

Equality of arms in the realm of e-evidence

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A lot has been written and debated already on how the development of information and communication technologies has shaped today's understanding of crime, either in the case of strict computer related crimes and analogue or traditional ones. These changes have spurred intense debates in the way authorities detect, investigate and prosecute crime, particularly when it comes to collect and use electronic evidence. In that regard, the investigation and prosecution of crime seems to be increasingly dependent on data. A large share of this potential electronic evidence is "guarded" by service providers, the business model of which, moves the evidence away from its source and also from the jurisdiction of the authorities requiring its access, storing it instead wherever the company decides to establish its data centre(s)¹.

In the words to the Commission, while *"more than half of total investigations include a request to cross-border access to electronic evidence"* nearly two thirds of crimes *"cannot be effectively investigated and prosecuted because of the challenges in cross border access"*². These challenges essentially related to the excessive duration for requests to be fulfilled, the inefficiencies in the cooperation between public and private cooperation and the shortcomings in defining the relevant jurisdiction. In view of this situation, a dynamic and global legislative process is currently taking place looking to provide authorities with clearer, faster and more efficient tools in today's digital environment³.

Whilst most emphasis and efforts have been placed in enhancing the investigating and prosecuting authorities needs in having access data, less attention has been paid on the consequences the datafication of criminal investigations might pose to the rights of the defence and the overall fairness of criminal proceedings. My research wishes precisely to focus on how this new context, modifies the position and rights of those under investigation and question whether in light to the right to fair trial and the principle of equality of arms, there is a need to strengthen the position of the defence in cases involving cloud computered evidence gathering within the EU's AFSJ.

¹ See Impact assessment of the Proposal for a [Regulation on European Production and Preservation Orders for electronic evidence in criminal matters](#), COM/2018/225 final - 2018/0108 (COD) p5

² Ibid p.9

³ In the U.S. see the Clarifying Lawful Overseas Use of Data Act (U.S. CLOUD Act) was signed into law on March 23, 2018. Soon after, the EU proposed the European Preservation and Production Order Regulation on April 17, 2018 which still today is under discussion.