



Council of the European Union
General Secretariat

Brussels, 21 September 2018

WK 11013/2018 INIT

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WORKING PAPER

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WORKING DOCUMENT

From:	Swedish, Finish and Czech delegations
To:	Delegations
Subject:	Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters - Comments/written contributions

Delegations will find attached the position of Sweden, Finland and the Czech Republic on the involvement of an authority of another Member State in the EPOC procedure ("tandem procedure").

A “tandem procedure” from SE, FI and CZ’s point of view

At the COPEN meeting of 5 and 6 September Germany, the Netherlands and Latvia presented a proposal on the involvement of an authority of another Member State in the EPOC procedure ("tandem procedure"). While many Member States understood the idea behind the proposal, a lot of questions and practical concerns were raised relating especially to the fact that the involved Member State would have been the state in which the affected person habitually resides. In the discussion that followed, Sweden, Finland and the Czech Republic were asked to present on a paper their idea of a “tandem procedure” where the enforcing authority in the MS of the addressee would be involved.

Sweden, Finland¹ and the Czech Republic fully support the idea of involving another Member State in the procedure. It seems obvious from the discussion held in the working party so far that the role foreseen for the service providers in the Regulation is neither feasible nor realistic. However, it also seems clear that there needs to be an instance where it is checked, for example, that the execution of the European Production Order (“Order”) does not violate the Charter of Fundamental Rights of the European Union, that the Order is based on the Regulation and that rules on immunity or fundamental interests of another state are not endangered. The authority of the issuing state is not always in the position to do this assessment because it may not have all the necessary information.

Having this in mind and taking also into account the discussions held in the working party, we believe that a slightly different version of “tandem procedure” could be a way forward. A summary of our proposal and arguments thereto are mentioned below.

The purposes of the procedure would, among others, be the following:

- Improving the efficiency of the instrument so that it would also work in practice,
- Safeguarding the respect for fundamental rights in the procedure as well as the sovereignty of the MS in which the Order is being enforced,
- Allowing judicial authorities to examine issues that are of a judicial nature and thus improving legal certainty by removing from the service providers tasks which have a criminal law, national security or fundamental rights perspective, and
- Relieving the judicial and financial burden of service providers, in particular SMEs.

Elements of a “tandem procedure”

- At the same time as the issuing authority transmits the Order to the addressee through a European Production Order Certificate (“EPOC”), a copy of the EPOC is transmitted to the enforcing authority in the MS of the addressee.

¹ Comments of Finland are only preliminary as the final Finnish position to the proposal is yet to be formed.

- In parallel – or tandem – with the service provider, the enforcing authority can make a judicial review of the Order and assess matters such as immunities and privileges.
- The enforcing authority could have the same time frame for their assessment as the service provider.
- If the Order infringes issues such as immunities and privileges or national security interests of the MS in which the Order is being enforced or if there are obstacles to the execution particularly due to conflicts with fundamental European values or inviolable principles of that MS's law, the enforcing authority can make an objection against the Order to the issuing authority.
- In a tandem procedure a service provider could still be obliged to transmit the data to the issuing authority within the stipulated timeframes – which should be more realistic in this model compared to the COM's proposal since the tasks of the provider would be lessened.
- If the service provider has not transmitted the data yet, an objection against the order would mean that the data collected may not be transmitted to the issuing authority.
- If the service provider already has transmitted the data to the issuing state, the enforcing authority's objection might imply that the data may not be used as evidence in a criminal procedure in the issuing state, similarly as in the procedure provided in Article 31 of the EIO Directive.
- If the enforcing authority doesn't object within the specified time frame, the issuing authority is free to use the data collected for the purposes referred-to in the EPOC.
- There would be no new players compared to the COM's proposal. In addition, the tasks of the service providers would be diminished and the legal certainty of the instrument would be increased.

Explanatory remarks

The exercise of authority on another state's territory can be allowed under certain circumstances. Sometimes such an extended exercise of jurisdiction may be necessary to fight crime and should be endorsed. We believe that such a necessity can be at hand when it comes to the collection of electronic evidence. Therefore, we fully support the objectives of the proposed Regulation.

However, allowing a foreign authority to exercise jurisdiction on another state's territory raises issues regarding state sovereignty and protection of fundamental rights, and that is why some safeguards are necessary. This is not, however, a task that private service providers could or should do. Therefore, we support efforts to involve from an early stage in the procedure the authorities in the MS where the Order is being executed. This would also be in line with the solution in existing legal instruments, such as the

European Investigation Order. Having a similar order here would bring added value with regard to coherency and legal certainty as well as it would protect the enforcing state's interest of state sovereignty. Which instrument the issuing authority decides to use should not affect the extent of the protection of these fundamental issues.

An early involvement of the executing authority in the procedure would also enhance efficiency. If the addressee does not comply with an EPOC and enforcement therefore becomes necessary, it would be an advantage if the enforcing authority already has had the chance to review the Order and therefore can start the enforcement process immediately.

Costly, time consuming and legally complex assessments relating to for example the Charter of Fundamental Rights of the European Union or rules regarding immunities or privileges, could be moved from the service providers to the enforcing authorities [Article 9(5)]. Judicial authorities are better suited to conduct such tasks and can do so with little or no additional effort. Also other articles, for instance Articles 5(7), 14(2) and 18, could be simplified so that the burden of the service provider and/or the issuing state is eased.

As this procedure would not interfere with the service providers' obligation to execute the Order within the set time frame, the efficiency of the instrument would be preserved or even enhanced. No additional time would be spent on trying to identify which Member States' authorities to involve in the procedure. The tandem procedure would also not affect the procedure for the issuing authorities in relation to efforts or costs for translation, as they would transmit the exact same certificate that they send to the service provider.