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on the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (2018/0108 (COD)) – Conditions for issuing an EPOC(-PR)s

Committee on Civil Liberties, Justice and Home Affairs

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2) The minimum threshold

Looking at Article 11(1)(g) of the EIO, providing for the threshold of '*custodial sentence or a detention order for a maximum period of at least three years*' in relation to the EU-list of offences for which the dual criminality check is excluded, it seems that this proposal only builds on the EIO approach, by using a similar minimum threshold as a condition to issue the EPOCs concerning transactional and content data (see Article 5 (4)(a) of the proposed Regulation).

However, what seems to be a selective filter is in reality an inapplicable safeguard, or at least a condition applicable in very rare cases. First, the alleged threshold would only be applicable for EPOCs on transactional and content data, but not for EPOCs on subscriber and access data or for EPOC-PRs. Therefore, EPOCs on subscriber and access data and EPOC-PRs could be issued for all criminal offences. As regards the access to the most sensitive data categories and, therefore, the most intrusive measures, all offences sanctioned with at least three years of custodial sentence in the issuing state would justify an EPOC. The offences defined in the EU instruments on terrorism, sexual exploitation of children and child pornography, fraud and counterfeiting of non-cash means of payments, and attacks against information systems, are not even subject to such a threshold (see Article 5(4)(b)).

Comparative research has shown that there is a trend in all Member States to increase the maximum level of penalties for all offences, that it will rather be the exception than the rule that a criminal offence will not meet the minimum threshold for issuing an EPOC. [1] Contrary to what the Commission states in its explanatory memorandum, the minimum maximum penalty of three years of imprisonment does not exclude even petty offences (e.g. a simple theft, fraud, assault). Consequently, as also concluded in the study of the EP Policy Department for Citizens' Rights and Constitutional Affairs, 'a requirement that will be met by most offences under national law, cannot be considered an adequate threshold for particularly intrusive measures'. Therefore, besides the need to solve the issue of the missing double criminality principle, it seems of utmost importance to raise the threshold required, in order to transform it into an effective safeguard against disproportionate requests. This threshold should not only be obligatory for EPOCs on transactional and content data, but also for EPOCs on access data, since some types of access data (e.g. IP addresses) already allow for intrusive insights into a person's life and, therefore, also have to be limited to the most serious offences.

c) Necessity and proportionality (Art. 5 and 6)

Articles 5 and 6 of the proposal provides that both EPOCs and EPOC-PRs need to be 'necessary and proportionate'. Moreover, EPOCs can only be issued if they would be available for the same offence in a comparable situation in the issuing state. Whereas the 'grounds for the necessity and proportionality of the measure' must be included in the order (see Art. 5 (5)(i) and 6 (3)(g)), they must not be included in the certificate that is addressed to the legal representative of the targeted service provider (see Art. 8(3) and (4)).
As concerns EPOCs on transactional and content data, if there are reasons to believe that the data is covered by immunities and privileges (in the state where the service provider is

[1] Study of the EP Policy Department for Citizens' Rights and Constitutional Affairs M. Böse, p. 40.

addressed), or that the order would affect fundamental interests of that Member State, the issuing authority 'has to seek clarification before issuing the European Production Order, including by consulting the competent authorities of the Member States concerned'.

One of the main concerns related to the Commission proposal is the potentially disproportionate recourse to EPOC(-PR)s, which might result in an abuse of these orders in cases that would not justify an interference with fundamental rights. The Proposal addresses such concerns by providing that the EPOC(-PR)s shall be 'necessary and proportionate' for the purpose of the ongoing criminal proceedings, and that EPOCs 'may only be issued if a similar measure would be available for the same criminal offence in a comparable domestic situation in the issuing State'.

Considering the choice of the Commission of not recognising or envisaging any role for the executing authority, this provision would only be addressed to the issuing authorities who: i) would not be entitled to request data to service providers established in another country if they are not allowed to issue a similar order to a service provider in their jurisdiction (prevention of forum shopping); and who ii) would be obliged to conduct a further test checking whether that order is really necessary and proportionate. As explained by the Commission in its Impact Assessment: "*As the measure would not include any limitation to serious forms of crime, the issuing judicial authority should be required to ensure in the individual case that the European Production order is necessary and proportionate, including in view of the gravity of the offence under investigation*"[2].

However, due to the absence of any role for the executing authority, it is doubtful whether the issuing authorities could and would actually fulfil these provisions. Even though it is true that also other EU instruments for the judicial cooperation in criminal matters rely primarily - although not exclusively - on the proportionality test conducted by the issuing authority, the concerns, in the context of the proposal, are even more compelling, due to at least three different, but intertwined reasons.

1) The elements of the proportionality test are different from those considered in other instruments

Proportionality is a multiform concept used in various EU law[3] and human rights law[4] contexts, in order to determine the relation between a measure and its objective[5], as well as the relation between a fundamental right and its limitations. In line with this, the EIO stipulates that the proportionality test should '*take into consideration the rights of the suspected or accused person*'.[6] However, this provision is not part of the e-evidence Proposal.

[2] P. 168.

[3] For example, as regards primary law, Articles 3, 4 and 5 TUE, Articles 49(3) and 52(1) CFREU, as well as highlighted in CJEU case law.

[4] See, for example, K. Möller, Proportionality: Challenging the critics, IJCL, Volume 10, Issue 3, 1 July 2012; see also older Y. Arai, The Margin of Appreciation doctrine and the principle pf proportionality in the jurisprudence of the ECHR, Intersentia, 2002.

[5] One may think, for example, of Article 52 of the Charter of Fundamental Rights EU (CFREU) stating that limitations to rights and freedom may be made only if provided by law, if they are necessary and meet legitimate objectives, and if they respect the essence of those rights and freedoms.

[6] Regulation 2018/1805 on the mutual recognition of on the mutual recognition of freezing orders and confiscation orders just provides that the issuing authorities 'shall ensure that the principles of necessity and

The problems related to the proportionality of the European Arrest Warrant derived from the apparent misuse of the warrant made by some national authorities for some trivial offences. This not only affected the position and rights of the requested persons but also the overall efficiency of the judicial cooperation through increase in costs and demand on resources in the executing State, as well as trust has been affected between some Member States and certain national authorities known for misusing the EAW. Therefore, the revised version of the 'European handbook on how to issue a European Arrest Warrant', invites the issuing authority to consider alternatives to the EAW, 'taking account of the overall efficiency of criminal proceedings'.[7]

Yet, the proposal does not refer to the principle of efficiency of judicial cooperation concerning the proportionality test - in fact, it does not provide for a real judicial cooperation at all. Instead, the proposal only limits the proportionality test to the relationship between the EPOCs and the 'purpose' of the criminal proceedings. This is particularly worrisome because one may wonder in which cases a national authority would actually consider that its request to access data, for the purposes of its own proceedings, was not proportionate or necessary.

Considering the EU-wide scope of EPOC(-PR)s, the relation that should be thoroughly assessed through the proportionality test is the one between the investigative measures and the fundamental rights which such measures interfere with, namely the right to privacy as enshrined in Article 7 CFREU and Article 8 ECHR. According to the ECtHR case-law on the question of proportionality in the framework of privacy and criminal law, the measure has to be "necessary in a democratic society", namely proportionate to the legitimate aim pursued. Here "necessary" does not mean "useful", "reasonable", or "desirable", but clearly implies the existence of a "pressing social need" for the interference in question. Regarding targeted interference into telecommunications (not bulk interference[8]), issuing authorities even have to proof that a certain evidence level exists which justifies such an intrusion (e.g. reasonable suspicion, reasonable doubt, etc.).[9]

Since this Proposal, once adopted, will be directly applicable, it should thus clarify the aspect

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proportionality are respected', but that is compensated by the ground for refusal based on a potential violation of fundamental rights. The same applies to the EIO Directive.

[7] https://e-justice.europa.eu/content_european_arrest_warrant-90--maximize-en.do

[8] For bulk interference see latest Big Brother Watch and Other v. UK, a. nos. 58170/13, 62322/14 and 24960/15 (referral to Grand Chamber).

[9] In that regard also the first criteria "in accordance with law" has to be mentioned again, as regards the foreseeability of the measure, which often precludes (due to not fulfilment) a further assessment of necessity - see ECtHR, Roman Zakharov v. Russia, § 229; Malone v. UK, § 67; Huvig v. France, 24 April 1990, § 29, Series A no. 176-B; Valenzuela Contreras v. Spain, 30 July 1998, § 46, Reports of Judgments and Decisions 1998-V; Rotaru v. Romania, § 55; Weber and Saravia v. Germany, § 93; Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, no. 62540/00, § 75, 28 June 2007. In its case-law on the interception of communications in criminal investigations, the ECtHR has developed the following minimum requirements that should be set out in law in order to avoid abuses of power: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their communications intercepted; a limit on the duration of interception; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which intercepted data may or must be erased or destroyed; arrangements for supervising the implementation of secret surveillance measures, any notification mechanisms and the remedies provided for by national law.

of proportionality to avoid problems with foreseeability and specifically to guarantee the respect for fundamental rights principles. The rights of the suspects, as well as those of the data subjects who might not be under investigations, should be the main elements to be considered in such a proportionality test.