Accessing E-evidence - challenges to fundamental rights

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I. Introduction

1. Electronic evidence and criminal justice
2. Overview of judicial cooperation mechanisms for gathering cross border data and their limits

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II. Electronic data and the right to a fair trial – the accused's perspective

Key principles:

- Presumption of innocence
- Adequate time and facilities to prepare the defence
- Ability to access and contest evidence
- Equality of arms

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II. The accused's perspective - Notification

- Legitimate reasons for confidentiality
  - Art. 19 EIO
  - Art. 11 E-evidence Proposal
  - EU/Japan and EU/USA MLAT
- Challenge to fairness of criminal process
- Prior notification to challenge legality – ex-post remedy not satisfying
- Equality of arms in electronic data sharing?
- Service providers: users' trust!

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Mitigating measures

- Requirement for clear and detailed reasons for non-notification;
- Power for recipients of requests to refuse to comply (or to request further information) if not satisfied by the justifications;
- Clear time-limits for the imposition of secrecy;
- Obligation for prompt ex-post notification once the legitimate basis for secrecy no longer applies
- Right for the affected person to challenge the legality of the evidence gathering and use of secrecy;
- Obligation for LEAs requesting electronic data (in the context of secrecy) to extend the request to cover exculpatory evidence.

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II. The accused's perspective – Early access to the casefile

- Equality of arms – access evidence for and against accused
- ECtHR and Rights to Information Directive
- Practice: disclosure not until after the investigation is complete
- E-evidence: failure to disclose → severe impact on the defence
  - Transient nature, quantity
  - Complexities in processing to identify relevant evidence
- Delays in case coming to court, increased pre-trial detention

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Mitigating measures

- Courts to give additional time to the defence to process electronic data and to obtain exculpatory evidence
- Presumption that detained defendants be released during this additional time;
- Increased efficiency in collecting electronic data which is required by the defence and sufficient resources being made available to the defence ;
- Requirement for LEAs to formulate requests for electronic data in a way that will ensure that relevant exculpatory evidence is also obtained (or preserved).

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II. The accused's perspective – Access to evidence-gathering tools

A key threat to a fair criminal justice process:

Ability to prepare a defence, delays proceedings and impacts on the procedural equality between parties

- Art. 1(3) EIO: explicit power to defence but lack of details
- E-evidence Proposal: silent
- Other instruments: explicit right for defence to of cross-border evidence gathering tools rare!

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Mitigating measures

- Powers to the defence to demand evidence gathering on equal terms with prosecutors;
- Obligations on states or service providers receiving such requests to process them with the same urgency as requests received from LEAs (as in the EIO Directive);
- Courts being required to give additional time to the defence to enable it to request electronic data;
- Presumption that detained defendants be released during this additional time where delays are caused by non-notification and/or late disclosure.

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II. The accused's perspective – preserving evidence

- Volatile nature of electronic data
- EIO and MLA instruments:
  - No possibility for the defence to seek to ensure the preservation of data that could support the defence
- E-evidence Proposal: silent
- Even if: unclear what defence wants to rely on
- Privacy!

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Mitigating measures

- Limiting the use of gagging orders;
- Ensuring LEAs are under a clear obligation to secure (or at least require the preservation of) all evidence of relevance to the case (both inculpatory and exculpatory);
- Giving the benefit of the doubt to the defence during the trial where exculpatory electronic data is no longer available.

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II. The accused's perspective – Challenging prosecution evidence

- Hard to challenge the probity or admissibility of the prosecution's evidence
- How was it gathered by LEAs in another country?
  - Violation of law?
  - Undermines reliability?
  - Presumption of legality of foreign evidence by e.g. Belgium

  - Reluctance – less willing to cooperate with future investigations?

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Mitigating measures

- Sufficient information to be provided by the requested LEA about the evidence gathered and the legality of its actions as part of the cooperation;
- A right to the defence to challenge prosecution evidence;
- Prohibiting “presumptions of admissibility”;
- Allowing the appointment (funded by the state where needed) of lawyers in the state from which the evidence was obtained.

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II. The accused's perspective – Understand & manage e-data

- Capacity of the defence?
  - Training needed to understand significance of the data provided
  - What kind of exculpatory e-data? Where stored?
  - Time consuming – limited resources, quantity of data, client in detention, timeframe, financial issues (software)
  - Legal aid
  - Equality of arms?

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Mitigating measures

- Prompt notification of requests for electronic data and timely disclosure of evidence;
- Development of protocols for the handling and sharing of electronic data between LEAs and the defence;
- Funding for the defence to acquire the IT tools they need to process electronic data on an equal footing to LEAs;
- Development and delivery of specialist training for defence lawyers on technology and electronic data;
- Creation of either specialist units to provide ad hoc assistance to lawyers handling electronic data (Bar Associations) or the provision of financial support to enable lawyers to contract privately with experts to obtain this support.

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II. The accused's perspective – Legal privilege

- Key to ensure effective exercise of rights of the defence
- Higher risk with data exchange of electronic data
- Art. 11 (1)(a) EIO
- Art. 6(7) E-evidence Proposal:
  - Protection designed to address this including a requirement on the issuing MS to take into account any such immunities or privileges
- Different approaches in MS – effective ex-post remedy?

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Mitigating measures

- Clarifying the obligations on recipients of requests for electronic data regarding to respect legal privilege;
- Training for lawyers on practical mechanisms to ensure privileged communications are not inadvertently collected;
- Where a risk is identified that electronic data may contain privileged materials, LEAs should create independent teams (not connected to the investigation or prosecution) to filter out those materials;
- Notification obligations and legal remedies where privileged information has been received by LEAs.

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II. The accused's perspective – Trial within a reasonable time

- Impacts on accused:
  - delayed disclosure of casefile
  - delayed trial preparation
  - extended pre-trial detention
- Increased efficiency to help protect fair trial rights – but concerns must be remedied!
- Defence to use tools with same speed and efficiency to obtain data
- Prompt notification and timely disclosure of evidence!

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III. E-evidence and the rule of law

- Fair criminal justice system core to RoL
- Accountability of law enforcement - checks on the legality of their actions
- Trust in justice system & respect for HR
- Prohibition of arbitrariness
- Independent and impartial courts
- Judicial review
- Equality before the law

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Mitigating measures

- Limits on the use of secrecy and prompt exchange of evidence are crucial to allow legal challenges;
- Clear rights should be given to the accused to challenge the legality of requests for electronic data before a judge;
- Effective oversight by an independent judge should be required before demands for electronic data are issued;
- LEAs should not benefit from illegally obtained evidence in order to secure a conviction and greater clarity is needed in domestic and regional law (particularly within the EU) on the appropriate remedy where E-evidence has been obtained illegally.

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III. RoL – Systematic oversight

- Fishing expeditions? Political motivation?
- EIO: evaluation report by COM in 2019
- Art. 19 E-evidence Proposal:
  - annual and more substantive reports
  - MS to collect and maintain statistics
  - Published?

- Voluntary transparency reports by SP

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III. RoL – Proportionality: probable cause & fishing expeditions

- Great impact on private and family life
- Required: sound basis to justify the request of e-data
- No vague and unsubstantiated suspicion!
- US law: probable cause
- EIO: proportionality and necessity assessment against fundamental rights – refusal! (Art. 11(1)(f))
- E-evidence Proposal: no evidential threshold – only general principles (Art. 5(2))

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Mitigating measures

- Clearly defined legal limits on the scope of electronic data requests, including a requirement to ensure proportionality, with effective judicial oversight;
- Clear powers for the recipient of a request for electronic data to refuse where this is not proportionate;
- An obligation to notify as soon as possible people whose personal data has been shared and for systemic oversight.

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III. RoL – Political abuse & oppression

- Provisions to protect in several mechanisms
- Within EU: no explicit refusal ground
- Mutual recognition – bound by same legal frameworks prohibiting political abuse
- Art. 11(1)(f) EIO
- E-evidence Proposal: oppose enforcement if it manifest violation of the Charter or manifestly abusive (Arts. 14(4)(f) and (5)(e))
  - Service providers to assess
  - Conflict of interest

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Mitigating measures

- Prompt notification to give an opportunity for an accused (or other person affected) to challenge the request for electronic data on political motivation grounds;
- Systematic reporting of how mechanisms are being used in practice
- Requirement for private service providers to continue to issue transparency reports;
- Judicial oversight of requests to identify and prevent abuses and should be required in the requested country where a state is known to abuse criminal justice systems for political ends.

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III. RoL – Human rights abuses

- Art. 11(1)(e) EIO – explicit ground for refusal
- E-evidence Proposal:

  - no second judicial authority to assess

  - Art 9(5): refer to 'competent enforcement authority' where manifest violation of Charter apparent or manifestly abusive

  - institutional capacity of SP

  - conflict of interests

  - very tight timeframes!

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Mitigating measures

- Receiving states to refuse to cooperate where requirements of dual criminality are not met;
- Requests accompanied by sufficient information to enable the recipient to make a meaningful assessment;
- People affected by electronic data requests are notified in advance of the evidence gathering (when possible) and given an opportunity to challenge the request on human rights grounds;
- Systemic information is published about the use of electronic data requests including details on the requesting country, the nature of the offence and decisions made to refuse cooperation on human rights grounds.

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III. RoL – Legal clarity

Conflicts of law:

- Which law applies?

  E.g. fines for Service Providers not executing a request

- Principle of national sovereignty
- State of residence
- Data protection for individual user

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Conclusions

- Cross-border gathering and the exchange of evidence is crucial to effective law enforcement.
- But considerable challenges for the fairness of the criminal justice systems – both from perspective of the accused and of the rule of law in general.
- Current systems do not operate perfectly from the perspective of fairness.
- Current proposals create new challenges.

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