

Commentaries on the proposal for a regulation on the European Production and Preservation Order

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Why do we need the Regulation? (s. 2.1 Impact Assessment)

“Crime cannot be effectively investigated and prosecuted in the EU because of challenges in cross border access to e-evidence”

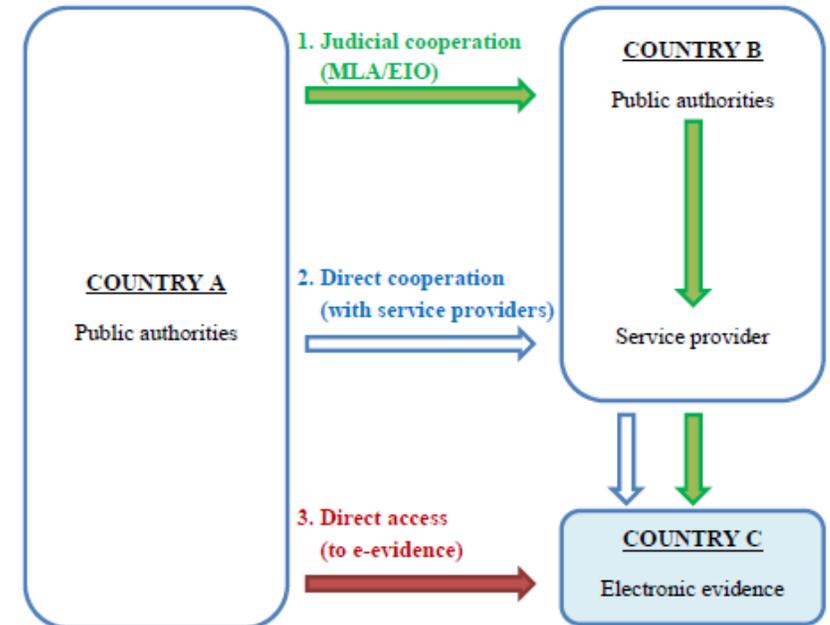
Whic are these challenges?

1. Electronic Evidence is often stored outside the country whose authorities need access : affects all types of data and all types of crime
2. Shortcomings of current channels to access e-evidence
3. Volatile nature of e-evidence

Existing channels to access e-evidence

- 1. Mutual Legal Assistance treaties (MLAT):**
 - Too slow,
 - disproportionate expenses of resources
- 2. Direct Cooperation with service providers**
 - Unreliable
 - Dependant on service providers policies
 - Lack of transparency
- 3. Direct access to data**
 - Legal fragmentation

Figure 1: the main parties and the three channels for cross-border access to e-evidence



Source: EPO Proposal Impact Assessment

The problem divers (s. 2.2 Impact Assessment)

1. It takes **too long** to access e-evidence across borders under existing **judicial cooperation** procedures, rendering investigations and prosecutions less effective.
2. Inefficiencies in **public-private cooperation** between service providers and public authorities **hamper effective investigations and prosecutions**.
3. Shortcomings in defining **jurisdiction** can hinder effective cross-border investigations and prosecutions.

Objectives of the Proposal

A. Specific objectives:

1. Reduce delays in cross border access to electronic evidence
2. Ensure cross border access to electronic evidence where it is currently missing
3. Improve legal certainty, protection of fundamental rights, transparency and accountability

B. General Objectives

1. **Ensure effective investigation and prosecution** of crimes in the EU by improving cross-border access to **electronic evidence** through **enhanced judicial cooperation** in criminal matters and an approximation of rules and procedures

DIMENSION OF THE PROBLEM

- A. Percentage of investigations including a request to cross-border access to e-evidence
- B. Percentage of requests to service providers that are fulfilled
- C. Percentage of crimes involving cross-border access to e-evidence that cannot be effectively investigated or prosecuted

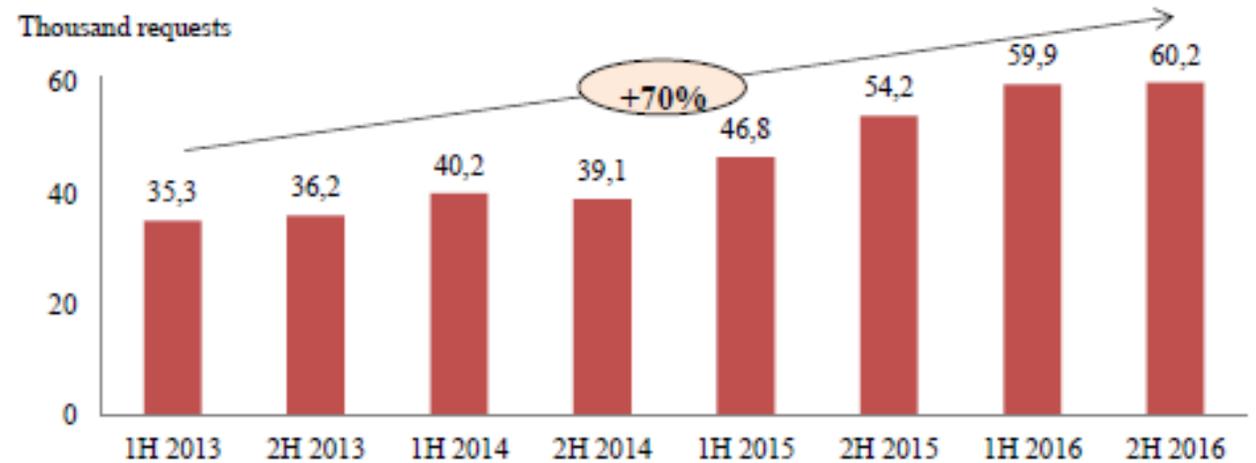
Sources of the Regulation Impact Assessment:

- **Survey** addressed to **public authorities** in Member States
- **Transparency reports** from the main service providers (Facebook, Google, Microsoft, Twitter and Apple)

A) Percentage of investigations including a request to cross-border access to e-evidence

- “E-evidence in any form is relevant in around **85%** of total (criminal) investigations”
- “In almost **two thirds** (65%) of the investigations where e-evidence is relevant, a request to service providers **across borders** is needed.”
- **55% of total investigations include a request to cross border access to e-evidence.**

Figure 2: evolution of number of Member States' requests²⁰ to the main service providers²¹



Source: EPO Proposal Impact Assessment

Service providers do not separate between judicial and voluntary cooperation requests

B) Percentage of requests to service providers that are fulfilled

Table 3: percentage of requests to service providers that are fulfilled (survey data)

		Within the EU		With non-EU countries	
		Judicial	Direct	Judicial	Direct
Non-content data	Subscriber data	75%	55%	45%	45%
	Metadata	60%	45%	35%	35%
Content data		55%	N/A ²²	30%	N/A ²³

- The median of the above responses is 45%.

Source: EPO Proposal Impact Assessment

Conclusions:

1. Subscriber data is easier to obtain than content data
2. Requests within EU are fulfilled more easily than with non EU-Countries
3. **Less than half of all the requests to service providers are fulfilled (45%)**

Why are the 55% of requests left unfulfilled?

Variety of reasons, including:

1. Possibility that a request is sent to the wrong provider;
2. it is drafted in an excessively broad or unclear manner;
3. it fails to specify an existing account or sought information;
4. it does not have a valid legal basis or
5. the data sought no longer exists

C) Percentage of crimes involving cross-border access to e-evidence that are negatively affected or cannot be pursued

Table 4: percentage of investigations involving requests to access e-evidence across borders that are negatively affected or cannot be pursued

Cause	Within the EU		With non-EU countries	
	Judicial	Direct	Judicial	Direct
Lack of timely access ²⁴	35%	25%	45%	15%
Lack of access (access denied)	25%	25%	25%	15%
Other	15%	5%	15%	10%
Total	75%	55%	85%	40%

Source: EPO Proposal Impact Assessment

Conclusions

1. Almost two thirds of crimes involving cross-border access to e-evidence cannot be effectively investigated or prosecuted
2. "Direct cooperation seems to be a more efficient channel than judicial cooperation, in particular with service providers based in non-EU countries.

Q2 - What do we understand by negative impact?

SOURCES:

1. Transparency reports of Apple, [Facebook](#), [Google](#), Twitter and Microsoft.
2. Targetted survey n°2 (p.135 of the impact assessment)

Targeted survey 2

The purpose of this survey was to collect quantitative and qualitative information on the size of the problem concerning cross-border access to e-evidence through both judicial cooperation channels and direct cooperation between public authorities and service providers.

The survey was addressed to public authorities in all Member States.

In total, 76 responses were received through the online survey from public authorities from all Member States except EL and PL. SE sent the information by email. 68 responses came from law enforcement, 5 from judicial authorities, and 4 from the public administration officials.

The survey was sent on 6 October 2017 and it was closed on 23 October 2017.



Questioning premises

1. Is access to e-evidence is (almost) always needed?
2. Are available mechanisms unfit for cross-border access to data ?
3. Does access to data negatively affect all criminal investigations equally?
4. A premature assessment of the EIO?

THANKS!

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