European Parliament
2014-2019

Committee on Civil Liberties, Justice and Home Affairs

6.2.2019

2nd WORKING DOCUMENT (A)

on the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (2018/0108 (COD)) - Scope of application and relation with other instruments

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Birgit Sippel

Co-Author: Nuno Melo

Introduction

The present working document on the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (2018/0108 (COD)) will cover the scope of the application and the relation of the proposed instrument to other European instruments. It will examine the legal scope of the instrument, namely the proposed legal basis of Article 82(1) TFEU, and will further examine potential connections with already existing instruments at the European level for access to electronic data, such as the Directive 2014/41/EU on the European Investigation Order in criminal matters (EIO), as well as the 2001 Convention on Cybercrime of the Council of Europe (CETS No.185) (the Budapest Convention).

Legal basis - Article 82 TFEU

The correct interpretation and application of the legal basis is essential for the legal nature of the EU as a supra-national entity, based on the principle of conferral of powers as enshrined in Article 5 TEU. This is even more sensitive in the field of criminal law due to its strong ties with the core of national sovereignty and its strong connection to the constitutional basis of the Member States.[1]

In that regard, one of the intentions with the Lisbon Treaty (and already before with the unsuccessful Constitutional Treaty) was to clarify the conferral of powers to the EU in order to establish "a better division and definition of competence in the EU".[2] The preparatory work on the Constitutional Treaty[3] as well as scholars[4] and several national constitutional courts[5] have

[1] See, for example, the claims of the Italian Constitutional courts as regards legal certainty in criminal law as part of Italian Constitutional identity (as mentioned in Article 4(2) TEU) - see Italian Constitutional Court, Order No. 24 of 2017 (in connection with the EU Court of Justice Case C-42/17, M.A.S. and M.B.) and judgment (Sentenza) 115/2018.

[2] See the European Council Meeting, Laeken, 14-15 December 2001. See also S. Miettinen, Criminal competence and the choice of legal basis: space in the margins?, EuCLR, No. 2/2015, 222-242; see also E. Herlin-Karnell, EU Competence in Criminal Law after Lisbon, in E. Biondi et al, EU Law after Lisbon, 2012.

[3] See in that regard working group X to the Constitutional Treaty that created the basic text of the current Article 82 TFEU (Article III-270 of the never ratified Constitutional Treaty), CONV 426/02, 2 December 2002. The group in its final report mentioned, inter alia, the following: "*The envisaged intensification of the Union's action, through reformed legislative instruments and decision-making procedures, requires at the same time that the scope of future Union legislation be more clearly identified. As a matter of fact, Articles 30 and 31 TUE - which constitute the applicable legal bases - are too vague in many respects, and too narrow in some other aspects...*" See also H. Labayle, Working doc. 3, 11 October 2002, WG X - WD 3.

[4] For example, Craig, The Lisbon Treaty, 2012; Weiler, The Constitution of Europe, 1999.

[5] BVerfG 2 BvE 2/08 (Lisbon Treaty Judgment), 30 June 2009 stating as regards EU competences in criminal law that "as regards the preconditions for criminal liability as well as the concepts of a fair and appropriate trial, the administration of criminal law depends on cultural processes of previous understanding that are historically grown and also determined by language, and on the alternatives which emerge in the process of deliberation which moves the respective public opinion... any transfer of sovereign rights beyond intergovernmental cooperation may only lead to harmonisation for specific cross-border situations on restrictive conditions" (para. 253) and "particularly the newly conferred competences in the areas of judicial cooperation in criminal (aa) and civil matters (bb), external trade relations (cc), common defence (dd) and with regard to social concerns can, and must, be exercised by the institutions of the European Union in such a way that at Member State level, tasks of sufficient weight in extent as well as substance remain which are the legal and practical conditions of a living democracy... What is decisive for the constitutional assessment of the challenge is not quantitative relations but whether the Federal Republic of Germany retains substantial national scope of action for central areas of statutory regulation and areas

highlighted the sensitive nature of the criminal law provisions in general, as well as the issue of an overly broad, 'generous' interpretation of EU criminal law (for example, regarding 'implied ancillary competence'). The issue came up recently again in the context of the debate on the legal basis of the Directive on Protecting the Financial Interests of the Union (the PIF Directive).[1]

As regards the case-law of the European Court of Justice (CJEU) concerning the legal basis for a Union legal act, the Court has stated that the choice of a legal basis must rely on objective factors amenable to judicial review, including the aim and the content of that measure (the so-called 'centre of gravity test').[2] If a Union legal act pursues a twofold purpose or comprises two components, with one of these being identifiable as predominant and the other one being merely incidental, the act must be based on a single legal basis, namely the one required by the main or predominant purpose or component. Exceptionally, if it is established that the act simultaneously pursues different objectives or has several components, which are inextricably, linked, without one being incidental to the other, such a measure will have to be founded on the various corresponding legal bases.[3] However, recourse to multiple legal bases is not possible where the procedures laid down for each legal basis are incompatible with each other.[4] In addition, any choice of the legal basis and its interpretation should not alter the Treaties.[5]

The proposed Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (2018/0108 (COD)) is based on Article 82(1) TFEU, which explicitly refers to the principle of mutual recognition of judicial decisions on criminal matters, either in the form of Directives of Regulations, for the purpose of the following objectives:

---

of life" (para. 351). See, for example, also A. Steinbach, The Lisbon Judgment of the German Federal Constitutional Court - New Guidance on the limits of European Integration?, German Law Journal Vol 11 No. 4 (2010), p. 377: "Due to the fact that democratic self-determination is affected in an especially sensitive manner by provisions of criminal law and law of criminal procedure, the corresponding foundations of competence in the Treaties must be interpreted strictly - on no account extensively - and their use requires particular justification."

[1] The Commission initially proposed the general Article 325 TFEU as the legal basis but upon insistence in the EP and the Council it was changed to Article 83 TFEU. See also S. Miettinen, Implieed ancillary criminal law competence after Lisbon, EuCLR, No. 3/2013, pp. 194-219.

[2] See, for example, C-300-89 (Titanium Dioxide judgment); and newer judgments of 6 September 2012, *Parliament v. Council,* C-490/10; of 6 May 2014, *Commission* v *Parliament and Council*, C-43/12; *C-377/12 Commission v Council*; of 14 June 2016, *Parliament* v *Council*; of 22 September 2016, *Parliament v. Council,* Joined Cases C-14/15 and C-116/15; of 26 July 2017, opinion 1/15; etc.

[3] Judgment of 14 June 2016, *Parliament* v *Council*, C-263/14, para. 44.

[4] Judgment of 6 November 2008, *Parliament* v *Council*, C-155/07, EU:C:2008:605, paragraph 37.

[5] See, for example, *Parliament v. Council*, Joined Cases C-14/15 and C-116/15, para. 47: *"According to the Court's case-law, as the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties. Accordingly, to acknowledge that an institution can establish secondary legal bases for the adoption of legislative acts or implementing measures, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaties (judgment of 10 September 2015, Parliament v Council, C-363/14, EU:C:2015:579, paragraph 43 and the case-law cited)."* As regards the choice of the legal basis for a given measure and its influence on the procedure and scope and content of EU policy see also E. Howeden,"The Legal Basis of European Union Policy: The Case of Environmental Policy", Politics and Space, Volume: 20 issue: 4, page(s): 535-553. See, per analogy, also Court of Justice opinions 2/94 and 2/13 as regards the issue when a Treaty change is necessary and interpretation alone cannot solve the issue.

a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgements and judicial decisions;
b) prevent and settle conflicts of jurisdictions between Member States;
c) support the training of the judiciary and judicial staff;
d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Beyond mutual recognition, Article 82 of the Lisbon Treaty,[1] provides:

- in paragraph 1, the mutual recognition principle of judicial decisions (either in the form of Directives or Regulations),
- in paragraph 2, the possibility of harmonising Directives (not Regulations) in certain areas,
- in paragraph 3, an emergency brake procedure for harmonising Directives,
- and in paragraph 3, second part, the possibility of enhanced cooperation in case of disagreement.

In the past, several instruments have been adopted under Article 82(1) as the sole legal basis of the act:

- Directive 2011/99/EU on the European protection order - based on Article 82(1)(a) and (d);
- Council Decision 2012/305/EU on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto – based on Article 82(1)(d) in conjunction with Article 218(6)(a);
- Council Decision 2014/835/EU on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway - based on Article 82(1)(a) in conjunction with Article 218(6)(a);
- Directive 2014/41/EU regarding the European Investigation Order in criminal matters (EIO) - based on Article 82(1)(a);
- Regulation 2018/1805/EU on the mutual recognition of freezing orders and confiscation orders - based on Article 82(1)(a).[2]

[1] Before the Lisbon Treaty, the concept of mutual recognition existed without an explicit mentioning in the former Treaties and was politically introduced by the European Council in Tampere.
[2] In principle every legal instrument has to be evaluated by itself as regards the appropriate legal basis. See, for example, judgment of 24 June 2014, *Parliament v Council* (C-658/11). However, the past use of Article 82(1) as the sole legal basis provides certain guidelines as regards the understanding of Article 82 TFEU. In that regard the focus is on instruments having Article 82(1) as the sole legal basis, and not on instruments having multiple legal basis, like Directive 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime - Articles 82(1)(a) and 87(2); Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020 - Article 81(1) and (2), Article 82(1) and Article 84; Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing; etc.

Although the Commission did not specify in its proposal on the e-evidence Regulation which of the four points under Article 82(1) applies, it is probable that points (a) and/or (d) apply.

All past instruments that have explicitly been based on Article 82(1)(a), have been targeted at judicial authorities and prescribed the recognition of judgments and judicial decisions. In addition, the instruments set out non-recognition grounds and accept the automatic non-application of the principle of dual criminality only for a list of 32 offences.[1]

Regarding the understanding of the concept of mutual recognition as enshrined in Article 82 TFEU, the CJEU has provided certain interpretation on the past instruments, for example concerning the *ne bis in idem* principle, the notion of 'judicial authority', the non-recognition grounds based on fundamental rights concerns, and the additional national procedures not foreseen by mutual recognition instruments.

In addition, the CJEU has provided for further understanding regarding the question of whether Article 82(1) had been chosen as the appropriate legal basis in the context of cooperation with a third country. For example, in its Opinion 1/15 (Grand Chamber) of 26 July 2017, the CJEU stated that Article 82(1)(d) is not the appropriate legal basis for a system where a private provider sends data to a law enforcement authority in a third country, rather than with judicial authorities.[2] Indeed, as stated by Attorney General Mengozzi, using Article 82(1)(d) as a legal basis for such a system between a private provider and a judicial authority could amount to a "generous"[3] - that is overly broad - interpretation of the Treaty. Consequently, any measure based on Article 82(1)(d) must therefore facilitate cooperation between two judicial authorities, while cooperation between law enforcement and private providers is not covered.

Furthermore, in its *Kovalkovas*, *Özcelik*, and *Poltorak* judgments, the CJEU further clarified the notion of issuing judicial authority, at least in the framework of the European Arrest Warrant

---

[1] Pre-Lisbon measures based on the mutual recognition principle operated/operate on the basis of two judicial authorities whereby the authority in the executing state has certain limited non-recognition grounds and double criminality is excluded only for a list of 32 offences: Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Council Framework Decision of 22 July 2003 on the execution in the EU of orders freezing property or evidence, Council Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

[2] In that regard the Court stated:
"102. By contrast, that decision cannot be based on point (d) of the second subparagraph of Article 82(1) TFEU, which provides for the possibility for the Parliament and the Council to adopt measures to 'facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions'. 103. As the Advocate General has observed in point 108 of his Opinion, none of the provisions of the envisaged agreement refer to facilitating such cooperation. As for the Canadian Competent Authority, that authority does not constitute a judicial authority, nor does it constitute an equivalent authority."
See also the Road Traffic Offence Information case (C-43/12) were the adequate legal basis due to the automatic nature without the involvement of the other authority was not Article 87(2) on police cooperation, but Article 91 TFEU on road safety.

[3] The term has been used by Advocate General Mengozzi in opinion 1/15, 8 September 2016, para. 105-109.

system. In that regard, Directive 2014/41/EU (EIO), and later instruments of judicial mutual recognition introduced a specific validation procedure by a judicial authority, clarifying that, if the national authority issuing the order is not a judicial authority, the order has to be validated by a judge or a prosecutor in the issuing state, before being sent to the executing state.[1]

All this being said, the Commission itself states in the proposed Regulation on e-evidence, that it applied a broad interpretation of Article 82(1), pushing the concept of mutual trust further, beyond the current understanding of cooperation between judicial authorities for the recognition of judgments and judicial decisions, stating: "*Article 82 TFEU provides a legal basis for judicial cooperation based on mutual recognition. According to Art. 82(1)(a), the European Parliament and the Council shall adopt measures to lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions. Most of the instruments based on that provision involve the judicial authorities of both Member States in the process... In the proposed Regulation, the mutual recognition principle is pushed one step further to the extent that, in the initial stage, there is no immediate involvement of the second Member State's judicial authorities. This implies that the order is sent directly to the service provider who is bound by it without a previous intervention of judicial authorities of the second Member State (similar to what would be the case in a domestic situation).*"[2] However, as stated in the proposal *"the European Production or Preservation Order can lead to the intervention of a judicial authority of the executing State when necessary to enforce the decision".*[3]

The Commission, thus, itself acknowledges that the proposed e-evidence instrument would no longer stipulate automatic cooperation between two judicial authorities, i.e. a direct involvement of the second Member State's judicial authorities. By contrast, according to the Commission, a systematic involvement of the judicial authorities of the executing Member State is not required for the principle of mutual recognition under Article 82(1)(a) to apply. Instead, according to the Commission, it was sufficient to involve the judicial authority of the executing state should problems arise with the execution of a production or preservation order by the service provider.

Taking all aforementioned into consideration, the e-evidence instrument, as proposed by the Commission, would go beyond the current application of Article 82(1)(a)) by broadening the concept of mutual recognition as laid down therein.

The choice of legal instrument

In the past, Union legal instruments adopted in the area of mutual recognition in criminal law, except one, took the form of Framework Decisions/Directives. Looking at the only Regulation adopted in the area of mutual recognition in criminal law, the recent freezing and confiscation mutual recognition instrument[4], it becomes clear that, even though it carries the title 'Regulation', the instrument actually includes several elements of a Directive and is therefore rather of a hybrid nature. While most parts of the Regulation are directly applicable in the

[1] See, for example, Article 2 EIO.
[2] Commission's written Follow-up to EP Shadows' Meeting 09/10/2018.
[3] COM Proposal (page 5).
[4] See Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

Member States, the basic nature of a Regulation, it still contains several references to "national law[1], a typical feature of a Directive.

Despite this being rather uncommon, the Commission has opted for a Regulation for the e-evidence instrument, claiming that this would create "clarity and greater legal certainty" avoiding "divergent interpretation in the Member States and other transposition problems".[2] With regards to the fact that the e-evidence Regulation creates rights and obligations for service providers, it, indeed, seems important to guarantee a level playing field for them within the Union, rather than being subject to divergent national regimes. Yet, looking back at the beginning of the deliberations on the Commission proposal at hand in Council, a group of Member States actually debated the form of a Regulation due to the remaining constitutional differences in national criminal law.

Apart from the novel interpretation of the legal instrument chosen, the proposed Regulation on e-evidence would also introduce certain harmonisation measures regarding the question of the correct authority to issue a European Production Order or European Preservation Order, the issue of prosecutorial/judicial authorisation (see Article 4 of the Commission proposal). With regards to the choice of the right legal instrument, which is closely linked to the legal basis (as outlined before), the question therefore arises whether this harmonisation component is inextricably linked to the purpose of the proposed Regulation and is to be considered to be fundamental in nature or if the harmonisation component is only a subordinate part. As set out above, mutual recognition instruments based on Article 82(1) can have the form of a Regulation or a Directive. If, however, the harmonisation component entails, for example, certain rules on admissibility the adequate legal basis would be Article 82(2). However, Article 82(2) only allows for the adoption of Directives. A legal act equally combining both goals on an equal level under Articles 82(1) and 82(2) would therefore most probably need to take the form of a Directive.

Conclusions

In summary, and without providing a final conclusion at this stage, both the choice and interpretation of the legal basis (Art. 82(1)) as well as the choice of the right instrument (Regulation vs. Directive) need to be made unequivocally clear.

Further, it seems that, in particular, the assessment of the legal basis is closely connected with the level of the involvement of the judicial authority in the executing state, namely:

- Would it be sufficient, as foreseen in the Commission proposal, to only involve the judicial authority in the executing state in case of problems with the execution of a European Production Order or a European Preservation Order, especially if no non-recognition grounds are specified?; or, in other words: Would it be sufficient for Art. 82(1)(a) to have a mutual

[1] See, for example, Article 2(8) of Regulation (EU) 2018/1805 - definition of issuing authority; Article 2(9) - executing procedure; Article 10(1) - postponement of execution; Article 11 - confidentiality; Article 30 - disposal of confiscated property; Article 32 - information to affected persons; etc. The same applies to the proposed Regulation on e-evidence - see, for example, Article 4 - issuing authority; Article 12 - reimbursement of costs; Article 14 - definition of privilege and immunities and national security and pecuniary sanctions; Article 17 - effective remedies; etc.

[2] See Commission proposal on the e-evidence Regulation.

recognition without systematic involvement by the affected Member State, as foreseen in the Commission proposal?;

- Would it be sufficient, as foreseen in the Council's general approach, to limit the compulsory notification of the judicial authority in the executing state to European Production Orders for content data in certain limited cases, without those notification having a suspensive effect?; or

- Would it be necessary to foresee a more meaningful notification regime based on the past examples of mutual recognition instruments in criminal law, at least in the form of a reaction to an order granted to the state of execution, based on certain non-recognition grounds within a certain time limit?