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**Responsible Data Use in Data-Driven Societies**

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**Cross-border electronic evidence and law enforcement:  
what it means for data privacy and fundamental rights**

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The fight against crime and terrorism in the digital age must continue to be carried out within a legal framework, which is designed to ensure compliance with fundamental rights including the respect for private life and the protection of personal data. The development of the digital world requires adjustments in many areas including justice. Access to electronic information has become an unavoidable necessity in most criminal cases – whether or not it relates to terrorism – and access depends on the place of establishment of the service provider.

In its proposal for a regulation on e-evidence, the Commission considers direct cooperation in criminal matters between the competent authorities of a member state and a service provider established or represented in another member state, without even having to inform the competent authorities of the state in which the service provider is established or represented.

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<sup>1</sup> The views expressed herein are those of the author in his personal capacity and do not necessarily reflect those of EUROJUST or the EU in general.

Defining the law and administering justice both fall within the sovereign functions of states. States may judicially cooperate together. Article 82(1)(d) of the Lisbon Treaty on judicial cooperation in criminal matters provides that Parliament and Council “*shall adopt measures to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.*”

The scope of this provision deals with cooperation between judicial or equivalent authorities of member states. It does not deal with cooperation between those authorities and private operators whose objectives are commercial.

On the **legal basis** of Article 82(1)(d) of the Lisbon Treaty, the Commission however considers such cooperation between competent authorities of member states and service providers of another member state. The use of this legal basis in the context of direct requests between public authorities and private parties is a novelty. In addition, the Commission considers granting quasi-judicial powers to service providers. Its proposal has the effect of depriving public authorities of member states of their sovereign prerogatives.

Article 9(5) of the proposal provides that service providers may refrain from executing a European Production Order Certificate if they consider, on the basis of the sole information contained in such certificate, that it “*manifestly violates the Charter of Fundamental Rights of the European Union or that it is manifestly abusive*”. **Private actors** would thus have to **assess compliance with the Charter**. In principle, this responsibility however rests with member states and EU institutions. In addition, Article 15(1) of the proposal provides that service providers may refrain from executing the European Production Order if they consider that compliance with it “*would conflict with applicable laws of a third country prohibiting disclosure of the data concerned on the grounds that this is necessary to either protect the fundamental rights of the individuals concerned or the fundamental interests of the third country related to national security or defence*”.

Service providers thus become auxiliaries of justice which are endowed with legal powers enabling them to assess the validity of European Production Orders notified to them. Service providers are however also commercial entities which pursue their own private and financial interests.

Easier access to electronic data for police and judicial authorities falls short of justifying such an abandonment of the exclusive powers of public authorities in criminal matters. It also falls short of justifying this confusion between public and private interests. Other means are available to facilitate judicial cooperation in the European area of freedom, security and justice, in which the principle of mutual trust is enshrined.

- **First**, the reasons why police and judicial authorities of member states encounter difficulties should be analysed. US law often applies to service providers. Competent authorities of member states must therefore request the assistance of US authorities even though the relevant criminal case is often domestic only. The legally correct solution should accordingly be found in improving the treaties on mutual legal assistance which are in force. The US and the EU have already signed such an agreement in 2003.

Treaties on mutual legal assistance are criticised since the applicable procedures are both slow and cumbersome. Time is of the essence to enable law enforcement authorities to obtain data which are indispensable for their criminal investigations and prosecutions. The proposal should be consistent with the Council of Europe Second Additional Protocol to the Budapest Convention on Cybercrime. In the context of its ongoing negotiations, a specific provision has however been provisionally adopted on “*emergency mutual legal assistance*”. This provision sets out the fastest possible procedure for requests for assistance made in an emergency situation. An emergency is defined as “*a situation in which there is a significant and imminent risk to the life or safety of any natural person.*” The Draft Explanatory Report provides the example of the case where “*the location of the victim may be determined through data stored by the provider*”.

The current functioning of treaties on mutual legal assistance can therefore be improved. Such treaties are the only available legal instruments to settle the thorny problems of conflict of laws. No available legal instrument solves the case where a service provider objects to a request for the transfer of data notified pursuant to the proposal because the domestic law of a third state such as US law does not provide for such transfer, for instance where the data subject is American. In this respect, the proposal of the Commission does not contribute to resolving conflicts of law when a European Production Order is notified to service providers to which the law of a third country applies. The proposal of the Commission then provides for a referral to a domestic court with jurisdiction over the authority which issued the Order. This complex mechanism seems surprising to say the very least in the context of a territorial conflict between:

1°/ the law of the state in whose territory the service provider is established or represented and

2°/ the law of the third state which applies to the same service provider.

• **Second**, independently of a possible improvement of treaties on mutual legal assistance, the objective aimed by the Commission could be achieved without calling into question the basic principles concerning the sovereign competences of member states. Restoring the traditional channel of cooperation between judicial authorities of member states suffices, by actively involving the enforcement authorities of the state in whose territory the service provider is located. The draft report of MEP Ms Sippel proposes a mechanism for notifying the state in whose territory the Order is to be executed, simultaneously with sending it to the service provider. The responsibility of legally examining the Order and its possible execution would rest with the enforcing authority only. Where appropriate, in the few exceptional cases where the person concerned by the procedure does not reside either on the territory of the issuing state or on the territory of

the state executing the Order, the Order must also be notified to the authorities of the person's place of residence, provided that this place of residence is known.

This notification to the "*affected State*" is consistent with the sovereign prerogatives of member states set out in Article 82 of the Lisbon Treaty. It is also consistent with striving for efficient procedures.

No issue is more sovereign than the protection of personal data. National sovereignty contributes to ensuring compliance with fundamental rights including the respect for private life and the protection of personal data. If the EU ever becomes a federal state, European sovereignty may then be relied on to comply with fundamental rights. European mechanisms may then also be considered to that effect. For the time being, relying on national sovereignty however remains necessary to ensure compliance with fundamental rights in the area of freedom, security and justice.

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