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BSA feedback on European Commission 'inception impact assessment' on 'Improving cross-border access to electronic evidence in criminal matters'

BSA | The Software Alliance (BSA)¹, the leading advocate for the global software industry, welcomes the opportunity to comment on the Commission's inception impact assessment on ['Improving cross-border access to electronic evidence in criminal matters.'](#) BSA supports the efforts of the Commission to address the challenges facing cross-border access requests for electronic evidence (e-Evidence) and shares the desire to achieve greater harmonisation and legal certainty. As the Commission evaluates possible legislation, we wish to provide the following comments:

BSA believes that the principle of mutual recognition should constitute the foundation of any future legal instrument and supports the Commission in its selection of Art. 82 TFEU as the necessary legal basis for any future legislation. We encourage the Commission to ensure that the draft law reflects the principles of the EIO whereby a law enforcement agency must effectively demonstrate that the investigative measure and evidence being sought ensure full respect for the Charter of Fundamental Rights (CFREU). Any limitation of such rights would need to meet the strict proportionality and necessity requirements of Art. 52 CFREU.

When considering the investigative measures outlined in "Option 1", we believe there should be a clear distinction between a possible legal framework built around "production requests" and "production orders". While the former largely reflects today's legal framework, the latter would constitute a departure from current practice. This would particularly be the case should service providers be compelled to disclose content data outside of the MLAT framework. Should the Commission decide to introduce a mandatory direct disclosure regime, it will have to be based on a proper impact assessment and clear evidence that current voluntary practices are no longer sufficient.

On the issue of direct access, we would caution the Commission against pursuing such a legislative option as set out in "Option 2". A framework providing Member States with the ability to directly obtain e-Evidence through a seized device or information system, without any involvement of a service provider, would lead to an erosion of trust amongst citizens. Such a framework, if envisaged, must include clear judicial oversight, fully respect fundamental rights and avoid placing an obligation on service providers to weaken cybersecurity standards.

Any investigative measure should avoid creating conflicts of law and BSA welcomes the recognition by the Commission of this important objective in its roadmap. Regarding "Option 3", we encourage the Commission to limit the scope of the investigative measure to data from EU subscribers or data stored by a service provider within the EU. Only entities acting as 'data controllers' should be the recipients of an investigative measure as they are legally responsible for the management of their data. Demands to service providers acting as 'data processors' for access to customer data should occur only under exceptional and clearly defined circumstances.

Moreover, any extra-territorial application of a future legislative instrument should be avoided. Instead, the Commission should seek to ensure that the framework does not create conflicts of law and finds common reciprocal solutions with international partners so that service providers operating across numerous jurisdictions are not faced with conflicting legal obligations.

With respect to “Option 4”, we believe that a dedicated dialogue with third countries should be immediately pursued. An intra-EU framework must be complemented with durable international frameworks. When considering the trans-Atlantic context, we believe the recent introduction of the International Communications Privacy Act in the US provides a unique opportunity for the creation of a EU-US framework supplementing the more laborious MLAT process. BSA stands ready to work with the EU to achieve this ambitious and necessary objective.

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ⁱ *BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 60 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.*

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