



## European Production and Preservation Orders for electronic evidence in criminal matters:

### A call for protection of the free and independent media in Europe

Brussels, 9 November

On 17 April 2018, the European Commission presented the proposal for a Regulation on European production and preservation orders for electronic evidence in criminal matters ([COM\(2018\) 225 final](#)). The European Commission's proposal aims at providing judicial authorities in European Member States with a tool to request the production or preservation of electronic data stored in a different Member State via production and/or preservation orders needed for investigation and prosecution purposes in crimes identified by the proposal. The proposal would allow the competent authorities in the issuing Member State to directly approach service providers based in an EU Member State to obtain electronic evidence originating from emails, messaging apps, social networks and similar services.

**ACT**, the Association of Commercial Television in Europe, **AER**, the Association of European Radios; **EBU**, the European Broadcasting Union; **EFJ**, the European Federation of Journalists; **EMMA**, the European Magazine Media Association; **ENPA**, the European Newspaper Publishers' Association; **EPC**, the European Publishers Council, **NME**, News Media Europe and **UNI MEI Global Union** would like to jointly raise their concerns on the Commission's proposal's serious implications it could have on media and journalists' freedom.

While there is no reason to believe that the intention of the proposed Regulation is to undermine press and media freedom, the proposal – as presented by the European Commission – **would pose an unacceptable threat for the freedom of press and media, the freedom of expression as well as the freedom of information.**

It is a key task of the press and media to **ensure independent reporting**. In order for it to be guaranteed, the **protection of journalistic research**, including the **protection of sources** and the **protection of editorial secrecy** are indispensable.

However, publishers, broadcasters and journalists would be directly affected by provisions of the proposed Regulation **as users of electronic services**. In the digital age, journalists rely on the use of electronic communication as means to conduct journalistic research, including interacting with informants and whistleblowers as well as storing information on computers or cloud servers. We are therefore concerned that the **types of data** that service providers ought to hand over to issuing authorities in other Member States with limited legal remedies include **subscriber data** (e.g. the identity of the subscriber including its name, date of birth and address), **access data** (e.g. the commencement and termination of a user accessing a service), **transaction data** (e.g. the source and destination of messages) and even **content data** (e.g. texts, voice messages, videos and images).



The possibility to obtain such **broad and all-encompassing data** without the necessary safeguards jeopardizes press freedom and undermines editorial secrecy. In addition, the lack of protection would not only have **severe damaging effects for journalists**, but it could also lead to **chilling effects** for future **informants** or **whistleblowers**, hampering investigative journalism and press freedom in general<sup>1</sup>.

Furthermore, the proposed Regulation **does not include an executing Member State in the procedural steps**. Therefore, the service provider would be addressed directly by the issuing authority. The service provider would be responsible to produce or preserve the requested data under significant time pressure, i.e. within 10 days of the receipt of the order, or within 6 hours in emergency cases. It is very probable that considering the tight deadline, a service provider would most likely abstain from making use of the (limited) remedies provided for in article 15 in the issuing member state – a foreign and unknown jurisdiction to the service provider.

While the draft Regulation includes some general safeguards with regard to fundamental rights, immunities and privileges, these general safeguards are not sufficient and suited to **protect media freedom** and the **protection of sources and informants** – an essential precondition for independent and investigative reporting.

The **lack of explicit safeguards for the media sector** and the weak legal remedies would leave journalists and publishers / media unable to protect their sources, their editorial secrecy and potentially even their databases. In fact, for persons whose data were obtained and are not subject to prosecution or investigation, **the offered legal remedies** (as provided for in article 17, for example) **are blatantly insufficient to safeguard the protection of a free and independent press and media in Europe**. This because firstly, it only provides **an ex post** possibility to challenge the production or preservation order. This means that the possibly sensitive data has already been issued and the potential damage is already done. Secondly, a possible complaint against a production or preservation order must be filed in the issuing Member State, which poses **logistic, bureaucratic and legal challenges** for journalists and publishers, especially smaller ones with limited resources.

Against this backdrop, European media outlets and journalists **call on European decision makers to protect the European media sector and its contribution to democratic societies**. It would be dramatic if the lack of specific safeguards would result in collateral damage and jeopardize journalists and informants alike. We therefore urge the decision makers to include **specific safety measures** that provide sufficient and clear protection for sources, for the work of journalists as well as for editorial secrecy.

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<sup>1</sup> These are the very reasons why the General Data Protection Regulation foresees an exception for media outlets at article 85  
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R0679-20160504&from=EN>



## Suggested amendments to safeguard and protect independent reporting

### Article 3 (Scope), paragraph 4 (new):

*European Production Orders and European Preservation Orders shall not be issued to obtain data in the meaning of article 2 paragraph (7)-(10) in cases where the possessors of the data or their partners in communication are persons who professionally participate in the preparation, production and dissemination of press or media content for the information and opinion forming of the public, irrespective of the means of dissemination involved.*

### Article 5 (Conditions for Issuing a European Production Order), paragraph 5 (j) (new)

*A notice verifying that as result of an evaluation no indications were found that the possessor of the data or a partner in communication is a person as of art. 3 para. 4.*

### Article 6 (Conditions for Issuing a European Preservation Order), paragraph 3 (h) (new)

*A notice verifying that as result of an evaluation no indications were found that the possessor of the data or a partner in communication is a person as of art. 3 para. 4).*

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*ACT, the Association of Commercial Television in Europe, represents the interests of leading commercial broadcasters in 37 European countries. ACT is committed to protecting and to promoting the interests of the European private broadcasters. ACT engages with the EU institutions to achieve a balanced and appropriate regulatory framework which will encourage further investment and growth in the sector so that it will continue to do what we do best – getting great content to viewers.*

See <https://acte.be/>

*AER, the Association of European Radios, is a Europe-wide trade body representing the interests of over 4,500 private/commercial radio stations across the EU28 and in Switzerland. AER's main objective is to develop the most suitable framework for private commercial radio activity. AER constantly follows and contributes to EU actions in the fields of media, telecommunications and private radio transmission, in order to contribute, to enrich and develop the radio sector.*

See: <http://www.aereurope.org>

*EBU, the European Broadcasting Union, is the world's leading alliance of public service media. We have 119 member organizations in 56 countries in Europe, and an additional 34 Associates in Asia, Africa, Australasia and the Americas. Our Members operate over 2,000 television, radio and online channels and services, and offer a*



*wealth of content across other platforms. Together they reach an audience of more than one billion people around the world, broadcasting in more than 160 languages. The EBU operates Eurovision and Euroradio services.*

*See: [www.ebu.ch](http://www.ebu.ch)*

*EFJ, the European Federation of Journalists, is the largest organization of journalists in Europe, representing over 320 000 journalists in 70 journalists' organisations across 44 countries.*

*See: [www.europeanjournalists.org](http://www.europeanjournalists.org)*

*EMMA, the European Magazine Media Association, is the unique and complete representation of Europe's magazine media, which is today enjoyed by millions of consumers on various platforms. EMMA represents 15,000 publishing houses, publishing 50,000 magazine titles across Europe in print and digital.*

*See: [www.magazinemedi.eu](http://www.magazinemedi.eu)*

*ENPA, the European Newspaper Publishers' Association, is an international non-profit organisation representing publishers of newspaper and news media on all platforms. In a rapidly changing media environment, ENPA supports publishers with the aim of achieving a successful and sustainable future for independent news media in Europe.*

*See: [www.enpa.eu](http://www.enpa.eu)*

*EPC, the European Publishers Council, is a high level group of Chairmen and CEOs of leading European media corporations actively involved in multimedia markets spanning newspaper, magazine, book, journal, internet and online database publishers, and radio and TV broadcasting.*

*See: <http://epceurope.eu>*

*NME, News Media Europe, represents the progressive news media industry in Europe – over 2200 European titles of newspapers, radio, TV and internet. NME is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing the newsbrands which are one of the most vital parts.*

*See: [www.newsmediaeurope.eu](http://www.newsmediaeurope.eu)*

*UNI MEI is the global union in the media, entertainment, and arts. UNI MEI represents 170 national unions & guilds affiliating more than 400 000 creators, technicians and other workers in the media, entertainment and arts worldwide.*

*See: [www.uniglobalunion.org](http://www.uniglobalunion.org)*