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**Action Grants to Support Transnational Projects to
Promote Judicial Cooperation in Criminal Matters**

Grant Agreement No. 766468

EVIDENCE2E-CODEX

**Linking EVIDENCE into e-CODEX for EIO
and MLA procedures in Europe**

**Report on data protection and other fundamental
rights issues**

Deliverable D2.3

The contents of this deliverable are the sole responsibility of the authors and can in no way be taken to reflect the views of the European Commission.



Executive Summary

This Deliverable, D2.3 'Report on data protection and other fundamental rights issues' (hereinafter 'Deliverable D2.3') examines how data protection implications in European Investigation Orders (hereinafter 'EIOs') and Mutual Legal Assistance (hereinafter 'MLA') procedures are being handled. The report examines "how data protection implications are being handled and identif[ies] legal and/or operational measures that need to be put in place to ensure respect to data protection rights especially in the case of electronic evidence".¹ The Deliverable D2.3 report also examines the other fundamental rights, which are both "directly and implicitly"² referred to in the Directive 2014/41/EU³ (hereinafter 'the EIO Directive'), and how they are being handled in other European Union (herein after 'EU') Member States.

This report first introduces both data protection and evidence exchange legislation and explains its necessity in the international law enforcement setting. In accordance with the objective of the Deliverable D2.3 report, both EIO and MLA procedures are analysed in detail in conjunction with data protection law and the operational practices of the competent authorities. Directive 2016/680⁴ provides the data protection legal and operational measures which need to be taken concerning the international electronic evidence exchange of personal data for crime investigation purposes and for legal and operational measures in general. This report subsequently highlights the necessary measures which need to be taken by the various relevant entities partaking in the evidence exchange process. Regarding electronic evidence, the European Commission has expressed the necessity for "strong privacy, data protection and privacy safeguards".⁵

¹ Grant Agreement, Number — 766468 — EVIDENCE2e-CODEX, WP2 D2.3.

² *ibid.*

³ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1–36.

⁴ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA OJ L 119, 4.5.2016, p. 89–131.

⁵ 'E-evidence - cross-border access to electronic evidence Improving cross-border access to electronic evidence' (European Commission) <<https://ec.europa.eu/info/policies/justice-and->



Consequently, emphasis on data protection compliance is reinforced within this report and is supported by the observation of the core and fundamental principles of data protection conjoined with the respecting the roles and responsibilities of the different actors, as well as the particular respect to security measures which need to be taken with electronic exchanges. Consequently, **this report provides guidelines and checklists for the legal and operational measures which need to be taken in the transfers of electronic evidence.** Additionally, acknowledgement is made between both the distinctions and commonalities of EIO and MLA procedures and the following measures which need to be put in place to ensure data protection compliance.

In achieving the aim of D2.3, this report provides background as to the data protection and law enforcement legislation on evidence exchange, while providing the necessary guidelines as to the data protection measures that need to be taken by the various competent authorities involved in the exchange of electronic evidence. In providing this guidance, this report delivers 'ready to use'⁶ information on data protection and digital evidence exchange as set out in the description of action.

EU Member States often differ in their implementation of both Directive 2016/680 and the EIO Directive. In order to gain an insight into the evidence exchange procedures across the Member States, in accordance with the requirements of D2.1, a questionnaire was distributed to members from 15 different Member States.⁷ This report therefore uses the most relevant responses from the questionnaire to make some recommendations as to the legal and operational measures which need to be put in place to ensure compliance with data protection and fundamental rights requirements in the course of EIOs and MLA agreements. It should be noted that while the answers to the questionnaire have been a valuable contribution to this report, the replies which were collected concerning data protection were limited in terms of their content.

The final part of the report examines where fundamental rights, other than the right to the protection of personal data, are directly or implicitly referred to in the

[fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en](#)> accessed 20 February 2019

⁶ Grant Agreement, Number — 766468 — EVIDENCE2e-CODEX, WP2 Description.

⁷ Member States featured in the questionnaire include Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, France, Germany, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Spain and Sweden.



EIO Directive, and how they are being handled in a selection of different Member States.

WP2 on the 'Legal issues' presented by EIOs and their transposition in Member States analyses the legal and operational measures required to "establish successful execution of EIO between Member States".⁸ It also analyses how EIO and MLA procedures with regard to electronic evidence, particularly from third countries interact, as well as the measures which need to be put in place to improve these processes. As such, within the context of WP2, and the project more generally, D2.3 identifies the legal and operational measures that need to be put in place with regard to EIO and MLA procedures, as well as identifying the various fundamental rights which interact with these processes, and which must therefore be taken into consideration when "creating a legally valid instrument to exchange digital evidence related to MLA and EIO procedures over e-CODEX".⁹

Therefore the measures identified and the recommendations made by this report, when read together with the other Deliverables in WP2 have the intention to build on the results from D2.1 'Report on implementation of EIO' (hereinafter 'Deliverable D2.1') and D2.2 'Report on EIO and MLA' (hereinafter 'Deliverable D2.2'). Deliverable D2.1 describes how Directive 2014/41/EU has been transposed by EU Member States, and specifically, bases its conclusions on a selection of EU Member States, each with different legal backgrounds. Deliverable D2.2 provides information on the operational measures required for the successful execution of EIOs between Member States. With regard to the corresponding Deliverables in WP2, Deliverable D2.3 adds to the information provided by its counterpart deliverables by providing the legal and operational parameters in both data protection law and other fundamental rights. D2.3 thus identifies the relevant legal provisions which need to be taken into account when considering how electronic evidence can be shared over e-CODEX in a legally valid way when using EIO and MLA procedures. In doing this D2.3 assists in solidifying the knowledge obtained in WP2, and therefore contributes to the project as a whole by generating awareness as to the legal/operational measures which need to be put in place, and by detailing the legal boundaries by which allow for transnational electronic evidence exchange and judicial cooperation both within and outside the EU in a secure and legally valid and compliant way.

Consequently, when Deliverable D2.3 is read together with Deliverables 2.1 and 2.2, the outputs from WP2 assist the project in providing a detailed picture

⁸ Grant Agreement, Number — 766468 — EVIDENCE2e-CODEX, WP2 Description.

⁹ *ibid.*



regarding the distinct and varying approaches to EIOs and MLA both between and within different countries, and crucially how to handle these varying approaches with regard to efficient practical application and legal compliance.

This report has used the valuable information on the national transposition of Directive 2014/41 from the University of Groningen based on their research for Deliverable D2.1. In addition, this report gained insightful input from Consiglio Nazionale delle Ricerche regarding the practical and technical aspects of electronic evidence exchange. Valued input was also provided by partners from the European Lawyers' Foundation, INTERPOL and the Law and Internet Foundation.

Additionally, members from the Austria's Ministry of Justice (Justizanstalten Justiz Querschnitt Bundesrechenzentrum) have provided their positive feedback for this report due to its extensive and insightful nature.

