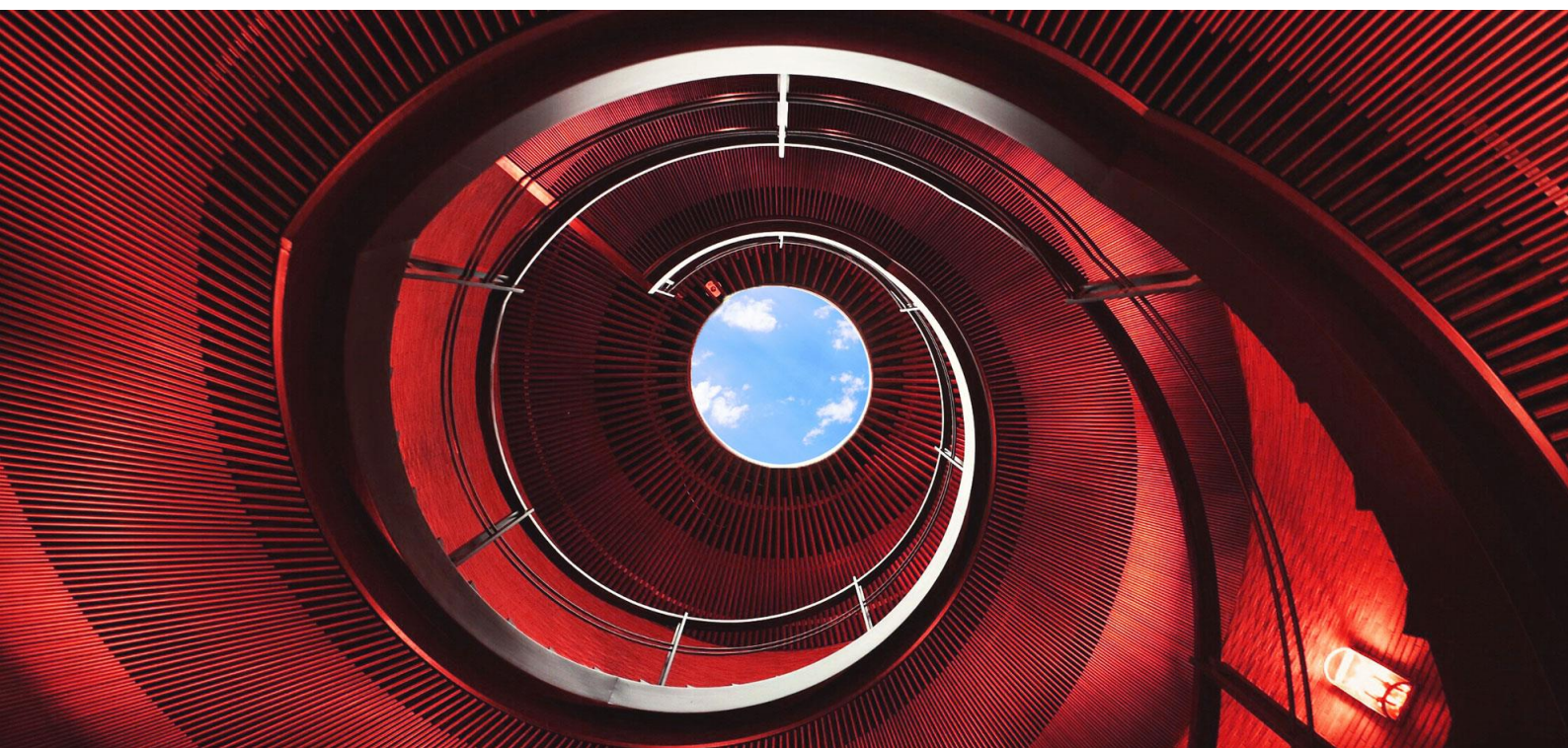


October 2019

# **Bilateral mutual legal assistance agreement with the US pursuant to the US CLOUD Act**

SBA position paper



## Bilateral mutual legal assistance agreement with the US on cross-border access to electronic evidence pursuant to the US CLOUD Act

The cross-border flow of data is increasing continuously. More and more criminal investigations rely on electronic evidence that is not in the public domain and is held by companies abroad. Facilitating cross-border access to electronic evidence is a new legal necessity which has come to politicians' attention and is also being discussed in Switzerland.

The Swiss Bankers Association is closely monitoring this process and calls for the further clarification on certain issues.

### The SBA's position

- It is the SBA's view that the Swiss authorities must evaluate measures to address the **new legal necessities**.
- The SBA welcomes the fact that the Federal Council is addressing the question of a **bilateral agreement** (executive agreement) **with the US** under the US CLOUD Act. This is to be coordinated with the activities surrounding the Second Additional Protocol to the Budapest Convention.
- The SBA supports preliminary clarifications on the **negotiations for an executive agreement** with the US, provided Switzerland's requirements for such agreement to ensure **adequate protection of its citizens and institutions** are met.
- At present, the SBA has identified the following **minimum requirements** for overseas production orders:
  - tight restrictions concerning potential addressees, natural persons and legal entities affected as well as data and crimes concerned
  - preservation of the rights of those concerned as well as data and legal protection
  - protection of bank-client confidentiality

## **A new legal necessity: cross-border access to electronic evidence**

Cross-border data flows are rising with the growing use of social media, messaging services and apps to communicate and obtain information – not always for lawful purposes. More and more criminal investigations therefore rely on electronic evidence that is not in the public domain and is held by companies abroad. Facilitating cross-border access to electronic evidence is therefore a pressing issue.

In the European Union, electronic evidence is needed in around 85% of criminal investigations. For two thirds of these investigations, it is necessary to obtain evidence from online service providers domiciled in another country. Between 2013 and 2018, the number of requests to the most important online service providers grew by 84%. This exponential increase exceeds the capacities of traditional mutual legal assistance procedures.

Internationally uniform and efficient ways to enable public prosecutors and judges to collect electronic evidence across borders in criminal proceedings while ensuring adequate protection for those concerned are therefore being sought.

Under current legislation, mutual legal assistance procedures are applicable to requests from foreign authorities for the disclosure of protected information in the financial sector, for example for the purpose of gathering evidence in criminal proceedings. Protected information may only be provided in accordance with the applicable legal provisions. This may be done with the written consent of the bank or on the basis of a decision by a competent Swiss court or the approval of a competent Swiss authority.

## **International initiatives for more efficient criminal prosecution**

In March 2018, the US enacted the US CLOUD Act (Clarifying Lawful Overseas Use of Data Act) for more efficient criminal prosecution within the scope of international investigations. The Act is intended to simplify cross-border access to electronic evidence and provides for the US to conclude bilateral agreements (executive agreements) with other countries as a means of agreeing overseas production orders outside the scope of the prevailing mutual legal assistance procedures.

This new procedure concerns the collection of evidence from telecommunications and data storage providers and is intended to be faster than the current route of mutual administrative and legal assistance agreements.<sup>1</sup> The US CLOUD Act stipulates that US authorities may only issue overseas production orders in respect of data relating to US persons to be collected in connection with investigations into serious criminal offences. Executive agreements are also to grant reciprocal rights.

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<sup>1</sup> Under existing mutual administrative and legal assistance agreements, requests are very bureaucratic, and the procedures are lengthy, which does not allow law enforcement authorities to react promptly in the prosecution of serious crimes.

To date, the United Kingdom has concluded an executive agreement with the US.<sup>2</sup> The UK parliament passed a law to this end in February 2019 which, under certain conditions, allows UK authorities to issue overseas production orders relating to the data of British citizens.<sup>3</sup> At the end of September 2019, the European Commission confirmed formal negotiations on an EU-U.S. agreement to facilitate access to electronic evidence in criminal investigations.<sup>4</sup>

At the same time, the Council of Europe is also negotiating a Second Additional Protocol to the Budapest Convention on Cybercrime in order to improve access to electronic evidence. A working group is to draw up a draft containing provisions by December 2019. These are to include a simplified mutual legal assistance procedure and direct cooperation with service providers in other countries by means of overseas production orders. Switzerland is also represented in the working group.

## **Swiss authorities must look into an executive agreement with the US**

Clear rules and ensuring the rights of customers and employees who are affected by criminal investigations remain of vital importance for the Swiss banking sector, even when new legal necessities arise. The Federal Council is analysing the questions that arise in this regard and is endeavouring to strengthen Switzerland as a business location and to improve law enforcement on the Internet.<sup>5</sup>

A bilateral agreement raises questions about its compatibility with specific areas in the existing legal system, including international treaties and obligations under international law, and requires clarification as to whether a more far-reaching legal basis is needed. Where applicable, possible conflicts with foreign laws should also be avoided or eliminated.

In the interests of protecting citizens and institutions, the content of an executive agreement between Switzerland and the US should be subject to stringent requirements. In particular, provision should also be made for compatibility with the Second Additional Protocol to the Budapest Convention.

At present, the SBA has identified the following **minimum requirements**:

- **Ensuring reciprocity.**
- **Definition of the territorial scope of application for production orders:**  
Production orders issued by US authorities to telecommunications providers domiciled in Switzerland should only be enforceable by means of an overseas order or through mutual legal assistance. Companies domiciled in Switzerland should not be subject to a national order from US authorities based on a broad interpretation of US jurisdiction.

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<sup>2</sup> <https://www.gov.uk/government/publications/ukusa-agreement-on-access-to-electronic-data-for-the-purpose-of-countering-serious-crime-cs-usa-no62019>

<sup>3</sup> <https://services.parliament.uk/bills/2017-19/crimeoverseasproductionorders.html>

<sup>4</sup> [https://europa.eu/rapid/press-release\\_STATEMENT-19-5890\\_en.htm](https://europa.eu/rapid/press-release_STATEMENT-19-5890_en.htm)

<sup>5</sup> cf. answer provided by Federal Councillor Karin Keller-Sutter on 11.03.2019 (<https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=45404>).

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- **Definition of the addressees of an order:** The addressees of an overseas production order should be clearly limited. For example, it should not be possible for financial intermediaries to be qualified as telecommunications providers under the executive agreement.
- **Limitation of affected persons:** Production orders issued by US authorities to telecommunications providers domiciled in Switzerland should be limited to the data of the provider's customers who are US citizens or legal entities domiciled in the US. For example, it should only be possible to order the disclosure of data relating to legal entities domiciled in Switzerland by way of mutual legal assistance.
- Definition of the data covered under the **scope of application**.
- Exhaustive **catalogue of criminal offences** that qualify for a procedure under the agreement.
- Ensuring **data protection compliance** by the participating authorities through the agreement of binding rules and the specifications for minimising the data received.
- **Safeguarding the rights of accused persons and customers**, for example by means of mandatory information about the right to appeal an order.
- Definition of **means of legal redress and appeals**.
- **Reservation of the protection of official and professional confidentiality:** Disclosure of the data concerned should only be possible via mutual legal assistance.

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