

Cross-border access to electronic evidence in the EU and US:
A paradigm shift in the system of cross border access in
criminal investigations?

Gemma Davies, Associate Professor, Northumbria
University



US – CLOUD Act

- Clarifying Lawful Overseas Use of Data Act –23 March 2018
- Overturns a previous privacy rule that was passed during the tenure of the former U.S. President Barack Obama that prohibited ISPs from sharing information about users without their consent.
- Also supposed to clarify the legal standard required when US government seeks data which is stored outside of its jurisdiction
- Previously regulated by Mutual Legal Assistance Treaties (MLATs)
- The executive branch can enter into bi-lateral agreements with foreign countries to provide requested data relating to its citizens

The CLOUD Act from an EU perspective

- Article 48 of the General Data Protection Regulation (GDPR)⁵⁶ states:
- “Any judgment of a court or tribunal and any decision of an administrative authority of a **third country** requiring a controller or processor to **transfer or disclose personal data** may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.”

CLOUD Act and Fundamental Rights

- CLOUD Act establishes that US constitutional safeguards would continue to apply only to foreign requests for data targeting US citizens or aliens lawfully admitted (for permanent residence) to the country.
- No specific guarantee is provided by the CLOUD Act as to the level of protection granted to EU citizens' data in the US, especially in the case where an executive agreement is signed between the US and a non-EU country.

Other Risks

- (1) allows foreign governments to wiretap on U.S. soil under standards that do not comply with U.S. law;
- (2) gives the executive branch the power to enter into foreign agreements without Congressional approval, including in cases where countries have a concerning human rights record;
- (3) allows foreign governments to obtain information that could pertain to individuals in the U.S. without meeting constitutional standards;
- (4) possibly facilitates foreign government access to information that is used to commit human rights abuses.

European Union legal framework - proposed

- **E-evidence - cross-border access to electronic evidence**
- Create a European Production Order
- Create a European Preservation Order
- Oblige service providers to designate a legal representative in the Union

Significant recent amendments

- **notification system** for content data in cases when the issuing authority believes the person whose data are sought is not residing on its own territory
- may only be issued for criminal **proceedings**
- Grounds for EA to refuse order on basis that it **'manifestly violates the Charter of Fundamental Rights and Freedom or is manifestly abusive'** is removed
- Notification of data subject by IA **'without undue delay'** but delay allowed if necessary and proportionate to avoid obstructing criminal proceedings
- **Speciality principle** applies – only used for the purpose it is sought unless preventing an immediate and serious threat to public security
- **Pecuniary sanctions** of up to 2% of the total worldwide annual turnover

E-evidence proposals

All DSP, as long as they offer services in the EU market,

Communications data only

Requests by judicial authorities or prosecutor

Protection of an individual's rights depends on the objection by a provider – unless subject not resident in IS

Must be criminal proceedings ONLY

Must be proportionate and legitimate – defined as min 3 years for content and no minimum for non-content

No substantive HR grounds for non compliance

Notice required to be given to the target user by the IA but can be delayed to safeguard the investigation of criminal offences,

CLOUD Act

US companies if their main site is in the US,

Communications and real time data

Requests by law enforcement agencies

protection of an individual's rights depends on the objection by a provider

Must comply with law of requesting state

Content data must be determined to “relate to significant harm” non-content without limitation

Order can be challenged by service provider if disclosing the data would risk violating foreign law.

No notice required to target user

Data classification

Judge or court – 3 years custodial sentence min	Prosecutor – no minimum sentence
Content data	Access data
Transactional data	Subscriber data

Extra-territorial application of law and the principle of mutual recognition

- The proposal introduces the concept of extra-territorial application of law.
- only the service provider of the concerned Member State (or the legal representative therein) will be aware of the order
- mutual recognition in criminal matters is not an absolute principle
- Public-private partnership

Risks

- Fundamental Freedoms - the use of the proposed instruments could potentially affect a number of fundamental rights, including the **right to protection of personal data, the right to respect of private and family life, the right to freedom of expression, the right of defence, the right to an effective remedy and to a fair trial.**
- Data Protection

Other Issues

- 1) Questions regarding the interpretation of Article 82(1) TFEU
- 2) Proportionality
- 3) The question of dual criminality
- 4) Relationship with the European Investigation Order
- 5) Relationship with current MLA and mutual recognition systems
- 6) The relationship to the provisions of the Council of Europe Budapest Cybercrime Convention.

Conclusions

- 1) Proposal could usher in paradigm shift in the system of cross-border access to data in criminal investigations.
- 2) MLATs add a layer of domestic review and reduce conflicts created by accessing data in another jurisdiction.
- 3) A move away from the EU's previous position.
- 4) Significant concerns about the protection of fundamental rights.
- 4) A global trend?