

Discussion

What to expect from the proposed European Production and Preservation Orders?

Frank Verbruggen



Co-funded by the Justice Programme of the European Union 2014-2020

1

Not so much?

- NEW POST -

HOW
EXPECTATIONS
CAN **RUIN** YOUR
RELATIONSHIP?



mentalandbodycare.com

2

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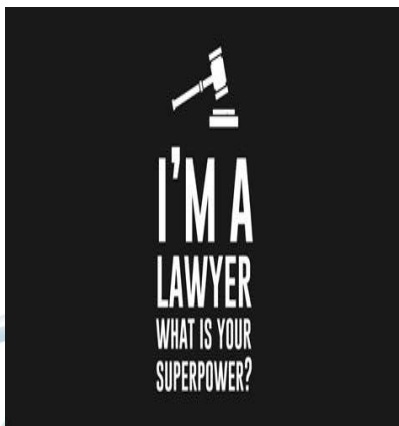


- Professor (European) Criminal Law
- University of Leuven, Flanders, Belgium
- Institute of Criminal Law
 - (Past) Belgian Cybercrime-Centre
 - => Lux & Dutch Presidency jurisdiction and coop cyberspace
 - Panel Commission e-evidence
 - Project ULiège: LEA cooperation with Private IT-industry
 - Discussion CEPS
 - Promotor criminal law and procedure PhD research on e-searches, e-seizures, e-evidence cooperation with Africa, hacking by law enforcement, (DP as a tool for Fair Algorithmic Policing)

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Attorney + concerned about individual rights and privacy

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• pinterest.com

4

Mechelen, Belgium



fr.tripadvisor.be

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Children of the renaissance



<https://www.hofvanbusleyden.be>

- 15th and 16th Century
- Burgundy, Habsburgs
- **Uniting Europe by marriage**
- Painting = late medieval dating app

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Erasmus: uniting Europe by marriage

erasmus



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97 % say they get along better with people from other cultures

EUROPEAN VOLUNTARY SERVICE



93 % say they appreciate the value of other cultures more

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80 % say they improved their intercultural awareness

ADULT EDUCATION



33 % of Erasmus+ alumni have a life partner with a different nationality

HIGHER EDUCATION

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euroskop.cz

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Adult dates in the 21st Century



droid-life.com

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EPO debate



capovelo.com

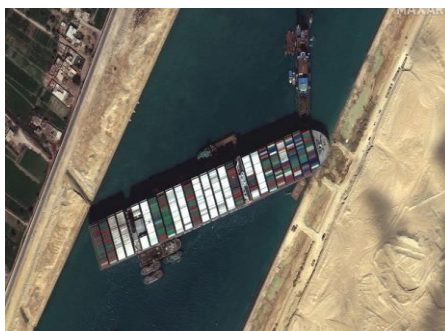
- European (Data) Preservation Order
- European (Data) Production Order
- Not EPPO

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Discussion

- Controversial Proposal Commission and Council
- At the moment 'Stuck?' in European Parliament
- Relevance/ importance somewhat diminished in view of even more controversial issue: the uncertainty following the illegality of Data retention

- Bored?
- <https://t.co/Cmm5Z2OmNgpic.twitter.com/ZevoBSFaEg>



Source: news.sky.com

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Previous speakers: Electronic evidence

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- Used to be niche for specialized investigators, especially related to cybercrime
- But that was before the whole of society and daily life were digitized
- Crime scenes: digitalized (photo, film, 3D,...)
- Extra boost during the pandemic



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After the lockdown: finally back to the bars and terraces!!

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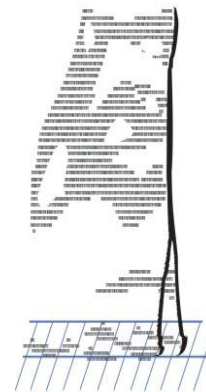
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[dailymail.co.uk](https://www.dailymail.co.uk)

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Everywhere, every day

- Growing societal importance social media, webmail, messaging services and apps to communicate, work, socialize and obtain information.
- New technological developments also used to commit cybercrimes or 'ordinary' crimes e.g. WhatsApp group of terrorists, students in date rape case, online bullying, racism,...
- + evidence everyday crimes: parking or bus ticket & location as alibi, fitbit murder victim (location, time)
- = Need to recover traces: digitization Law Enforcement
- Commission 2016: **more than half of all criminal investigations** today include a cross-border request to access electronic evidence such as texts, e-mails or messaging apps



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How to get hold of such data for criminal investigations?



- Cfr previous speakers
- **Taking** it yourself (openly or covertly)
 - Sky ECC
- Getting it through the access which **target** of investigation has **or related individuals**
- Getting it from private persons or corporations with privileged access to the data (SPs):
 - **Request (voluntary cooperation)**
 - **Order**

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Metadata: data about data

- What?
- When?
- By whom?
- To whom?
- How?
- Where?



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= important digital traces

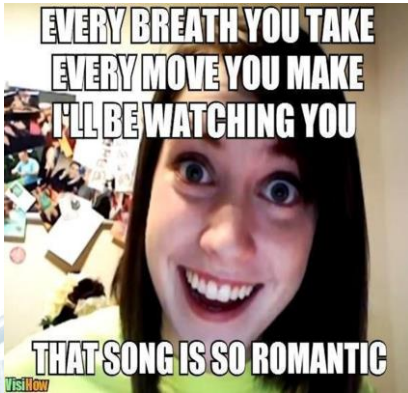


descriptionebooks.com

- LEA interested in
- **WHO** talks to/ has contact with/ knows **WHOM**?
- How **OFTEN** do they communicate?
- **WHERE** are they **WHEN**?
- **SEPARATE (!?!):** what do they say about what (**CONTENT** of communication)

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// your jealous partner // (big and small) data corporations



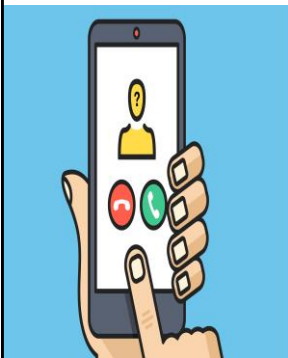
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scoopwhoop.com

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Subscriber data



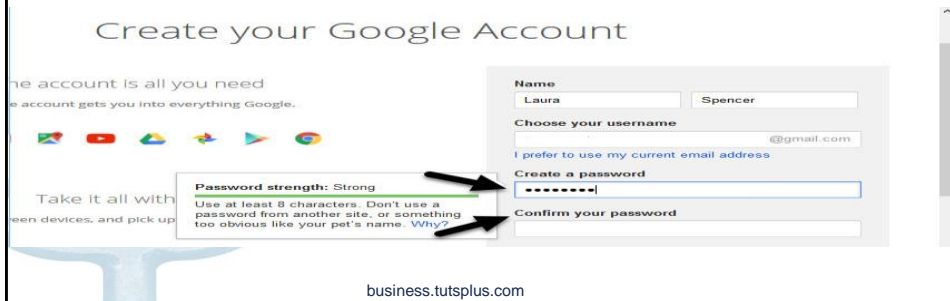
www.lifewire.com

- Any data pertaining to:
- (a) **identity** subscriber or customer such as provided name, date of birth, postal or geographic address, billing and payment data, telephone, or email;
- (b) **type of service** and its duration including technical data and data identifying related technical measures or interfaces used by or provided to subscriber or customer, and data related to validation of use of service,
- **excluding passwords or other authentication means used in lieu of a password that are provided by a user, or created at the request of a user**

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Access data

- Related to commencement and termination of user access session to a service, which is strictly **necessary for sole purpose of identifying** user of service,
 - such as date and time of use, or log-in to and log-off from service, together with IP address allocated by internet access service provider to user of a service, data identifying interface used and user ID
 - includes electronic communications metadata



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Transactional data



- Related to provision service offered by service provider
- to provide context or additional information about such service and is generated or processed by an information system of SP,
 - such as source and destination of a message or another type of interaction,
 - data on location of the device, date, time, duration, size, route, format, protocol used and type of compression,
 - unless such data constitutes access data
 - includes electronic communications metadata

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Content data



emotioncard.com.br

- Any stored data in a digital format such as **text, voice, videos, images, and sound** other than subscriber, access or transactional data;

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Everywhere every day: European Commission

- E-evidence in any form relevant in around **85%** of total (criminal) investigations
- In almost **two thirds** (65%) investigations where e-evidence relevant, request to service providers **across borders** (based in another jurisdiction) needed
- => **55%** total investigations include request to **cross-border access to e-evidence**
- Requests **non-content** data > requests content within EU and beyond.
- Non-content data from electronic **communications** most commonly requested.
- The **transparency reports ISPs**: idea **number** requests
- Number of requests to the above service providers has **increased by 70%** in 2013-2016

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SP or data storage outside jurisdiction

In other EU MS's or even in third countries (especially the USA)

→ Gathering electronic evidence = often cross-jurisdictional activity

→ How do MSs deal with this now?



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Current framework

- European Investigation Order (EIO)
- Bilateral and multi-lateral mutual legal assistance (MLA) instruments
- Budapest Convention on Cybercrime CoE
- National regimes of Member States and third countries.
- Three ways to obtain cross-border e-evidence
 - 1) formal cooperation between relevant authorities of two countries (MLA/EIO) or police-to-police cooperation;
 - 2) direct access to (device containing the) data (under national law)
 - 3) (voluntary or mandatory) cooperation between law enforcement authorities of one country and foreign service providers



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Why problematic?



- MLA (even if use EIO) too **burdensome** and (!! too **slow** for type of evidence concerned
- **Voluntary** cooperation SP with LEA (from other state), allowed by US law:
 - LEA **depend** on their choice to cooperate or not
 - **Different** Policies by Different SPs
 - **EU SPs not allowed** to ? (conflicting obligations SP)
 - Legal **uncertainty**: SPs and people prosecuted
- **Confidentiality**/ Warning Users: depends on policy SP
- For US SPs: voluntary cooperation not possible for **content** (*probable cause* needed)

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Requests fulfilled? (around 50%)

Table 3: percentage of requests to service providers that are fulfilled (survey data)

		Within the EU		With non-EU countries	
		Judicial	Direct	Judicial	Direct
Non-content data	Subscriber data	75%	55%	45%	45%
	Metadata	60%	45%	35%	35%
Content data		55%	N/A ²²	30%	N/A ²³

Source: Impact assessment Commission p.16

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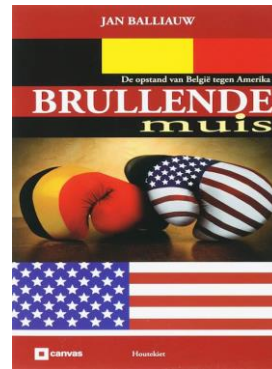
Brave Little Belgium of Roaring Mouse (revisited)?

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17 Brave Little Belgium | Heerkring Karel Van de Poele,

Lichtervelde |



Bol.com

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Belgium small country with long arms:

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movieworld.ws

Belgian investigation into online orders paid with stolen credit cards.

Belgian prosecutor ordered Yahoo to release identification details behind couple of email addresses

Relied on art. 46bis Belgian CCrim Proced which allows to **demand such domestic order execution within Belgium**

Yahoo Inc., however, is **established in USA** + no physical presence in Belgium => Yahoo disputed competence of Belgian authorities and refused to cooperate without US order (Be MLA with US)

Belgian courts: Yahoo = economically present in Belgium => 'judicially present' in Belgium

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Belgium small country with long arms: Yahoo-case

- Yahoo, as provider of webmail services territorially present in Belgium => **voluntary subjects itself** to Belgian law enforcement cooperation laws
- Why? actively participates in Belgian economic life (using domain name 'www.yahoo.be', local language, showing advertisements based on location users, accessibility in Belgium for users with complaints and problems (e.g. helpdesk))
- **Criminal conviction** failure to abide by Belgian domestic order
- Principle **codified** in subsequent Belgian CodeCrProc
- Similar case against **Skype** (Luxemburg): Criminal conviction for failure **obligation to help interception without MLA**
- Quid if conflict with local law SP?
- // Microsoft-case on whether US LEA could order production in US of data stored in Ireland



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Since 2015 high on agenda

- *Consultations, questionnaires, research projects, conferences, workshops*
- *Also parallel CoE Cybercrime negotiations*



studyabroad.careers360.com

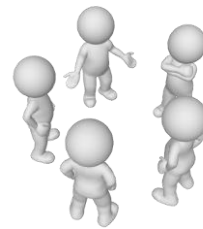
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Consultation

From July 2016 until June 2017

Meetings with MS's, stakeholders, experts

Questionnaire amongst MS's 2017:
divergence visions & practices MS



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Results June 2017 (non-paper Commission services)

- **Practical measures** to improve cross-border access to e-evidence (e.g. electronic user-friendly version EIO-form, platforms for exchange digital evidence)
- But also **legislative measures** suggested:
 - **Direct access** → possibility common conditions and minimum safeguards in potential **cross-border** situations at EU level + mitigating measures (e.g. notifications to possibly affected countries)
 - EU legal framework for investigative measures addressed to SP enabling authorities to request ("production request") or **compel** ("production order") **SP in another MS to disclose** information about a user
 - EU level bilateral agreements with **key partner countries** (USA!)

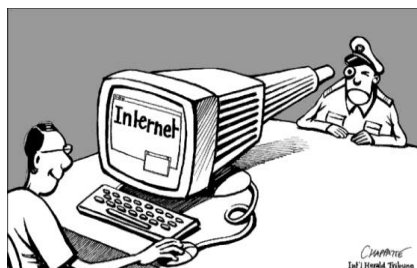
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Results June 2017 (non-paper from the Commission services)

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- New legislation should also take protection of individuals' rights into consideration
- especially in criminal proceedings
- + fundamental rights of data protection and privacy.

Privacy?

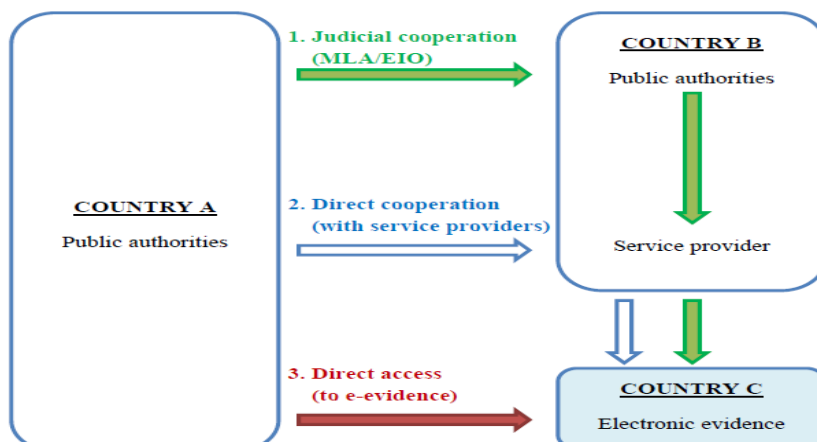


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Debates: which shortcuts possible?

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Figure 1: the main parties and the three channels for cross-border access to e-evidence



Source: Impact assessment Commission p.10

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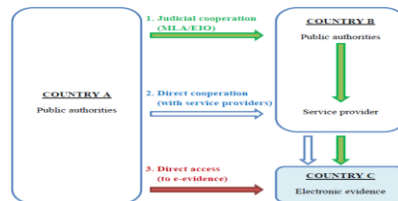
No proposal yet : direct LEA cross-border access

- Still too sensitive – but happening every day!!
- Negotiations 2nd add.protocol to Cybercrime Convention CoE
 - **Commission** received mandate to negotiate on **behalf EU**

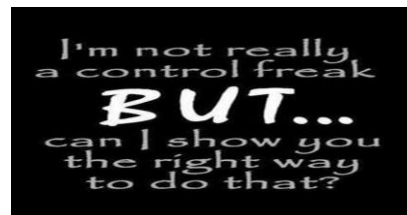
NB: Leuven proposal localization searches (Digital present => Law enforcement jurisdiction state where individual is, Digital past, digital home => state of residence has jurisdiction)

- Using phone: call from Morocco to friend in Belgium
- Past communications, photos stored,...: protected by Belgian law (Morocco needs MLA from Belgium which decides conditions for and rules on searches)

Figure 1: the main parties and the three channels for cross-border access to e-evidence



Source: Impact assessment Commission p.10



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Proposal Directive 2018: if offering digital services in EU

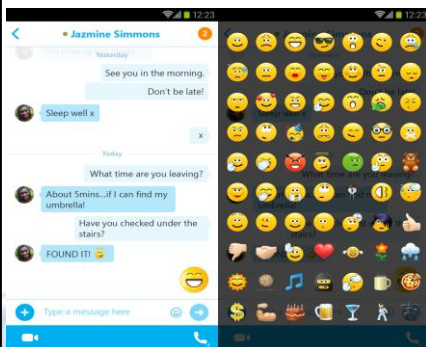


Source: Impact assessment Commission p.55

- SP should have **legal representative in EU for compliance** with e-evidence orders under EU-law => US based corporation without establishment in EU must have representative in EU
- EU treated as single market: it is enough to be in 1 MS, no need to have 27 representations confronted with 27 production orders
- Problem: Denmark
- Ireland opted in

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Software or e-communication service?



- // taxi-construction or taxi-service?
- // Uber and AirBnB > software?
- Belgian law very broad: Skype-case
- Proposal too
- SME's up to it? Outsource it?

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Service provider

- (a) electronic **communications** services
- (b) information society services for which **storage of data is defining component of service provided** to the user, including social networks, online marketplaces facilitating transactions between their users, and other hosting service providers
- (c) **internet domain name and IP numbering** services such as IP address providers, domain name registries, domain name registrars and related privacy and proxy services

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Offering services in EU =?

- enabling legal or natural persons in one or more EU MS(s) to use services
- and
- having a **substantial connection** to those MS(s):
 - **establishment** in one or more MS, or
 - **significant number of users** in MS, or
 - **targeting of activities towards** MS, determined on all relevant circumstances: use of a **language** or a **currency** generally used in MS, availability of an app in the relevant **national app store**, providing **local advertising** or advertising in language used in MS, from making **use of any information originating from persons in MS** in course activities, or from handling of **customer relations** such as by providing customer service in language generally used in MS

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2018 Proposal Regulation on E.Production + E.Preservation Order



clientinsight.ca

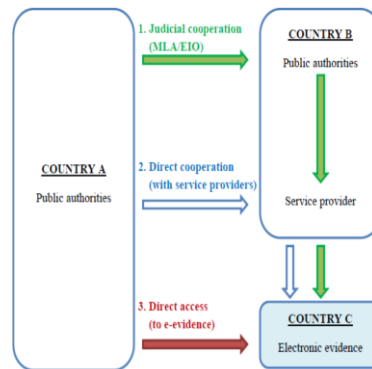
- **(for –some- E-evidence)**
- **Regulation:** directly applicable in all (but 2) MS
- standardized (preservation &) production orders + certificate issued by **national authority 1 MS directly to ISP in any EU MS**

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Cut out LEA other MS as go-between: EU-wide Production Order directly to SPs

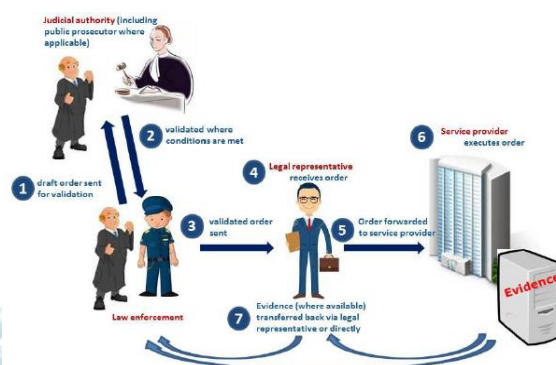
- **Massive amount** of data and requests
 - Will only increase with Internet of Things
- MLA-procedure too burdensome and slow
- EIO too burdensome and slow
- **Contribution and Control possibilities authorities requested MS limited: waste time, money and energy (not much added value)**

Figure 1: the main parties and the three channels for cross-border access to e-evidence



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Proposal Regulation on Eur. Production Order



Source: Impact assessment Commission p.56

- Only for **data pertaining to services offered in the EU**

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Safeguards

- Approved by judicial authority
- Transactional and content data EPO limited to serious crimes
- Individuals will be notified that their data was requested
- Individuals will be notified of their rights
- Criminal law procedural rights apply



keepcalm-o-matic.co.uk

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Approved by judicial authority

- EPO subscriber and access data may be issued by:
- (a) **judge, court, investigating judge or prosecutor** competent in case concerned
- or
- (b) any other competent authority acting as an investigating authority in criminal proceedings with competence to order gathering evidence. Such EPO shall be **validated**, by judge, court, investigating judge or a prosecutor in issuing State
- (Authority may be regarded as issuing authority for purposes of transmission)



nieuwsblad.be

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Thresholds

- EPO shall be necessary and proportionate for purpose proceedings and **only if a similar measure available** for same criminal offence in comparable **domestic** situation issuing State
- EPO for **subscriber** or **access** data: for **all** criminal **offences**
- EPO for **transactional** or **content** data: **only**
 - (a) for criminal offences punishable in the issuing State by a custodial sentence of a maximum of **at least 3 years, or**
 - (b) if they are wholly or partly **committed** by **means of an information system**, for :
 - fraud and counterfeiting of non-cash means of payment
 - sexual abuse and sexual exploitation of children and child pornography
 - attacks against information systems
 - (c) **terrorism**

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Corporate data



- Data sought is stored or processed as part of **infrastructure provided by SP to a company** or another entity other than natural persons,
- EPO **only** be addressed to **service provider** where investigatory measures addressed to company or the entity are not appropriate, in particular because they might **jeopardize investigation**

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Privileged data (transactional or content)

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peopleculture.com.au

- Issuing authority reasons to believe data requested is protected by **immunities** and **privileges** law MS SP
- Or disclosure may impact fundamental interests of that MS such as **national security** and defence
- => seek **clarification before** issuing, consulting competent authorities MS concerned (directly, via Eurojust or EJV)
- If protected, no EPO

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Speed (<-> EIO)

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- SP transmits data directly to issuing authority or LEA indicated in EPOC **at the latest within 10 days** upon receipt of the EPOC, **unless** issuing authority indicates **reasons for earlier** disclosure ,
- **Emergency** cases: imminent threat to life or physical integrity person or to critical infrastructure: **6 hours** max
- Cannot comply because **incomplete**: contact without delay (issuing must react within 5 days)
- **Force majeure** or de facto impossibility: inform without delay + reasons (standard form)



capovelo.com



ei.co.uk

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Can/must ISP refuse to execute?

- No: same rules for everyone
- **Except** limited number situations
- **Manifestly violates the Charter FREU or manifestly abusive** (f.i. clearly disproportionate or singling out people based on sexual preference without reason,...)
- Send Form to competent **enforcement authority in MS addressee**. => may seek clarifications from issuing authority (directly, via Eurojust or EJV)
 - ? Removed by Council (because of criticism 'privatization' law enforcement and 'privatization fundamental rights protection'?)
 - I hope European Parliament brings it back
- **Preserve** data requested, not produced immediately, unless cannot identify data requested => seek clarification
- Preservation until data produced, on clarified EPO or through other channels, MLA. (issuing informs if no longer necessary) preservation is no longer necessary, the issuing authority shall inform addressee

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Rule for ISPs when EPO conflicts with laws other state

- Applicable **laws third country prohibiting disclosure** data concerned
- **Reasoned objection**
- If Issuing MS intends to uphold EPO, it shall request a **review** by its **Courts**
- Execution EPO suspended pending procedure



archive.iam.uic.edu

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Court decides on conflict of laws, factors:

- (a) **interest** protected law **third** country, + third country's interest in preventing disclosure
- (b) degree **connection criminal case to either of 2 jurisdictions**, indicated inter alia by:
 - location, nationality and residence of person whose data is being sought and/or victim(s),
 - place where offence committed;
- (c) degree **connection SP-third country**; data storage location by itself does not suffice for substantial degree of connection;
- (d) **interests** investigating **MS in obtaining** evidence concerned, based on seriousness offence and importance of obtaining evidence in expeditious manner;
- (e) possible **consequences** for addressee or **SP of complying** with EPO, including sanctions that may be incurred.



pixcove.com

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Confidentiality and user information



gifimage.net

- Addressees takes necessary measures to ensure confidentiality EPO + data produced or preserved
- + where **requested** by issuing authority, **refrain from informing person** whose data is sought not to obstruct criminal proceedings
- => **Issuing authority shall inform person** whose data is being sought **without undue delay** about data production: may delay as long as necessary and proportionate to avoid obstructing relevant criminal proceedings + include information about any available remedies

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Procedure for enforcement

- Not complied within deadline without providing reasons: EPO to authorities
MS SP: recognizes it within 5 days + enforces it unless ground refusal (with deadlines)
- Addressee **only oppose** if:
 - (a) not issued or validated right authority;
 - (b) not an offence provided for by art. 5(4);
 - (c) could not comply, de facto impossibility, force majeure, manifest errors in EPOC;
 - (d) does not concern data stored by or on behalf SP at time receipt EPOC;
 - (e) service is not covered by Regulation;
 - (f) based on sole information contained in EPOC, apparent that manifestly violates Charter FR or manifestly abusive



thethings.com

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Reimbursement costs

- SP may claim reimbursement of their costs, **if provided by law issuing** State for domestic orders in similar situations



youtube.com

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Sanctions

- MS shall lay down rules on **pecuniary sanctions** applicable to infringements of the obligations
- Effective, proportionate and dissuasive



45cat.com

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Effective remedies data subjects



nieuws.vtm.be



marketingdonut.co.uk

- Remedies available under LEA data processing Directive and GDPR +
- **Suspects** and accused persons whose data obtained via EPO right to effective remedies against EPO during criminal proceedings for which order was issued
- Person whose data obtained **not suspect or accused** person effective remedy before court issuing MS in accordance with its national law and possibility to **challenge legality of the measure, including its necessity and proportionality**

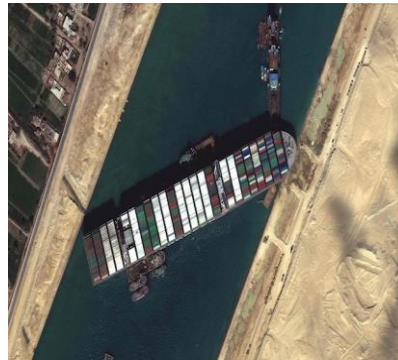
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Objections in European Parliament

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multimedia.europarl.europa.eu



pmnewsnigeria.com

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Criticism against Proposal

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- **Privatization** Law Enforcement, cutting out MS?
 - *Judicial authority issues/ ultimately decides*
 - *Legal certainty: orders*
 - *Already domestic => EU as **Area** FSJ, intra-EU ≠ foreign*
- Burden **small SP?**
- No **legal base treaty** because not based on mutual recognition? MR would require explicit recognition by judicial authority other MS (cut out)?
 - *Superior form of MR: recognition by law (// internal market, // documents issued by other MS) of standards/ decisions authorities*
 - *Legal service Commission agrees*



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Criticism against Proposal

- **EIO** sufficient, not given enough time?
 - already clear not practical for every data request (massive)?
 - added value of intervention 'mailservice states'?
- Dropping **double criminality**?
 - excessive control, burden, mini-trial at execution stage, law of that MS relevant: most = **communication between users in issuing MS**
- Some **MS** cannot be trusted?
 - Data requests not the worst area?
 - Judicial authorities issue EPO

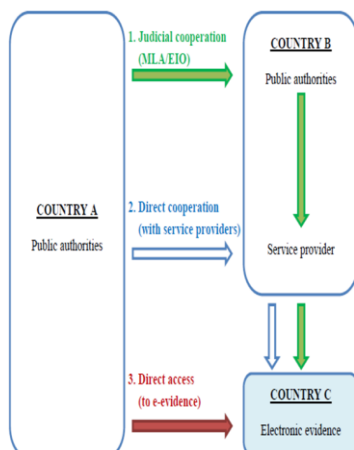


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Who should be notified? Who would get veto powers?

Figure 1: the main parties and the three channels for cross-border access to e-evidence



- Data subjects themselves
=> when? (+ how?)
- State ISP
- this conference call wState (all???) data subjects?
- Example: suppose data concerning could be requested
- 'Buried with information'
- <-> effect HR protection?
- => Spam??

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Data held by SPs 3rd state or stored in 3rd state

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gardenprofessors.com

- Only partially solved by Directive
- US Cloud Act 2018
 - Allows for direct access US LEA to US based SP
 - **Option bilateral deal** with partner states for direct cross-border orders to SP's
 - Special status US citizens or residents: still MLA
- Commission Request to Council for Mandate to **Negotiate EU-wide deal with US**: bottom lines for deal already stated
- Rest o/t world? 2nd add. Protocol to CCConv or similar deals direct access

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Data Retention

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Eur. **Preservation** Order necessary to make sure the data will still be there when Eur. Production Order

Data loss

No compulsory retention

(Should)

I know what you did last summer

(?)



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Metadata: data about data

- What?
- When?
- By whom?
- To whom?
- How?
- Where?
- Problem is not present and future, **problem = past**



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CJEU: EU DR Directive violated Charter FR EU (disproportionate)



fortune.com



- CJEU Digital Rights Ireland (**Directive** annulled): blow
 - => national DR laws amended
 - Still DR but stricter rules access and use
- CJEU Tele2 and Watson (**MS national DR laws** violate EU law): final blow?
 - Stated that DR obligation is possible, but conditioned it to criteria that are impossible?

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Solution?



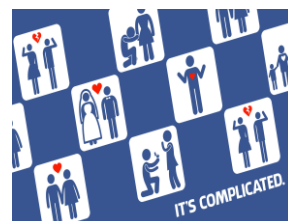
Foto: hindlinks4u.to

- 2018: Questions to CJEU (a.o.)
 - **Criteria** suggested in Tele2 Sweden **impossible** to apply for Belgian lawmakers?
 - **ECHR obligation** to give certain HR (punishment violation sexual integrity children) precedence over others (privacy internet users): Belgium caught between rock & hard place?
- Hope: CJEU brings extra nuance (blanket DR possible, if strict access conditions and control mechanisms, limited period) to adjust human rights protection EU and ECtHR
- ECtHR is less opposed to DR

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CJEU Does (Not?) Move

- CJEU joint cases Quadrature du Net a.o.
- 6 October 2020
 - Blanket DR remains illegal
 - Very limited DR possible and **ONLY** for very serious crime and Terrorism
 - No time-limitations, no 'regularisation' past illegality by national court
 - But consequence illegality for criminal procedure is matter of MS national law
 - No obligation to exclude the illegal evidence and its fruits, other ways to render HR protection effective: weighing evidence and sentencing
 - Except: compulsory exclusion if impossible for defence to verify reliability/ source
 - Identification and IP data less sensitive, if not communication and location
 - (= subscriber + access data)?



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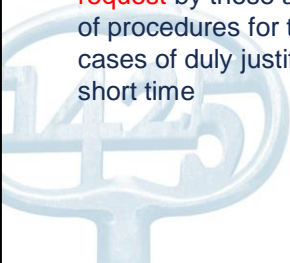
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Access to retained data

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- Access, for purposes in criminal field, to a **set of traffic or location data in respect of electronic communications, allowing precise conclusions to be drawn concerning a person's private life**, is permitted **only** in order to combat **serious crime** or prevent serious threats to public security
 - E-evidence: judge procedure in which use is made best placed to evaluate (fragments together in mosaic)
- Access competent national **authorities subject to a prior review carried out either by a court or by an independent administrative body, and that the decision of that court or body be made following a reasoned request** by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime. In cases of duly justified urgency, the review must take place within a short time



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Access to retained data

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- EPO issued or validated by judge, court, **investigating judge (??) or prosecutor (??)** competent in case concerned BECAUSE Not independent enough?
- Requirement independence authority prior review must
 - have all powers and provide all guarantees necessary to reconcile various interests and rights at issue
 - **be third party in relation to authority which requests access to the data, to be able to carry out review objectively and impartially and free from any external influence.** In particular, in criminal field => authority prior review must **not be involved in conduct of criminal investigation in question + has a neutral stance vis-à-vis the parties to the criminal proceedings.**



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EPO + EPO



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- Since no/ more difficult DR
- Need first shot (Preservation) asap
- Second shot (Production) later after more burdensome procedure
- Boomer-law?

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Victory for HR and Privacy?

Many practical questions impact case law CJEU on e-evidence in general and day to day LEA investigative practice
More procedures and (unnecessary) bureaucracy?

Confusion about data regimes for different types of data: access data/ transactional data, location data (not always easy to separate in practice)?

More covert LEA data gathering?

Quid voluntary cooperation?

Quid unilateral applications national law?

Quid impact data cooperation with rest of the world?



<https://www.hofvanbusleyden.be>



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Conclusion

