

# NGO Sees Lack of Key Safeguards in Planned E-Evidence Legislation



Thomas Wahl

## News

The plans to establish new rules that enable law enforcement authorities to directly seek the preservation and production of electronically stored data held by private service providers (the “e-evidence proposals”, see [eucrim 1/2018, 35-36](#)) face further criticism from civil stakeholders. In February 2019, Fair Trials – a global watchdog that focuses on improving the right to a fair trial in accordance with international – issued a “[Consultation Paper](#).” It looks into the fundamental rights implications of the potential new legislation on e-evidence.

Fair Trials observes that the USA, with its CLOUD Act, and the EU, with the Commission proposal of April 2018 currently under negotiation, are about to set up a global “gold standard” as regards the effective cross-border access of law enforcement to electronic data. So far, however, human rights protections have only been vaguely recognised. Therefore, the consultation paper focuses on the following four key safeguards, which must be incorporated into the new mechanism:

- Prior notification of the suspect;
- Robust prior judicial authorisation procedure;
- Meaningful remedies in the event of a trial;
- Effective and systemic oversight on the use of the measures by law enforcement authorities.

Fair Trials concludes that the new EU rules on e-evidence, the U.S. CLOUD Act and the planned EU-US agreement on the exchange of e-evidence in criminal matters (see [eucrim 4/2018, 207](#)), can only serve as a global model if they “set high standards and uphold the fairness of criminal proceedings through real and meaningful safeguards.” It further remarks: “In the absence of such safeguards, the new cross-border cooperation mechanism is likely to fail, causing injustice to the persons concerned and undermining public trust in law enforcement authorities.”

The consultation paper, together with a more comprehensive “[policy brief](#)” released in October 2018, analysed the impact of current mechanisms for cross-border access to electronic data. The fairness of criminal proceedings was also taken into account in the critical working papers on the e-evidence proposal for a regulation on European preservation and production orders by the European Parliament’s LIBE Committee .

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