoft CSR](#).

⁵ Austria (Article 111(3) of the Austrian Code of Criminal Procedure); Belgium (Article 10 of the Royal Decree of 9 January 2003 and the Annex); Germany (Article 23 of the Judicial Remuneration and Compensation Act); Italy (Presidential Decree

no. 115/2002); the Netherlands (Article 13.6 of the Telecommunication Act and the Ministerial Order on the reimbursement of costs of interception and provision of data); Portugal (Article 16 of Regulation of Judicial Costs); Slovakia (Article 117 of the Telecommunications Act); and Sweden (Post and Telecom Authority). See [ANNEX I](#) to the Cost-Reimbursement System Factsheet for an overview of relevant domestic legal provisions.

⁶ Countries that reported having a cost reimbursement system in place are Austria, Belgium, Czechia, Germany, Italy, Portugal, Slovakia, Sweden and The Netherlands. For more information on EU MSs domestic legislation on cost reimbursement see the [ANNEX I](#).

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Do you have a cost reimbursement system for private entities in place in your country, in case they provide data upon official request?

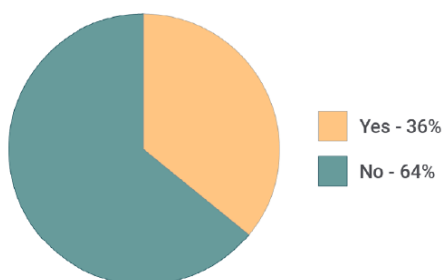


Fig.1 SIRIUS EU Digital Evidence Situation Report 2022, p. 52

Certain MSs explicitly reject any reimbursement of costs incurred for compliance with production orders.⁷

B- ONLINE SERVICE PROVIDERS' POLICIES

In parallel to the domestic legislation establishing the grounds for cost reimbursement of OSPs, they themselves often adopt their own **individual policies** on the matter. Such policies are particularly relevant in relation to cross-border voluntary cooperation, where absent any relevant legal framework on cost reimbursement they set out the **conditions of cooperation of OSPs with the foreign authorities**.

The examples below demonstrate how the wording used in these policies can vary, ranging from a relatively **abstract set of principles** determining if and when the OSP in question may request reimbursement to a rather **detailed set of guidelines on claiming reimbursement** including, in some cases, an indicative price list.

- Uber:

"At this time, Uber generally does not seek reimbursement for costs associated with responding to legal process, although it reserves the right to do so."⁸

- Facebook:

"We may seek reimbursement for costs in responding to requests for information as provided by law. These fees apply on a per-account basis. We may also charge

additional fees for costs incurred in responding to unusual or burdensome requests. We may waive these fees in matters investigating potential harm to children, Facebook, Instagram and our users, and emergency requests."⁹

- GitHub:

"Under state and federal law, GitHub can seek reimbursement for costs associated with compliance with a valid legal demand... While we do not charge in emergency situations or in other exigent circumstances, we seek reimbursement for all other legal requests in accordance with the following schedule, unless otherwise required by law:

- Initial search of up to 25 identifiers: Free
- Production of subscriber information/data for up to 5 accounts: Free
- Production of subscriber information/data for more than 5 accounts: \$20 per account

Secondary searches: \$10 per search."¹⁰

2. WHAT ARE THE CURRENT IMPLICATIONS?

At present, the application of cost-reimbursement system seems limited to the context of domestic procedures,¹¹ **rarely affecting the judicial cooperation process or the EU-based direct requests for data**.

The [SIRIUS Digital Evidence Situation Report 2022](#) confirms this as a restricted practice; a vast majority of the respondents, even in the MSs with a cost-reimbursement system in place, have never encountered the situation where an OSP requested reimbursement of the costs associated with their requests for data.¹²

⁷ Estonia (Section 215(1) of the Code of Criminal Procedure); Hungary (Section 264(2) of the Hungarian Criminal Proceedings Act) and Poland (Article 180d of the Telecommunications Act). See ANNEX I for an overview of relevant domestic legal provisions.

⁸ Uber, Guidelines for Law Enforcement Authorities. Available at: [Legal | Uber](#).

⁹ Facebook, Information for law enforcement authorities. Available at: [Safety Center \(facebook.com\)](#).

¹⁰ GitHub, Guidelines for Legal Requests of User Data. Available at: [Guidelines for Legal Requests of User Data - GitHub Docs](#).

¹¹ SIRIUS EU Digital Evidence Situation Report, December 2022, p. 53.

¹² Similarly, in 2020, only 2% of the respondents reported having received a bill for the handing over of data. See, SIRIUS EU Digital Evidence Situation Report, 2021, p. 29.

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In relation to your requests toward foreign authorities/OSPs in 2021, have you encountered the situation where the OSP requested reimbursement of the costs associated?

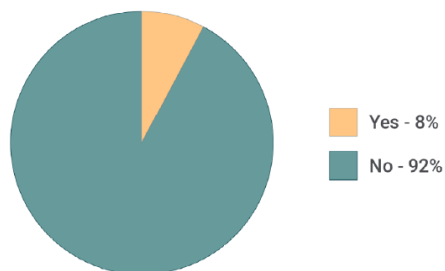


Fig.2 SIRIUS EU Digital Evidence Situation Report [2022](#), p. 53.

A- JUDICIAL COOPERATION

Several **international legal instruments** on judicial cooperation in criminal matters include the concept of cost reimbursement among their provisions. The **rule of gratuity** (of judicial cooperation) appears to be the general principle underpinning the regulation of cost-reimbursement systems in most of these treaties and conventions on mutual legal assistance (MLA).¹³ In practical terms, that means that, unless the costs of cooperation appear excessive, the requesting and the requested State each have to bear the costs of services incurred by their authorities in the MLA process.

i) Judicial cooperation framework in the EU

Within the EU, the [Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters](#) (“EIO Directive”) provides that the executing State shall as a general rule bear all the costs incurred on its territory in relation to the execution of an EIO (Art. 21(1)). This should in principle include any costs stemming from the OSPs’ claims for reimbursement. If the executing State finds the costs exceptionally high, the issuing and executing authorities should consult on whether and how the costs should be shared or the EIO modified (Art. 21(1)), noting that the mechanism should not serve as a ground for refusal, delay or impediment to the execution of the EIO.¹⁴

In contrast with the above, [Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European](#)

Union, establishes that the requesting Member State shall bear the costs incurred by telecommunications operators or service providers in executing requests for interception of telecommunications (Art. 21).

ii) Judicial cooperation framework outside the EU

As regards the judicial cooperation with countries outside the EU, Article 20 of the [European Convention on Mutual Assistance in Criminal Matters](#), as amended by Article 5 of the [Second Additional Protocol to the Convention](#), provides that, unless the execution of the request entails certain specific costs (e.g. experts’ attendance) or the costs are substantial or extraordinary (in which case the States concerned should consult on the matter), “[p]arties shall not claim from each other the refund of any costs resulting from the application of this Convention or its Protocols”. Similarly, according to Article 18(28) (Mutual Legal Assistance) of the [United Nations Convention against Transnational Organized Crime](#) the requested State bears the ordinary costs of executing a request, unless otherwise agreed by the States concerned or if the expenses of execution are of a substantial or extraordinary nature (in which case the States concerned should consult on the matter).

iii) Practical implications

The results included in the [SIRIUS Digital Evidence Situation Report 2022](#) attest to how exceptionally the OSPs’ expenses and the reimbursement systems in place in practice affect the judicial cooperation process. The statement below is one of a very few examples of the EU judicial authorities reporting in previous years on having such experience:

“In the child pornography case subscriber and traffic data related to numerous IP addresses were requested. The authorities of the [European] country in question requested to pay a sum of money per IP address. Consultation did not lead to a solution and finally the data retention period expired. As a consequence evidence was not provided.”¹⁵

The U.S. and Irish¹⁶ authorities provided that the **cost-reimbursement systems in place have not yet had any significant impact on the MLA processes**;¹⁷ the relevant authorities have not yet encountered

¹³ See, among other principles, paragraph 48 of the [Explanatory Report to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters](#).

¹⁴ Recital 13b of the EIO Directive.

¹⁵ Response provided by one of the respondents of the survey for the [SIRIUS EU Digital Situation Report, 2020](#), p. 29.

¹⁶ Ireland is not bound by the EIO Directive.

¹⁷ [SIRIUS EU Digital Situation Report, 2020](#), p. 30.

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any demands for cost reimbursement from the OSPs in the context of cross-border judicial cooperation with the EU MSs.¹⁸

B- VOLUNTARY COOPERATION

U.S.-based service providers have generally **responded to cross-border law enforcement requests without asking for a reimbursement** of related costs.¹⁹ Major service providers have already put in place efficient procedures to deal with the requests for data.²⁰

3. WHAT IMPLICATIONS ARE EXPECTED IN THE FUTURE?

Even though the cost-reimbursement system does not yet have a significant impact on accessing digital data and its actual application either by the OSPs or foreign authorities to which request is submitted is quite sporadic, it has a **potential to influence data acquisition process to a greater extent in the future**.

A- JUDICIAL COOPERATION

The international legal instruments relevant to cross-border access to e-evidence that are under negotiation or might have future implications do not seem to approach the question of cost-reimbursement in the same way.

i) Judicial cooperation framework in the EU

In particular, while the European Commission's proposal of [Regulation on European Production and Preservation Orders for e-evidence in criminal matters](#) does not intend to harmonize the cost-reimbursement systems across the EU MSs, the provisions on cost reimbursement of service providers form an integral part of the e-evidence legislative package proposal. As it stands now, the proposal entitles the service provider to claim reimbursement of costs from the issuing Member State, if in similar situations reimbursement is provided in national law of that State for domestic orders (Art. 12). Consequently, service providers operating in a Member State that has a system of reimbursement of costs, will have to bear

additional operating costs linked to the execution of orders issued by judicial authorities of MSs without such system in place. European Parliament's proposal seems to attach even more importance to the principle of cost reimbursement in the process of cross-border access to e-evidence, entitling service providers to claim reimbursement of justified costs from the issuing State or, in certain circumstances (e.g. different national rules for the reimbursement of costs between the States in question),²¹ the executing State.²²

ii) Judicial cooperation framework outside the EU

Conversely, the [Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of e-evidence](#), which was opened for signature by the Parties to the Convention on 12 May 2022, does not envisage any cost-reimbursement system.²³

iii) Practical implications

The **divergent approaches to cost-reimbursement regulation** described above are expected to contribute to the existing **fragmentation** in the field of cross-border access to e-evidence. With various cost-reimbursement systems in place (or absent any system under certain legal regimes), the States concerned could in the future resort to a sort of **"venue shopping"** of the most cost-efficient legal frameworks of judicial cooperation for them when it comes to accessing e-evidence – opting for the regimes under which they are not obliged to reimburse the OSPs (directly or via payments made to the cooperating State). The OSPs could be likewise more inclined to set their headquarters (or designate legal representatives in the context of the proposed e-legislative package) in the States where they could claim reimbursement of their expenses under the applicable legal regimes.²⁴

While service providers seem to favour precise and harmonised rules on reimbursement of costs (being able to expect the same reimbursement of expenses regardless of the system established in the country of issue or the country where they provide services), this approach to the regulation could however potentially have a chilling effect on

¹⁸ SIRIUS Digital Evidence Situation Report 2022 provides that even though cost-reimbursement system appears not to have a significant impact on access to electronic data, it does have the potential to influence the data acquisition process to a greater extent in the future, p. 51.

¹⁹ EU Commission's Impact Assessment, p. 224.

²⁰ Ibid., n. 185. The U.S. authorities provided that even in the context of domestic procedures, major U.S.-based OSPs do not charge anything in relation to production orders.

²¹ Recital (43e).

²² If the service provider decided to claim the costs from the latter, the issuing State would have to reimburse them to the executing State.

²³ At the date of the publishing of this factsheet, the Protocol has been signed (but not yet ratified) by 24 States.

²⁴ <https://www.ceps.eu/download/publication/?id=30689&pdf=TFR-Cross-Border-Data-Access.pdf>, p. 36

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the issuing authorities and limit the number of requests.²⁵ Given that a majority of EU MSs do not have a system of cost reimbursement in place, an EU-wide introduction of such system based on pre-defined rates could have negative consequences for those MSs' budgets.²⁶ This new **budgetary burden** could also discourage the States from gathering digital evidence via judicial cooperation channels and negatively impact the investigation process or even the criminal proceedings as a whole (e.g. delays in gathering evidence, insufficient evidentiary basis to establish certain elements of crimes).

B- VOLUNTARY COOPERATION

If the major OSPs started implementing their policies more vigorously and claiming reimbursement of their costs from the requesting authorities,²⁷ conditioning their cooperation with the authorities on a flat-rate compensation for each request, MSs' budgets could be seriously affected. The budgetary concerns linked to direct requests could **dissuade the authorities from seeking the**

OSP's assistance in the first place or limit it to the cases where access to digital data would be deemed absolutely necessary.²⁸ In turn, the authorities might opt for alternative, **cheaper means of gathering evidence** that might not necessarily be as efficient as the voluntary cooperation channels, again potentially impacting the investigation process and criminal proceedings as a whole.

²⁵ [Cross-border data access in criminal proceedings and the future of digital justice – CEPS](#), p. 60.

²⁶ [EU Commission's Impact Assessment](#), p. 282.

²⁷ Google, for example, announced in January 2020 that it would start charging pre-determined fees to law enforcement and

other government agencies for legal demands seeking data. Available at: [Have a Search Warrant for Data? Google Wants You to Pay - The New York Times \(nytimes.com\)](#).

²⁸ [EU Commission's Impact Assessment](#), p. 224.

ANNEX I

RELEVANT DOMESTIC LEGISLATION

AUSTRIA

Code of Criminal Procedure

Article 111

(3) Persons not suspect of the offence shall, upon their request, be reimbursed for the reasonable and customary costs necessarily incurred by separating documents or other objects relevant to the evidence from others or in delivering copies.

BELGIUM

Royal Decree of 9 January 2003

Article 10

Costs related to investment, operation and maintenance of the technical means used by the operators of telecommunications networks and the online service providers for the execution of this Decree should be borne by those operators and providers.

Costs related to investment, operation and maintenance of the technical means used by the judicial authorities for the execution of this Decree should be borne by the Ministry of Justice.

The only compensation which operators of tele-communications networks and online service providers obtain in exchange for their cooperation in accordance with Articles 3, 4 and 5 of this Decree is set out in the Annex to this Royal Decree.

The operator of tele-communications networks or online service provider who observes an accumulation of requests from judicial authorities giving rise to a considerable difference between its actual costs and the costs that are foreseen to be reimbursed under this Royal Decree, may contact the NTSU-CTIF service to determine the best way to avoid or limit such a difference.

Article 2 of the Annex

The following services are reimbursed as follows:

- 1) Observation in real time ..., whatever the duration and regardless of any extensions: 92 euros per request;
- 2) Observation of historical data (retro-observation) ..., regardless of the period requested: 80 euros per request;
- 3) Observation in a network (on pylons or network access points) ..., whatever the duration, the technology used or the number of access points: 115 euros per request;
- 4) Interception of communications ..., including the interception of IP, regardless of the technology used, duration and possible extensions: 140 euros per request;
- 5) Specific requests: the actual costs of carrying out the request are compensated upon production of supporting documents.

Article 3 of the Annex

[Operators can receive a yearly flat rate compensation for complying with the legal obligation to cooperate. The flat rate is determined by the Minister of Justice on a yearly basis. A distinction is made between big and small operators.]

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CZECHIA

Code of Criminal Procedure

Section 8

(1) Public authorities, legal entities and natural persons are obliged to comply without undue delay, and unless a special legal enactment provides otherwise, also without any remuneration, with requests of authorities involved in criminal proceedings in the performance of their tasks.

Electronic Communications Act

Section 97

“ ...

(3) A legal entity or natural person providing a public communications network or providing a publicly available electronic communications service shall retain for a period of 6 months operating and location data generated or processed in the provision of its public communications networks and in the provision of its publicly available electronic communications services. ... A legal entity or natural person retaining the operating and location data shall provide it without delay upon request

a) to law enforcement authorities for the purposes and under the conditions laid down by special legislation,

...

(7) For fulfilling the obligations specified in Subsections 1, 3 and 5 above, the legal entity or natural person is entitled to reimbursement for the efficiently incurred costs from the entitled entity that requested or ordered such an action. The amount and method of reimbursement for the efficiently incurred costs shall be specified in an implementing legal regulation.”¹

ESTONIA

Code of Criminal Procedure

Section 215

(1) The orders and demands issued by investigative bodies and the Prosecutor's Office in the criminal proceedings conducted by them are binding on everyone and shall be complied with throughout the territory of the Republic of Estonia... Costs incurred for compliance with a demand or order shall not be compensated for.

GERMANY

Judicial Remuneration and Compensation Act

Article 23

(1) Insofar as those who provide telecommunications services or are involved in such services (telecommunications companies) implement orders for the monitoring of telecommunications or provide information for which special compensation is specified in Annex 3 of this Act, the compensation is calculated exclusively according to this Annex.

(2) Third parties who ... are requested by law enforcement or judicial authorities on the basis of a request for evidence to

¹ The implementing legal regulation is the Order of the Czech Telecommunications Office No. 462/2013 Coll., from 19 December 2013 on the determination of the amount and method of reimbursement of the costs effectively incurred for the interception and recording of messages, for the storage and provision of traffic and location data and for the provision of information from the database of voice communication service subscribers.

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1. hand over objects ... or avert the obligation to hand them over in accordance with a request by law enforcement or judicial authorities, or

2. provide information in cases other than those mentioned in paragraph 1,

shall be compensated in the same way as witnesses. If the third party makes use of an employee or another person, the expenses for this (Article 7) will be reimbursed within the framework of Article 22...

(3) The necessary use of an own data processing system for the purpose of dragnet searches shall be compensated if the total investment for the hardware and software used in the individual case amounts to more than 10,000 euros. The compensation shall amount to

1. 5 euros for each hour of use in case of an investment of more than 10,000 to 25,000 euros; the total duration of use is to be rounded up to full hours;

2. in the case of other data processing systems

a) in addition to the compensation according to paragraph 2, for each hour of use of the system 10 Euros in case of development of a special application programme required for the individual case; and

b) for the remaining duration of use, including the required personnel costs, one ten-millionth of the investment sum per second for the time during which the central processing unit is occupied (CPU second), up to a maximum of 0.30 euros per CPU second.

The investment amount and the CPU time used must be made credible.

(4) A third-party system is equivalent to one's own electronic data processing system if the costs that are directly attributable to the provision of information (see Article 7) cannot be determined with certainty.

HUNGARY

Criminal Proceedings Act

Section 264

(2) The requested organization shall comply with the request free of charge, including in particular the processing, recording or transmission of the data in writing or by electronic means.

POLAND

Telecommunications Act

Article 180d

Telecommunications undertakings shall be obliged to provide conditions for access to and recording of and shall make available, at their own expense, to authorised entities, as well as to a court and a prosecutor, the data processed by those undertakings and relating to telecommunications services provided by them, on the terms and in accordance with the procedures provided for in separate regulations.

PORTUGAL

Regulation of Judicial Costs

Article 16

1 - The costs comprise the following types of charges:

d) Payments due or paid to any entities for the production or delivery of documents, provision of services or similar acts, requested by the judge on request or *ex officio*, except in the case of certificates extracted *ex officio* by the court;

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SLOVAKIA

Telecommunications Act

Article 117

The cost of the tangible media necessary for the provision of data shall be borne by the public authority to which such data has been provided.

SWEDEN

Post and Telecom Authority

Section 3

Upon disclosure of stored information, the person liable for storage shall be compensated on the basis of one of the following categories.

Category 1: disclosure of stored data relating to a certain geographically delimited area...

Category 2: other disclosures of stored data.

Section 4

Compensation shall be paid per category stated in section 3 according to the following levels.

- delivery [of data] according to category 1 during office hours [i.e. 08.00 – 17.00]: SEK 525.
- delivery according to category 1 outside office hours: SEK 790.
- delivery according to category 2 during office hours: SEK 150.
- delivery according to category 2 outside office hours: SEK 170.

Section 5

When the costs of disclosure deviate significantly from the compensation provided in accordance with section 4, the person liable for storage may instead request compensation that corresponds to the costs incurred in the individual case.

THE NETHERLANDS

Telecommunication Act

Article 13.6

1. The investment, operation, and maintenance costs for the technical arrangements that have been or are made by providers of public telecommunications networks and publicly available telecommunications services in order to comply with the provisions of Articles 13.1, 13.2a, 13.4, and 13.5 shall be at their own expense.
2. Providers of public telecommunications networks and publicly available telecommunications services shall be entitled to a payment from the State treasury for the administration costs and personnel costs that they incur arising directly from their complying with a special order or consent pursuant to the Intelligence and Security Services Act 2017 within the meaning of Article 13.2(1) and (2) or Article 13.2a, or a demand or request within the meaning of Article 13.2a, Article 13.2b, or Article 13.4(1), (2), or (3).
3. Rules may be set by ministerial order regarding how the costs within the meaning of paragraph 2 are to be determined and paid.

Ministerial Order on the reimbursement of costs of interception and provision of data

Article 3

1 If the commissioning party [the authority that has given the provider an order or request or made to carry out a wiretapping or provide information] is of the opinion that the declared costs are billable costs [the

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administrative and personnel costs incurred by a provider which result directly from the carrying out of tapping or information provision activities, as specified in annex to this Order], the compensation will be set at the amount declared by the provider, insofar as the declared costs can reasonably be considered necessary.

2 Contrary to the former, the commissioning party may conclude agreements with a group of providers on the amount of the fee for billable costs and the conditions for the payment of that fee.