

# Understanding the French Criminal Justice System as a Tool for Reforming International Legal cooperation and Cross-Border Data Requests

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Understanding the French criminal justice system has long been of interest to common-law commentators in the U.S. seeking to reform their own systems and improve international legal cooperation.<sup>2</sup> Traditionally, such cooperation was based on two types of requests: investigation requests and extradition requests.<sup>3</sup> In an increasingly interconnected world, where communications can happen anywhere and at any time, law enforcement agencies may need access to evidence stored overseas. To help national law enforcement agencies work together more effectively, a large number of Mutual Legal Assistance Treaties (“MLATs”) have been signed from 1970 onwards.<sup>4</sup> Since 2000, new cooperation mechanisms have flourished, particularly those created in order to seize criminal assets and funds.<sup>5</sup> Mutual Legal Assistance (“MLA”) regimes, however, have not been updated to deal with the rise in the number of international requests for access to data for criminal investigations.<sup>6</sup> The current process for cross-border data sharing is slow and cumbersome.

MLA issues have become the subject of greater academic and policy scrutiny since the rise of cross-border data requests caused by greater electronic communications across borders. In recent years, a growing number of works and projects aiming to reform the MLA regimes have emerged. These reforms impact not only the efficiency of the criminal system but also individual freedom and liberty.<sup>7</sup>

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This article was written in connection with the research project on mutual legal assistance led by Peter Swire at the Georgia Tech Scheller College of Business. The author is grateful to the many lawyers, experts and officials with whom she spoke for their advice and instruction. The author thanks Marie le Pichon, Christopher Brown, Nicolas Guillou, DeBae Kennedy-Mayo, Justin Hemmings, and Peter Swire for their helpful comments on earlier drafts. She also expresses appreciation for funding from the Hewlett Foundation for this article.

<sup>2</sup> See e.g., Richard Frase, “Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do it, How Can We Find Out, and Why Should We Care?” (1990) 78 (3) Cal. L. Rev. 539.

<sup>3</sup> Oliver Beauvallet, “Les Commission Rogatoires Internationales”, *JurisClasseur Procédure pénale* (2015), § 2.

<sup>4</sup> See, for example, the first MLAT the U.S. entered into with Switzerland in 1973 (27 U.S.T. 2019).

<sup>5</sup> *JurisClasseur Procédure pénale* (n 3). See also the agreements between the U.S. and other countries to improve international tax compliance and to implement the Foreign Account Tax Compliance Act.

<sup>6</sup> Andrew Woods, *Data Beyond Borders. Mutual Legal Assistance in the Internet Age* (The Global Network Initiative, 2015) 2. Available online at <<https://globalnetworkinitiative.org/sites/default/files/GNI%20MLAT%20Report.pdf>>, accessed 17 September 2016.

<sup>7</sup> See e.g., Gail Kent, “Sharing Investigation Specific Data with Law Enforcement - An International Approach” (2014) Stanford Public Law Working Paper. Available online via SSRN

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2472413](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472413)>, accessed 17 September 2016; and Council of Europe Cyber Crime Committee (T-CY), “Transborder access to data and jurisdiction: Options for further action by the T-CY” (December 2014)

<[http://www.coe.int/t/dghl/cooperation/economiccrime/Source/Cybercrime/TCY/2014/T-CY\(2014\)16\\_TBGroupReport\\_v17adopted.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/Source/Cybercrime/TCY/2014/T-CY(2014)16_TBGroupReport_v17adopted.pdf)>, accessed 17 September 2016.

In the absence of a clear understanding of the legal framework governing criminal investigation systems in different countries, an effective reform of MLA regimes appears unlikely. This article aims to answer this need in three ways. First, it outlines and summarises the basic structures of the French criminal system and the standards required under French law to obtain evidence during a criminal investigation. Secondly, it focuses on cross-border evidence exchange between France and the U.S. to demonstrate how the current MLA regime is failing the needs of time-sensitive investigations. The lack of resources dedicated to U.S. processing of MLA requests may explain the low number of requests currently exchanged between France and the U.S. Finally, this article provides suggestions for future research that will contribute to coherent MLA reform.

In short, this article provides a description of the current French criminal process and explains the steps required for French investigating authorities to access evidence located in the U.S. The article seeks to advance the mind set adopted when considering these issues, and serve as a foundational document for a larger research project informing MLAT reform while taking into account the protection of individuals' rights including privacy and data protection.

## I. THE MAIN CHARACTERISTICS OF THE FRENCH CRIMINAL SYSTEM

It is commonly assumed that French law enforcement authorities are less restrained than their American counterparts in the gathering and use of criminal evidence.<sup>8</sup> This assumption may be explained by the differences in the ways the French and U.S. systems frame protections during the investigative process. In the French criminal system, most evidence considered in an investigation is available to be used in the criminal prosecution. The protections are inherent in the process because the trial judge makes an independent reviews of evidence. The U.S. system reviews evidence to ensure rights are protected at the prosecution phase, with the possibility that evidence used in the investigation will not be allowed in the prosecution. The French criminal system adopts an organic protection (*i.e.* protection intended to be provided through an organ, represented here by the

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See also generally: The Cloud Evidence Group Website <<http://www.coe.int/en/web/cybercrime/ceg>>, accessed 17 September 2016; Marek Martyniszyn, "Inter-Agency Evidence Sharing in Competition Law Enforcement" (2015) 19 (1) International Journal of Evidence & Proof 11; Michael Chertoff & Paul Rosenzweig, "A Primer on Globally Harmonizing Internet Jurisdiction and Regulation" Global Commission on Internet Governance Paper Series, issue 10 (2015). Available online at <[https://www.cigionline.org/sites/default/files/gcig\\_paper\\_no10\\_0.pdf](https://www.cigionline.org/sites/default/files/gcig_paper_no10_0.pdf)>, accessed 17 September 2016; Jennifer Daskal & Andrew Woods, "Cross-Border Data Requests: A Proposed Framework" (*Just Security*, 24 November 2015) <[www.justsecurity.org/27857/cross-border-data-requests-proposed-framework](http://www.justsecurity.org/27857/cross-border-data-requests-proposed-framework)>, accessed 17 September 2016; Greg Nojeim, "MLAT Reform: A Straw Man Proposal" (*CDT*, 3 September 2015) <[www.cdt.org/insight/mlat-reform-a-straw-man-proposal](http://www.cdt.org/insight/mlat-reform-a-straw-man-proposal)>, accessed 17 September 2016; Peter Swire & Justin Hemmings, "Stakeholders in Reform of the Global System for Mutual Legal Assistance" (2015) Georgia Tech Scheller College of Business Research Paper 32. Available online via SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2696163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2696163)>, accessed 17 September 2016; Peter Swire & Justin Hemmings, "Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program" (2016) Georgia Tech Scheller College of Business Research Paper 38. Available online via SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2728478](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728478)>, accessed 17 September 2016; Vivek Krishnamurthy, "Cloudy with a Conflict of Laws" (2016) Berkman Center Research Publication 2016-3. Available online via SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2733350](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733350)>, accessed 17 September 2016.

<sup>8</sup> For a review of the different traditions see, *e.g.*, Frase (n 2) 573; Edward Tomlinson, "Nonadversarial Justice: The French Experience" (1983) 42 MD. L. Rev. 131, 182–183; Mirjan Damaškjad, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1973) 121 U. PA. L. Rev. 506, 506–522.

*magistrature*—thus, the constraint is the person who has to ask for the evidence), while the U.S. adopts protections that restrict the use of evidence in the prosecution of a criminal case.<sup>9</sup>

A review of the French criminal system will provide a better understanding of the extent to which investigative authorities have broader powers than their American counterparts and the existing safeguards designed to protect individuals' rights during the criminal investigation process.

The French criminal justice system features a clear separation between prosecutorial, investigative and adjudicative functions.<sup>10</sup> The French *magistrature* (judiciary) has two branches: one is the standing judiciary and the other is the sitting judiciary. The standing judiciary represents prosecutorial functions and consists of a public prosecutor (*ministère public* or *procureur de la République*).<sup>11</sup> Public prosecutors are hierarchically subordinate to the minister of justice and the executive.<sup>12</sup> The other branch of the judiciary is the sitting judiciary, which is composed of the investigating magistrate (*juge d'instruction*) and the trial judge (*magistrat*), who represent the investigative and adjudicative functions respectively. The sitting judiciary is independent and is “non-movable”—once appointed, the sitting judiciary holds office until the age of mandatory retirement and may not be fired, suspended, transferred to a different court, or even promoted against its wishes.<sup>13</sup> As noted by Hodgson, “[t]he separation of these three functions acts as a series of checks, a guarantee ensuring the protection of the rights of the accused and the careful scrutiny of the dossier of evidence at each stage of the case.”<sup>14</sup>

Alongside these functions, it is also important to mention police authorities. These are represented by the Officers of the Judicial Police (the *officiers de police judiciaire*) (“the OJP”) who play a key role during criminal inquests and investigations. As opposed to the U.S., where investigating powers are exercised by the prosecutor or the investigating judge, the police officers are gathering the evidence under their directions or according to the rogatory commission.<sup>15</sup> The OJP are responsible for recording criminal offenses, receiving complaints from victims, summoning witnesses, interviewing suspects and gathering evidence.<sup>16</sup>

An analysis of the phases of the French criminal process will provide an overview of the roles that these actors play in the gathering of evidence.

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<sup>9</sup> For further research on the specifics of the U.S. regime and the French regime on the access to data, see the upcoming article “A Mutual Legal Assistance Case Study: The United States and France” by Peter Swire, Justin Hemmings & Suzanne Vergnolle (forthcoming in Wisconsin International Law Journal).

<sup>10</sup> Jacques Leroy, *Procédure Pénale* (4th ed., LGDJ 2015) §119.

<sup>11</sup> For a discussion of the independence of the French prosecutor, see *Medvedyev v France* (2010) 51 E.H.R.R. 39; *Moulin v France* App no 37104/06 (ECtHR, 23 November 2010). The European Court of Human Rights ruled that public prosecutors in France did not satisfy the requirement of independence from the executive in order to be described as an “officer authorized by law to exercise judicial power” within the meaning of the ECHR, art. 5(3). For comments of the decision see, e.g., AJDA 2011. 889, chron. Laurence Burgorgue-Larsen; *D.* 2011, 338, obs. Sabrina Lavric; *D.* 2011, 338, note Jean Pradel; *D.* 2010, 2761, édito. Félix Rome; *D.* 2011, 26, point de vue François Fourment; *D.* 2011, 277, note Jean-François Renucci; *RFDA* 2011, 987, chron. Henry Labayle et Frédéric Sudre; *RSC* 2011, 208, obs. Damien Roets; *Gaz. Pal.* 8–9 déc. 2010, 6, note Olivier Bachelet. See also: *Cour de cassation*, Crim. 15 December 2010, n. 10–83.674, *Bull. crim.*, n. 207, Crim. 20 March 2013, n. 12–82.112.

<sup>12</sup> Jacqueline Hodgson, “The French Prosecutor in Question” (2010) 67 Wash. & Lee L. Rev. 1361, 1379.

<sup>13</sup> See, e.g., Maud Léna, “Jugement”, *Répertoire de droit pénal et de procédure pénale* (2013) § 41. See also Olivier Pluen, *L'immovibilité des magistrats: un modèle?* (Doctoral thesis, Université Panthéon-Assas 2011). Available online at <<https://docassas.u-paris2.fr/nuxco/site/esupversions/0c5bec53-71c8-4569-91b3-3f5e0f4e0143>>, accessed 17 September 2016.

<sup>14</sup> Jacqueline Hodgson, “The Police, the Prosecutor and the Juge D’Instruction: Judicial Supervision in France, Theory and Practice” (2001) 41 (2) Brit. J. of Criminology 342, 343.

<sup>15</sup> See the French Code of Criminal Procedure, arts. 12 and 81.

<sup>16</sup> Gildas Roussel, “Police Judiciaire”, *Répertoire de droit pénal et de procédure pénale* (2016) s.1.

## II. PHASES OF FRENCH CRIMINAL PROCESS

The French criminal process follows three main phases, corresponding to the three functions outlined above: prosecutorial, investigative and adjudicative. First, there is the prosecution phase conducted by the prosecutor, which can be followed by an investigation phase directed by the investigating magistrate, and finally the trial phase run by the trial judge. The scope of this chapter limits our discussion to the first two parts of the French criminal process and will not analyse the trial phase. The present study analyses the process for the gathering of evidence during preliminary inquests conducted by the prosecutor and formal investigations conducted by the investigative magistrate, especially focusing on the existing safeguards protecting privacy and data protection under the French criminal system.

The French criminal process thus determines the tools that the investigating authorities can use and under which conditions they can be used. The more serious the offense, the more investigating authorities will be allowed to use tools that intrude upon the freedoms of the individual.

### A. THE PRELIMINARY PHASE

The prosecution phase begins when an offense is committed and the case is transferred to the public prosecutor. The Code of Criminal Procedure provides that the Judicial Police are “responsible for recording crime, gathering evidence and seeking out those who have committed offenses.”<sup>17</sup> The Police must inform the prosecutor without delay<sup>18</sup> of any criminal wrongdoing or offenses *in flagrante delicto*. As in the U.S., criminal offences are classified hierarchically. First, the most serious offenses are *crimes* (such as murder); then *délits* (such as assault or burglary) and finally *contraventions*. The classification of the offense determines the competent of the Penal Court.<sup>19</sup> According to Professor Jean Pradel, 15% of the investigations are initiated by the OJP and 85% are opened after an intervention of a victim or a third party.<sup>20</sup>

The public prosecutors represent the public interest<sup>21</sup> in search of the truth. In the context of this mission, they need to gather evidence<sup>22</sup> in order to determine appropriate actions.<sup>23</sup> To do so, they “direct the activity of the police ... and supervises the detention of suspects in police custody.”<sup>24</sup> Preliminary inquest rules leave the prosecutor and the OJP with broad powers to gather evidence. There are many different powers: some can be exercised directly by the OJP, others have to be authorised by the prosecutor and others have to be authorised both by the prosecutor and the *Juge des libertés et de la Détention* (one of the sitting judiciary, who is a guarantor of individual freedom).<sup>25</sup>

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<sup>17</sup> See the French Code of Criminal Procedure, art. 14. See also Hodgson, “The Police, the Prosecutor and the Juge D’Instruction: Judicial Supervision in France, Theory and Practice” (n 14) 343.

<sup>18</sup> See the French Code of Criminal Procedure, arts. 40 and 54. See also *The French Legal System* (Ministère de la Justice 2012) 10. Available online at <[www.justice.gouv.fr/art\\_pix/french\\_legal\\_system.pdf](http://www.justice.gouv.fr/art_pix/french_legal_system.pdf)>, accessed 17 September 2016.

<sup>19</sup> See, e.g., Bron McKillop, “Readings and Hearings in French Criminal Justice: Five Cases in the Tribunal Correctionnel” (1998) 46 Am.J. Comp. L. 757, 758.

<sup>20</sup> See Etienne Vergès, “L’enquête Pénale au Cœur d’un Changement de Paradigme: le Statut et les Droits de la Personne Mise en Cause dans la Procédure Pénale” (2009) 4 Revue pénitentiaire et de droit pénal 837, 838.

<sup>21</sup> Hodgson, “The Police, the Prosecutor and the Juge D’Instruction: Judicial Supervision in France, Theory and Practice” (n 14) 347.

<sup>22</sup> Under the French Code of Criminal Procedure, art. 12, the OJP work under the direction and supervision of the prosecutors to help them gathering evidence.

<sup>23</sup> Leroy (n 10).

<sup>24</sup> Hodgson, “The Police, the Prosecutor and the Juge d’Instruction: Judicial Supervision in France, Theory and Practice” (n 14) 343. See also the French Code of Criminal Procedure, art. 41.

<sup>25</sup> See e.g., Bernard Bouloc, *Procédure pénale* (25th ed., Dalloz 2015).

Hodgson identified that during this phase “the law permits, and indeed anticipates that the vast majority of cases will be investigated by the police under the supervision of the [prosecutor].”<sup>26</sup>

The prosecutor is granted a wide range of discretion, or freedom, over initial charging decisions according to the principle of prosecutorial discretion.<sup>27</sup> Prosecutors have three options. They can either: (a) decide to drop all charges, (b) decide to proceed with an alternative procedure, or (c) decide to prosecute.<sup>28</sup> This decision is made for the protection of the general interests of society. Most relevant to this study is when the prosecutor decides to prosecute.

## B. THE INVESTIGATION PHASE CONDUCTED BY THE INVESTIGATING MAGISTRATE

When the investigation magistrate decides to open an investigation, a new set of rules governs their powers. Investigating magistrates oversee the most serious and complex offences.<sup>29</sup> Their role is to gather all the information that may incriminate or exonerate a person accused of an offence.<sup>30</sup> Their mission is to accomplish all the acts “necessary to establish the truth.”<sup>31</sup> Unlike in the U.S.,<sup>32</sup> the investigating magistrate represents both the prosecution and the defence, using a single method of obtaining evidence.<sup>33</sup>

In principle, to perform their mission, investigating magistrates are given extensive powers. They have both adjudicative<sup>34</sup> and investigative powers.<sup>35</sup> Some of their powers can only be exercised personally (including the decision to charge someone and to conduct evidentiary hearings, interviews and confrontations), while others can be delegated with a rogatory commission (*commission rogatoire*)—the act by which the investigating magistrates delegates her powers to another magistrate or judicial police officer in order to make them proceed for her to one or more acts of investigation.<sup>36</sup> Investigating magistrates also have coercive powers, including the power to issue warrants (research, summons to appear, arrest or *mandat d’amener*, a warrant to have a suspect brought before an investigating magistrate).<sup>37</sup> In France, on the few occasions a “warrant” is required, a rogatory commission is issued. It does not need to be “based on any particular level of suspicion or specify the place to be searched or item to be seized.”<sup>38</sup> Indeed, there is no general requirement of “probable cause”

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<sup>26</sup> See e.g., Hodgson, “The Police, the Prosecutor and the Juge d’Instruction: Judicial Supervision in France, Theory and Practice” (n 14) 349; Bouloc (n 25) 763.

<sup>27</sup> Cour de cassation, Crim. 2 November 1820, *Bull. crim.*, n. 140; Crim. 28 February 2007, n. 06-84.266, *Bull. crim.*, n. 65.

<sup>28</sup> François Molins, “Ministère Public” *Répertoire de droit pénal et de procédure pénale* (2014) s.86.,

<sup>29</sup> “The French Legal System” (n 18) 10.

<sup>30</sup> See e.g., Bouloc (n 25) 31.

<sup>31</sup> See the French Code of Criminal Procedure, art. 81.

<sup>32</sup> Lisa Williams, *Sizing up the Prosecution: A Quick Guide to Local Prosecution* (Harvard Law School, 2010). Available online at <<http://hls.harvard.edu/content/uploads/2008/07/prosecution2010.pdf>>, accessed 17 September 2016.

<sup>33</sup> Robert Lyman, “Compulsory process in a globalized era: defendant access to mutual legal assistance treaties” (2006) 47 *Va. J. Int’l L.* 261, 278.

<sup>34</sup> Christian Guéry, “Instruction Préparatoire”, *Répertoire de droit pénal et de procédure pénale* (2016) s.12, explaining that the investigating magistrate can have “adjudicative” powers concerning a suspect including: order pre-trial detention, issuance of warrants and the transfer of persons to the Court.

<sup>35</sup> *Répertoire de droit pénal et de procédure pénale* (n 34) explaining that the investigating magistrates are investigators since they supervise the OJP, commend investigations in search for the truth, conduct evidentiary hearings, interviews.

<sup>36</sup> Christian Guéry, “Commission Rogatoire”, *Répertoire de droit pénal et de procédure pénale* (2015) s.1.

<sup>37</sup> See the French Code of Criminal Procedure, art. 122.

<sup>38</sup> Christopher Slobogin, “Comparative Empiricism and Police Investigative Practices” (2011) 37 (2) *N.C. J. Int’l L. & Com. Reg.* 321, 323.

to conduct a search or request evidence from a third party<sup>39</sup> under French law.<sup>40</sup> This system is very different from the U.S. system, where the Fourth Amendment of the U.S. Constitution requires a showing of “probable cause” for the issuance of a search warrant.<sup>41</sup> This Amendment was adopted to fight abuses associated with general warrants,<sup>42</sup> necessarily exceeding a proper balance of individual rights and public necessity.<sup>43</sup> In the U.S., as defined by The Law Dictionary, probable cause to search for, or request, evidence “requires that an officer is possessed of sufficient facts and circumstances as would lead a reasonable person to believe that evidence or contraband relating to criminal activity will be found in the location to be searched.”<sup>44</sup> The safeguards in place to protect civil liberties during the criminal process in these countries are thus of a different nature. Privacy protections are insured mainly by the person requesting the evidence in France and by the scope and extent of the request in the U.S.

During the gathering of evidence, the investigating magistrate might realise that they need evidence that is located in a foreign jurisdiction. Because of the double principles of independency and sovereignty, law enforcement authorities cannot, in principle, perform any executive jurisdiction outside their own territory.<sup>45</sup> The location of the evidence, however should not, in principle, be an obstacle for the successful conduct of the investigation.<sup>46</sup> MLATs have been developed in order to facilitate international criminal cooperation and assistance.

### III. INTERNATIONAL CRIMINAL COOPERATION AND ASSISTANCE: MLA REQUESTS

The collection of evidence in electronic form is often a very time-sensitive issue and is likely to impact the privacy of individuals.<sup>47</sup> Since electronic data can be located anywhere, and may often be located in a foreign jurisdiction, competent national authorities need to use tools available for international cooperation, such as formally requesting mutual legal assistance.<sup>48</sup> France and the U.S. signed an MLAT in Paris on 10 December 1998, which entered into force on 1 December 2001.

The MLA process involves many players in multiple phases. On average, this process takes approximately ten months to be complete for valid and execute an MLA request.<sup>49</sup> The existing MLA regimes are often described as being “too slow and cumbersome to meet the time constraints” of an

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<sup>39</sup> Under French law there are two main regimes that regulate the access to evidence: the traditional search and seizure regime (regulated by the French Code of Criminal Procedure, arts. 92, 94, 96, 706-91 and 706-94) and the request regime (regulated by the French Code of Criminal Procedure, arts. 60-1, 77-1-1 and 99-3).

<sup>40</sup> Frase (n 2) 575.

<sup>41</sup> Wayne LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, vol 2 (5th edn, West Pub. Co. 2015) s.3.1(a).

<sup>42</sup> The Founders expressed concerns about the abuses of general warrants in England as well as in colonial America. See Alan Westin, *Privacy and Freedom* (Antenecum 1968) 332.

<sup>43</sup> See generally: Richard Wilkins, “Defining the ‘Reasonable Expectation of Privacy’: An Emerging Tripartite Analysis” (1987) 40 (5) Vand. L. Rev. 1077.

<sup>44</sup> James Hirby, “Definitions of Probable Cause Vs. Reasonable Suspicion” (*The Law Dictionary*) <<http://thelawdictionary.org/article/definitions-of-probable-cause-vs-reasonable-suspicion/>>, accessed 17 September 2016. See also *Illinois v Gates* (1983) 462 U.S. 238.

<sup>45</sup> Christian Guéry, “Commission Rogatoire Internationale”, *Répertoire de droit pénal et de procédure pénale* (2015) s.258. See also the United Nations Charter, art. 2, §1, signed on June 26, 1945.

<sup>46</sup> Ludovic Belfanti, “Juge d’Instruction”, *Répertoire de droit pénal et de procédure pénale* (2016) s.76.

<sup>47</sup> Council of the European Union, “Effective Criminal Justice in the Digital Age. What are the Needs. State of Play” (2015) <<http://data.consilium.europa.eu/doc/document/ST-14369-2015-INIT/en/pdf>> [8], accessed 17 September 2016.

<sup>48</sup> *ibid.*

<sup>49</sup> The U.S. President’s Review Group states that the average length of time that it takes for the U.S. to produce evidence to its foreign partners under the MLA process is 10 months. See President’s Review Group on Intelligence & Communications Technologies, *Liberty and Security in a Changing World* (12 December 2013) <[www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf)>, accessed 17 September 2016.

investigation.<sup>50</sup> Indeed, as described by Joutsen, “often, requests are not answered; the response comes too late, or comes in a form that cannot be used in the courts of the requesting state.”<sup>51</sup> Because of the broad French rule allowing evidence to be brought by all means,<sup>52</sup> the use of evidence obtained through an MLA procedure seems less problematic in France than in other countries.<sup>53</sup>

In addition, in the sphere of bilateral cooperation in criminal law, an imperfect understanding of another country’s legal system may discourage international requests.<sup>54</sup> This time consuming process can also impact the conservation of digital evidence. The issue of conservation of data is well known in the sphere of data protection. Privacy advocates often lobby for the deletion of data after a certain amount of time. The time taken to process MLA requests might be so long that some of the data that would be useful to law enforcement authorities might already be deleted or even lost.

#### A. MLAT IN PRACTICE: THE EXISTING STANDARDS AND REQUIREMENTS

When investigating authorities in France—representing either the public prosecutor and the OJP during the preliminary inquest or the investigating magistrate during a formal investigation—realise that they need evidence located in a foreign jurisdiction, they are required to follow a series of steps. This section provides a description of these steps and the standards required to obtain evidence under these circumstances.

First, the investigating authorities must determine which treaty or treaties (if any) apply to their request. For example, the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ratified by France and published with the Decree of 23 July 1967) has been one of the cornerstone texts for Europe. If there is no treaty applying to the request, the rules regulating the request on the French side are based on the general rules of law, which is the application of Title 10 of the French Code of Criminal Procedure. In most cases, they will have to write an “international rogatory commission,” or an MLA request (when there is an MLAT between the two countries). An international rogatory commission is generally defined as a formal request from a competent national authority to a foreign competent authority to perform, in its place, one or more specified actions.<sup>55</sup> Under French law, an international rogatory commission requires no formal conditions other than the ones that apply to a domestic rogatory commission and the ones imposed by the Treaty applying to the request.<sup>56</sup> It is relevant to note that, in France, cooperation requests are from the prosecutor, as a cooperation request from the police is not considered an “international rogatory commission.”<sup>57</sup>

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<sup>50</sup> Council of the European Union (n 47) 8; Swire & Hemmings “Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program” (n 7) 15; Bryan Cunningham, “Why State and Local Enforcement Should Be part of the MLAT Reform Process” (*Government Executive*, 25 March 2015) <[www.govexec.com/state-local/2015/03/mlat-reform-state-local-law-enforcement/108427/](http://www.govexec.com/state-local/2015/03/mlat-reform-state-local-law-enforcement/108427/)>, accessed 17 September 2016; Woods (n 6) 3.

<sup>51</sup> Matti Joutsen, “The European Union and Cooperation in Criminal Matters: The Search for Balance” (2006) Heuni Paper no. 25, 11. Available online at <[http://www.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI\\_papers\\_25.pdf](http://www.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf)>, accessed 17 September 2016.

<sup>52</sup> This principle ensures that all types of evidence are admissible (written, oral, testimony, etc.). It has a truth seeking function.

<sup>53</sup> While exclusion is the usual response to an illegal search and seizure in the U.S., that remedy is rarely resorted to in Europe. See generally: Charles Whitebread & Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* (5th edn, Foundation Press 2008) ch. 2.

<sup>54</sup> Mads Andenas & Duncan Fairgrieve, *Courts and Comparative Law* (OUP Oxford 2015) 616.

<sup>55</sup> See e.g., Hartini Matsopoulou et al, “Commissions rogatoires internationales”, *Revue Lamy Droit Pénal des Affaires (Lamy dr. pén.)*, 2016, § 5850; Claudia Ghica-Lemarchand, “La commission rogatoire internationale en droit pénal” *RSC* 2003, p. 33.

<sup>56</sup> *JurisClasseur Procédure pénale* (n 3) 9.

<sup>57</sup> See Hartini Matsopoulou et al, (n 55) § 5850.

French government guidelines<sup>58</sup> on international mutual legal assistance recommend the use of a general formula at the end of the international rogatory commission such as: “take all necessary actions to enforce the punishment of the offenses referred to in the request.”<sup>59</sup> However, such a general formula sent to the U.S. could not be enforced due to the strict requirements of U.S. search and seizure laws.<sup>60</sup> Requests made under an MLAT are executed pursuant to the terms of the treaty and the general rule of law.<sup>61</sup> Thus, any MLA request must be consistent with U.S. First Amendment speech protections and U.S. Fourth Amendment search and seizure protections. In addition, under the Electronic Communications Privacy Act,<sup>62</sup> providers in the U.S. cannot directly turn over evidence to a foreign government official.<sup>63</sup> Narrow tailoring of requests for communications information is essential to protecting individuals’ fundamental rights to freedom of expression and privacy while permitting lawful criminal investigations.<sup>64</sup>

The Snowden revelations led to widespread international distrust of the security of personal data that enters the U.S.<sup>65</sup> Many Europeans think that the standards to obtain evidence in the U.S. are much lower than those existing in Europe.<sup>66</sup> For the EU, this concern culminated in the *Schrems* decision of the European Court of Justice (“the CJEU”),<sup>67</sup> which held that the EU-U.S. Safe Harbour agreement was no longer a lawful basis for sending personal data from the EU to the U.S. It must be remembered, however, that the Snowden revelations mainly dealt with access to evidence by intelligence agencies and not law enforcement agencies—generally, information about a U.S. person collected by an intelligence agency may not be used in evidence in any proceeding against that U.S. person.<sup>68</sup>

## B. CASE STUDY OF A FRENCH MLA REQUEST TO THE U.S.

The French/U.S. MLAT, art. 2 designates the central authority through which requests must be transmitted. In the U.S., this authority is the Attorney General and in France, the Ministry of Justice.

As discussed above, when the investigating authorities realise that they need evidence located in the U.S., the French authority has to prepare an MLA request. Once an MLA request is prepared, it is submitted to the French Ministry of Justice. That request is then sent to the U.S. Office of International Affairs (“the OIA”) at the Department of Justice,<sup>69</sup> who screens the request to ensure

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<sup>58</sup> Ministère de la Justice, “Direction des affaires criminelles et des grâces: Circulaire-mémento L’entraide pénale internationale” (2004).

<sup>59</sup> *Répertoire de droit pénal et de procédure pénale* (n 45) § 271.

<sup>60</sup> United Nations Commission on Crime Prevention & Criminal Justice, *Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide* (12 April 2011) 59. Accessible online at <[https://www.coc.int/T/dghl/standardsetting/pc-oc/PCOC\\_documents/8\\_MLA%20step-by-step\\_CN152011\\_CRP.6\\_cV1182196.pdf](https://www.coc.int/T/dghl/standardsetting/pc-oc/PCOC_documents/8_MLA%20step-by-step_CN152011_CRP.6_cV1182196.pdf)>, accessed 17 September 2016.

<sup>61</sup> United Nations Commission on Crime Prevention & Criminal Justice (n 60) 56. For the U.S., see specifically, 28 U.S.C. § 1782 and 18 U.S.C. § 3512.

<sup>62</sup> Electronic Communications Privacy Act 1986 (18 U.S.C. § 2510 *et seq.*).

<sup>63</sup> President’s Review Group on Intelligence & Communications Technologies (n 49) 228.

<sup>64</sup> Woods (n 6) 6.

<sup>65</sup> Peter Swire, “How Technology is Prompting US/EU Tension on Mutual Legal Assistance” (Emory Law School Throwing Symposium, Atlanta, Georgia, U.S., February 2016). A copy of the slides used during this presentation can be found online at <[http://peterswire.net/speeches\\_post/technology-prompting-useu-tension-mutual-legal-assistance/](http://peterswire.net/speeches_post/technology-prompting-useu-tension-mutual-legal-assistance/)>, accessed 17 September 2016.

<sup>66</sup> *ibid.*

<sup>67</sup> Case C-362/14 *Schrems v Data Protection Commissioner* (Grand Chamber, 6 October 2015). Available online at <<http://curia.europa.eu/juris/document/document.jsf?docid=169195&doclang=EN>>, accessed 17 September 2016.

<sup>68</sup> For more information, see President’s Review Group on Intelligence & Communications Technologies (n 49) 145.

<sup>69</sup> See the MLAT between France and the U.S., art. 2.



compliance with constitutional requirements.<sup>70</sup> If needed, the OIA will iterate with the requesting body to make sure that the format of the request is correct and that it contains all necessary information.<sup>71</sup> After an MLA request has been reviewed by OIA, it is generally sent to the U.S. Attorney's Office in the district where the evidence is located for execution.<sup>72</sup> Most of the time, the Assistant U.S. Attorney in that district needs to apply to the U.S. district court for review and for an order appointing him or her as a commissioner to execute the foreign request.<sup>73</sup> The magistrate would rule on the request, and the service provider would receive a court order to produce the documents. This court order arrives in the form of a search warrant, although, as noted by Woods, this warrant is "often without identifying that the warrant is being served in accordance with an MLA [request] and that the data will be shared with a foreign government."<sup>74</sup> Woods further points out that this lack of transparency is problematic for individuals and companies since it is "necessary for enabling redress where abuses of MLA mechanisms occur"—and that, to have effective privacy protections, "users and companies ought to know who is requesting their data and for what purposes."<sup>75</sup>

Considerable time can pass between the referral from the OIA and receipt of the order by the service provider.<sup>76</sup> Once the requested evidence is obtained by the commissioner (at the U.S. Attorney Office), it is further reviewed and then transmitted back to the OIA and then to the French Minister of Justice, who will transmit the request back to the investigating authority.

To avoid delays in the processing of the request due to differences in legal systems, investigating authorities can ask for support from the liaison magistrate. France created this new position in 1993.<sup>77</sup> Liaison magistrates are mostly used by EU countries. As described by Joutsen, the liaison magistrate is an official from one state with—

"special expertise in judicial co-operation who has been posted in another state, on the basis of bilateral or multilateral arrangements, in order to increase the speed and effectiveness of judicial cooperation and facilitate better mutual understanding between the legal and judicial systems of the States in question."<sup>78</sup>

In general, liaison magistrates are "sent to countries with which there is a high number of requests for mutual assistance, and where differences in legal systems have caused delays."<sup>79</sup>

Among EU Member States, France has been the most active in sending out liaison magistrates. Currently, in 2016, there are 17 French liaison magistrates in 36 countries (mainly in Europe, but also in other countries such as Brazil and the U.S.).<sup>80</sup> There is one French liaison magistrate in the U.S., based in Washington DC, who works closely with the Department of Justice and different authorities to facilitate cooperation between France and the U.S.<sup>81</sup> Reciprocally, there is one U.S. liaison

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<sup>70</sup> Swire & Hemmings "Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program" (n 7) 55.

<sup>71</sup> U.S. Attorney's Manual, "Criminal Resource Manual", s.276. Available online at <[www.justice.gov/usam/criminal-resource-manual-276-treaty-requests](http://www.justice.gov/usam/criminal-resource-manual-276-treaty-requests)>, accessed 17 September 2016.

<sup>72</sup> United Nations (n 60) 56.

<sup>73</sup> Among the powers granted to the commissioner under U.S. law (28 U.S.C 1782) is the authority to issue subpoenas to compel the appearance of a witness to provide testimony or produce documents. See United Nations (n 60) 56.

<sup>74</sup> Woods (n 6) 3.

<sup>75</sup> Woods (n 6) 7.

<sup>76</sup> Swire & Hemmings "Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program" (n 7) 34.

<sup>77</sup> The first French liaison magistrate was sent in Rome in 1993 (see Arrêté of 1 February 1993 designating the liaison magistrate attached to the Ministry of Justice of Italy).

<sup>78</sup> Joutsen (n 51) 17.

<sup>79</sup> *ibid.*

<sup>80</sup> See "Réunion annuelle des magistrats de liaison" (*Ministère de la Justice*, 11 January 2016) <[www.justice.gouv.fr/le-garde-des-sceaux-10016/reunion-annuelle-des-magistrats-de-liaison-28618.html](http://www.justice.gouv.fr/le-garde-des-sceaux-10016/reunion-annuelle-des-magistrats-de-liaison-28618.html)>, accessed 17 September 2016.

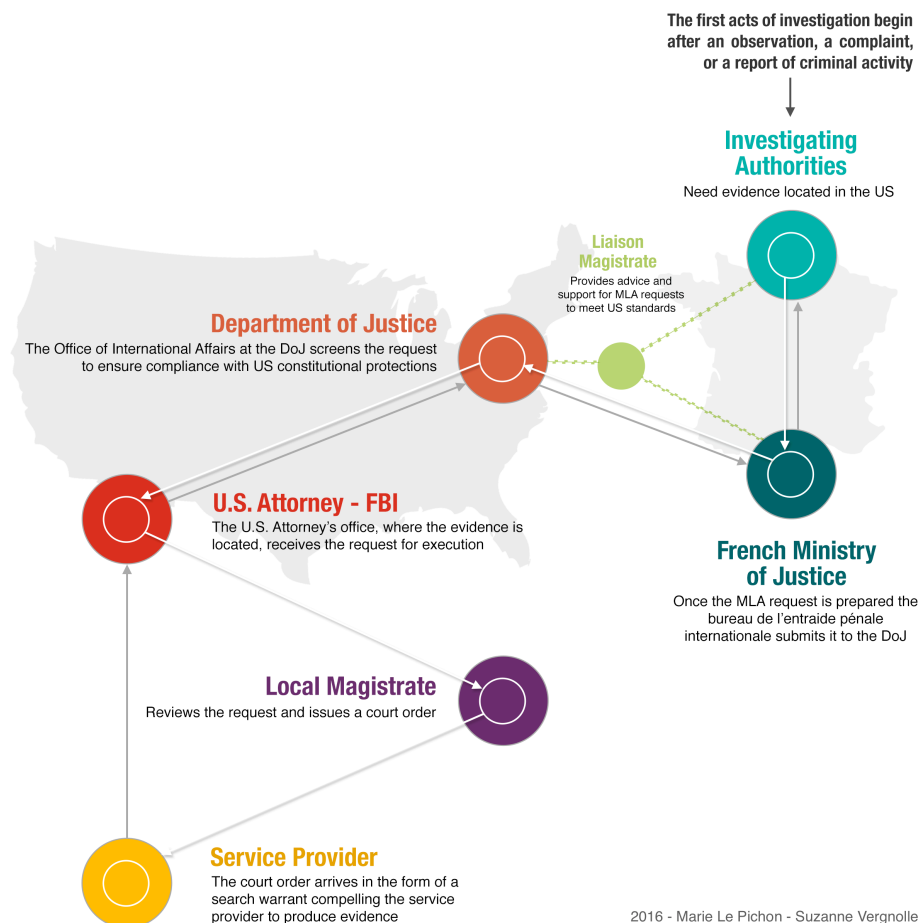
<sup>81</sup> See "Magistrat de liaison" (*Ambassade de France aux États-Unis*)

magistrate in Paris.<sup>82</sup> During the entire MLA process, the investigating authorities can at any moment work with the liaison magistrate to make sure that the request meets the standards of U.S. law in order to avoid delays.

The system in the U.S. to request evidence located in a foreign country is very similar to the one that has just been described—briefly, a local (state or federal) prosecutor will send a request to OIA, who will then send it to the Minister of Justice in France. Then the request is in principle sent to the competent prosecutor, who will obtain the requested evidence in accordance with the French Code of Criminal Procedure rules.

Phases of

## THE FRENCH REQUEST FOR MLA



<<http://fr.franceintheus.org/spip.php?article870>>, accessed 17 September 2016.

<sup>82</sup> The foreign liaison magistrates in France are based in the Service of European & International Affairs. See Répertoire de droit international Dalloz, *V*° "Entraide Judiciaire" 2016, by Bernadette Aubert, § 141.

### C. THE LACK OF RESOURCES IN THE U.S. TO PROCESS MLA REQUESTS

Multiple factors contribute to the lengthy response time of MLA requests. Among them is a lack of resources for processing an ever-increasing number of requests. Based on the interviews we have conducted, there seems to be only one prosecutor in the Northern District of California (the area that contains Silicon Valley, San Francisco and Oakland) handling every MLA request from all of the world. This assumption, even if inaccurate, does correspond to the numerous recent reports regarding the lack of resources in the U.S. allocated to the MLA process.<sup>83</sup> According to the Department of Justice:

“Over the past decade, the number of requests for assistance from foreign authorities handled by the Criminal Division’s Office of International Affairs ... has increased by nearly 60 percent, and the number of requests for computer records has increased ten-fold [however] U.S. Government resources, including personnel and technology, have not kept pace with this increased demand.”<sup>84</sup>

From 2007 to 2015, France addressed 500 MLA requests to the U.S. (48 were related to terrorism) and the U.S. addressed 200 MLA requests to France (37 of which were related to terrorism).<sup>85</sup> Thus, there are around 60 to 80 requests per year from France to the U.S.. These numbers are extremely low considering the global nature of today’s internet services and the fact that communications data are increasingly stored in other or multiple countries. In addition, communications are no longer only made through traditional national communications services, but through voice or text services of companies based outside of France, such as Facebook, Google (*Gmail, Hangouts, Youtube, etc.*), Apple (*Facetime, iMessages*), Whatsapp, Viber, Telegram, Signal, *etc.* It is well known that these services collect, store and process a wide range of data that have an impact on the privacy of individuals. Most law enforcement authorities who need evidence located abroad are balancing the time constraints of an MLA request with the advancement of the investigation and process. The low number of requests suggests that this disequilibrium is leading law enforcement authorities to use processes outside MLAs.<sup>86</sup>

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<sup>83</sup> See *e.g.*, President’s Review Group on Intelligence & Communications Technologies (n 49) 227–228; Woods (n 6) 10; and U.S. Department of Justice, “FY 2016 President’s Budget” (2016) 21 <[www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/10\\_criminal\\_division\\_crm.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/10_criminal_division_crm.pdf)> accessed 17 September 2016.

<sup>84</sup> U.S. Department of Justice, “FY 2015 President’s Budget” (2015) 1. Available online at <[www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/mut-legal-assist.pdf](http://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/mut-legal-assist.pdf)>, accessed 17 September 2016.

<sup>85</sup> *JO Assemblée nationale*, discussion of 28 January 2016, speaker Mme. Jeanine Dubié. To compare, there have been 950 mutual legal assistance requests since 1998 between France and Morocco: “Dossier De Presse: Visite de travail et d’amitié au Royaume du Maroc” (Élysée, 2015). Available online at <<http://www.elysee.fr/assets/Uploads/DP-Visite-de-travail-et-damiti-au-Royaume-du-Maroc.pdf>> accessed 17 September 2016.

<sup>86</sup> This can include directly requesting evidence from the U.S. companies, see Cour de cassation, Crim. 6 November 2013, n.12-87.130, *Bull. crim.*, n.217. For comments of the decision see, *e.g.*, *Dalloz actualité*, 19 November 2013, obs. Fucini; *D.* 2013. Actu. 2646; *ibid.* 2826, note Hennion-Jacquet; *ibid.* Pan. 2014 1742, obs. Pradel; *AJ pénal* 2014 40, note de Comblès de Nayves; *Procédures* 2014 56, obs. Chavent-Leclère; *Gaz. Pal.* 9 févr. 2014 38, note Fourment. For similar decisions requesting data from companies in France, see, *e.g.*, Crim. 22 November 2011, n.11-84.308, *Bull. crim.*, n.234; Crim. 9 February 2016, n.15-85.070.

#### IV. ASPECTS OF REFORM FOR INTERNATIONAL CRIMINAL COOPERATION AND ASSISTANCE

An examination of the steps required to access evidence located in a foreign jurisdiction has shown that the current process is not designed to respond to the time-sensitive nature of the criminal process system. Waiting months to gain access to evidence can have a meaningful impact on the success of the investigation and trial phases. Any reform of the MLA regimes needs to take into account a variety of factors and recent developments to ensure that the system runs efficiently, safeguards civil liberties and does not weaken internet privacy.

This section will discuss in which ways the divergent legal approaches might have an impact on compliance with the laws of different countries. This section will also provide an analysis of recent EU-U.S. developments related to data protection and MLAs.

##### A. DIVERGENT LEGAL APPROACHES

In principle, the location of data triggers the application of the law where *in situ*. Thus, U.S. companies whose servers are in California must comply with U.S. laws (federal and state laws).

Divergent legal approaches can create an impossible situation for these companies. Complying with one country's legal obligation can lead to a violation of another legal system. EU member-state courts and the CJEU have recognised and enforced their jurisdiction over U.S. companies for several years.<sup>87</sup> They have also been enforcing, after choice of law processes, European laws. In every different area of law, different rules of choice of law may apply (see for instance, The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters signed on 18 March 1970). In the field of data protection, there is a trend of EU judges to apply EU laws (the EU directive or their national laws). In 2015, in the case of *Google Spain*,<sup>88</sup> the CJEU held that Google, a California-based company, was "established" in Spain within the meaning of the Data Protection Directive<sup>89</sup> and therefore subject to Spanish law because it held a commercial office for advertising solicitation there. In 2015, in the case of *Weltimmo*,<sup>90</sup> the CJEU went further when considering that even a minimal real and effective activity in the territory of a Member State will trigger the application of the law of that Member State. Accordingly, EU Member States have used the criterion whether the company is actively directing its activities towards consumers present in their own territory.

In the context of cross-border legal cooperation, the fact that an increasing number of judges outside the U.S. are recognising their jurisdiction over U.S. companies may become a problem when

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<sup>87</sup> It is possible to see a trend in European law and Member State laws. See generally Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1. See also in France: CA Paris, 12 February 2016 n.15-08624 (French judge enforces jurisdiction over Facebook); CA Paris, 12 June 2013, n.13/06106 (French judge enforces jurisdiction and law over Twitter); or in Belgium: Cour de cassation, 1 December 2015 n.P. 13. 2082. N/1 (Belgium judge enforces jurisdiction and law over Yahoo!).

<sup>88</sup> Case C-131/12 *Google Spain SL v Agencia Española de Protección de Datos (AEPD)* (Grand Chamber, 13 May 2014). Published in the electronic Reports of Cases  
<<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0131>>, accessed 17 September 2016.

<sup>89</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

<sup>90</sup> Case C-230/14 *Weltimmo v Nemzeti Adatvédelmi és Információszabadság Hatóság* (Third Chamber, 1 October 2015). Available online at  
<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=168944&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=665869>>, accessed 17 September 2016.

companies are faced with conflicting legal obligations.<sup>91</sup> For instance, a U.S. provider that stores data in the U.S. from the email account of a Belgian citizen located in Belgium might be simultaneously required (by Belgian law) and forbidden (by U.S. law)<sup>92</sup> to produce the true identity of suspected cyber criminals.<sup>93</sup> If this sounds hypothetical, it is not. In a case which has taken eight years to prosecute, Yahoo! (a U.S.-based company) has been fined by Belgian courts for refusing to work with the Belgian police and provide data to the prosecutor in Termonde, a Belgian town. The data requested were mainly basic subscriber information, which are permitted to be disclosed under the Electronic Communications Privacy Act of 1986 (18 U.S.C. § 2510 *et seq.*). However, Yahoo! was also asked for “any other personal details or information that might lead to the identification of the account user(s),” which might include content data. The Belgium Supreme Court ruled that the company, “as a provider of a free webmail service, has a presence on Belgium’s territory, and voluntarily submits to Belgian law because it actively participates in the economic life in Belgium.”<sup>94</sup> The €44,000 fine for breach of the Belgium Code of Criminal Procedure, art. 42 bis §2<sup>95</sup> was therefore valid and applicable. The Belgium Supreme Court considered that Belgian judges did not exercise non-attributable extraterritorial jurisdiction.<sup>96</sup>

In a similar case, Microsoft has been litigating a search warrant issued by a magistrate judge in the Southern District of New York. The search warrant ordered the company to provide to the U.S. government emails kept by Microsoft on servers at a data center in the Republic of Ireland.<sup>97</sup> On 14 July 2016, the Second Circuit Court of Appeals of the U.S. reversed the District Court’s denial of Microsoft’s previous motion to quash and vacate its order. The Court of Appeals ruled that the Stored Communications Act “does not authorise a U.S. court to issue and enforce an SCA warrant against

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<sup>91</sup> See, e.g., American Chamber of Commerce to the European Union, “AmCham EU Statement on Article 43(a) in the GDPR” (14 September 2015)

<[www.amchameu.eu/system/files/position\\_papers/amcham\\_position\\_on\\_article\\_43a\\_gdpr.pdf](http://www.amchameu.eu/system/files/position_papers/amcham_position_on_article_43a_gdpr.pdf)>, accessed 17 September 2016; and the Reform Government Surveillance project <[www.reformgovernmentsurveillance.com](http://www.reformgovernmentsurveillance.com)>, accessed 17 September 2016.

<sup>92</sup> See Electronic Communications Privacy Act 1986, 18 U.S.C. § 2510 *et seq.* For further research on the specifics of the U.S. regime and the French regime on the access to data, see the upcoming article “A Mutual Legal Assistance Case Study: The United States and France” by Peter Swire, Justin Hemmings & Suzanne Vergnolle (forthcoming in *Wisconsin International Law Journal*).

<sup>93</sup> *Yahoo!* (n 87). See comments of the decision: Ruben Roex, “La Justice Belge Peut (Enfin) Réclamer Directement des Informations à Yahoo!” (*Tendance Trends*, 11 December 2015) <[trends.levif.be/economie/high-tech/la-justice-belge-peut-enfin-reclamer-directement-des-informations-a-yahoo/article-column-440009.html](http://trends.levif.be/economie/high-tech/la-justice-belge-peut-enfin-reclamer-directement-des-informations-a-yahoo/article-column-440009.html)>, accessed 17 September 2016; Lars Andersen, “Confirmation of Yahoo fine for refusing to collaborate with Belgian police” (*The Brussels Times*, 2 December 2015) <[www.brusselstimes.com/rss-feed/4617/confirmation-of-yahoo-sentence-for-refusing-to-collaborate-with-belgian-police](http://www.brusselstimes.com/rss-feed/4617/confirmation-of-yahoo-sentence-for-refusing-to-collaborate-with-belgian-police)>, accessed 17 September 2016; and Geert van Calster, “It’s true! Belgian Supreme Court confirms order for Yahoo! to hand over IP-addresses” (*GAVC Law*, 7 December 2015) <[www.gavclaw.com/2015/12/07/its-true-belgian-supreme-court-confirms-order-for-yahoo-to-hand-over-ip-addresses/](http://www.gavclaw.com/2015/12/07/its-true-belgian-supreme-court-confirms-order-for-yahoo-to-hand-over-ip-addresses/)>, accessed 17 September 2016.

<sup>94</sup> *Yahoo!* (n 87) §9.

<sup>95</sup> The Belgium Code of Criminal Procedure, art. 42 bis §2 provides: “When tracking crimes and misdemeanors, the Public Prosecutor can [...] based on any information in his possession or by means of access to the customer files of the operator [of an electronic communications network] or of the provider [of an electronic communications service] proceed or order to proceed to: 1. the identification of the subscriber or regular user of an electronic communications service.”

<sup>96</sup> *Yahoo!* (n 87) §9.

<sup>97</sup> See *In re a warrant to search a certain e-mail account controlled and maintained by Microsoft corporation* (2014) 15 F.Supp.3d 466. See also, Ellen Nakashima, “Microsoft fights U.S. search warrant for customer e-mails held in overseas server” (*The Washington Post*, 10 June 2014) <[www.washingtonpost.com/world/national-security/microsoft-fights-us-search-warrant-for-customer-e-mails-held-in-overseas-server/2014/06/10/6b8416ac-f0a7-11e3-914c-1fbd0614e2d4\\_story.html](http://www.washingtonpost.com/world/national-security/microsoft-fights-us-search-warrant-for-customer-e-mails-held-in-overseas-server/2014/06/10/6b8416ac-f0a7-11e3-914c-1fbd0614e2d4_story.html)>, accessed 17 September 2016.

United States-based service provider for the contents of a customer's electronic communications stored on servers located outside of the United States.”<sup>98</sup>

These examples demonstrate some of the problems that companies are facing. As the traditional factor used to trigger the application of law is the location of the data, companies doing business in more than one jurisdiction may be faced with conflicting obligations. Other factors could be used to determine the law that applies. For instance, the criterion could be the law of the State where the data was first recorded, before any transfer or storage.

## **B. EU-U.S.: RECENT DEVELOPMENTS RELATED TO DATA PROTECTION AND MLAS**

As described by De Hert and Papakonstantinou, “[p]olice and judicial cooperation occupy a specific position in the field of data protection.”<sup>99</sup> The most recent legal tools developed at the EU-U.S. level have identified data protection as a fundamental issue in the MLA system. The current operational challenges in law enforcement actions do not alter the obligations of the institutions and States to ensure the safeguarding of fundamental rights in any operating framework of internal and transnational cooperation in law enforcement or criminal justice.<sup>100</sup>

The Privacy Shield's adoption has been an essential element for the transfer of personal data from the EU to the U.S. At the EU-U.S. level, two major recent legal developments have addressed privacy and data protection issues related to the processing of an MLA request: the reform of EU data protection rules, including the General Data Protection Regulation (“the GDPR”) and the Umbrella Agreement that have both been adopted in the Spring 2016.

### ***i. Privacy Shield***

According to the Data Protection Directive, art. 25(1) the transfer of personal data from Member States to third countries may take place only if the third country in question ensures an adequate level of protection. To allow transfer of personal data from the EU to the U.S., the European Commission adopted a decision in 2000 called the “Safe Harbour Privacy Principles.”<sup>101</sup> This decision was implemented in accordance with the guidance provided by the “Frequently Asked Questions” issued by the U.S. Department of Commerce. Under this decision, it was considered that the U.S. provided an “adequate level of protection” for personal data transferred from the EU to organisations established in the U.S. However, in *Schrems*,<sup>102</sup> the CJEU declared Commission Decision 2000/520/EC invalid. Since this judgment, debates regarding the improvement of the legal basis for the transfer of personal data from the EU to the U.S. have intensified in order to elaborate a new basis for the transfer of personal data: The Privacy Shield. This new instrument aims to provide a basis, under the Data Protection Directive, art. 25(2), for the transfer of personal data from the Union to self-certified organisations in the U.S. It is based on a system of self-certification by which U.S. organisations commit to a set of privacy principles issued by the U.S. Department of Commerce.<sup>103</sup> Thus, self-certified organisations in the U.S. will still be able to collect, process and transfer personal

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<sup>98</sup> *Microsoft Corporation v United States of America* (U.S. Court of Appeals, Second Circuit, Docket No. 14-2985, 14 July 2016) 2016 WL 3770056.

<sup>99</sup> Paul De Hert & Vagelis Papakonstantinou, “The Police and Criminal Justice Data Protection Directive: Comment and Analysis” (2012) 22 (6) *Computers & Law Magazine of SCL* 1, 1.

<sup>100</sup> Directorate General for Internal Policies, EU Parliament, “The law enforcement challenges of cybercrime: are we really playing catch-up?” (2015) 48.

<sup>101</sup> Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce [2000] OJ L215/7.

<sup>102</sup> Case C-362/14 *Schrems v Data Protection Commissioner* (n 67).

<sup>103</sup> Commission Implementing Decision pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield of 12 July 2016, Annex II, C (2016) 4176 final (Brussels, 12 July 2016).

data from the EU to their servers in the U.S. if they are complying with the requirements of the Privacy Shield. On 12 July 2016, the European Commission formally adopted the Privacy Shield as providing an adequate level of protection.

If the Privacy Shield is essential for companies transferring personal data from the EU to the U.S., it does not provide a basis for international criminal cooperation and cross-border data requests. The new rule regarding access by third countries' law enforcement agencies to personal data stored in the EU was adopted in the General Data Protection Regulation.

## ***ii. Reform of EU data protection rules***

The European Parliament has introduced a small section in the GDPR providing that companies should not always comply with requests from courts, tribunals and administrative authorities in non-EU countries for the personal data of Europeans. Indeed, art. 48 prohibits the transfer of personal data out of the EU if it is not compliant with a mutual legal assistance treaty or an international agreement. This article provides that—

“[a]ny judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognized or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.”

Thus, this article considers that the requests outside of an MLAT process or similar agreement does not provide sufficient safeguards for data protection. It is worth noting that this provision appears only to apply to judgments. Indeed, companies that voluntarily transfer data out of the EU in response to a law enforcement request do not seem affected by this article. International and European companies have lobbied against art. 48.<sup>104</sup> According to the Industry Coalition for Data Protection, companies may “be ordered by a court in one jurisdiction to hand over the data of EU citizens, but forbidden by the [GDPR] to comply”.<sup>105</sup> Thus, this provision could lead to significant conflict of law issues in multi-jurisdictional proceedings or enforcement actions.<sup>106</sup> Also, the fact that the provision is in the GDPR and not in the specific directive regarding law enforcement issues has been criticised.<sup>107</sup> Indeed, ch. V

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<sup>104</sup> See *e.g.*, European Data Coalition, “Re: International data transfers” (24 August 2015) <[www.europeandatacoalition.eu/wp-content/uploads/2015/06/Coalition-reaction-on-Ch-V3.pdf](http://www.europeandatacoalition.eu/wp-content/uploads/2015/06/Coalition-reaction-on-Ch-V3.pdf)>, accessed 17 September 2016; and Neil Ford, “European Data Coalition lobbies against GDPR Article 43a – the ‘Anti-FISA’ clause” (*IT Governance*, 3 September 2015) <[www.itgovernance.eu/blog/european-data-coalition-lobbies-against-gdpr-article-43a-the-anti-fisa-clause/](http://www.itgovernance.eu/blog/european-data-coalition-lobbies-against-gdpr-article-43a-the-anti-fisa-clause/)>, accessed 17 September 2016.

<sup>105</sup> See, *e.g.*, David Meyer, “Industry Issues Plea Over Data Reform” (*Politico*, 27 August 2015) <[www.politico.eu/article/industry-plea-data-reform-protection-privacy/](http://www.politico.eu/article/industry-plea-data-reform-protection-privacy/)>, accessed 17 September 2016; and Phil Bradley-Schmieg, “Progress on EU GDPR Reform: International Aspects Debated” (*Inside Privacy*, 23 July 2015) <[www.insideprivacy.com/international/european-union/progress-on-eu-gdpr-reform-international-aspects-debated/](http://www.insideprivacy.com/international/european-union/progress-on-eu-gdpr-reform-international-aspects-debated/)>, accessed 17 September 2016.

<sup>106</sup> See *e.g.*, Shane Murphy, “All the latest on proposed new European data rules (aka the GDPR)” (*TechUK*, 27 July 2015) <[www.techuk.org/insights/news/item/5247-all-the-latest-on-proposed-new-european-data-rules-aka-the-gdpr](http://www.techuk.org/insights/news/item/5247-all-the-latest-on-proposed-new-european-data-rules-aka-the-gdpr)>, accessed 17 September 2016; and Meyer, *ibid.*

Before the vote to leave the EU, the U.K. had decided not to opt-in to this provision, which meant that Article 48 would not have applied to U.K. businesses, see, *e.g.*, Rhiannon Webster, “UK confirms that it will not opt-in to Article 43a of the GDPR” (*Lexology*, 17 March 2016) <<http://www.lexology.com/library/detail.aspx?g=3f322b85-981e-4660-85e7-0c345c3ed6c9>>, accessed 17 September 2016. See also the U.K. Government’s written statements HLW5500 (4 February 2016) and HCW5511 (4 February 2016).

<sup>107</sup> European Commission, “Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data” COM (2015) 10 final (Brussels, 25 January 2012).

of this proposal provides specific rules for the transfer of personal data to third countries or international organisations.

### *iii. Umbrella Agreement*

On 2 June 2016, the EU and the U.S. signed the so-called “Umbrella Agreement.”<sup>108</sup> This Agreement aims to implement a comprehensive data protection framework for EU-U.S. criminal law enforcement cooperation.<sup>109</sup> It intends to protect personal data (for example names, addresses, criminal records) when transferred and processed between the EU and the U.S. law enforcement authorities for the purpose of “prevention, detection, investigation and prosecution of criminal offences, including terrorism.”<sup>110</sup> The Agreement cannot itself serve as a legal basis for the transfer of personal data.<sup>111</sup> Thus, the scope of the Umbrella Agreement is different to an MLAT, since it aims to “put in place a comprehensive high-level data protection framework for EU-U.S. law enforcement cooperation.”<sup>112</sup>

The agreement is not yet in effect and additional procedural steps are needed to finalise the agreement, including the approval of the European Parliament.<sup>113</sup> The relationship between the Umbrella Agreement and the subsequent legal bases for transfers between the EU and the U.S. will be a crucial component of data sharing, and its implications remain unclear.<sup>114</sup> Since the draft of the agreement became public in September 2015, many privacy advocates and EU institutions have criticised it for multiple reasons including, but not limited to: the absence of a human rights clause, the risk for cooperation on data sharing, the inconsistency of safeguards and remedies for EU and U.S. nationals in the U.S., and lack of safeguards and remedies for non-EU citizens.<sup>115</sup>

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<sup>108</sup> “Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses” <[http://ec.europa.eu/justice/data-protection/files/dp-umbrella-agreement\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/dp-umbrella-agreement_en.pdf)>, accessed 17 September 2016.

<sup>109</sup> European Commission, “Questions and Answers on the EU-US data protection ‘Umbrella agreement’”, Memo15/5612 (Brussels, 8 September 2015). Available online at <[http://europa.eu/rapid/press-release\\_MEMO-15-5612\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5612_en.htm)>, accessed 17 September 2016.

<sup>110</sup> See the Umbrella Agreement, art. 3(1). See also, European Data Protection Supervisor, “Opinion 1/2016 Preliminary Opinion on the agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences” (2016) 5.

<sup>111</sup> See the Umbrella Agreement, art. 1(3). See also European Parliament Legal Service, “Legal Opinion: EU-US Umbrella agreement concerning the protection of personal data and cooperation between law enforcement authorities in the EU and the US” (14 January 2016) [37].

<sup>112</sup> European Commission, “Questions and Answers on the EU-US data protection ‘Umbrella agreement’” (n 109).

<sup>113</sup> “Enhanced data protection rights for EU citizens in law enforcement cooperation: EU and US sign ‘Umbrella agreement’”, European Council Press Release 305/16 (2 June 2016) <[http://www.consilium.europa.eu/en/press/press-releases/2016/06/02-umbrella-agreement/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=Enhanced+data+protection+rights+for+EU+citizens+in+law+enforcement+cooperation+%3a+EU+and+US+sign+%22Umbrella+agreement%22](http://www.consilium.europa.eu/en/press/press-releases/2016/06/02-umbrella-agreement/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Enhanced+data+protection+rights+for+EU+citizens+in+law+enforcement+cooperation+%3a+EU+and+US+sign+%22Umbrella+agreement%22)>, accessed 17 September 2016.

<sup>114</sup> European Parliament Legal Service (n 111).

<sup>115</sup> See, e.g., Douwe Korff, “EU-US Umbrella Data Protection Agreement: Detailed Analysis by Doowe Korff” (*FREE Group*, 14 October 2015) <<http://free-group.eu/2015/10/14/eu-us-umbrella-data-protection-agreement-detailed-analysis-by-douwe-korff/>>, accessed 17 September 2016; and Catherine Stupp, “Commission’s ‘Umbrella Agreement’ with US under fire from MEPs” (*EurActiv* 16 February 2016) <[www.euractiv.com/section/digital/news/commissions-umbrella-agreement-with-us-under-fire-from-civil-liberties-meps/](http://www.euractiv.com/section/digital/news/commissions-umbrella-agreement-with-us-under-fire-from-civil-liberties-meps/)>, accessed 17 September 2016.



## V. CONCLUSION

The MLA system provides a mechanism for law enforcement authorities to obtain evidence outside of their borders, but there is room for improvement. Reforming the existing but malfunctioning MLA process appears essential and critical. Indeed, access to evidence is a time-sensitive issue for not only the solving and prevention of crimes but also as part of the individual's right to a fair trial. This article provided a review of the French criminal system as an example of a mature EU legal system. It also illustrated that each legal system maintains different checks and balances that have to be carefully considered in reforming any multilateral legal cooperation. A reform of the MLA regimes thus need to take into account the broader picture of the legal systems in place in different countries. As discussed in this article, there is a need to increase and specialise the staffing related to MLA issues. There is also a need to ensure that MLA requests are generated and processed as efficiently and securely as possible and in a way that respects international civil liberties and human rights. Better transparency of the receipt and processing of MLA requests emerges as a key issue not only to monitor the regime's performance but as a safeguard for individuals.

Further research is still needed on the substantive standards to highlight the difficult issues at stake and to complement the procedural standards set forth here. In the absence of a strong legal framework dealing in an efficient and expedient way with cross-border data requests, law enforcement agencies have been using practices and policies outside the traditional international legal process,<sup>116</sup> weakening both privacy and data protection.

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<sup>116</sup> Crim. 6 November 2013, n.12-87.130 (n 86).