

# CEPS/QMUL Report Helps Navigate the E-Evidence Discussion

Thomas Wahl



## News

In October 2020, a taskforce of the Centre for European Policy Studies (CEPS) and Queen Mary University of London (QMUL) published a [report on "Cross-border data access in criminal proceedings and the future of digital justice"](#). The report contributes to the current discussion on law enforcement obtaining electronic data held by service providers that are subject to another jurisdiction. The report is the result of discussion within the Task Force that included EU and national policymakers, providers of internet and telecommunication services, prosecutors, criminal lawyers, civil society actors, and academic experts.

It examines the ways in which data can currently be requested, disclosed, and exchanged – in full respect of the multilayered web of legally binding criminal justice, privacy, and human-rights standards that apply within the EU and in cooperation with third countries. After having analysed the current main developments concerning cross-border access of law enforcement authorities to data stored by service providers – i.e., the US CLOUD Act, the drafting of the Second Additional Protocol to the Budapest Convention, and the European Commission's e-evidence proposal –, the authors (*Sergio Carrera, Marco Stefan and Valsamis Mitsilegas*) provide a number of policy, normative, and technical solutions. They are designed to facilitate rule-of-law-based and fundamental rights-compliant judicial cooperation when it comes to the cross-border gathering and transfer of data in criminal proceedings. Key findings include:

- Reciprocal judicial scrutiny of cross-border data-gathering measures constitutes a key factor that must be maintained in judicial cooperation between EU countries;
- A compatibility assessment with EU legal standards should remain a prerogative of States' judiciaries and cannot be performed by service providers as private companies;
- Instruments that promote the direct and unmediated extraterritorial enforcement of criminal jurisdiction exacerbate conflict of laws;
- There is no quantitative or qualitative evidence showing that procedures under the European Investigation Order (EIO) take too long or are ineffective for the purpose of collecting e-evidence across borders;
- Improvement could be made by having a single EU portal for electronic communication and transmission of digital EIOs;
- Given the recent CJEU *Schrems II* ruling (→ [eu crim 2/2020, 98-99](#)), EU international cooperation instruments enabling cross-border transfers of data must provide for effective safeguards;
- Protection of EU standards can be ensured by applying the EU-US MLA Agreement – the standing legal basis for the collection and transfer of electronic information;

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- The CLOUD Act is a one-sided instrument designed to serve U.S. interests and leading to disadvantages of non-US citizens or residents;
- EU Member States' participation in the negotiations on the Second Addition Protocol to the Budapest Convention risks the coherence with applicable EU law;
- The e-evidence proposal would introduce an EU legal framework on direct public-private partnership, with the intention of overcoming "legal fragmentation" and solving financial issues;
- Given recent developments, there is a serious need to reassess the necessity and appropriateness of the proposed e-evidence rules;
- The lack of systematic and/or meaningful involvement of competent oversight authorities in the country of execution or in the affected State (in the e-evidence proposal) limits the right to effective judicial remedy;
- The direct interconnection of law enforcement authorities with service providers will generate hitherto largely unexplored challenges;
- A new EU instrument allowing Members States' judicial authorities to order disclosure of the content of electronic communication data directly from U.S. service providers would not prevent conflicts of law and conflicts of jurisdiction at the transatlantic level.

The CEPS/QMUL report contributes food for thought to the current, heated debate on e-evidence (see previous eucrim issues under the heading "Law Enforcement Cooperation").

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