

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

Raegan

*12 Respondent's last name

MacDonald

*13 Name of the organisation

Mozilla Corporation

*14 Email address

raegan@mozilla.com

*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.

174457719063-67

*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

*20 If "other", please specify:

USA

*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

25 In what sense? (Please use the space below)

500 character(s) maximum

We only say "yes" to write this, but we mean "maybe" bc it depends what cooperation looks like. All efforts to seek info from another jurisdiction should be subject to rigorous judicial oversight and the principles of necessity & proportionality. To ensure mutual respect for the right of citizens, we would oppose the development of such a mechanism outside of the European union member states. We also suggest to prioritise reform of MLATs, then assess whether a new mechanism is needed.

*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

29 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
* Mandatory nature	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Increasing volume of requests	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Hampering customer's trust in your services	<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

As noted above, our most serious concern would be the risk of laxer processes with less oversight undermining the fundamental rights of EU citizens. We feel targeted reform of existing processes to address known weaknesses of existing mechanisms such as MLATs (e.g. speed, accessibility) should be prioritised over a new process.

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

	Yes	No	No opinion
* Legal certainty	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* EU wide common request form	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

* 34 Definitions exist for example for "subscriber information" in the Convention on Cybercrime of the Council of Europe, for "traffic data" and "location data" in Directive 2002/58/EC, for "electronic communications metadata" and "electronic communications content" in the Commission proposal for a Regulation on e-privacy. Nevertheless there is still no harmonised definition for data exchanged in the context of judicial cooperation and the existing definitions may not cover all forms of data. Do you think that setting up EU definitions for these terms in the context of judicial cooperation, taking into consideration existing EU definitions for other purposes, would clarify the situation and thus be helpful?

- Yes
- No
- No opinion

* 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

* 48 Has your business ever been requested by a judicial or law enforcement authority to provide access to electronic evidence for a criminal investigation?

- Yes
- No
- I don't know

49 If your **headquarters are located within the EU**: How many requests are from a European law enforcement or judicial authority that is located...

	2015	2016	No data available/not applicable
in the same Member State as your headquarters			
in another Member State as your headquarters			

50 If your **headquarters are located in a third country**: How many requests are from a European law enforcement or judicial authority that is located in an European Member State in the following years?

	2015	2016
Number of requests	0	0
No data available/applicable		

* 51 The time it takes for service providers to provide the requested data seems to vary a lot. In your experience, does it take longer to provide the requested data when the requesting judicial or law enforcement authority is located in another country as your headquarters?

- Yes
- No
- I don't know

52 How long does it take before you can provide the requested data (average in days)?

	within 2 days	between 3-5 days	between 6-10 days	between 11-30 days	between 1 month-6 months	more than 6 months	more than 1 year
When the requesting authority is situated in the same country	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
When the requesting authority is not situated in the same country	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

53 What are the main obstacles in cross border situations to swiftly provide the requested data? (please rate relevance below)

	very relevant	relevant	somewhat relevant	not relevant	no opinion
* Legal uncertainty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* No common definition of the type of the requested data	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Requests differing in form and content between Member States	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Need to assess the legitimacy of the request	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Insufficient information to assess the legitimacy of the request	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Need to assess authenticity of the request e.g. that the request is from a law enforcement authority	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Guaranteeing the protection of fundamental rights, including personal data protection and privacy	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

* Conflicting obligations for the digital service provider deriving from different legal frameworks (requesting State and State in which the headquarter is located)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
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54 Others: (please use the space below)

500 character(s) maximum

55 What are the most relevant drivers for costs for your entity if the requests come from an authority that is **not** located in the same country as your headquarters? (please rate relevance below)

	very relevant	relevant	somewhat relevant	not relevant	no opinion
* Need to assess the authenticity and legitimacy of the requests	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Requests do not provide all necessary information, so more information is needed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* In cases of questions, to contact the relevant person	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* No common definition of the type of requested data	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* The volume of requests	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Requests differing in form and content between Member States	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

56 Others : Please specify in the space below

500 character(s) maximum

57 Are these cost-drivers also applicable in purely domestic cases? Please specify in the space below

500 character(s) maximum

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 checked="" type="radio"/>	<input 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 type="radio"/>	<input type="radio"/>	<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"/>	<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

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)
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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

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 type="radio"/>	<input type="radio"/>	<input checked="" 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 type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Possibility for the notified Member State to object the measure	<input type="radio"/>	<input type="radio"/>	<input checked="" 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

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 checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Conclusion of multilateral treaties	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Development of an EU-wide common system/approach	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

70 Others : Please specify in the space below

500 character(s) maximum

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.

Contact

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