



# Judicial Cooperation in Criminal Matters and Electronic IT Data in the EU (JUD-IT): Ensuring Efficient Cross-Border Cooperation and Mutual Trust JUD-IT TASK FORCE

## *Prospectus*

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## CONTEXT & MOTIVATION

Crime fighting within Europe and across the Atlantic increasingly relies on the possibility to access electronic information held by Internet Service Providers (ISPs).

Existing EU and international law instruments for judicial cooperation in criminal matters provide investigating and prosecuting authorities with the possibility to issue requests directed at obtaining pieces of information, also in digital form, which are held by private companies and located in another Member State within the Union, or in third countries such as the United States.

However, Mutual Legal Assistance Treaties (MLATs), as well the European Investigation Order (EIO), are often described as “unfit for the purpose” of gathering the different types of electronic data which are sought in the framework of criminal investigations. These judicial cooperation avenues are considered ineffective because of the “volatility” of electronic information, which requires LEAs’ to access data swiftly, regardless of their location.

At the national, regional and international level, policy and legislative efforts have thus been increasingly directed at the creation of new data-gathering mechanisms allowing investigating and prosecuting authorities to swiftly access electronic information held by Internet Service Providers across borders. The EU and the US are in particular equipping Law Enforcement Authorities (LEAs) with investigative tools that will speed up the gathering of data located outside of their countries territory.

In April 2018, the European Commission tabled two legislative proposals on “electronic evidence” in criminal matters. The first, is a proposal for a Regulation<sup>1</sup> which foresees the introduction of two new data-gathering tools, namely the European Production and Preservation Orders. The second, consists of a proposal for a Directive<sup>2</sup> that would introduce an obligation for private companies in the EU to appoint ‘at least one’ legal representative that would act as point of contact for Production and Preservation Orders issued by Member States’ LEAs.

These two legislative proposals are in particular aimed at addressing access to data held by US companies, and were published days after the signature of the “Clarifying Lawful Use of Overseas Data (CLOUD) Act”.<sup>3</sup> The latter grants US LEAs the power to order private companies to disclose “content of a wire or electronic communication and any record of other information” about a person, regardless of the nationality of the latter and of the location of the data. The CLOUD Act also allows the conclusion of “executive agreements” that the US government would conclude with “qualifying foreign powers”. These agreements will allow non-US governments to directly request data of non-US persons from US-based providers without going through the MLA process.

Both the CLOUD Act and the Commission proposals foresee a model of cooperation which is radically different from the one established under the MLATs and the EIO. These new data-gathering

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<sup>1</sup> European Commission, Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, 17 April 2018.

<sup>2</sup> European Commission, Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018) 226 final, 17 April 2018.

<sup>3</sup> CLOUD Act, S. 2383, H.R. 4943.

instruments enable LEAs' access to data outside pre-established judicial cooperation channels, and assign ISPs and their legal representatives the responsibility to assess and execute cross-border requests.

The planned legislation on the European Production and Preservation Orders is high in the EU's policy agenda, with the Austrian Presidency aiming to reach an agreement of the EU Justice Ministers by the end of 2018.<sup>4</sup> Advancements in the inter-institutional debate at the EU level are understood as crucial in order to kick-start negotiations with the US administration on a future EU-US agreement dealing with data gathering for criminal justice purposes. In parallel, the possibility to extend the scope of the Commission's e-evidence proposal, and in particular to allow law enforcement authorities' with direct access to data held by Internet service providers is also being considered. The idea behind the hefting of direct access and real-time interception of data in the new EU legislation is to provide European investigators with all the tools that are also "available to their US colleagues".<sup>5</sup>

At the same time, the introduction of instruments allowing LEAs unmediated or direct access to electronic information across border would pose new privacy and data protection dilemmas, and raise far-reaching challenges for 'justice-related' fundamental rights provided under EU law. These include, in particular, the rights to a legal defence and fair trial guarantees for suspects in criminal investigations and proceedings, as well the presumption of innocence and the principle of legality of criminal offences and sanctions.

Against this fast-evolving backdrop, CEPS is setting up Task Force which aims at informing the policy debate on the e-evidence, as it unfolds at the EU and international level. The Task Force aims at providing a forum for discussion which will allow key international experts, stakeholders from EU and national institutions, practitioners and private sector representatives to address, from a multi-disciplinary perspective, issues related to the European and US initiatives on e-evidence. The main following questions will be explored:

- To which extent are the different options for cross-border access to electronic information currently discussed by the EU-co-legislators compatible with existing EU primary and secondary rules applying to cross-border judicial cooperation in criminal matters?
- What are the risks of enabling Law Enforcement Authorities' to access electronic information without the intervention of an authority of the country where the data or the service provider is located, both from a fundamental rights and business practices point of view?
- Would the new proposed instruments for cross-border access to data subject to foreign jurisdictions avoid or generate new conflicts of laws? Are there any alternative and more secure

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<sup>4</sup> Programme of the Austrian Presidency, see under "Justice and Home Affairs Council: A Union that protects freedom and justice - Criminal Justice", p. 30. Available at: <https://www.eu2018.at/agenda-priorities/programme.html>.

<sup>5</sup> Council of the European Union (2018) Note from Presidency to Permanent Representatives Committee, "E-evidence", 9117/18 Limite, Brussels, 25 May 2018. Available at: <http://statewatch.org/news/2018/jun/eu-council-e-evidence-9117-18.pdf>.

basis to cooperate in these sensitive criminal justice matters within the European Union, and in relations with the US?

This Task Force is implemented in the framework of the JUD-IT Project (*Judicial Cooperation in Criminal Matters and Electronic IT Data in the EU: Ensuring Efficient Cross-Border Cooperation and Mutual Trust*), which is co-funded by the European Commission (DG for Consumers and Justice) and coordinated by CEPS.

## METHODOLOGY

The Task Force will ensure a venue for a structured closed-doors dialogue involving high level policy makers, academics, EU agencies representatives, legal practitioners including judges, prosecutors and defense lawyers based in the EU and the US, as well as key experts from the IT sector.

The dialogue will be informed by the findings of the independent research conducted by CEPS Justice and Home Affairs Section and the other institutions cooperating in the framework of the JUD-IT Project. It will be implemented in the form of **three meetings** at CEPS premises in Brussels:

- ✓ A **first meeting** will be organized in **mid-October 2018** to identify main challenges and available ways forward;
- ✓ A **second meeting** will be organized by **mid-December 2018** to discuss to discuss preliminary results and policy recommendations in light of the relevant developments;
- ✓ A **third meeting** will take place at the **end of January 2019** to discuss the final report and potential policy recommendations.

## CO-RAPPORTEURS:

**Prof. Sergio Carrera**, is Senior Research Fellow and Head of Justice and Home Affairs Programme at CEPS. He is Visiting Professor at the Paris School of International Affairs (PSIA) at Sciences Po (France); Associate Professor/Senior Research Fellow at the Faculty of Law in Maastricht University (The Netherlands); and Honorary Industry Professor/Senior Research Fellow at the School of Law in Queen Mary University of London (UK).

**Prof. Valsamis Mitsilegas**, is Head of the Department of Law, Professor of European Criminal Law and Director of the Criminal Justice Centre at Queen Mary, University of London.

**Prof. Petra Bard** is Associate Professor, Eötvös Loránd University, Budapest; Visiting Faculty, Central European University (CEU), Budapest; and Visiting Professor, Goethe University, Frankfurt. (TBC)

**Dr. Marco Stefan**, is Research Fellow within the Justice and Home Affairs Programme at CEPS and member of the JUD-IT Research & Coordination Team.

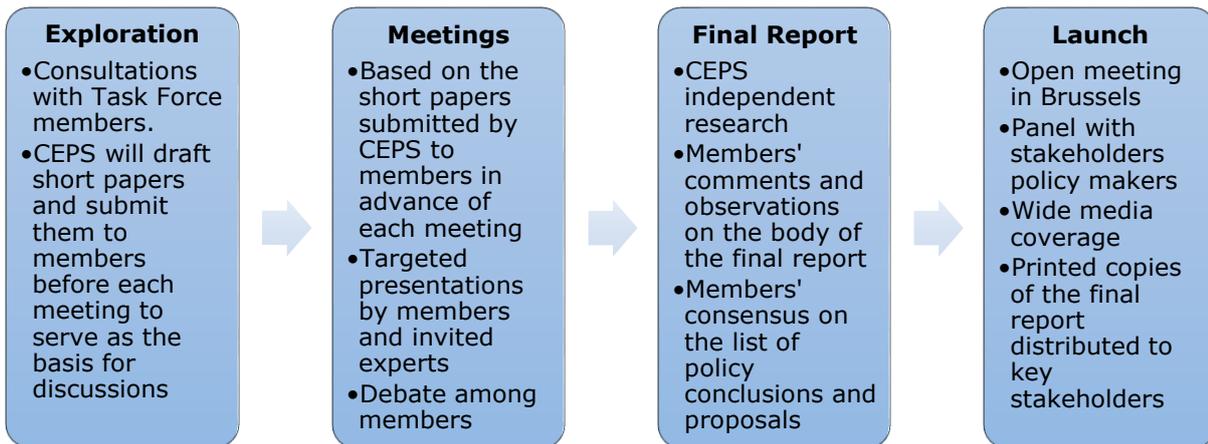
## INTENDED STAKEHOLDERS

This Task Force is intended for the following stakeholders:

- ✓ EU and national policy makers

- ✓ Private Sector and IT Companies
- ✓ Legal practitioners (Judges, Prosecutors, EU, criminal and data protection lawyers)
- ✓ Civil society organisations and international organisations
- ✓ Experts from academia

Other stakeholders not explicitly mentioned are welcome to participate. CEPS Task Forces usually benefit from the participation of representatives of national and international policymaking bodies as «observers». Few selected invitees will be also invited as keynotes.



## JOINING THE TASK FORCE

Participation in the Task Force is free of charge for those invited academics, practitioners & policy-makers and subject to a fee to cover the research and organisational expenses for for-profit entities and membership organisations (CEPS Corporate Members). CEPS Corporate Members are entitled to receive a significant discount. Discounted fees will be considered for non-members if they decide to become a member of CEPS.

The fee covers:

- The research carried out by CEPS for the purpose of this Task Force
- Organisational, catering and other costs of all meetings
- Launch of the final report in Brussels in a public event to maximise exposure
- Press release and communications management
- Printing and editing costs of the final report
- Distribution of the final report to key stakeholders in industry and policy-making
- Three printed copies of the final report per member (mailing included)

Upon request, CEPS will mail additional copies of the final report to members, at their expense. The final report will be launched at a public event in Brussels, open to the press, with the presence of high-level policy-makers. Additional launch events in other European capitals may be organised, if sponsored by members of the Task Force.

<b>Fee Structure (+21% VAT if applicable)</b>	
CEPS Corporate Members	€ 1,000
Non-Members	€ 5,000
Academics & Practitioners	Free of charge
Policy-makers	Free of charge

**To join the Task Force, for for-profit entities and CEPS Corporate Members, please fill in the application form on the next page.** If you have any questions do not hesitate to contact us:

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## REGISTRATION FORM

### JUD-IT Task Force - Judicial Cooperation in Criminal Matters and Electronic IT Data in the EU

Person attending the meetings			
Title:	First name:	Last name:	
Job title:			
E-mail:		Telephone:	
Company / Institution			
Company / Institution name:			
Postal address:			
	Postcode:	City:	Country:
Contact Person:			
E-mail:		Telephone:	
Billing information			
Tax register number (VAT for Europe):			
Your reference, Customer Purchase Order No. or Cost Code N:			
Department:			
Postal address:			
	Postcode:	City:	Country:
Contact person:			
CEPS members – check the applicable fee (+21% VAT)			
<input type="checkbox"/>	CEPS Corporate Member   EUR 1,000		
Non-members - check the applicable box (+21% VAT)			
<input type="checkbox"/>	Full Fee   EUR 5,000	<input type="checkbox"/>	My company is interested in becoming a member of CEPS*
Date:		Signature:	
<b>Return to:</b> <i>Miriam Mir</i>   <a href="mailto:miriam.mir@ceps.eu">miriam.mir@ceps.eu</a>   Centre for European Policy Studies   1 Place du Congrès   1000 Brussels   Belgium			
<b>More information:</b> If you would like to become a member or need more information, please contact <i>Sergio Carrera</i> , Senior Research Fellow at <a href="mailto:sergio.carrera@ceps.eu">sergio.carrera@ceps.eu</a> +32 2 229 3926 or <i>Diana Musteata</i> , Corporate Relations Coordinator, at <a href="mailto:diana.musteata@ceps.eu">diana.musteata@ceps.eu</a> ,+32 2 229 39 34.			

\*Discounted fees for this Task Force will be considered for non-members if they decide to become member of CEPS

# ANNEX

## Principles and Guidelines for CEPS Task Forces

This Annex offers guidance to prospective Task Force members and other interested parties in understanding the functioning of a CEPS Task Force and the process of drafting a Task Force report. Task Forces are processes of structured dialogue among industry representatives, policymakers, consumers and NGOs, who are brought together over several meetings. Task Force reports are the final output of the research carried out independently by CEPS in the context of the Task Force.

### Participants in a Task Force

- ✓ Members are for-profit entities, membership organisations, NGOs, academics, practitioners, officials & policy-makers which participate in a Task Force.
- ✓ Rapporteurs are CEPS researchers who organise the Task Force, conduct the research independently and draft the final report.
- ✓ Chair is an expert appointed by CEPS to steer the dialogue during the meetings and advise as to the general conduct of the activities of the Task Force.
- ✓ Observers are any policymakers or stakeholders who are invited to attend the Task Force meetings and provide oral and written input.

### Objectives of a Task Force report

- ✓ Task Force reports are meant to contribute to policy debates by presenting a balanced set of arguments, based on the members' views, available data and literature.
- ✓ Reports seek to provide readers with a constructive basis for discussion. Conversely, they do not seek to advance a single position or misrepresent the complexity of any subject matter.
- ✓ Task Force reports also fulfill an educational purpose, and are therefore drafted in a manner that is easy to understand, without jargon, and with any technical terminology fully defined.

### The role of the Task Force members

- ✓ Member contributions may take the form of participation in informal debate or a formal presentation in the course of the meetings, or a written submission.
- ✓ Input from members is encouraged and will be made available to all members, if it is to be used for the final report.
- ✓ Members represent their institutions but are asked to provide input as experts.



The JUD-IT project counts with the financial support of the Justice Programme of the European Union. The contents of this document are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

- ✓ Members are given ample opportunity to review the Task Force report before it is published, as detailed below.

## **Drafting of conclusions and recommendations**

- ✓ Task Force reports feature a set of conclusions. To draft these conclusions, rapporteurs will summarise members' views.
- ✓ Wherever members' views do not lead to clear conclusions, general phrasing will be employed.
- ✓ Task Force reports feature a set of policy recommendations. These recommendations are meant to reflect members' views. - For a recommendation to be featured in the report, there needs to be 'consensus' or 'broad agreement' among Task Force members.
- ✓ Consensus does not however mean unanimity or full agreement as to every aspect of a given recommendation. - Where 'consensus' co-exists with a significant minority view, the report will feature this minority view next to the relevant recommendation.
- ✓ Where there is no 'consensus' but several contradictory views, the report will feature all these views and either refrain from making any recommendation or simply advise policymakers to clarify the given subject matter. - In all cases, the report will seek to identify the points where there is some form of agreement, for instance a common understanding of facts or opinions.
- ✓ Both conclusions and policy recommendations will be summarised at the beginning of the report in the form of an 'executive summary'.
- ✓ Members will be given ample opportunity to review the text of both conclusions and recommendations.

## **Drafting of the main text**

- ✓ In the main text, rapporteurs detail the results of the research carried out independently in the framework of the Task Force. This part of the report will refer to the discussions during the task force meetings but also to available data and literature.
- ✓ Members' views are not simply presented as such but are also put into context. Wherever there is fundamental disagreement, the rapporteurs will ensure that all views are presented in a clear and fair manner.
- ✓ Scientific literature may be cited in this part of the report. Members are not purported to endorse any reference to this literature. A general disclaimer is inserted to clarify this aspect.
- ✓ The conclusions for each section will be clearly presented –and highlighted if appropriate. For the drafting of these conclusions please refer to the section above.

## **Sample disclaimer**

“This report is based on the discussions in the Task Force on *Judicial Cooperation in Criminal Matters and Electronic IT Data in the EU (JUD-IT)*, which met on three separate occasions in 2018-2019. The policy recommendations offered at the beginning of this report reflect a general consensus reached by Task Force members, although not every member agrees with every aspect of each recommendation. A list of members, observers and invited guests of the Task Force can be found in Annex X. The members were given the opportunity to comment on the draft final report, but its contents may only be attributed to the rapporteurs.”