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#### NOTE

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From:	Presidency
To:	Council
No. prev. doc.:	6284/19
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Subject:	Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings - General approach

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#### INTRODUCTION

1. On 17 April 2018, the Commission adopted and transmitted to the Council and to the European Parliament the above-mentioned proposal with Articles 53 and 62 TFEU as a legal basis. The draft Directive serves as a tool to overcome the risk of diverging national approaches evidence in criminal proceedings, as it sets out the rules for the appointment of service providers' legal representatives.

2. The proposal aims at harmonising the various national approaches, that currently include: asserting national jurisdiction over a service provider on the basis of its seat, the place where it offers services or the location of its data; extending enforcement jurisdiction (extra-territoriality); or requesting that a special representative be designated for some service providers for that Member State.
3. The legal representative should reside or be established in one of the MS where the service provider is established or is offering services, and its obligations are strictly limited to the receipt of and compliance with decisions and orders issued by the MS competent authorities, and they can be subject to enforcement procedures.
4. On 18 October 2018, the European Council<sup>1</sup> called for a solution to be found to ensure swift and efficient cross-border access to e-evidence in order to effectively fight terrorism and other serious and organised crime, both within the EU and at international level. It stressed that the Commission proposals on e-evidence should be agreed on by the end of the current legislature.
5. In the European Parliament, Ms Birgit Sippel (LIBE, S&D) was appointed as rapporteur on 24 May 2018. The LIBE Committee discussed the proposal on 11 June 2018 and has held several meetings and hearings, including a public hearing on 27 November 2018. No timeline has been set for the adoption of the report.
6. The European Economic and Social Committee adopted its opinion on 12 July 2018<sup>2</sup>.

## **II. WORK WITHIN THE COUNCIL**

7. The Commission presented this proposal to the COPEN Working Party on 27 April 2018, followed by an article-by-article examination of the draft directive and an exchange of views on the impact assessment in the Working Party on 7-8 May 2018. In general, both the impact assessment and the proposal were positively received by delegations.

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<sup>1</sup> EUCO 13/18, paragraph 9.

<sup>2</sup> 11533/18.

8. Discussions were centered mainly around the selection criteria proposed by the Commission for the designation of a legal representative in the Union by the service provider for the receipt of, compliance with and enforcement of decisions and orders issued by competent authorities of Member States, as well as the sanctions for non-compliance with the obligations under the directive.
9. The examination of the proposal by the Working Party were conducted under the Bulgarian, Austrian and Romanian Presidencies. Six meetings were held which resulted in three revised versions of the proposed Directive. The outcome of those discussions together with the written input received from delegations and their reservations on the text are reflected in the revised Presidency compromise text as set out in the Annex. The recitals have been adapted to reflect changes in substantive provisions. All changes compared to the Commission proposal are indicated in **bold** (new text) or ~~strikethrough~~-(deleted text).
10. Discussions were concluded on 18 February 2019 with a view to submitting the compromise text as set out in the Annex for adoption as a general approach at the forthcoming Council (Justice and Home Affairs) to be held on 7 and 8 March 2019.

### III. CONCLUSION

11. The text, as set out in the Annex, reflects the efforts of the Presidency and Member States to strike a compromise.
12. On 27 February the Permanent Representatives Committee reached an agreement on the Presidency compromise text as set out in the Annex to this note with only one technical amendment as suggested by the CZ delegation.
13. The Council is therefore invited to reach a general approach on this text, which will constitute the basis for the negotiations with the European Parliament in the framework of the ordinary legislative procedure (Art. 294 TFEU).

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53 and 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>3</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Network-based services can in principle be provided from anywhere and do not require a physical infrastructure, corporate presence, or staff in the country where the services are offered, nor in the internal market itself. As a consequence, it can be difficult to apply and enforce obligations laid down in national and Union law which apply to the service providers concerned, in particular the obligation to comply with an order or a decision by a judicial authority. This is the case in particular in criminal law, where Member States' authorities face difficulties with serving, ensuring compliance and enforcing their decisions, in particular where relevant services are provided from outside their territory.

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<sup>3</sup> OJ C , , p. .

- (2) Against that background, Member States have taken a variety of disparate measures to more effectively apply and enforce their legislation. This includes measures for addressing service providers to obtain electronic evidence that is of relevance to criminal proceedings.
- (3) To that end, some Member States have adopted, or are considering adopting, legislation imposing mandatory legal representation within their own territory, for a number of service providers offering services in that territory. Such requirements create obstacles to the free provision of services within the internal market.
- (4) There is a significant risk that other Member States will try to overcome existing shortcomings related to gathering evidence in criminal proceedings by means of imposing disparate national obligations in the absence of a Union-wide approach. This is bound to create further obstacles to the free provision of services within the internal market.
- (5) Under the current circumstances, the resulting legal uncertainty affects both service providers and national authorities. Disparate and possibly conflicting obligations are set out for service providers established or offering services in different Member States, which also subject them to different sanction regimes in case of violations. This divergence in the framework of criminal proceedings will likely further expand because of the growing importance of communication and information society services in our daily lives and societies. The foregoing not only represents an obstacle to the proper functioning of the internal market but also entails problems for the establishment and correct functioning of the Union's area of freedom, security and justice.

- (6) To avoid such fragmentation and to ensure that undertakings active in the internal market are subject to the same or similar obligations, the Union has adopted a number of legal acts in related fields such as data protection<sup>4</sup>. To increase the level of protection for the data subjects, the rules of the General Data Protection Regulation<sup>5</sup> provide for the designation of a legal representative in the Union by controllers or processors not established in the Union but offering goods or services to individuals in the Union or monitoring their behaviour if their behaviour takes place within the Union, unless the processing is occasional, does not include processing, on a large scale, of special categories of personal data or the processing of personal data relating to criminal convictions and offences, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing or if the controller is a public authority or body.
- (7) By setting out harmonised rules on the legal representation of certain service providers in the Union for receipt of, compliance with and enforcement of decisions issued by competent authorities in the Member States for the purposes of gathering evidence in criminal proceedings, the existing obstacles to the free provision of services should be removed, as well as the future imposition of divergent national approaches in that regard should be prevented. Level playing field for service providers should be established. **This should not affect obligations on service providers deriving from other EU legislation.** Moreover, more effective criminal law enforcement in the common area of freedom, security and justice should be facilitated.

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<sup>4</sup> [Directive 95/46/EC](#) of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31); [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1); [Directive 2002/58/EC](#) of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

<sup>5</sup> [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

- (8) The legal representative at issue should serve as an addressee for domestic orders and decisions and for orders and decisions pursuant to Union legal instruments ~~adopted~~ **falling** within the scope of Title V, Chapter 4, of the Treaty on the Functioning of the European Union for gathering evidence in criminal matters, **including where those orders and decisions are transmitted in form of a certificate**. This includes both instruments that permit the direct serving of orders in cross-border situations on the service provider **or its legal representative, such as the [Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (“Regulation”)]<sup>6</sup>**, and other instruments ~~based on~~ **for judicial cooperation applicable between the judicial authorities Member States, notably those falling within the scope of under** Title V, Chapter 4, **such as the Directive on the European Investigation Order<sup>7</sup> and the 2000 Mutual Legal Assistance Convention<sup>8</sup>**. Recourse to the legal representative should be in accordance with the procedures set out in the instruments and legislation applicable to the judicial proceedings. The competent authorities of the Member State where the legal representative resides or is established should act in accordance with the role set out for them in the respective instrument if and where an involvement is foreseen.

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<sup>6</sup> **Regulation of the European Parliament and of the Council on European Production and preservation orders for electronic evidence in criminal matters**

<sup>7</sup> **Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1.**

<sup>8</sup> **Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, p. 1 and its Protocol, OJ C 326, 21.11.2001, p. 2.**

- (9) Member States shall ensure that **service providers have** the obligation to designate a legal representative ~~is immediate that is from the date of transposition set out in Article 7 for service providers that offer services in the Union at that date~~ **by [6 months from the transposition deadline of this Directive]** or from the moment service providers start offering services in the Union for those service providers that will start offering services after **[6 months from the ~~date of transposition deadline of this Directive]~~.**
- (10) The obligation to designate a legal representative should apply to service providers that offer services in the Union, meaning in one or more Member States. Situations where a service provider is established on the territory of a Member State and offers services exclusively on the territory of that Member State, should not be covered by this Directive.
- (11) Notwithstanding the designation of a legal representative, Member States should be able to continue addressing service providers established on their territory, be it in purely domestic situations, be it after receipt of a request for assistance under legal instruments on mutual legal assistance and on mutual recognition in criminal matters. **Likewise Member States should be able to continue addressing the Member States where service providers are established with instruments falling within the scope of Title V, Chapter 4, such as the Directive on the European Investigation Order and the 2000 Mutual Legal Assistance Convention.**
- (12) The determination whether a service provider offers services in the Union requires an assessment whether the service provider enables legal or natural persons in the Union to use its services. However, the mere accessibility of an online interface (for instance the accessibility of the service provider's or an intermediary's website or of an email address and of other contact details) taken in isolation should not be a sufficient condition for the application of this Directive.



(13) A substantial connection to the Union should also be relevant to determine the ambit of application of this Directive. Such a substantial connection to the Union should be considered to exist where the service provider has an establishment in the Union. In the absence of such an establishment, the criterion of a substantial connection should be ~~assessed on the basis of the existence of~~ **based on specific factual criteria such as** a significant number of users in one or more Member States, or the targeting of activities towards one or more Member States. The targeting of activities towards one or more Member States can be determined on the basis of all relevant circumstances, including factors such as the use of a language or a currency generally used in that Member State, or the possibility of ordering goods or services. The targeting of activities towards a Member State could also be derived from the availability of an application ('app') in the relevant national app store, from providing local advertising or advertising in the language used in that Member State, or from the handling of customer relations such as by providing customer service in the language generally used in that Member State. A substantial connection is also to be assumed where a service provider directs its activities towards one or more Member States as set out in Article 17(1)(c) of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. On the other hand, provision of the service in view of mere compliance with the prohibition to discriminate laid down in Regulation (EU) 2018/302<sup>9</sup> cannot be, on that ground alone, be considered as directing or targeting activities towards a given territory within the Union. The same considerations should apply to determine whether a service provider offers services in a Member State.

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<sup>9</sup> [Regulation \(EU\) 2018/302](#) of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 601, 2.3.2018, p. 1).

(14) Service providers obliged to designate a legal representative should be able to choose to that effect an existing establishment in a Member State, be it a corporate body or a branch, agency, office or a main seat or headquarters, and also more than one legal representative.

**This legal representative could also be a third party, which could be shared between several service providers, in particular small and medium-sized enterprises.**

Nevertheless, a corporate group should not be forced to designate multiple representatives, one for each undertaking part of that group, **but can designate one legal representative for the group**. Different instruments ~~adopted~~ **falling** within the scope of Title V, Chapter 4, of the Treaty on the Functioning of the European Union apply in the relationships between Member States when gathering evidence in criminal proceedings. As a consequence of this ‘variable geometry’ that exists in the common area of criminal law, there is a need to ensure that the Directive does not facilitate the creation of further disparities or obstacles to the provision of services in the internal market by allowing service providers offering services on their territory to designate legal representatives within Member States that do not take part in relevant legal instruments, which would fall short of addressing the problem.

Therefore, at least one representative should be designated in a Member State that participates in the relevant Union legal instruments to avoid the risk of weakening the effectiveness of the designation provided for in this Directive and to make use of the synergies of having a legal representative for the receipt of, compliance with and enforcement of decisions and orders issued in the context of gathering evidence in criminal proceedings, including under the [Regulation], **the Directive on the European Investigation Order** or the 2000 Mutual Legal Assistance Convention. In addition, designating a legal representative, which could also be utilised to ensure compliance with national legal obligations, makes use of the synergies of having a clear point of access to address the service providers for the purpose of gathering evidence in criminal matters.

- (15) Service providers should be free to choose in which Member State they designate their legal representative, and Member States may not restrict this free choice, e.g. by imposing an obligation to designate the legal representative on their territory. However, the Directive also contains certain restrictions with regard to this free choice of service providers, notably that the legal representative should be established in a Member State where the service provider provides services or is established, as well as the obligation to designate a legal representative in one of the Member States participating in judicial cooperation instruments ~~adopted under~~ **falling within** Title V of the Treaty. **The sole designation of a legal representative should not be considered to constitute an establishment of the service provider.**
- (16) The service providers most relevant for gathering evidence in criminal proceedings are providers of electronic communications services and specific providers of information society services that facilitate interaction between users. Thus, both groups should be covered by this Directive. Providers of electronic communication services are defined in the proposal for a Directive establishing the European Electronic Communications Code. They include inter-personal communications such as voice-over-IP, instant messaging and e-mail services. **This Directive should also be applicable to other** ~~The categories of information society services~~ **providers within the meaning of Directive (EU) 2015/1535 that included here are those for which the storage of data is a defining component of the service provided to the user, and refer in particular to social networks to the extent they do not qualify as electronic communications services **providers, but offer their users the ability to communicate with each other or offer their users services that can be used to process or store data on their behalf. This should be in line with the terms used in the Budapest Convention on Cybercrime. Processing of data should be understood in a technical sense, meaning the creation or manipulation of data, i.e. technical operations to produce or alter data by means of computer processing power.****

**The categories of service providers included here are, for example** online marketplaces ~~facilitating transactions between their users (such as~~ **providing** consumers ~~or and~~ businesses) **the ability to communicate with each other** and other hosting services, including where the service is provided via cloud computing, **as well as online gaming platforms and online gambling platforms. Where an information society service provider does not provide its users the ability to communicate with each other, but only with the service provider, or does not provide the ability to process or to store data, or where the ability to store/process data is not an essential part of the service provided to users, such as legal, architectural engineering and accounting services provided online at a distance, it would not fall within the scope of the definition, even if within the definition of information society services pursuant to Directive (EU) 2015/1535. Information society services for which the storage of data is not a defining component, and for which it is only of an ancillary nature, such as legal, architectural, engineering and accounting services provided online at distance, should be excluded from the scope of this Directive, even where they may fall within the definition of information society services as per Directive (EU) 2015/1535.**

- (17) Providers of internet infrastructure services related to the assignment of names and numbers, such as domain name registrars and registries and privacy and proxy service providers or regional internet registries for internet protocol ('IP') addresses, are of particular relevance when it comes to the identification of actors behind malicious or compromised web sites. They hold data that is of particular relevance for criminal investigations as it can allow for the identification of an individual or entity behind a web site used in criminal activity, or the victim of criminal activity in the case of a compromised web site that has been hijacked by criminals.

- (18) The legal representative should be able to comply with decisions and orders addressed to them by Member States' authorities on behalf of the service provider, which should take the appropriate measures to ensure this result, including sufficient resources and powers. The absence of such measures or their shortcomings should not serve as grounds to justify non-compliance with decisions or orders falling into the ambit of application of by this Directive, neither for the service provider nor its legal representative. **Neither should service providers be able to exculpate themselves due to missing or ineffective internal procedure, as they are responsible for providing the necessary resources and powers to guarantee compliance with orders and national decisions. Nor should the legal representative be able to exculpate himself by claiming for example he is not empowered to deliver data. The service provider and its legal representative(s) should remain free to allocate among themselves the tasks of identifying and accessing the requested evidence as long as decisions and orders addressed to them are complied with.**
- (19) Service providers should notify the Member State in which the legal representative resides or is established of the identity and contact details of their legal representative, as well as related changes and updates of information. The notification should also provide information about the languages in which the legal representative can be addressed, which should include ~~at least one~~ **or more** of the official languages **in accordance with the national law** of the Member State where the legal representative resides or is established, but may include other official languages of the Union, such as the language of its headquarters.

When the service provider designates more than one legal representative, it may also notify considerations to determine which one should be addressed. These considerations ~~are not binding for Member States' authorities, but~~ should be followed except ~~in duly justified~~ **where the competent authorities consider it is necessary to depart from those considerations on a case-by-cases basis e.g. when the legal representative is unavailable or uncooperative. Where the competent authorities, by way of exception, depart from these considerations they should only address a legal representative established in a Member State participating in the respective instrument. All this information, which is of particular relevance for Member States' authorities, should be made publicly available by the service provider, for example on its website, in a manner comparable to the requirements for making available general information pursuant to Article 5 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market<sup>10</sup> (e-Commerce Directive). For those service providers subject to the e-Commerce Directive, Article 3(3) complements but does not replace these requirements.** Furthermore, Member States should ~~also~~ **publish and keep up-to-date** the relevant information for their country on a dedicated ~~site~~ **internet page** of the ~~e-Justice Portal~~ **European Judicial Network in criminal matters** to facilitate coordination between Member States and use of the legal representative by authorities from another Member State. **The data may also be further disseminated to facilitate access to this data by competent authorities, such as via dedicated intranet sites or forums and platforms.**

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<sup>10</sup> ~~Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1).~~

(20) **The service provider should be subject to effective, proportionate and dissuasive sanctions for the infringement of its obligations to designate a legal representative, to entrust the legal representative with the necessary powers and resources to comply with decisions and orders, establish the appropriate procedures and to notify and make publicly available the information related thereto should be subject to effective, proportionate and dissuasive sanctions. The service provider and the legal representative should be subject to effective, proportionate and dissuasive sanctions for the systematic infringement by the legal representative of the obligation to cooperate with the competent authorities when receiving decisions and orders. Member States should ensure that both the designated legal representative and the service provider can be held jointly and severally liable for non-compliance with obligations deriving from the applicable legal framework when receiving decisions and orders. Jointly and severally liable means that either the legal representative or the service provider may be sanctioned for non-compliance by either of them with any of the obligations under this Directive. Joint and several liability should not apply for actions or omissions of either the service provider or the legal representative which constitute a criminal offence under the law of the Member State imposing the sanction.** Under no circumstances should the sanctions determine a ban, permanent or temporary, of service provision. Member States should coordinate their enforcement action where a service provider offers services in several Member States. **Central authorities should coordinate** to ensure a coherent and proportionate approach, ~~a coordination mechanism is provided~~. The Commission could facilitate such coordination if necessary, but needs to be informed of cases of infringement. This Directive does not govern the contractual arrangements for transfer or shifting of financial consequences between service providers and legal representatives of sanctions imposed upon them.

- (20a) **When determining in the individual case the appropriate and proportionate sanction, the competent authorities should also take into account the financial capacity of the service provider.**
- (21) This Directive is without prejudice to the investigative powers of authorities in civil or administrative proceedings, including where such proceedings can lead to sanctions.
- (22) In order to ensure the application of the Directive in a consistent manner, additional mechanisms for the coordination between Member States should be put in place. For that purpose, Member States should designate a central authority that can provide central authorities in other Member States with information and assistance in the application of the Directive, in particular where enforcement actions under the Directive are considered. This coordination mechanism should ensure that relevant Member States are informed of the intent of a Member State to undertake an enforcement action. In addition, Member States should ensure that central authorities can provide each other **any relevant information and** with assistance in those circumstances, and cooperate with each other where relevant. Cooperation amongst central authorities in the case of an enforcement action may entail the coordination of an enforcement action between competent authorities in different Member States. **It should aim to avoid positive or negative conflicts of competence.** For the coordination of an enforcement action, central authorities **should** ~~shall~~ also involve the Commission where relevant. The existence of the **obligation of these authorities to cooperate** ~~coordination mechanism~~ does not prejudice the right of an individual Member State to impose sanctions on service providers that fail to comply with their obligations under the Directive. The designation and publication of information about central authorities will facilitate the notification by service providers of the designation and contact details of its legal representative to the Member State where its legal representative resides or is established of the designation and contact details.



- (23) Since the objective of this Directive, namely to remove obstacles to the free provision of services in the framework of gathering evidence in criminal proceedings, cannot be sufficiently achieved by the Member States, but can rather, by reason of the borderless nature of such services, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (24) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>11</sup> and delivered an opinion on (...) <sup>12</sup>,
- (25) The Commission should carry out an evaluation of this Directive that should be based on the five criteria of efficiency, effectiveness, relevance, coherence and EU value added and should provide the basis for impact assessments of possible further measures. The evaluation should be completed 5 years after entry into application, to allow for the gathering of sufficient data on its practical implementation. Information should be collected regularly and in order to inform the evaluation of this Directive.

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<sup>11</sup> [Regulation \(EC\) No 45/2001](#) of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

<sup>12</sup> OJ C , , p. .

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

*Subject matter and scope*

1. This Directive lays down rules on the legal representation in the Union of certain service providers for receipt of, compliance with and enforcement of decisions and orders issued by competent authorities of the Member States for the purposes of gathering evidence in criminal proceedings.
2. Member States ~~may~~ **shall** not impose additional obligations to those deriving from this Directive on service providers covered by this Directive for the purposes set out in paragraph 1.
3. This Directive is without prejudice to the powers of national authorities in accordance with Union and national law to address **directly** service providers established on their territory for the purposes referred to ~~in~~ in paragraph 1.
4. This Directive shall apply to the service providers defined in Article 2(2) offering their services in the Union. It shall not apply where those service providers are established on the territory of a single Member State and offer services exclusively on the territory of that Member State.

*Article 2*  
*Definitions*

For the purpose of this Directive, the following definitions apply:

- (1) ‘legal representative’ means a legal or natural person, designated in writing by a service provider for the purpose of Articles 1(1), 3(1), 3(2) and 3(3);
- (2) ‘service provider’ means any natural or legal person that provides one or more of the following categories of services, **with the exception of financial services referred to in Article 2(2)(b) of Directive 2006/123/EC**:
  - (a) electronic communications service as defined in Article 2(4) of ~~{~~Directive (EU) 2018/1972 establishing the European Electronic Communications Code<sup>13</sup>~~}~~;
  - (b) **internet domain name and IP numbering services such as IP address providers, domain name registries, domain name registrars and related privacy and proxy services**;
  - (c) **other** information society services as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council<sup>14</sup> **that provide**:
    - **the ability to its users to communicate with each other; or**
    - **to process or store data on behalf of the users to whom the service is provided for which the storage of data is a defining component of the service provided to the user, including social networks, online marketplaces facilitating transactions between their users, and other hosting service providers;**

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<sup>13</sup> **Directive (EU) 2018/1972 of the European Parliament and Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36.)**

<sup>14</sup> [Directive \(EU\) 2015/1535](#) of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

~~(d) internet domain name and IP numbering services such as IP address providers, domain name registries, domain name registrars and related privacy and proxy services;~~

- (3) ‘offering services in a Member State’ means:
- (a) enabling legal or natural persons in a Member State to use the services referred to in point (2); and
  - (b) having a substantial connection **based on specific factual criteria** to the Member State referred to in point (a);
- (4) ‘establishment’ or ‘**being established**’ means ~~either~~ the actual pursuit of an economic activity for an indefinite period through a stable infrastructure from where the business of providing services is carried out or ~~a stable infrastructure from where~~ the business is managed;
- (5) ‘group’ means a group as defined in Article 3(15) of Directive (EU) 2015/849 of the European Parliament and of the Council<sup>15</sup>.

### *Article 3*

#### *Legal representative*

1. Member States where a service provider offering services in the Union is established shall ensure that it designates at least one legal representative in the Union for the receipt of, compliance with and enforcement of decisions and orders issued by competent authorities of Member States for the purpose of gathering evidence in criminal proceedings. The legal representative shall reside or be established in one of the Member States where the service provider is established or offers the services.

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<sup>15</sup> [Directive \(EU\) 2015/849](#) of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

2. Where a service provider is not established in the Union, Member States shall ensure that such service provider offering services on their territory designates at least one legal representative in the Union for the receipt of, compliance with and enforcement of decisions and orders issued by competent authorities of Member States for the purpose of gathering evidence in criminal proceedings. The legal representative shall reside or be established in one of the Member States where the service provider offers the services.
3. As regards the receipt of, compliance with and enforcement of decisions and orders issued by the competent authorities of Member States under Union legal instruments ~~adopted~~ **falling** within the scope of Title V, Chapter 4, of the Treaty on the Functioning of the European Union for gathering evidence in criminal proceedings, the Member States taking part in those legal instruments shall ensure that service providers offering services on their territory designate at least one representative in one of them. The legal representative shall reside or be established in one of the Member States where the service provider offers the services.
4. Service providers ~~shall be free to~~ **may** designate additional legal representatives, ~~resident or established in other Member States, including those~~ where the service providers **are established or** offer their services. Service providers ~~which are part of a group~~ shall be allowed to collectively designate one legal representative.
5. Member States shall ensure that the decisions and orders by ~~the their~~ competent authorities for evidence gathering in criminal proceedings are addressed to the legal representative designated by the service provider to that effect. That **legal** representative shall be entrusted with the receipt, **of and** compliance **with and enforcement** of those decisions and orders on behalf of the service provider concerned, **and can be subject to enforcement measures.**

6. Member States shall ensure that service providers established or offering services in their territory provide their legal representative with the necessary powers and resources to comply with ~~those~~ decisions and orders **received from any Member State**.
- 7.<sup>16</sup> ~~To this end, The~~ Member States ~~where shall ensure that~~ the legal representatives ~~are~~ residing or ~~are~~ established ~~on their territory~~ **shall verify that the said legal representatives have received from the service providers the necessary powers and resources to comply with decisions and orders received from any Member State and that they** cooperates with the competent authorities when receiving those decisions and orders, in accordance with the applicable legal framework.
8. Member States shall ensure that **both the** designated legal representative **and the service provider** can be held **jointly and severally** liable for non-compliance with obligations deriving from the applicable legal framework when receiving decisions and orders, ~~without prejudice to the liability and legal actions that could be initiated against the service provider~~ **with the effect that each of the legal representative and service provider may be sanctioned for non-compliance of either of them**. In particular, the lack of appropriate internal procedures between the service provider and the legal representatives cannot be used **by either side** as a justification for non-compliance with those obligations. **Joint and several liability shall not apply for actions or omissions of either the service provider or the legal representative which constitute a criminal offence in the Member State applying the sanction**.
9. Member States shall ensure that the obligation to designate a legal representative ~~applies~~ **is fulfilled by [6 months from the date of transposition set out in Article 7] for service providers that offer services in the Union at that date, or from the moment service providers start offering services in the Union for those service providers that will start offering services after the date of transposition of the Directive that date**.

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<sup>16</sup> Paragraphs 6 and 7 of this Article from the Commission Proposal have been switched.

*Article 4*  
*Notifications and languages*

1. Member States shall ensure that, upon designation of its legal representative in accordance with Article 3(1), (2), ~~and (3)~~ **and (4)**, each service provider established or offering services in their territory notifies in writing the central authority of the Member State where its legal representative resides or is established of the designation and contact details of its legal representative as well as any changes thereof.
2. The notification shall specify the official language(s) of the Union, as referred to in Regulation 1/58, in which the legal representative can be addressed. This shall include, ~~at least,~~ **one or more** of the official languages **in accordance with the national law** of the Member State where the legal representative resides or is established.
3. When a service provider designates several representatives, the notification shall specify the official language(s) of the Union or Member States covered by each of them ~~or~~ **and** any other considerations to determine the appropriate legal representative to be addressed. ~~In duly justified cases, Member States'~~ **Competent** authorities may depart from those considerations **on a case-by-case basis; where necessary Member States shall ensure that in such cases, the addressed legal representative has to comply with these orders and decisions.**
4. ~~{~~Member States shall ensure that ~~the service provider makes~~ the information notified to them in accordance with this Article **is publicly available**~~} Member States shall publish that information on a dedicated internet page of the e-Justice Portal of the European Judicial Network in criminal matters. Member States shall ensure that this information is regularly updated. This information may be further disseminated to facilitate access by competent authorities.~~

## Article 5

### Sanctions

1. Member States shall lay down rules on sanctions applicable to infringements of national provisions adopted pursuant to **Article 3 and 4** ~~this Directive~~ and shall take all measures necessary to ensure that they are implemented. The sanctions provided for shall be effective, proportionate and dissuasive.
2. Member States shall, by the date set out in Article 7, notify the Commission of those rules and of those measures and shall notify it, without delay, of any subsequent amendment affecting them. Member States shall also inform the Commission on an annual basis about non-compliant service providers and relevant enforcement action taken against them.

## Article 6

### ~~Coordination mechanism~~ **Central authorities**

1. **In accordance with their legal systems**, Member States shall designate **one or more a** central **authorities** ~~authority or, where its legal system so provides, more than one central authority~~, to ensure the application of this Directive in a consistent and proportionate manner.
2. Member States shall inform the Commission of their designated central authority, or central authorities, referred to in paragraph 1. The Commission shall forward a list of designated central authorities to the Member States. The Commission will also make publicly available a list of designated central authorities to facilitate the notifications by a service provider to the Member States where its legal representative resides or is established.
3. Member States shall ensure that **their** central authorities ~~shall provide each other with relevant~~ **coordinate and cooperate with each other and, where relevant, with the Commission, and provide any appropriate** information and ~~mutual~~ assistance **to each other in order to relevant to application of apply this** Directive in a consistent and proportionate manner. The **coordination, cooperation and** provisioning of information and ~~mutual~~ assistance shall cover, in particular, enforcement actions.



~~4. Member States shall ensure that the central authorities shall cooperate with each other and, where relevant, with the Commission to ensure the application of this Directive in a consistent and proportionate manner. Cooperation shall cover, in particular, enforcement actions.~~

#### *Article 7*

##### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ~~6~~ **18** months after entry into force. They shall immediately inform the Commission thereof.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
3. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

#### *Article 8*

##### *Evaluation*

By [*5 years from the date of application of this Directive*] at the latest, the Commission shall carry out an evaluation of the Directive and present a report to the European Parliament and to the Council on the application of this Directive, which shall include an assessment of the need to enlarge its scope. Where appropriate, the report shall be accompanied by a proposal for the amendment of this Directive. The evaluation shall be conducted according to the Commission's Better Regulation Guidelines. Member States shall provide the Commission with the information necessary for the preparation of that Report.

*Article 9*

*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 10*

*Addressees*

This Directive is addressed to the Member States ~~in accordance with the Treaties~~.

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*

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