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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) Proportionality alone may not be sufficient without any control by the executing authority

Considering the rationale of the mutual recognition principle, it seems generally logical to entrust the issuing authority with the task of conducting the proportionality test: the issuing judicial authority, having the full overview on the criminal case, is usually in a better position to find the adequate balance between various interests and rights than the executing authority. Accordingly, some existing mutual recognition instruments, such as the EIO and the Regulation 2018/1805/EU on the mutual recognition of freezing and confiscation orders, reserve the proportionality test to the issuing authority and do not explicitly provide for the possibility for the executing authority to challenge the reasons given by the issuing authority, or control whether those reasons really apply. Nonetheless, Article 10 of the EIO enables the executing authority to exercise a control on the decisions made by the issuing authority, among others, by providing for the possibility, or even the obligation, to execute a different type of investigative measure than the one requested. This occurs, for example, if '*the investigative measure indicated in the EIO does not exist under the law of the executing State*' (Art. 10 (1)(a) EIO); if '*the investigative measure indicated in the EIO would not be available in a similar domestic case*' (Art. 10 (1)(b)); or '*if the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO*' (Art. 10 (3)). This *de facto* gives the executing authority a scrutiny function in order to assess whether or not the proportionality test conducted by the issuing authority is acceptable in the executing State.

Furthermore, in the instruments mentioned above, some grounds for refusal allow the executing authority to also question the proportionality of the request. This holds true both with regard to the grounds based on a potential violation of fundamental rights (see e.g. Directive 2014/41/EU on the EIO: if '*there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter*'),[1] as well as with regards to the unavailability of the measure in similar situations in the domestic system of the executing authority (see Art. 11 (1)(h): if '*the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO*').[2]

The rationale behind these grounds for refusal is, indeed, to prevent the execution of an intrusive measure, where the executing State has considered it not to be proportionate, either considering the fundamental rights at stake or the gravity of the offence. At least from the side of the European Parliament as a co-legislature, the intention was to include the proportionality test in the framework of a fundamental rights non-recognition ground for the executing state, in case of obvious and evident violations of the proportionality principle as part of a fundamental rights limitation test.[3]

Looking at the Commission proposal, the executing authority does not conduct any control on

[1] Art. 11(1)(f) EIO Directive. See also Art. 8(1)(f) and Art. 19(1)(h) of Regulation 2018/1805/EU.
[2] Art. 11(1)(h) EIO Directive.
[3] This is even evident, for example, from the drafting procedure of Regulation 2018/1805/EU.

the proportionality test, nor does the addressee/service provider to which the EPOC(-PR) is directly sent.[4] Pursuant to Articles 8(3) and (4), the '*grounds for the necessity and proportionality of the measure or further details about the investigations shall not be included*' in the certificate sent to the addresses in order '*to avoid jeopardizing the investigations*'.[5] For this reason, the alleged possibility to involve the executing authority seems to be merely theoretical, as if only '*based on the sole information contained in the EPOC it is apparent that it manifestly violates the Charter of Fundamental Rights of the European Union or that it is manifestly abusive*'.[6] Given the lack of immediate remedy for the data subject, the grounds for the necessity and proportionality of the measure can only be challenged at a later stage, i.e. probably only at the trial stage when dealing with the admissibility and assessment of the gathered evidence. This, however, represents only a partial remedy, and one may doubt that it complies with the requirement of an effective remedy provided by Article 47 of the CFREU with regard to the intrusion upon the right to privacy protected by Article 7.

In other words, the lack of any possibility to scrutinise the issuing of an EPOC(-PR) raises serious concerns also with regard to the respect of the proportionality principle and thus, the protection of the fundamental rights of the suspect and other data subjects. Leaving the proportionality check entirely to the issuing authority without any control deprives the system of mutual recognition and enforcement of coercive measures of the necessary checks and balances. Even if, in the light of the principle of mutual recognition, it would be excessive to put the executing authority on the same level as the issuing authority, it still seems necessary to foresee for a right to execute a different type of measure or to refuse an EPOC(-PR) based on doubts about the proportionality.

3) The proportionality test is too vague

Due to the in principle exclusion of the executing authority, the proportionality test represents the only safeguard against misuse. In this regard, it is particularly problematic that the proposal does not offer real guidance to the issuing authority on how to conduct an effective test but relies on a very vague formulation, as do other EU instruments on judicial cooperation. In other words, the proposal does not have a clear provision but offers a sort of procedural framework to be followed before making a decision. The reason for this is twofold: first, the proportionality check is usually supposed to serve as an additional point of reference to more precise rules for the issuing authority. Second, the concept of proportionality, due to its nature, can barely operate as a rule (which either applies or does not apply) but rather as a principle (which needs to be balanced with other principles). Given the lack of harmonisation of national criminal law and the diverging national approaches to proportionality, the lack of control by the executing authority and the fact that the instrument is supposed to be a directly applicable Regulation, the question arises whether such a principle is sufficient.

In the long run, it might be necessary to think about more detailed, common rules on

[4] This was confirmed by the Commission in the written answers following the shadow meeting of 9 October 2018.
[5] See the Explanatory Memorandum, p. 18.
[6] See Study of the EP Policy Department for Citizens' Rights and Constitutional Affairs, M. Böse.

proportionality, in order to respect the minimum standards imposed by Article 8 ECHR and Article 7 CFREU, such as evidentiary thresholds, e.g. reasonable grounds of suspicion, probable cause, etc.. Yet, these thresholds are currently regulated differently across the Member States, especially, but not only, in the field of e-evidence. The inclusion of such types of new rules would, on their part, raise some further crucial constitutional questions.[7] Therefore, once again, the question of a stronger inclusion of the executing state arises, in order to guarantee the protection of the data subjects' rights.

Conclusions

In conclusion, taking into consideration these concerns, the work related to the Commission proposal should focus on three main directions.

- First, regarding the issuing authority, a judicial (court) authorisation should not only be obligatory for transactional and content data, but also for access data.

- Second, and in line with the conclusion of the other Working Documents, it seems necessary to foresee a more binding system of contact and cooperation between issuing and executing authorities by establishing a meaningful notification system. Such a system should foresee the right of the executing state to check e.g. whether immunities or privileges are affected, whether the measure would be admissible in a similar domestic case (as provided by the EIO), but also the right to oppose an EPOC(-PR), at least when fundamental rights obligations are at stake, and EPOCs on transactional and content data, when the double criminality principle is not fulfilled.

- Third, the content and functioning of the proportionality test should be further explored. For this purpose, it will be essential to clarify whether this could be done by spelling out some basic conditions and thresholds in this mutual recognition instrument, or whether it is necessary to work on a different instrument that would establish minimum rules in all jurisdictions, taking into account "the differences between the legal traditions and systems of the Member States".[8]

[7] If adopting common rules would be considered as a pure mutual recognition instrument, this might still be remedied by improving the proposed regulation based on Article 82(1) TFEU. Yet, if it would mean to venture in the approximation of criminal procedural rules concerning the gathering and admissibility of evidence, this would probably require a different legal basis - namely Article 82(2) TFEU - which, again, only provides for the adoption of directives.
[8] Art. 82(2) TFEU.