

Public consultation on improving cross-border access to electronic evidence in criminal matters

Fields marked with * are mandatory.

Introduction

Obstacles to accessing electronic evidence complicate criminal investigations and therefore affect criminal justice in the digital age. Criminal procedural measures to gather evidence as part of a criminal investigation are usually national in scope. By contrast, obtaining electronic evidence frequently has cross-border implications. Therefore, authorities have to rely on judicial cooperation mechanisms like mutual legal assistance (MLA) or, within the EU, mutual recognition, on the direct cooperation of service providers, or on direct access to obtain electronic information. All three channels raise different types of issues affecting the investigations that may result in abandoned and unsuccessful cases and, ultimately, in a less effective criminal justice.

In the perspective of improving access to electronic evidence in criminal investigations, the Commission will assess the scope for horizontal or further sectorial action at EU level, while respecting the principle of subsidiarity. The present public consultation is intended to feed this assessment - without, however, either prejudging any action by the European Union or prejudging the legal feasibility of an EU action with regards to the limits of the Union's competence.

About you

1 You are welcome to answer the questionnaire in any of the [24 official languages](#) of the EU. Please let us know in which language you are replying.

English

*2 You are replying

- as an individual in your personal capacity
- in your professional capacity or on behalf of an organisation

*11 Respondent's first name

Maryant

*12 Respondent's last name

Fernández Pérez

*13 Name of the organisation

European Digital Rights (EDRi)

*14 Email address

maryant.fernandez-perez@edri.org

*15 What is the nature of your organisation?

Please select the answer option that fits best.

- Electronic communication service provider (e.g. telecommunications operators, transmission services excluding broadcasting, etc.)
- Information society service provider (e.g. online services, cloud services, social networks, platforms, etc.)
- Professional/business association
- Government of a Member State or regional government
- Law enforcement or judicial authority or public authority directly related to it (e.g. Ministry of Justice, Ministry of Interior)
- Other public authority/administration
- EU institutions or agencies
- Data protection authority
- Academic/research institution
- Law firm
- Non-governmental organisation (NGO)
- Other

*17 Is your organisation included in the Transparency Register?

If your organisation is not registered, we invite you to register [here](#), although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#)

- Yes
- No
- Not applicable

*18 If so, please indicate your Register ID number.

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*19 Place of establishment (main headquarters in case of multinational organisations)

- Austria
-

- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

*21 Your contribution,

Note that, whatever option chosen, your answers may be subject to a request for public access to documents under [Regulation \(EC\) N° 1049/2001](#)

- can be published with your organisation's information** (I consent the publication of all information in my contribution in whole or in part including the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication)
- can be published provided that your organisation remains anonymous** (I consent to the publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that it is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent the publication.

Part II: General Questions and Current Situation in your country/entity

The use of electronic communication tools is constantly growing, so are the criminal investigations that require electronic evidence

* 22 Instead of using landline and meeting in person criminals use more and more other information society services, such as social media, webmail, messaging services and apps to communicate. Do you consider the increased use of information society services as an obstacle for effective criminal investigations?

- Yes
- No
- No opinion

* 24 In cross-border cases law enforcement and judicial authorities regularly have to address a judicial authority of another State via a judicial cooperation mechanism such as mutual legal assistance or EU mutual recognition mechanisms. Do you believe direct cross-border cooperation of law enforcement and judicial authorities with digital service providers will bring an added value in criminal investigations?

- Yes
- No
- No opinion

* 26 Should the European Commission propose measures to improve direct cooperation of EU law enforcement and judicial authorities with digital service providers headquartered in third countries under the condition that sufficient safeguards are in place to protect your fundamental rights?

- Yes
- No
- No opinion

27 Which concerns would an EU initiative in the area of electronic evidence raise in your view?

	Very relevant	Relevant	Somewhat relevant	Not relevant	No opinion
* Negative impact on (fundamental) rights guaranteed by national law / EU Law	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Loss of sovereignty for your Member State	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Risk that third countries impose similar obligations to service providers to disclose electronic evidence stored in the EU (reciprocity)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

30 Others/comments (please use the space below)

500 character(s) maximum

Priority should be given to making mutual legal assistance more effective, rather than seeking to create a direct cooperation system that enables law enforcement authorities to request personal data without the judicial authorisation of the country where data are stored, following case law of CJEU & ECtHR. Direct cooperation poses serious risks to human rights, particularly when it does not require the knowledge and agreement of the country where data is stored or where the data subject resides.

33 What do you expect to be achieved by an EU initiative on electronic evidence ?

	Yes	No	No opinion
* Legal certainty	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Guarantees for the protection of fundamental rights in accordance with the Charter of Fundamental Rights	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

* 35 Besides the possibility to set up a legal framework for cases with cross-border dimension, do you think the possible EU initiative should also cover purely domestic cases?

- Yes
- No
- No opinion

Part III. Access to e-evidence by a direct production request/order to the digital service provider

58 A possible EU initiative could enable law enforcement authorities to directly request (through a “production request”) or compel (“production order”) a service provider in another Member State to disclose specific information about a user without having to go through a law enforcement or judicial authority in the other Member State. Do you think a EU initiative should cover

	Yes	No	No opinion
* A direct production request to the service provider (voluntary measure)?	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* A direct production order to the service provider (mandatory measure)?	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

59 If the European Commission proposes a legal Framework for direct cross-border requests to service providers: how relevant are the following conditions for a possible cross-border instrument to access e-evidence (Please rate relevance below)?

	very relevant	relevant	somewhat relevant	not relevant	no opinion
* Direct access should only be given for a limited number of offences (e.g. depending on the severity)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Condition that the act is punishable in both countries (double criminality)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Specific safeguards to ensure fundamental rights	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

* Notification of another Member State affected by this measure	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Possibility for the notified Member State to object the measure	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Notification of the targeted person	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Legal remedies for the person affected	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

60 Others : Please specify in the space below

500 character(s) maximum

The response to this question must not be interpreted as EDRi endorsing a framework for direct cooperation bypassing MLATs or as EDRi endorsing "direct access" to data without any intermediary involved ("government hacking"). If there was a move towards direct cooperation, other safeguards should apply, such as the necessity and proportionality principles: <http://bit.ly/1969y1g> . The EU should not follow the US DOJ bill example as it contains very low standards. See <http://bit.ly/2xiTFVL>

61 Data is frequently categorised as non-content (subscriber information, e.g. the name of an e-mail account holder and metadata, e.g. the time an e-mail was sent) or as content (e.g. the content of an e-mail). If the EU would establish a legal framework for the direct cross-border cooperation with service providers, which data should be subject to it?:

	All types of data (content and non-content)	Only non-content data (subscriber information and metadata)
Only data stored in the EU	<input type="radio"/>	<input type="radio"/>
Also data stored outside the EU	<input type="radio"/>	<input type="radio"/>
Depending on where the service provider is located	<input type="radio"/>	<input type="radio"/>

* 62 If the EU would establish a legal framework for the direct cross-border cooperation with service providers, which types of service providers should be subject to it (multiple choice)?

- Electronic communication service providers (e.g. telecommunications operators, transmission services excluding broadcasting, etc.)
- Information society service providers (e.g. online services, cloud services, social networks, platforms, etc.)
- Other digital services providers relevant for investigation measures

63 If you replied other, please specify in the space below

500 character(s) maximum

It is impossible to answer this question without supporting some direct cooperation.
Improving MLATs is a better solution than direct cooperation. Before taking a decision on this, the COM should gather real data from LEAs. Further, imposing the same obligations on all actors could have different repercussions both for the companies, the data subjects and/or all Internet users. The COM should take

size of the company, geographic scope, nature & resources of companies involved into account.

Part IV. Direct access to e-evidence through an information system without any intermediary (e.g. a service provider) involved

There could be a situation e.g. during a house search on the suspect's premises where his/her laptop is searched and access to his/her virtualised storage media (cloud-based) is possible directly from the seized device, but it might be unclear where the data is stored or whether there is a cross border dimension at all.

*64 Do you see any need for a common EU framework for this situation?

- Yes
 No
 No opinion

65 If the European Commission should decide to propose a legal Framework for this situation, what should the proposal provide?

	Yes	No	No opinion
* Condition that the act is punishable in both countries (double criminality)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Specific safeguards to ensure fundamental rights	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Notification of another Member State affected by this measure	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Possibility for the notified Member State to object the measure	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Notification of the targeted person	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Legal remedies for the person affected (including challenging the admissibility of evidence)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

66 Others : Please specify in the space below

500 character(s) maximum

N.B: Since the exception not to jeopardise investigations is often abused, the default must be to notify the targeted person in line with EU data protection rules. Following the absence of evidence showing that Member States comply with high human rights standards, we call for a presumptive ban on government hacking until the safeguards indicated in pp. 9-11 of our position paper <http://bit.ly/2zMcOkR> and the annex to this consultation response are proven to be met, monitored and reviewed.

Part V. International scope

Important service providers are often headquartered in third countries, such as in the US. Alternatively or additionally, the requested data may be stored in a third country. These elements often hamper criminal investigations.

69 In your opinion, what could improve criminal investigations with a third country dimension? (Please rate importance below)

	very important	important	somewhat important	not important	no opinion
* Conclusion of bilateral treaties with main affected third parties	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Conclusion of multilateral treaties	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Development of an EU-wide common system/approach	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

70 Others : Please specify in the space below

500 character(s) maximum

MLATs reform without bypassing them & lowering the current safeguards. Any further harmonisation or cooperation should happen upwards, not downwards. Similar experiences in this context like the EU-US Umbrella Agreement show failed attempts to establish high standards. See, for instance, <http://bit.ly/21bFj89> & <http://bit.ly/2y0TEu7>. In case the COM decides contrary to our recommendations, it would be advisable to directly refer any potential treaty to the Court of Justice of the European Union.

Document upload and final comments

72 Should you wish to provide additional information (e.g. a short position paper) or raise specific points not covered by the questionnaire, you can upload your additional document here.

Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The optional document will serve only as additional background reading to better understand your position.

02024bce-3e94-4581-aaa9-907a03a9ab27/20171026_edri_annexconsultatione-evidence_final.pdf

Contact

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