



Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters (COM (2018) 225) – general approach by the Council and draft report for the LIBE committee.

The EAJ wants to stress the importance of a European wide instrument to enable prosecutors and investigating judges to get speedy access in criminal investigations to data stored in another member state. However, this object cannot endanger the right of accused and other persons to a fair procedure and the Rule of Law.

Legal safeguards are most important when content data, as defined in Art 2(3, 10) of the regulation, are to be produced. Content data are the most personal and sensitive data and access should only be granted after proper legal scrutiny. Therefore, this statement focuses on access to content data only.

Access to data in a criminal investigation takes place normally without the knowledge of the person whose data are being sought. A possible remedy by the data owner month or even years after the data has been produced is too late and not effective. To fill this lack of protection, it is indispensable that the prosecution service has to get the permission from a judge of the place where the data are being stored to get access to these data (and use them). This place and the legal protection it offers is in most cases of importance for the owner of the data and chosen with intent. Its legal regime cannot be ignored. It is for a judge from this jurisdiction to ensure that access to data is done lawfully and under regard of the legal safeguards of this member state. This public duty of a judge from one jurisdiction cannot be taken over by a judge from another jurisdiction as long as the standards on access to data are not harmonized.

Looking at the proposals in the general approach of the Council from 11.June 2019 – Doc: 10206/19 - and the draft report of Birgit Sippel for the LIBE committee of the European Parliament from 24.October 2019 (2018/0108(COD)), the EAJ states that these proposal falls short in protecting these rights.

The regulation itself does not harmonize the condition for issuing a European production order, Art 5, and does not even makes express recourse to the protection of fundamental rights (see Doc-Nr. 10206/19 foot note 31 to Art 6). Regarding the still existing different standards on the Rule of Law within the member states and the varying procedural safeguards for accused and other person against unlawful access to their data, the EAJ has serious doubts if the approach of enabling cross border access to content data without harmonizing legal standards is compatible with the high standard of the protection of fundamental rights the regulation itself proclaims (recital 12, 13). The regulation, so the impression of the EAJ, would open access to content data across the European Union following the lowest standard in any given member state.

For the EAJ, the general approach of the Council from June 2019 does not offer a solution to this problem. The proposed notification system, as put down in Art 7a, cannot replace a judicial decision in the executing member state. The notified authority is not an independent court, but part of the executive of the enforcing member state (recital 35c, Art 4 (1) (b)). Its power to intervene against an unlawful request is questionable.

The EAJ welcomes the proposal by the draft report for the LIBE committee of the European Parliament by Birgit Sippel. It is a step into the right direction including into the regulation the obligation to address the executing authority of the member state (recitals 37, 40, art 9 (1), amendments 42, 46, 141) and that this authority has the power to end the execution (art 9 (2a), amendment 145). However, the EAJ wants to stress that it is not for the executing authority as part of the executive

to decide on the lawfulness of the production order, but for an independent judge. Therefore the proposed amendment 99 to art 2 (10(14) in the draft report should be drafted in a way that it is obligatory and not open to national law, that the execution of the order requires the procedural involvement of a court.

The EAJ accepts the necessity to get immediate access to content data in some investigations. However, these exceptional cases should be addressed properly in the regulation as such and given special procedural treatment in it. For the EAJ, it might be possible, following the idea of Art 4 (5) for issuing orders for subscribers and access data in emergency cases, to open access to content data in emergency cases without the authorisation of a court in the enforcing member state. However, this would need an explicit definition of emergency cases, a strict limitation of these cases to very serious crime and the obligation of the issuing member state to ask for a judicial authorisation simultaneously with the execution. If the authorisation is not given within a certain period, maybe 72 hours, the right for the issuing member state to use the data expires and the data has to be deleted.

The EAJ asks the European lawmaker to take these points on legal safeguards for person, whose content data are being sought, into consideration when restarting its deliberations on the regulation.