

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law



CM1809 Comments on the proposal for a regulation on European Production and Preservation Orders for electronic evidence in criminal matters

18 July 2018

The Meijers Committee wishes to respond herein to the legislative proposals made by the European Commission on cross-border access to electronic evidence (COM (2018) 225 final). The Meijers Committee acknowledges that the increased use of digital services and storage mechanisms by natural and legal persons and their potential relevance as evidence in criminal proceedings poses challenges in the practice of transnational cooperation amongst EU Member States and in the relationships with other countries that are worth considering possible improvements.

The Meijers Committee notes that the approach of the proposals is fundamentally different from all existing mutual recognition instruments, because it *de facto* enhances the operational reach of the competent authorities far beyond their national borders, that is to say directly *vis-à-vis* third parties (service providers). Moreover, the scope of the proposals does not only target EU-based providers, but also companies based in third states. Only in cases of non-cooperation is the help of judicial authorities from the executing state foreseen.

This note aims to raise a number of questions and concerns that follow from the proposals, and provides several recommendations on how to improve them.

A proper legal basis?

The Meijers Committee questions the use of Article 82 TFEU as a legal basis for the proposed Regulation on European Production and Preservation Orders for electronic evidence in criminal matters. This Article has until now never been used to adopt legislation enabling national authorities to directly address citizens or companies living/residing in other Member States. Rightfully, the impact assessment to this proposal identifies this element as ‘a new dimension in mutual recognition’. But the question arises whether Article 82 TFEU does actually allow for such a new dimension. True, Article 82(1)(d) TFEU envisages the possibility to 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’. However, the cooperation that this draft Regulation deals with is proposed to be governed by the principle of mutual recognition, whereas, according to the Meijers Committee, that very principle has been reserved for cooperation between *judicial* authorities only. This follows from the first line of Article 82(1) TFEU as well as from the wording of Article 67(3) TFEU which limits the application of mutual recognition as taking place between law enforcement authorities.

Moreover, the Meijers Committee doubts whether the selected legal basis suffices to adopt draft Article 13 which obliges the Member States to provide for pecuniary sanctions for violations of the obligations under Articles 9-11 of the proposed Regulation. The potential harmonizing effect of this provision on the substantive criminal laws of the Member States may require an additional legal basis.

In view of the above, the Meijers Committee recommends the EU legislator to provide for a convincing justification of the choice for Article 82 TFEU as a legal basis for the proposed Regulation.

Unconvincing arguments for the choice for a Regulation

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The Meijers Committee wishes to draw attention to the Commission's choice for a regulation as a legal instrument governing the requests for digital data as evidence. This choice has been justified by referring to the positive impact a Regulation would have on the clarity of norms (by avoiding divergent interpretations in the Member States), and thus on legal certainty. But these arguments are far from convincing. True as it is that a Regulation, because of its direct applicability, will result in equal norms being applicable in the national legal orders of the Member States, interpretation issues are still likely to arise. This is for instance illustrated by national case-law on the application of Regulations in the sphere of environmental law. Why would it be preferred to burden judges in individual criminal cases with such interpretation issues, whereas most of these issues can be prevented by adequate legislative choices in the implementation process? Besides, would these regulations be adopted, adjustments of national laws seem to be unavoidable anyhow, if only because the competent authorities are determined by national law.

Moreover, an unanswered question so far is if and how the preservation and transmission of data by non-judicial entities of another Member State could raise issues under the principle of legality – as enshrined in Article 49 of the EU-Charter on Fundamental Rights – especially where the actions of the authorities of another Member State could not have been performed by the authorities of the issuing state. Would the principle of legality not entail that the exercise of such interfering powers requires a basis in national criminal procedure?

The Meijers Committee strongly recommends to reconsider the choice for a Regulation, instead of a Directive. Would the choice for a Regulation be maintained, it underlines the strong need for more convincing arguments why a Regulation would be preferred in this context.

The scope of the European Production Order

The proposed Regulation is said to have a limited scope, in line with the principle of proportionality (see p. 5-6 of the Explanatory Memorandum). In that regard, draft Article 5 proposes to only allow the issuing of European Production Orders for transactional data or content data when the underlying offence is punishable with a custodial sentence of 3 years or more, or when the underlying offence falls under one of the definitions adopted under EU instruments regarding money counterfeiting, child sexual abuse, cybercrime, and terrorism. Two questions arise.

First, limiting the application of European Production Orders to criminal offences punishable by custodial sentences of at least 3 years can hardly be qualified as a real limitation. Under the penal codes of the Member States, a very large number of offences fall under this category, including offences that are not considered to constitute a serious crime (one could think of a single theft of a bottle of wine). Are such crimes indeed meant to qualify for action under the proposed European Production Order mechanism? Moreover, would it be possible to explain why exactly the 3-years limit has been chosen, also in view of the fact that other cooperation mechanisms set other limits?

Secondly, Article 5 refers to definitions of crime adopted at the EU-level in areas in which Member States are allowed to provide for broader definitions of crime at the national level. Should the European Production Order apply to these extended offences too?

The issuing authorities

Article 4 of the Proposed Regulation determines the authorities that are competent to issue European Production Orders and European Preservation Orders. Article 4(2) strictly limits the competence to

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issue a European Production Order for transactional and content data to the authorities mentioned in this provision ('may be issued *only* by...'). Regrettably, Articles 4(1) and 4(3) are far less strict in their definitions of the authorities competent for issuing a European Production Order for subscriber data and access data, and for issuing a European Preservation Order, respectively ('may be issued by...'). Should this be taken as a suggestion that the listing of competent issuing authorities in Articles 4(1) and 4(3) is not exhaustive? The Meijers Committee recommends to clarify this point.

Stricter terms for the preservation of data

In view of the 2015 annulment by the Court of Justice of the data retention directive (joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger*), communication providers are no longer under EU law obliged to retain communications metadata. In the case *Tele2 Sverige and Watson* (C-203/15) the Court of Justice also objected to general obligations to retain communications data of all EU citizens. Since general obligations to retain communications data are rightly considered to be disproportionate, the rapid preservation of data should be preferred over the more intrusive option of data retention. Therefore, there is some justification for the Commission's choice in the proposed Regulation to significantly shorten the deadlines to be respected by the company that is requested to transfer data. Such a fast mechanism of cooperation should not only be welcomed because of the volatile nature of digital evidence and the speed with which it can be moved, manipulated or destroyed, but also because fast procedures make future instruments for data retention superfluous.

In view of this, we would like to draw attention to draft Article 10 of the proposed Regulation under which the addressee's obligation to preserve any requested data ceases to exist after 60 days, unless it has been confirmed by the issuing authority that a subsequent European Production Order has been 'launched', though not yet 'served'. In such a situation, no time limit has been provided for the preservation of the requested data. The Meijers Committee recommends to include such a time limit for cases where the issuing authority, for whatever reason, will refrain from actually serving the European Production Order at all.

Involvement of companies

The Commission's proposed Regulation introduces a direct request for data to be sent from the requesting judicial authority to the company that controls the data or to its legal representative within the EU. In accordance with article 15 of the proposed Regulation, such a company can object to a request for data, either on the basis of refusal grounds (draft Article 14) or because of a so-called conflict of laws (draft Articles 15 and 16).

Positive as this may sound, the Meijers Committee believes that more clarity is needed on what the involvement of companies in the procedures for executing European Production Orders and European Preservation Orders precisely entails. As will be demonstrated below, the current proposals particularly lack sufficient legal certainty regarding companies' obligations and regarding the consequences would they fail to comply with these obligations.

First, traditional mutual legal assistance is a request-based mechanism developed in order to allow the requested state to assess possible grounds for refusing the request, for example based on the lack of dual criminality or for political offences. The proposed regulation now places *companies* in the position of identifying these grounds for refusal. The state where the company has its main seat has no opportunity to make its own assessment of the matter. The question arises whether companies are

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actually able to assess the application of refusal grounds, and what this would mean for their obligations under the national law of the requested state.

Secondly, it strikes that there is no court involved in the Member State of the issuing authority in case the addressee does not object to the European Production Order or the European Preservation Order. The Meijers Committee takes the viewpoint that court involvement is necessary, because some grounds of refusal aim to protect interests of persons whose data are involved. An independent court is placed in a better position to decide on such grounds than the involved company can ever be, especially where it concerns very small companies such as startups.

Thirdly, it remains unclear what the consequences could be if a company does not object to a request for data where it should have done so. In such a situation, the result may be that the data which is transferred is not admissible as evidence in a criminal procedure. How can, or should, the proposed mechanism avoid this?

Review procedure in case of conflicting obligations of the addressee

The Meijers Committee wishes to share some concerns regarding the role of the judge of the issuing Member State in cases where the addressee holds the opinion that the execution of a European Production Order would conflict with applicable laws of a third country prohibiting disclosure of the data concerned. In such cases, draft Articles 15 and 16 of the proposed Regulation oblige the issuing authority, if it decides to uphold the European Production Order, to have it reviewed by a court in its Member State. Pursuant to draft Articles 15(3) and 16(4), that court should assess whether a conflict exists, *inter alia* by examining whether the law of the third country concerned indeed prohibits disclosure of the data concerned.

This would entail that a judge in the issuing Member State may be held to interpret the laws of foreign countries. According to the Meijers Committee, this is likely to bring national judges in EU Member States in a rather difficult position. As a result of judges' unacquaintedness with foreign laws, this position might lead to non-foreseeable outcomes. Moreover, with regard to the review procedure envisaged in draft Article 15 (in case of conflicting obligations based on fundamental interests of a third country), the court would be held under draft Article 15(4) to take into account whether the third country law is actually not aiming at protecting fundamental rights or fundamental country interests, but, instead, 'manifestly seeks to protect other interests' or aims to 'shield illegal activities from law enforcement requests in the context of criminal investigations'. The Meijers Committee wonders whether a court in the issuing Member State would be able at all to assess this, and if it would, whether it is desirable to burden national judges with such a task. It is recommended to provide more clarity on these matters.

Another issue may arise in case the competent court of the issuing authority finds, according to Article 15(5), that a relevant conflict exists, and upon that requests information from the central authority of the third state where the addressee is located. If then the central authority does not respond, even after being sent a reminder, the European Production Order is automatically to be upheld by the court in the issuing state. It is doubtful whether such an involvement of a central authority can adequately protect the interests of the addressee and of the person whose data are involved. The proposed Regulation does not include any definition of the 'central authorities' involved. According to draft recital 51, these are authorities already in place for purposes of mutual legal assistance. But these authorities mostly belong to the investigative and prosecutorial authorities and are not clearly

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independent from the executive. The Meijers Committee therefore advises to clarify how the interests of the addressee and of the person whose data is involved are protected by involving central authorities in the procedure to uphold a European Production Order.

Access to justice

A final point of concern the Meijers Committee wishes to share has already been put forward several times, for instance in the context of the negotiations on the European Public Prosecutor's Office. It concerns the problem that in the context of cross-border investigations, individuals may lack clear indications of where exactly (in which country, before which court) they have to bring their claims that rights or procedural rules are violated.

It has been argued that such indications are even less clear in cross-border investigations under the European Public Prosecutor's Office, but the situation becomes even more pressing where – as proposed – judicial authorities can address European Production Orders and European Preservation Orders to service providers' legal representatives or establishments. Under the proposed mechanism, it is very likely that a situation will arise in which the individual involved – either being a suspect or not – resides in another Member State than both the issuing Member State and the state on which territory the service provider's legal representative or establishment is placed. Would that not lead to uncertainty under the fundamental rights acquis or otherwise, in which country the individual can lodge a complaint?

It is strongly recommended to clarify this in the proposal. The Meijers Committee underlines the importance of an effective and practical safeguarding of the right of access to justice. In view of that, it must be considered less obvious to only allow individuals to lodge their complaint in either the issuing Member State or in the state from whose territory a company preserved or transmitted the requested data. The Meijers Committee therefore suggests to seriously consider the possibility of explicitly allowing individuals to bring their complaints before a court in their state of residence.