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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)) – Relation with third country law

Committee on Civil Liberties, Justice and Home Affairs

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Articles 15 and 16

In Articles 15[1] and 16[2] of the proposed e-evidence Regulation, the Commission introduces a review procedure for cases in which the service provider, requested to produce data based on an EPOC, is faced with conflicting obligations from third country law. Such a situation of conflicting obligations may appear when a service provider, offering its services in the EU, has its headquarters in a third country whose law prohibits the requested data to be disclosed. In such a situation, the provider may be held liable for compliance under EU law (as result of the proposed Regulation) but also under criminal and/or civil law of the third country. In order to resolve such a conflict, the proposal sets up a two different review procedures, to be carried out in the Member State where the EPOC has been issued: Article 15 touches upon cases of "conflicting obligations based on fundamental rights or fundamental interests of a third country", while Article 16 covers cases of "conflicting obligations based on other grounds".[3]

However, such review procedures are only foreseen for conflicting obligations in case of an issued EPOCs, i.e. potential conflicting obligations related to an EPOC-PRs are not covered in the Proposal. Furthermore, these procedures are only foreseen for the protection of interests of a third country and the service provider, but not for the affected person. Therefore, these review procedures cannot replace a necessary effective legal remedy for the affected person (see also Article 47 of the EU Charter of Fundamental Rights).[4]

If the service provider considers that compliance with an EPOC would conflict with third country law that prohibits disclosure of the requested data, it shall inform the issuing authority

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[1] Conflicting obligations based on fundamental rights or fundamental interests of a third country (Article 15). As regards Article 15, the procedure is foreseen in the case of conflict with a law of a third country in connection with fundamental rights of the individuals concerned or the fundamental interests of the third country related to national security or defence. A particular several stage procedure is foreseen, namely first a reasoned objection has to be delivered to the issuing authority; second, if the issuing authority upholds the order, it shall request a review by a competent court in the issuing State whereby the order is suspended pending decision; whereby the court informs the other state which has a certain deadline to oppose; thirdly, the court assess if a conflict of law exists; if not it upholds the order; fifth, if a conflict exists, it informs the third country concerned that has a certain deadline to respond; if not response is provided the order is upheld; if the third country objects, the order is lifted.

[2] Conflicting obligations based on other grounds (Article 16). A procedure is foreseen for other cases that those refereed in Article 15, whereby first, a reasoned objection is send to the issuing authority that can revoke the order or upheld it; second, if the order is upheld a review by the competent court of the issuing state is requested; third, the court asses if a conflict exists; if no conflict exists it upholds the order; fourth, if a conflict exists it makes an autonomous decision based on certain proscribed criteria as regards the order (without informing the third country authorities). The assessment criteria are: (a)the interest protected by the relevant law of the third country, including the third country's interest in preventing disclosure of the data; (b)the degree of connection of the criminal case for which the Order was issued to either of the two jurisdictions, as indicated inter alia by: the location, nationality and residence of the person whose data is being sought and/or of the victim(s), the place where the criminal offence in question was committed; (c)the degree of connection between the service provider and the third country in question; in this context, the data storage location by itself does not suffice in establishing a substantial degree of connection; (d)the interests of the investigating State in obtaining the evidence concerned, based on the seriousness of the offence and the importance of obtaining evidence in an expeditious manner; (e) the possible consequences for the addressee or the service provider of complying with the European Production Order, including the sanctions that may be incurred.

[3] See Articles 15 and 16 of the proposed Regulation.

of its reasons for objection. Such a reasoned objection must include detailed information regarding the specific law of the third country, its applicability to the case and the nature of the conflicting obligation. The objection cannot be based on the fact that similar conditions, formalities and procedures regarding the issuance of a production order do not exist in the third country law, or on the only circumstance that the data is stored in the country.[5]

It is then upon the issuing authority to review the EPOC on the basis of this reasoned rejection: If - despite the objection from the service provider - it intends to uphold the EPOC, it shall request a review of the competent court in its Member State. The competent court assesses whether a conflict indeed exists, and shall lift the EPOC if it finds that the third country law actually applies and prohibits disclosure of the requested data, based on the specific circumstances of the case. Until this review procedure is completed, the service provider is exempt from executing the EPOC.

If the reasoned objection was based on conflicting obligations based on fundamental rights or fundamental interests of the third country (Art. 15), the court shall further take into account whether the conflicting third country law, instead of actually protecting fundamental rights or fundamental interests of the country related to national security or defence, rather seeks to protect other interests or intends to shield illegal activities from law enforcement requests in criminal investigations. If the court indeed establishes a conflict of obligations for the service provider, it shall contact the central authority of the third country with all relevant information about the case, with a 15 days deadline (30 days in case of requested extension). If the central authority of the third country confirms that it objects to the EPOC within the deadline, the competent court in the issuing Member State shall lift the order and inform the issuing authority and service provider. If the central authority in the respective third country is not responding within the deadline, the competent court shall uphold the EPOC.

In case of conflicting obligations based on other grounds (Article 16) - i.e. that the third country law does not intend to protect fundamental rights or fundamental interests of the third state - the decision of the competent court of the issuing state whether or not to lift the EPOC, shall be based on a balancing of
- interests protected by the third country law;
- the degree of connection of the criminal case to the two jurisdictions;
- the location, nationality and residence of the suspect and/or the victim;
- the place of the investigated criminal offence;
- the degree of connection of the service provider with the third country;
- the interest of the issuing country in the requested data based on the seriousness of the offence and the importance of the data; as well as
- the possible consequences of the EPOC for the service provider (also taking into account possible sanctions under Article 13.

Having said that, Articles 15 and 16 raise the following questions and problems:[6]

- The proposed Regulation expects private service providers to provide a very detailed and extensive assessment of certain third countries' legislation to the issuing authority within a

5 See Articles 15(2) and 16(2) of the proposed Regulation.
6 See also T. Christakis, E-evidence in a Nutshell: Developments in 2018, Relations with the Cloud Act and the Bumpy Road Ahead, CBDF 2019.

very short timeframe (see deadlines for execution of an EPOC (Art. 9 (1)). It has to be recalled that the service provider only gets very limited information on the case (and no information about proportionality/necessity) which makes it even more difficult for the service provider to assess whether or not and to lay down to what extent the third country law conflicts with the EPOC. This problem is further aggravated by the fact that third country laws that include important protection of fundamental rights are not necessarily framed as laws intended to protect fundamental rights as such, but might be "hidden" in all types of legislation. By leaving it upon the service provider to flag up potential conflicting obligations with third country law based on fundamental rights or fundamental interests of that third state, important fundamental right protections may not be recognized. Thus, especially but not only for smaller and medium-sized service providers, the foreseen review procedures would put a large burden in terms of time and costs on their activities. This is all the more true, since the Proposal, in its current form, only foresees reimbursement of costs for service providers in the issuing state, meaning that if the national law of the issuing state does not foresee any cost reimbursement, no costs reimbursements can be requested.

- After a reason objection has been filed by the service provider, it is only the competent court of the country where the EPOC has initially been issued that carries out the assessment of whether or not a conflict exists. However, given the complexity of third country law, as well as language difficulties, etc., it is doubtful to what extent the competent court in the issuing state can actually carry out such a proper assessment of a potential conflict of an EPOC with third country law. This is all the more true given that the third country authorities will only be involved in cases of conflicting obligations based on fundamental rights or fundamental interest of that state (i.e. Article 15) and only after the competent court in the issuing state, in the initial stage, has established that a relevant conflict exists. It others words: How can a Member State court alone interpret the law of a certain third country in a certain specific context, if it is not a specialist on the substance of the law?[7] Furthermore if the legal representative of a third country service provider operating in the EU has been appointed in another Member State than the one initially issuing the EPOC and, therefore, being responsible for carrying out the assessment of whether or not a conflict exists, also that second Member State might be concerned. In addition, one could argue that the service provider that initially filed the objection to an EPOC, should have the right to intervene in the review procedure following its initial objection. According to the current proposal, and if the issuing authority, the competent court (or, based on Article 15, the third country authorities) oversee any possible issue, the service provider would neither be able to further justify its objection in the review procedure, nor to appeal a decision by the competent court to uphold an EPOC.

Given all these difficulties, it has been argued that, in case the competent court of the Member State, after having received a reasoned opinion raised by a service provider based on Article 15 (i.e. fundamental rights or fundamental interests of the third state), should automatically lift the respective EPOC. That means that the competent court should only decide to uphold it if the third country authority explicitly negated any existence of conflicting obligations; the absence of any response from the third country authority should not be taken as a consent (as

[7] See also Meijers Committee, CM1809, Comments on the proposal for a regulation on European Production and Preservation Orders for electronic evidence in criminal matters, 2018, stating: *"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' un acquaintedness with foreign laws, this position might lead to non-foreseeable outcomes."*

the Proposal currently foresees).[8]

All these shortcomings in the Commission proposal are further aggravated when looking at the Council's General Approach on the Commission Proposal, which foresees to delete Article 15 and introduced a new Article 16 ("Review procedure in case of conflicting obligations"). This new Article 16 does no longer stipulate the involvement of the third country's authorities, as was at least foreseen in the Commission proposal for conflicting obligations based on fundamental rights or fundamental interests of the third state (Article 15). Instead, the competent court "may seek information from the competent authority of the third country" without being obliged to do so.[9] As such, the Council basically gives the competent court of the issuing Member State court the right to autonomously decide whether or not a conflict exists - for all grounds of rejection, incl. fundamental rights concerns. In other words, the Council would only like to apply the "light" review procedure as foreseen in Article 16 of the Commission proposal for "conflicting obligations based on other grounds".

Conclusions

As regards the MLA EU-US Agreement, it has been shown that extensive possibilities already exist to streamline and provide a faster and more efficient procedure in the scope of the existing legal framework without the necessity of new instruments. Consequently, it seems that the provision by national authorities of more financial, human and technical resources, including better training and awareness of EU authorities of US law and legal requirements, already now, could make the process of exchanging and accessing electronic data with third countries faster and more efficient, especially as regards the possibility to acquire non-traffic data directly from US providers.

Furthermore, the Commission draft negotiating mandate for a possible agreement with the US raises several important questions to be answered, especially as regards the legal basis and the co-existence of such an agreement with the CLOUD Act and a possible EU e-evidence instrument.

Finally, any system of exchanging and accessing e-evidence based on extra-territoriality cooperation needs a thorough procedure, in order to properly assess potential conflicts of law. However, the analysis of Articles 15 and 16 in the proposed Regulation has clearly demonstrated that the currently foreseen review procedure raises many various concerns. Moreover, it has to be noted that such remedy is mainly foreseen to protect the third country and the provider and, thus, cannot be understood to replace legal remedies necessary for the affected person.

[8] See, for example, Microsoft's Response to the Council Position on the Proposed E-Evidence Regulation, January 2019.

[9] See Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters general approach, Council of the EU, 12 December 2018.