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From:	General Secretariat of the Council
To:	Delegations
Subject:	European Judicial Network's Working Group on E-evidence - Conclusions of the 4th online meeting on the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters

Delegations will find the above mentioned conclusions of the EJN's Working Group on E-Evidence.

ANNEX

Conclusions of the 4th online meeting of the

European Judicial Network e-Evidence Working Group on the Proposal for the Production and Preservation Orders

12 January 2021

Background

Considering the expertise of the European Judicial Network (EJN) Contact Points in cross-borders judicial cooperation in criminal matters and in light of the importance of their feedback on proposals of legal instruments, the EJN established a Working Group (EJN WG) to discuss and provide the practitioners' perspective to the proposals for a Regulation on a European Production Order and a European Preservation Order (hereinafter – the Regulation) and a Directive on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings (hereinafter – the Directive).

The EJN WG first met in September 2018 to discuss the proposed Regulation and Directive from the perspective of their practical application and then, in January 2019, to discuss the developments of the proposed instruments and the Annexes to the proposed Regulation. Following each meeting, the conclusions and recommendations were published accordingly.[1]

On 11 July 2019 the EJN WG gathered for the third time to review, *inter alia*, the changes that were introduced in the General Approach of the Regulation and its Annexes (as circulated on 11 June 2019), including the amendments made following the previous comments and suggestions of the EJN WG.

After having analysed the General Approach and considering that the proposed new instruments as drafted would in general terms meet the urgent need of practitioners and bring a significant and necessary change to the EU legal framework, in April 2020 the EJN WG made a statement on the e-evidence legislative package to improve the gathering of electronic evidence in cross-border cases.

[1] *See* Council document WK 13576 2018 INIT of 9 November 2018, "Conclusions of the EJN e-Evidence Working Group on the proposals for a Production and Preservation Order and Appointment of a legal representative" LIMITE and Council document 6649/19 of 22 February 2019, "Annexes to the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters - conclusions of the 2nd meeting of the EJN e-Evidence Working Group - comments on Annexes I-III", LIMITE.

The Statement on support of the e-evidence legislative package was sent to Mr Juan Fernando LÓPEZ AGUILAR, chair of the LIBE Committee at the European Parliament, calling on the legislator to ensure that the instruments provide an efficient and feasible tool for practitioners. The EJN Working Group particularly highlighted that the new instruments must remain proportionate and not create burdensome procedures that will be impossible to handle in practice. The Statement can be found annexed to this document.

In December 2020, the European Parliament published its position on the e-evidence package that introduced a major change if compared to the initial proposal made by the Commission – namely, the relevant content of the proposed Directive was integrated into the proposed Regulation, merging two instruments and keeping only one[2]. Furthermore, many other provisions have also been altered.

To discuss the changes and analyse the issues and challenges that might arise in the light of the latest amendments to the legislative package on e-evidence, the EJN WG came together for the fourth meeting that was organized online due to the COVID-19 restrictions.

EJN WG Conclusions and Recommendations after the 4th meeting

The EJN WG expressed concerns regarding the text of the Regulation[3]. The EJN WG discussed that the provisions are not consistent within the Regulation and in the context of other legal instruments applicable in the EU Member States. Namely, the use of the terminology could be found **confusing** (for example, Regulation provides for the requirements for orders and certificates – documents that have the same mandatory information, the use of these terms is inconsecutive throughout the text of the Regulation), **unclear** (for example, what are the consequences if the service provider and executing authority have the different opinion regarding the proportionality of the request?) or even **inconsistent** (for example, why the executing authority has the particular obligation to assess with *due diligence* the grounds for non-recognition and non-execution in respect to the orders coming from the MS that are subject to the procedure referred to in Article 7(1) or 7(2) of the Treaty on European Union? Does it mean that regarding the rest countries the executing authorities are believed to be less attentive?).

Furthermore, the EJN WG commented on the eight main points that might negatively affect the judicial cooperation regarding the obtaining the electronic evidence in case if the Regulation would be adopted in the current redaction.

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2 See the document of reference under: https://www.europarl.europa.eu/doceo/document/A-9-2020-0257_EN.html#title1

3 See the document of reference under: https://www.europarl.europa.eu/doceo/document/A-9-2020-0256_EN.html

1. The Article 1 – Subject matter

The EJN WG have analysed the text of the Article 1 of the Regulation and concluded that its content is too vague to be clear. The major concerns have been raised by the two paragraphs:

1) *"This Regulation lays down the rules under which an authority of a Member State, in a criminal proceeding, may order a* ***service provider offering services in the Union and established*** *or, if not established, legally represented in another Member State to produce or preserve electronic information that may serve as evidence,* ***regardless of the location of data****".*

2) *"Authorities of the Member States shall* ***not issue domestic orders with extraterritorial effects*** *for the production or preservation of electronic information that could be requested on the basis of this Regulation"*

The EJN WG expressed doubts in the correct understanding of the meaning of this provision and of the content of the term "domestic order". According to the current practice, domestic orders usually are issued based on national criminal procedure law, whereas if they relate to getting evidence abroad, requests are being made according to the international legal framework. The purpose of the legislator to include this provision in the Regulation remains unclear. Besides, it is disputable whether this Regulation should be used also for requesting the information from the service providers located in the same Member State. Taking into account that this Article already raises a number of questions regarding the meaning, interpretation, content and its linking to the other parts of the Regulation, the EJN WG proposes that the provisions should be redrafted in a consistent manner.

2. The independence of issuing authority

The EJN WG has analysed the term of **issuing authority** from different angles, concluding that:

1) the requirements of the independence of the issuing authority are not in line with the latest CJEU case-law[4] that does not consider the legal subordination an obstacle for issuing an EIO;

[4] Judgment of European Court of Justice in the case C-584/19, 8 December 2020

2) the Regulation does not foresee the competence for law enforcement authorities to request the preservation of information without any additional formalities, thus making this legal instrument less effective for the investigation in comparison, for example, to Budapest Convention;

3) since "investigative judge" is not the authority existing in every MS, this Regulation might cause problems in application in the countries where public prosecutor has the competence of the investigative judge.

3. Orders and Certificates

The Regulation provides for two types of documents: **orders** (European Production Order and European Preservation Order, a decision made by authority) and **certificates** (EPOC and EPOC-PR). According to the Article 5 and 6, read together with the Article 8 (1), **orders** and **certificates** should contain the same amount of information, **certificate** being the document to be sent **to both service provider and executing authority**. Therefore, the information that would be disclosed to the service provider would include the data of the person in question, provisions of the criminal law and grounds for the necessity and proportionality of the measure (Art 6(3)).

Moreover, if read together with the Article 9, the Regulation would give service providers the competence to ask for clarification and even to assess the proportionality of the request, their reaction having the suspending effect (for example, Art 9 (5) – "*in case the **service provider** considers that the EPOC cannot be executed because based on the sole information contained in the EPOC it is apparent that **it is manifestly abusive** or that **it exceeds the purpose** of the order, the **service provider** shall also send the Form in Annex III to the issuing authority as well as to the executing authority referred to in the EPOC **with a suspensive affect as regards** the transmission of the requested data.*"

The EJN WG pointed out that, first of all, this provision would compromise the interests of the investigation, especially, in the cases where any disclosure of information or delays might lead to the irreversible damage, such as terrorism-related offences or cases where national security interests have been touched upon.

Secondly, this provision may need to be analysed in line with the current data protection regime as the personal information that might be a part of the order most probably would exceed the need for service providers to be able to execute the request.

To sum it up, the EJN WG believes that, while the purpose and benefit of the broadening of the competence of service providers are not clear, the risks that it would entail for the investigation and for personal data are definitely inadequate.

Apart from that, the Regulation foresees a system where service provider simultaneously sends a copy of the data transferred to the executing authority (Art 8a (2)). As a result, the executing authority would get an overwhelming amount of information that would be impossible to handle; however, the purpose of this rule remains unclear.

4. Use of the Information Obtained

Recital 43(b) and Article 11(a) stipulate that "*the information obtained under this Regulation shall not be used for the purpose of proceedings other than those for which it was obtained in accordance with this Regulation, except for where there is an imminent threat to the life or physical integrity of a person*".

To the opinion of the EJN WG, this strict approach to the use of information is not justified. Often the information obtained from the service provider would be needed in the other case, but according to the Regulation, authorities would need to make a new request for the same data. This will be burdensome to all actors involved as the procedure would be duplicated and would involve the risk that the data would have already been deleted. Therefore, to solve this issue, the EJN WG proposed to include a kind of "derogation clause" – similar to what is used in the other instruments – to ask the executing authority for the permission to use the information in other case. Additionally, the competence should not be granted to a service provider to allow or forbid the use of this information.

Moreover, the Article 11c provides for the criteria of admissibility of the evidence, stating that *"electronic information that has been obtained **in breach** of this Regulation, including where the criteria laid down in this Regulation are not fulfilled, shall not be admissible before a court"*. However, the EJN WG has the opinion that the admissibility of evidence should be **evaluated by the court** of the issuing State since only court should have the exclusive competence, firstly, to evaluate the severity and circumstances of the breach of the Regulation, and, secondly, to assess whether the information could be accepted as evidence.

With respect to other countries

Article 3 (1a) states that "*this Regulation shall not apply to proceedings initiated by the issuing authority for the purpose of providing mutual legal assistance to another Member State or a third country*".

Since it puts the limitation to use the obtained evidence in other proceedings, the current redaction of the Regulation might negatively affect or even forbid the exchange of information within the Joint Investigation Teams, especially with those set up with the third countries. It is highly likely that then other instruments, such as EIO or MLA requests, would be used instead of the Regulation.

5. List of offences

The EJN WG upholds the previous position regarding the offences that fall in the scope of this Regulation. However, the proposed threshold for traffic and content data is not high (at least maximum of 3 years of imprisonment), the Regulation would not be sufficient and would not cover the majority of the crimes being investigated, therefore practitioners would use other instruments instead, for example, EIO or Budapest Convention. This conclusion leads to the idea that the Regulation do not meet the needs of practitioners. The EJN WG agreed that it would be preferable to have a clearer and enumerated list of offences as it is in the other legal instruments.

6. Immunities and privileges

Admitting that there is no common definition for immunities and privileges in the EU law, the issuing State would be required not only to take into account immunities and privileges according to its national law, but also to consult with the executing State if it has grounds to believe that information there is protected (Article 5 (7)).

Meanwhile there are no time limits for executing State to reply during this consultation procedure. In these circumstances, there is a risk of losing data while consultation is taking place. Also, actually this rule would require issuing authorities to take into consideration immunities and privileges of two countries: of the executing State (even if a person in question does not reside there); and also of the country where a person resides.

Other legal instruments foresee the competence pertaining to the executing State to evaluate whether requests concern privileges and immunities of the person in question, and therefore the EJN WG wonders why this Regulation should be an exception from this rule.

7. Grounds for refusal

Unlike the EIO Directive, the Regulation provides for both mandatory and non-mandatory grounds for refusal to execute the request, making it unclear why there should be such a substantial difference between two instruments related to the same purpose – obtaining evidence abroad. In the view of the EJN WG, all grounds for refusal should be optional where executing State **may** decide not to execute the request.

Furthermore, the Article 10a (2) e) foresees the unprecedented ground for refusal – when there is a conflict with the applicable legislation of a third country (Art 10a (2) e)) – that, to the opinion of the EJN WG, would cause confusion and misunderstanding among practitioners. Both service provider and executing authority have the competence to refuse the execution if the request does not comply with law of any non-EU Member State. The EJN WG doubts that authorities would be able to interpret the law of the third country, not even to mention that they would have to use the foreign law as a basis for their decision. This provision particularly ties the Regulation to any foreign legislation applicable and as a consequence introduces the legal uncertainty back to the system that should be eradicated. Therefore, observing the legal consequences and burden created to the procedures, the EJN WG would propose to remove this provision out of the text of the Regulation.

8. Time limits (for the urgent requests)

The Article 8a and 9 state that in urgent cases requests shall be executed in 16 hours. The EJN WG believes that this time limit for execution is **too long** in comparison with the previous proposal that foresaw only 6 hours for the urgent requests. Besides, the existing practice proves that urgent requests could be processed in much shorter period of time. However, if the time cannot be shorter than 16 hours, service providers should be at least required to preserve the information immediately.

Summing up the conclusions of the meeting, the EJN WG emphasizes that it is necessary for practitioners to have a flexible and clear instrument that would advance gathering of the electronic evidence across the EU. Unfortunately, at the moment the provisions of this Regulation do not outweigh the advantages of other legal instruments in the field of judicial cooperation.

The EJN WG is determined to follow-up the development of this Regulation and will continue the discussions – also regarding the certificates, procedure and role of the EJN - in the nearest future.

Annex: First Statement of the EJN Working Group on e-Evidence on the legislative package to improve the gathering of Electronic Evidence in cross-border cases

Statement by the European Judicial Network's Working Group on e-Evidence on the legislative package to improve the gathering of Electronic Evidence in cross-border cases

The European Judicial Network (EJN) has been a key actor in facilitating judicial cooperation in criminal matters for cross-border cases since 1998. The EJN is composed of approximately 400 prosecutors and judges who are experts in judicial cooperation in criminal matters and act as active intermediaries particularly in cases related to serious crime. The EJN is assisting in more than 7000 (seven thousand) cases per year. These actions help building the European judicial culture and mutual trust by promoting the application of the EU legal instruments.

The EJN is increasingly dealing with requests involving different types of electronic evidence and supporting their colleagues with such requests on a daily basis. With this experience, the EJN wants to underline that timely access to electronic evidence is nowadays a key factor for successful criminal investigations. As digital data is volatile by nature and know no boundaries, practitioners encounter challenges that must be addressed. The current systems to obtain electronic evidence are diverse and do not meet the demand for timely responses, which is detrimental for the investigations and ultimately for the victims.

The justice system is largely dependent on the goodwill and internal rules and values of the service providers for obtaining electronic evidence on a voluntary basis. The current lack of legal certainty constitutes a major problem, both for the authorities involved and for the companies. The proposed set of rules for the cooperation would in effect improve the situation and help to ensure that the rule of law and fundamental rights are respected.

The EJN has analysed the Council General Approach on the Regulation and Directive and overall considers that the proposed new instruments meet an urgent need of the practitioners and bring a significant and necessary change to the EU legal framework.

In the further process of reaching a final agreement on the texts, the EJN would like to call on the legislator to ensure that the instruments provide an efficient and feasible tool for the practitioners. The new instruments must remain proportionate and not create burdensome procedures that will be impossible to handle in practice – e.g. a notification system should be limited only to the more sensitive data. Hence, the EJN reiterates that the balance between the different interests is well founded in the General Approach and therefore utmost caution must be applied when reviewing the instruments as they stand now.

We remain at your disposal for any consultation.

The European Judicial Network
Working group on e-Evidence
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