



Current Developments in Digitalisation in Criminal Proceedings

Training for Defence Lawyers

Vilnius, 7-8 November 2024



EXCELLENCE IN
EUROPEAN LAW¹

Speakers

Ciprian Băban, Defence Lawyer, Bucharest

Amedeo Barletta, Defence Lawyer, Rome

Wendy De Bondt, Professor of Special Criminal Law, Ghent University

Raimundas Jurka, Professor, Mykolas Romeris University; Defence Lawyer, Vilnius

Lavinija Levar, Zagreb

Jiří Novák, Defence Lawyer, Prague

Marie Poirot, Attorney-at-Law, BONIFASSI Avocats, Paris

Key topics

- The impact of the new legal framework on digitalisation of EU judicial cooperation in criminal matters on defence lawyers
- The EU law on video-conferencing in criminal matters
- Getting e-evidence from abroad and its admissibility
- The impact of the EncroChat case
- The rights of targeted persons under the European Preservation and Production Orders
- Artificial Intelligence and its use in criminal proceedings: challenges, experiences, pros and cons

Language
English and Lithuanian (simultaneous interpretation)

Event number
324DT109

Organisers
ERA (Cornelia Riehle) in cooperation with the Lithuanian Ministry of Justice and the Lithuanian Bar Association



Current Developments in Digitalisation in Criminal Proceedings

Thursday, 7 November 2024

- 08:45 Arrival and registration of participants
- 09:00 **Welcome and introduction to the programme**
Representative of Lithuania & Cornelia Riehle (ERA)

PART I: Setting the scene

Chair: Cornelia Riehle

- 09:05 **The new legal framework on digitalisation of EU judicial cooperation in criminal matters: Impact for defence lawyers in practice**
- European e-Justice Strategy 2024-2028
 - Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters
 - Directive (EU) 2023/2843 as regards digitalisation of judicial cooperation
 - European electronic access point
 - e-Codex, eEDES and other projects to digitalise cross-border criminal proceedings
- Jiří Novák*
- 10:00 Discussion
- 10:15 Coffee break
- 10:45 **Virtual courts? The EU law on videoconferencing in criminal matters**
- CJEU case law and the right to be present (Directive 2016/343)
 - Beyond gathering evidence: EAW and EIO
 - Requirements under Regulation (EU) 2023/2844 to use videoconferencing or other distance communication technology
- Wendy De Bondt*
- 11:30 **The new rules on videoconferencing in criminal matters in practice: the perspective of the defence**
Amedeo Barletta
- 12:15 Discussion
- 12:30 Lunch

PART II: The use of e-evidence

Chair: Amedeo Barletta

- 13:30 **Beyond mutual recognition: getting e-evidence from abroad**
- Directive 2023/1544
 - The admissibility of evidence: the EIO and e-evidence: case examples
- Wendy De Bondt*
- 14:15 Discussion
- 14:30 Coffee break
- 15:00 **The EncroChat case and its impact for criminal defence in Europe**
- Judgement C-670/22 of 30 April 2024
 - ECHR, 17 octobre 2024, A.L. AND E.J. v. France (dec.) no. 44715/20 and 47930/21 of 18 October 2024
- Marie Poirot*

Objective

Training of defence lawyers with special regard to European criminal law has gained more and more importance over the years. This seminar will look at current and forthcoming issues regarding the gathering of evidence, e-evidence and digitalisation for the judicial cooperation in criminal matters in the EU. Participants will have the possibility to get to know each other and make contact with colleagues from all over the EU to further their professional networks.

About the Project

This seminar is part of a large-scale project co-financed by the European Commission entitled "European Criminal Law for Defence Lawyers". Fifteen interactive, practice-oriented activities will be implemented within this project ranging from face-to-face seminars and conferences to webinars and eLearning tools. For more information, see: <https://training-for-defence.era.int/>

Who should attend?

Defence lawyers, who are citizens of eligible EU Member States participating in the EU Justice Programme (Denmark does not participate), Albania, Bosnia and Herzegovina, Kosovo* and Ukraine.

* This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ opinion on the Kosovo declaration of independence.

Venue

Ministry of Justice
Conference Hall
Gedimino pr. 30
01104 Vilnius
Lithuania

CPD

ERA's programmes meet the standard requirements for recognition as Continuing Professional Development (CPD). Participation in the full programme of this event corresponds to **10 CPD hours**. A certificate of participation for CPD purposes with indication of the number of training hours completed will be issued on request. CPD certificates must be requested at the latest 14 days after the event.

- 15:30 **Challenging foreign e-evidence: Discussion with participants based on their experience**
Marie Poirot and Jiří Novák
- 16:00 **Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons**
Raimundas Jurka
- 16:30 Discussion
- 17:00 End of first day
- 19:00 Dinner offered by the organisers

Friday, 8 November 2024

PART III: Artificial Intelligence and its use

Chair: Jiří Novák

- 09:00 **Participants' experience with AI**
Wendy De Bondt
- 09:20 **Challenges a lawyer faces in court and AI solutions to overcome them**
- Court transcription and translation practices and AI solutions
 - Access to and studying court files
 - Lawyer-Judge/ Lawyer-Clerks Relationship
 - Virtual lawyers
 - Preparation of judicial decisions
- Ciprian Băban*
- 10:00 **Reflections on using AI in legal practice:**
Ciprian Băban, Wendy De Bondt, Marie Poirot, Jiří Novák
- 10:45 Coffee break
- 11:15 **Is Artificial Intelligence able to replace the human factor in criminal sentences? – Pros and Cons: discussion with the participants**
- Equal treatment
 - Right to fair trial
 - Privacy issues
- Ciprian Băban*
- 12:00 **Predictive criminal law and AI: how is it used by investigators and prosecutors – legal challenges**
- Right to privacy
 - Presumption of innocence
 - Fair trial
- Lavinija Levar*
- 12:30 Discussion
- 12:45 Closing
Cornelia Riehle
- 13:00 End of seminar

For programme updates: www.era.int
Programme may be subject to amendment.



Times indicated are
UTC +2 / Lithuanian local time

Your contacts



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Save the date

Data Protection & Cyber Security as Law Enforcement Core Business
The Hague, 16-17 September 2024

Understanding Bitcoins and Cryptocurrency Technologies
Online, 15-16 October 2024

Sanctions in the EU's External Relations
Trier & Online, 14-15 November 2024

Annual Conference on EU Criminal Justice 2024
Sofia & Online, 14-15 November 2024

Recent Case Law of the ECtHR in Criminal Law
Online, 2-3 December 2024

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www.era.int/?133162&en



Co-funded by the European Union.

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Application

Current developments in digitalisation in criminal proceedings

Vilnius, 7-8 November 2024 / Event number: 324DT109



Terms and conditions of participation

Selection

1. Participation is only open to lawyers in private practice from eligible EU Member States (Denmark does not participate in this EU Justice Programme), Albania, Bosnia and Herzegovina, Kosovo* and Ukraine.

The number of open places available is limited (10 places). Participation will be subject to a selection procedure. Selection will be according to professional eligibility, nationality and then "first come, first served".

Interested defence lawyers from Croatia should apply via the Croatian Bar Association.
Interested defence lawyers from Hungary should apply via the Budapest Bar Association.
Interested defence lawyers from Latvia should apply via the Latvian Council of Sworn Advocates.
Interested defence lawyers from Lithuania should apply via the Lithuanian Bar Association.
Interested defence lawyers from Portugal should apply via the Portugues Bar Association.
Interested defence lawyers from Spain should apply via ICAB.

2. Applications should be submitted before **6 October 2024**.
3. A response will be sent to every applicant after this deadline. **We advise you not to book any travel or hotel before you receive our confirmation.**

Registration Fee

4. €110 including documentation, coffee breaks, lunch and dinner.

Travel and Accommodation Expenses

5. Participants will receive a fixed contribution towards their travel and accommodation expenses and are asked to book their own travel and accommodation. **The condition for payment of this contribution is to sign all attendance sheets at the event.** The amount of the contribution will be determined by the EU unit cost calculation guidelines, which are based on the distance from the participant's place of work to the seminar location and will not take account of the participant's actual travel and accommodation costs.
6. Travel costs from outside Lithuania: participants can calculate the contribution to which they will be entitled on the European Commission website (<https://era-comm.eu/go/calculator>, table 2). The distance should be calculated from their place of work to the seminar location.
7. For those travelling within Lithuania, the contribution for travel is fixed at €20 (for a distance between 50km and 399 km). Please note that no contribution will be paid for travel under 50km one-way. For more information, please consult p.10 on <https://era-comm.eu/go/unit-cost-decision-travel>
8. Accommodation costs: International participants will receive a fixed contribution of €94 per night for up to two nights' accommodation. National participants travelling more than 50km one-way will receive a fixed contribution of €94 per night for one night accommodation. For more information, please consult p.14 on <https://era-comm.eu/go/unit-cost-decision-travel>.
9. These rules do not apply to representatives of EU Institutions and Agencies who are required to cover their own travel and accommodation.
10. Successful applicants will be sent the relevant claim form and information on how to obtain payment of the contribution to their expenses. Please note that no payment is possible if the registered participant cancels their participation for any reason.

Participation

11. Participation at the whole seminar is required and participants will be asked to sign attendance sheets daily.
12. A list of participants including each participant's address will be made available to all participants unless ERA receives written objection from the participant no later than one week prior to the beginning of the event.
13. The participant will be asked to give permission for their address and other relevant information to be stored in ERA's database to provide information about future ERA events, publications and/or other developments in the participant's area of interest.
14. A certificate of attendance will be sent electronically after the seminar.

Hotel recommendations

15. ERA neither provides nor endorses local accommodation recommendations. Kindly consult available online booking platforms.

*This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

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www.era.int/?133162&en

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Lithuania

Language

English and Lithuanian

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Co-funded by
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BACKGROUND DOCUMENTATION

***** All documents are hyperlinked *****

Work carried out by the European Union on AI and e-evidence

1	The European AI ACT Regulation (EU) 2024/1689 of the European Parliament and of the Council 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act)	
2	Council Decision (EU) 2023/436 of 14 February 2023 authorising Member States to ratify, in the interest of the European Union, the Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence (ST/6438/2022/INIT, OJ L 63, 28.2.2023)	
3	Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (PE/4/2023/REV/1, OJ L 191, 28.7.2023, p. 118–180)	
4	Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings (PE/3/2023/REV/1, OJ L 191, 28.7.2023, p. 181–190)	

Cybercrime

1	Internet Organised Crime Threat Assessment (IOCTA) 2023
2	European Parliament Legislative Train Schedule: Horizontal cybersecurity requirements for products with digital elements in “A Europe Fit for the Digital Age”, As of 20 September 2023
3	European Parliament Legislative Train Schedule: Review of the Directive on security of network and information systems in “A Europe Fit for the Digital Age”, As of 20 September 2023
5	European Parliament Briefing: EU cyber-resilience act, May 2023
6	Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity

	across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance), (OJ L 333, 27.12.2022)
7	Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 (Text with EEA relevance), (OJ L 333, 27.12.2022)
8	Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC (Text with EEA relevance), (OJ L 333, 27.12.2022)
9	Proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020, (COM/2022/454 final, 15 September 2022)
10	Regulation (EU) 2021/1232 of the European Parliament and of the Council of 14 July 2021 on a temporary derogation from certain provisions of Directive 2002/58/EC as regards the use of technologies by providers of number-independent interpersonal communications services for the processing of personal and other data for the purpose of combating online child sexual abuse (Text with EEA relevance), (OJ L 274, 30.7.2021)
11	European Judicial Cybercrime Network 9th Plenary Meeting - 2nd Outcome report 2020, 27 January 2021
12	Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (Official Journal L 218/8 of 14.08.2013)
13	Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA (OJ L 335; 17.12.2011)
14	Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (Strasbourg, 28.I.2003)
15	Convention on Cybercrime (Budapest, 23.XI.2001)

Other EU criminal justice documents

A) The institutional framework for criminal justice in the EU

A1) Main treaties and conventions

A1-01	Protocol (No 36) on Transitional Provisions
A1-02	Statewatch Analysis, "The Third Pillar acquis" after the Treaty of Lisbon enters into force, Professor Steve Peers, University of Essex, Second Version, 1 December 2009
A1-03	Consolidated version of the Treaty on the functioning of the European Union, art. 82-86 (OJ C 326/47; 26.10.2012)
A1-04	Consolidated Version of the Treaty on the European Union, art. 9-20 (OJ C326/13; 26.10.2012)
A1-05	Charter of fundamental rights of the European Union (OJ. C 364/1; 18.12.2000)
A1-06	Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)
A1-07	Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 239; 22.9.2000, P. 19)

A2) Court of Justice of the European Union

A2-01	Court of Justice of the European Union: Presentation of the Court
A2-02	European Parliament Fact Sheets on the European Union: Competences of the Court of Justice of the European Union, April 2023
A2-03	Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 111, 17 April 2019
A2-04	Consolidated Version of the Statute of the Court of Justice of the European Union (01 August 2016)
A2-05	Consolidated version of the Rules of Procedure of the Court of Justice (25 September 2012)

A3) European Convention on Human Rights (ECHR)

A3-01	Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14 together with additional protocols No. 4, 6, 7, 12 and 13, Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, Council of Europe
A3-02	Guide on the case-law of the European Convention on Human Rights: European Union law in the Court's case-law, Council of Europe, updated on 31 August 2022

B) Mutual legal assistance

B1) Legal framework

B1-01	Council Act of 16 October 2001 establishing in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2001/C 326/01), (OJ C 326/01; 21.11.2001,P. 1)
B1-02	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 197/1; 12.7.2000, P. 1)
B1-03	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 (OJ L 292, 21.10.2006, p. 2–19)
B1-04	Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 8.XI.2001)
B1-05	Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 17.III.1978)
B1-06	European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20.IV.1959)
B1-07	Third Additional Protocol to the European Convention on Extradition (Strasbourg, 10.XI.2010)
B1-08	Second Additional Protocol to the European Convention on Extradition (Strasbourg, 17.III.1978)

B1-09	Additional Protocol to the European Convention on Extradition (<i>Strasbourg, 15.X.1975</i>)
B1-10	European Convention on Extradition (<i>Strasbourg, 13.XII.1957</i>)

B2) Mutual recognition: the European Arrest Warrant

B2-01	Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, COM/2023/185 final, 5 April 2023
B2-02	European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)), (<i>OJ C 456, 10.11.2021</i>)
B2-03	Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (<i>OJ L 81/24; 27.3.2009</i>)
B2-04	Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (<i>OJ L 190/1; 18.7.2002, P. 1</i>)
B2-05	Case law by the Court of Justice of the European Union on the European Arrest Warrant – Overview, Eurojust, 15 March 2020

B3) Mutual recognition in practice: evidence and e-evidence

B3-01	Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, (<i>OJ L 191, 28.7.2023</i>)
B3-02	Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings, (<i>OJ L 191, 28.7.2023</i>)
B3-04	Joint Note of Eurojust and the European Judicial Network on the Practical Application of the European Investigation Order, June 2019
B3-05	EURCRIM, "The European Commission's Proposal on Cross Border Access to e-Evidence – Overview and Critical Remarks" by Stanislaw Tosza, Issue 4/2018, pp. 212-219
B3-06	Fair Trials, Policy Brief, „The impact on the procedural rights of defendants of cross-border access to electronic data through judicial cooperation in criminal matters”, October 2018
B3-07	ECBA Opinion on European Commission Proposals for: (1) A Regulation on European Production and Preservation Orders for electronic evidence & (2) a Directive for harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, Rapporteurs: Stefanie Schott (Germany), Julian Hayes (United Kingdom)
B3-08	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, COM(2018) 226 final, Strasbourg, 17 April 2018

B3-09	Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, Strasbourg, 17 April 2018
B3-10	Non-paper from the Commission services: Improving cross-border access to electronic evidence: Findings from the expert process and suggested way forward (8 June 2017)
B3-11	Non-paper: Progress Report following the Conclusions of the Council of the European Union on Improving Criminal Justice in Cyberspace (7 December 2016)
B3-12	ENISA 2014 - Electronic evidence - a basic guide for First Responders (Good practice material for CERT first responders)
B3-13	Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130/1; 1.5.2014)
B3-14	ACPO Good Practice Guide for Digital Evidence (March 2012)
B3-15	Council Framework Decision 2008/978/JHA 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 (OJ L, 350/72, 30.12.2008)
B3-16	Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196/45; 2.8.2003)
B3-17	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 (Directive on electronic commerce) (Official Journal L 178/1, 17.7.2000)

B4) Conflicts of jurisdiction – *Ne bis in idem*

B4-01	Case law by the Court of Justice of the European Union on the principle of ne bis in idem in criminal matters, Eurojust, April 2020 Case-law by the Court of Justice of the European Union on the Principle of ne bis in idem in Criminal Matters, Eurojust, December 2021
B4-02	Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ L 328/42; 15.12.2009, P.42)
B4-03	European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg, 15.V.1972)

C) Procedural guarantees in the EU

C-01	Report from the Commission to the European Parliament and the Council on the implementation of Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, COM/2023/44 final, 1 February 2023
C-02	Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, (OJ L 86, 24.3.2023)
C-03	FRA Report, Presumption of innocence and related rights – Professional perspectives, Luxembourg, 31 March 2021

C-04	FRA Report, Rights in practice: Access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings, Luxembourg, 27 September 2019
C-05	Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, COM/2019/560 final, 26 September 2019
C-06	Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, COM/2018/857 final, 18 December 2018
C-07	Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, COM/2018/858 final, 18 December 2018
C-08	Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297/1, 4.11.2016)
C-09	Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132 1; 21.5.2016)
C-10	Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (11.3.2016; OJ L 65/1)
C-11	Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294/1; 6.11.2013)
C-12	Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (1.6.2012; OJ L 142/1)
C-13	Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280/1; 26.10.2010)



ACADEMY OF
EUROPEAN LAW

JIŘÍ NOVÁK

VILNIUS - NOVEMBER
7, 2024



The new legal framework on digitalisation of EU judicial cooperation in criminal matters: Impact for defence lawyers in practice

Agenda

- ▶ European e-Justice Strategy 2024-2028
- ▶ Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters (Directive (EU) 2023/2843)
- ▶ European electronic access point
- ▶ e-Codex, eEDES



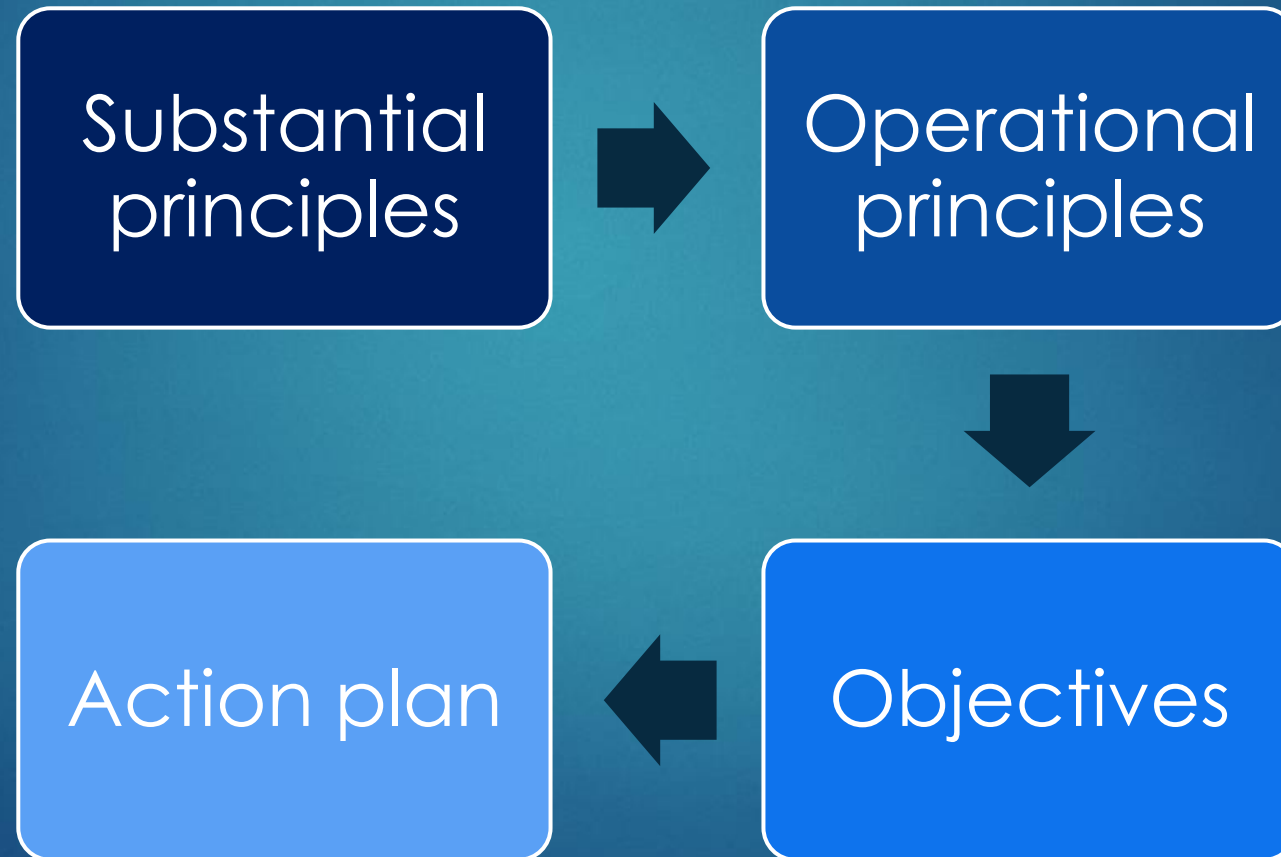
European e-Justice Strategy 2024-2028

European e-Justice Strategy 2024-2028

e-Justice Strategy and Action Plan for 2019-2023

- ▶ e-CODEX system (Regulation (EU) 2022/850)
- ▶ Service of Documents (Regulation (EU) 2020/1784)
- ▶ Taking of Evidence (Regulation (EU) 2020/1783)
- ▶ e-Evidence (Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings)
- ▶ “Artificial Intelligence Act (Regulation (EU) 2024/1689)“

European e-Justice Strategy 2024-2028



European e-Justice Strategy 2024-2028

Substantial principles



Respect for
fundamental
rights and
principles



Access to
justice



People
centricity



Bridging the
digital divide



Digital
empowerment
of users



Sustainability

European e-Justice Strategy 2024-2028

Operational principles



Once-only
principle



Digital by
default



Interoperability
and
cybersecurity



Dynamic
justice



Data-driven
justice



Open source

European e-Justice Strategy 2024-2028



European e-Justice Strategy 2024-2028

Strategic objectives

Improve access to digital justice

- ▶ Promote universal access to digital justice
- ▶ Promote value-added digital justice services
- ▶ Improve and promote the e-Justice Portal and EUR-Lex
- ▶ Bridge the digital divide for access to digital justice
- ▶ Empower persons, businesses and justice professionals

European e-Justice Strategy 2024-2028

Strategic objectives

Enhance digital judicial cooperation

- ▶ Improve cross-border interoperability
- ▶ Real-time communication services

European e-Justice Strategy 2024-2028

Strategic objectives

Make digital justice more efficient

- ▶ Promote data-oriented justice
- ▶ Technologies for the efficiency of digital justice
- ▶ Promote the digitalisation of some face-to-face activities in justice

European e-Justice Strategy 2024-2028

Strategic objectives

Promote innovative digital justice

- ▶ Leverage of innovative technologies
- ▶ Promote the exchange of innovative experiences

European e-Justice Strategy 2024-2028



e-CODEX



e-Justice
Portal

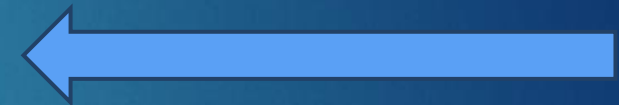


Electronic
access points



Real Time
Applications

Action plan



Data



AI



Other
working
areas



Digitalisation of judicial cooperation and access to justice

Digitalisation of judicial cooperation and access to justice

- ▶ Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters
- ▶ (Directive (EU) 2023/2843 as regards digitalisation of judicial cooperation)

Digitalisation of judicial cooperation and access to justice

Regulation will apply to:

- ▷ Communication in judicial cooperation procedures
- ▷ Communication between private entities and authorities in civil and commercial matters
- ▷ Hearings through videoconferencing
- ▷ the application of electronic signatures and electronic seals
- ▷ the legal effects of electronic documents
- ▷ electronic payment of fees

Digitalisation of judicial cooperation and access to justice

Communication in judicial cooperation in criminal matters:

- ▷ European arrest warrant (CFD 2002/584/JHA)
- ▷ execution of orders freezing property or evidence (CFD 2003/577/JHA)
- ▷ mutual recognition to financial penalties (CFD 2005/214/JHA)
- ▷ mutual recognition to confiscation orders (CFD 2006/783/JHA)
- ▷ mutual recognition to judgments in criminal matters (CFD 2008/909/JHA)
- ▷ mutual recognition to judgments and probation decisions (CFD 2008/947/JHA)
- ▷ mutual recognition to decisions on supervision measures as an alternative to provisional detention (CFD 2009/829/JHA)
- ▷ prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (CFD 2009/948/JHA)
- ▷ European protection order (Directive 2011/99/EU)
- ▷ European Investigation Order in criminal matters (Directive 2014/41/EU)
- ▷ mutual recognition of freezing orders and confiscation orders (Regulation (EU) 2018/1805)

Digitalisation of judicial cooperation and access to justice

Communication in judicial cooperation in civil matters:

- ▷ minimum common rules on legal aid (Council Directive 2003/8/EC)
- ▷ European Enforcement Order for uncontested claims (Regulation (EC) No 805/2004)
- ▷ European order for payment procedure (Regulation (EC) No 1896/2006)
- ▷ European Small Claims Procedure (Regulation (EC) No 861/2007)
- ▷ Maintenance obligations (Council Regulation (EC) No 4/2009)
- ▷ Succession (Regulation (EU) No 650/2012)
- ▷ enforcement of judgments (Regulation (EU) No 1215/2012)
- ▷ mutual recognition of protection measures (Regulation (EU) No 606/2013)
- ▷ European Account Preservation Order (Regulation (EU) No 655/2014)
- ▷ insolvency proceedings (Regulation (EU) 2015/848)
- ▷ matrimonial property regimes (Council Regulation (EU) 2016/1103)
- ▷ property consequences of registered partnerships (Council Regulation (EU) 2016/1104)
- ▷ Matrimonial, parental responsibility, and international child abduction (Council Regulation (EU) 2019/1111)

Digitalisation of judicial cooperation and access to justice

Communication in
judicial cooperation
procedures

Digitalisation of judicial cooperation and access to justice

Communication in judicial cooperation procedures

- ▶ Criminal, Civil and Commercial procedures
- ▶ Communication carried between competent authorities of
 - ▶ different Member States and/or a Union body or agency
- ▶ Via a secure, efficient and reliable decentralised IT system
- ▶ Alternative means if:
 - ▶ the disruption of the decentralised IT system;
 - ▶ the physical or technical nature of the transmitted material; or
 - ▶ force majeure.
- ▶ Voluntarily in Interstate or interagency communication

Digitalisation of judicial cooperation and access to justice

Communication
between private
entities and
authorities in civil
and commercial
matters

Digitalisation of judicial cooperation and access to justice

Communication between private entities and authorities in civil and commercial matters

European electronic access point

Digitalisation of judicial cooperation and access to justice

European electronic access point

- ▷ a portal
- ▷ accessible to natural and legal persons
- ▷ or their representatives
- ▷ throughout the EU and
- ▷ connected to an interoperable access point in the decentralised IT system

Digitalisation of judicial cooperation and access to justice

European electronic access point

- ▶ Contains information on right to legal aid (including in cross-border proceedings)
- ▶ Allows to file claims, launch requests and receive procedurally relevant information and communicate with the competent authorities, or to be served with judicial or extrajudicial documents (after giving consent)
- ▶ Enables representatives to act on behalf of natural and legal persons

Digitalisation of judicial cooperation and access to justice

Hearings through
videoconferencing

Digitalisation of judicial cooperation and access to justice

Hearings through videoconferencing

Article 5

- ▶ Civil and commercial matters
- ▶ Competent authority decides:
 - ▷ Availability
 - ▷ Opinion of the parties
 - ▷ Appropriateness

Article 6

- ▶ Criminal matters
- ▶ Consent of the person affected exception:
 - ▷ serious threat to public security or public health
- ▶ Lawyer-client confidentiality ensured

Digitalisation of judicial cooperation and access to justice



legal effects of
electronic documents



electronic signatures
and electronic seals



electronic payment
of fees

Digitalisation of judicial cooperation and access to justice

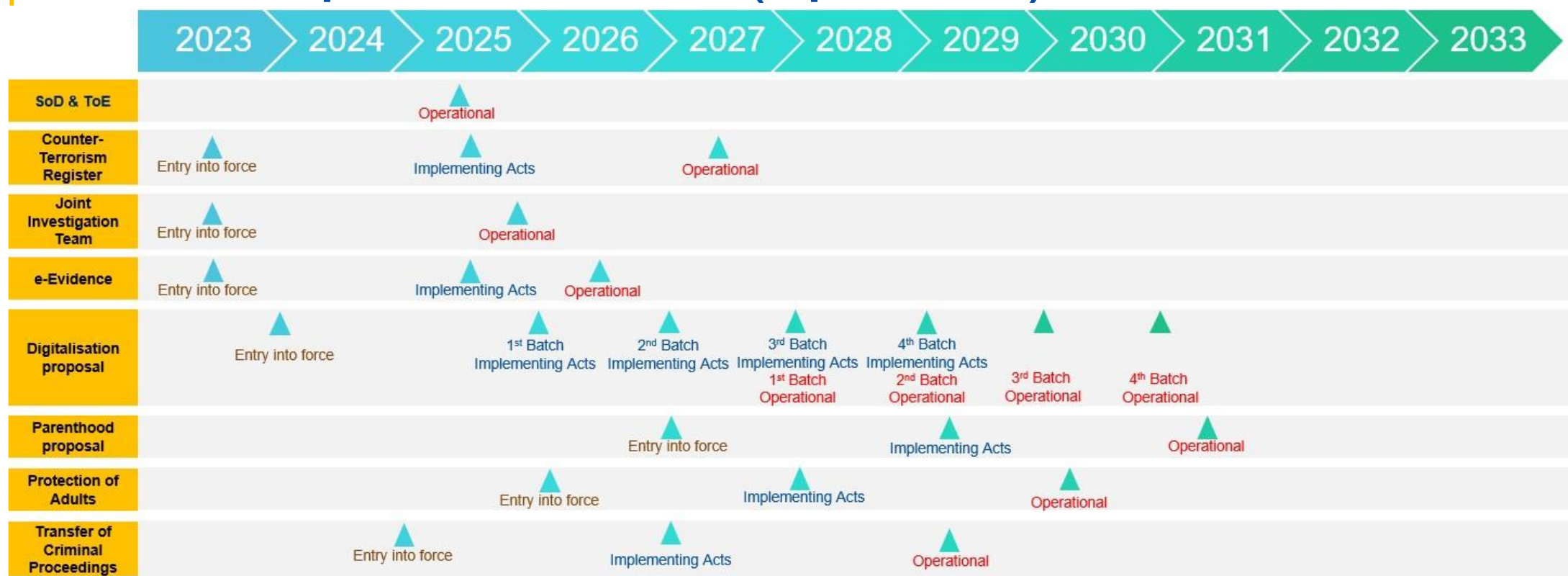
- ▶ Regulation applicable from May 1, 2025
- ▶ Communication in judicial cooperation procedures and European electronic access point applicable in 4 batches between 2028 and 2031 (two years after implementing acts for each procedure adopted)

Digitalisation projects

- ▶ e-Codex (Regulation (EU) 2022/850)
 - ▷ “e-Justice Communication via Online Data Exchange system“
 - ▷ a decentralised and interoperable system for cross-border communication for electronic exchange of data, including content data,
 - ▷ in a swift, secure and reliable manner
 - ▷ in the area of judicial cooperation in civil and criminal matters
- ▶ eEDES
 - ▷ The e-Evidence Digital Exchange System

Digitalisation projects

Roadmap for eEDES (updates)



Why e-Justice
matters to
lawyers?





This is the End.

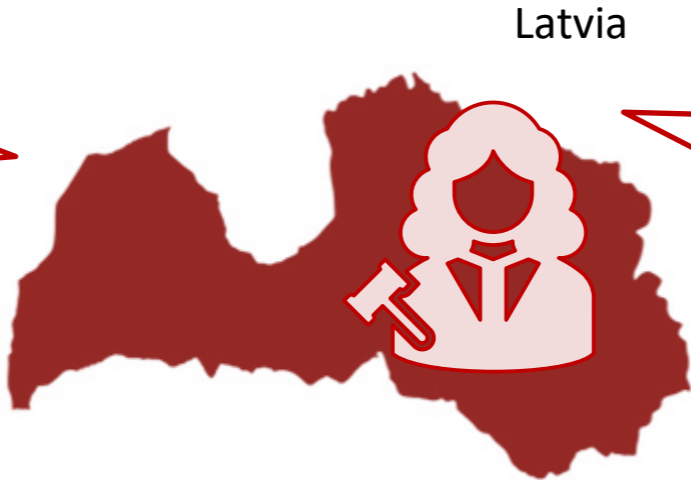
Questions?



Virtual courts? The EU law on videoconferencing in criminal matters

Prof. dr. Wendy De Bondt

Our EIO and MLA request have been refused by Germany

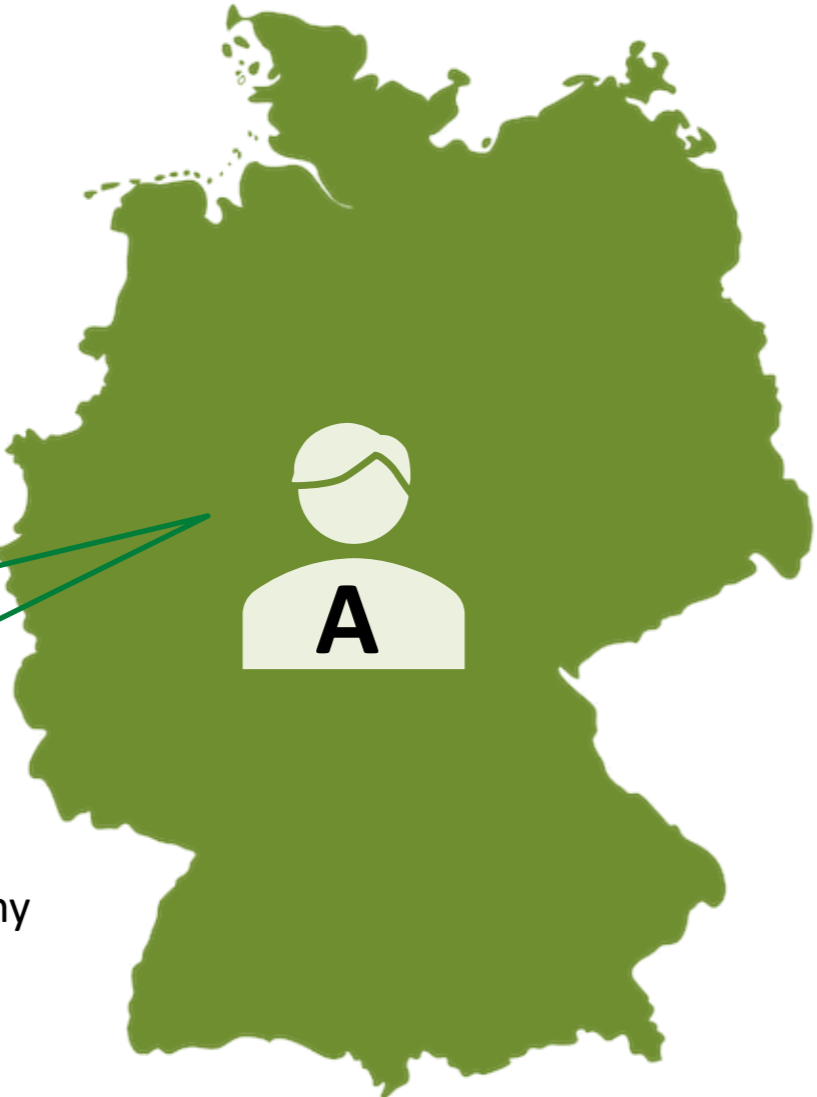


Latvia

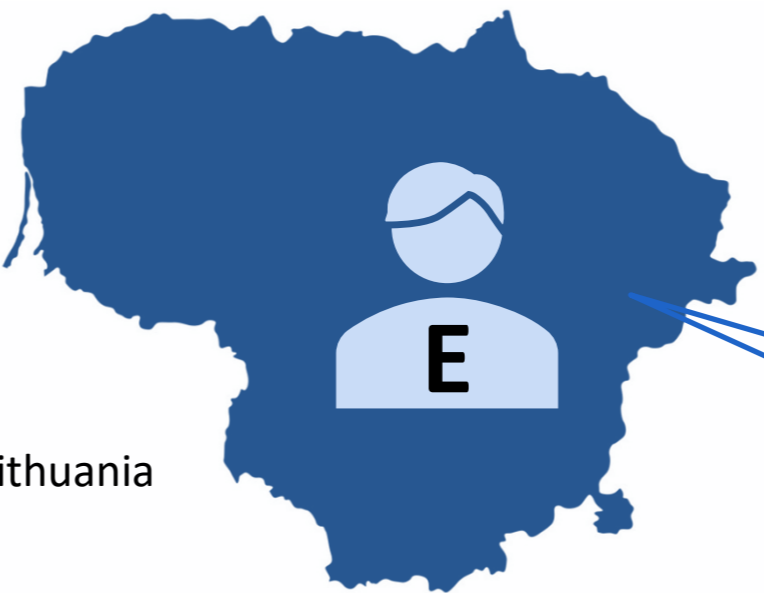
Remote participation would have been possible if you were in Latvia

Issuing an EIO would be disproportionate because your presence is not legally required

I would like to participate remotely



Germany



Lithuania

I would like to participate remotely

Must Article 24(1) of *Directive [2014/41] be interpreted* as meaning that the hearing of an accused person by *videoconference includes the situation where the accused person participates in the trial* in a criminal case in a different Member State by videoconference from that person's Member State of residence?

Must Article 8(1) of *Directive [2016/343]* be interpreted as meaning that *the right of accused persons to attend* the oral procedure *may also be ensured* by an accused person participating in the trial in a criminal case taking place in a different Member State *by videoconference* from that person's Member State of residence?

Does *participation* by an accused person in the trial in a case that takes place in a different Member State *by videoconference* from the Member State of residence *equate* to that person's *physical* presence at the hearing before the court in the Member State which is hearing the case?

Do Articles 1(1), 6(1)(a) and 24(1), second subparagraph, of *Directive 2014/41 permit* legislation of a Member State according to which a person residing in a different Member State may, *without a European [I]nvestigation [O]rder being issued, participate by videoconference*, as an accused person, in judicial proceedings, where the accused person is not being heard in that phase of the proceedings, that is to say, *where no evidence is being gathered*, provided the person directing the proceedings in the Member State in which the case is being tried is able, by technical means, to verify the identity of the person in the other Member State and provided that person's rights of the defence and assistance by an interpreter are ensured?

Could *the consent of the person* who is to be heard constitute an *independent or supplementary criterion or prerequisite* for that person to participate by videoconference in the judicial proceedings in question, where no evidence is being gathered in that phase of the proceedings, if the person directing the proceedings in the Member State in which the case is being tried is able, by technical means, to verify the identity of the person who is in the other Member State and provided that person's rights of the defence and assistance by an interpreter are ensured?



Right to Fair Trial

Right to be present

Video conferencing

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

EU CHARTER FUNDAMENTAL RIGHTS

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Right to Fair Trial

Right to be present

Video conferencing

CHAPTER 3 RIGHT TO BE PRESENT AT THE TRIAL

Article 8

Right to be present at the trial

1. Member States shall ensure that suspects and accused persons have the *right to be present* at their trial.
2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: [...]

DIRECTIVE (EU) 2016/343

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Right to Fair Trial

Right to be present

Video conferencing

“Participation by *videoconference* may *generally be accepted* as sufficient in light of the right to be present or even the obligation to be present”

European Court of Human Rights
Saknovskiy vs Russia (2010)
Marcello Viola vs Italy (2006)
Goluber vs. Russia (2006)

Provided that a number of conditions are met

- Communication with the lawyer should always be possible
- Active participation by e.g. cross-examination of witnesses should be possible in the same way as during physical participation
- Technical support should be available
- ...



Right to Fair Trial

Right to be present

Video conferencing

“Participation by *videoconference* may *generally be accepted* as sufficient in light of the right to be present or even the obligation to be present”

European Court of Human Rights
Sakhnovskiy vs Russia (2010)
Marcello Viola vs Italy (2006)
Goluber vs. Russia (2006)

Provided that a number of conditions are met

There is no case law that accepts a reduction of the right to be present to the right to be only present via videoconferencing without the *consent of the person involved*, beyond the general rules on the possibility to deviate from the right to be physically present, such as in cases of a medical emergency such as we have seen during the covid crises.



Must Article 24(1) of *Directive [2014/41]* be interpreted as meaning that the hearing of an accused person by *videoconference includes the situation where the accused person participates in the trial* in a criminal case in a different Member State by videoconference from that person's Member State of residence?

Do Articles 1(1), 6(1)(a) and 24(1), second subparagraph, of *Directive 2014/41* permit legislation of a Member State according to which a person residing in a different Member State may, *without a European [I]nvestigation [O]rder being issued, participate by videoconference*, as an accused person, in judicial proceedings, where the accused person is not being heard in that phase of the proceedings, that is to say, *where no evidence is being gathered*, provided the person directing the proceedings in the Member State in which the case is being tried is able, by technical means, to verify the identity of the person in the other Member State and provided that person's rights of the defence and assistance by an interpreter are ensured?

Must Article 8(1) of *Directive [2016/343]* be interpreted as meaning that *the right of accused persons to attend* the oral procedure *may also be ensured* by an accused person participating in the trial in a criminal case taking place in a different Member State *by videoconference* from that person's Member State of residence? ✓

Could *the consent of the person* who is to be heard constitute an *independent or supplementary criterion or prerequisite* for that person to participate by videoconference in the judicial proceedings in question, where no evidence is being gathered in that phase of the proceedings, if the person directing the proceedings in the Member State in which the case is being tried is able, by technical means, to verify the identity of the person who is in the other Member State and provided that person's rights of the defence and assistance by an interpreter are ensured? ✓

Does *participation* by an accused person in the trial in a case that takes place in a different Member State *by videoconference* from the Member State of residence *equate* to that person's *physical* presence at the hearing before the court in the Member State which is hearing the case? ✓



Various instruments

Right to be heard v
right to be present

Hearing to gather
evidence

Hearing in mutual
recognition context

12.7.2000

EN

Official Journal of the European Communities

C 197/1

(Acts adopted pursuant to Title VI of the Treaty on European Union)

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

(2000/C 197/01)

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recognition context

1.5.2014

EN

Official Journal of the European Union

L 130/1

I

(Legislative acts)

DIRECTIVES

**DIRECTIVE 2014/41/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 3 April 2014
regarding the European Investigation Order in criminal matters**

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 Article 82 (1)(a) thereof,

Having regard to the initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden,

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

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Various instruments

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recognition context



Official Journal
of the European Union

EN
L series

2023/2844

27.12.2023

REGULATION (EU) 2023/2844 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 December 2023

on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation

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 Article 81(2), points (e) and (f), and Article 82(1), point (d), 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 ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

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evidence

Hearing in mutual
recognition context

12.7.2000 EN Official Journal of the European Communities

(Acts adopted pursuant to Title VI of the Treaty on European Union)

COUNCIL ACT

of 29 May 2000

establishing in accordance with Article 34 of the Treaty on European Union Mutual Assistance in Criminal Matters between the Member States of the E

(2000/C 197/01)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 31(a) and 34(2)(d) thereof,

Having regard to the initiative of the Member States,

Having regard to the opinion of the European Parliament⁽¹⁾,

Whereas:

(1) For the purposes of achieving the objectives of the Union the rules on mutual assistance in criminal matters between the Member States of the European Union should be improved and a Convention, as set out in the Annex hereto, should be established to that end.

(2) Some of the provisions of the Convention fall within the scope of Article 1 of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*⁽²⁾,

⁽¹⁾ Opinion delivered on 17 February 2000 (not yet published in the Official Journal).
⁽²⁾ OJ L 176, 10.7.1999, p. 31.

(3) This is the case with Art to the extent relevant to 16, and, to the extent re with Article 1.

(4) The procedures set out the Council of the Euro of Iceland and the Kingd letters' association with and development of th observed in respect of th

(5) When the adoption of th of Iceland and the King with Article 8(2)(a) of 1 those two States will b contents of Article 29 of Norway and will be inv inform the Council and t of their constitutional r ments under Article 24 €

HAS DECIDED that the Conve in the Annex and which 1 Representatives of the Gover the Union, is hereby establish

⁽³⁾ OJ L 176, 10.7.1999, p. 36.

1.5.2014 EN Official Journal of the European Union L 130/1

I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2014/41/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 3 April 2014

regarding the European Investigation Order in criminal matters

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 Article 82 (1)(a) thereof,

Having regard to the initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden,

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

Acting in accordance with the ordinary legislative procedure⁽¹⁾,

Whereas:

(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.

(2) Pursuant to Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), judicial cooperation in criminal matters in the Union is to be based on the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council of 15 and 16 October 1999, commonly referred to as a cornerstone of judicial cooperation in criminal matters within the Union.

(3) Council Framework Decision 2003/577/JHA⁽²⁾ addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the State issuing the order (the issuing State) in accordance with the rules applicable to mutual assistance in criminal matters. This results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of cooperation and is therefore seldom used in practice by the competent authorities.

(4) Council Framework Decision 2008/978/JHA⁽³⁾ concerning the European evidence warrant (EEW) was adopted to apply the principle of mutual recognition for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. However, the EEW is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial cooperation in criminal matters with respect to evidence. Because of its limited scope, competent authorities have been free to use the new regime or to use mutual legal assistance procedures which, in any case, remain applicable to evidence falling outside of the scope of the EEW.

⁽¹⁾ Position of the European Parliament of 27 February 2014 (not yet published in the Official Journal) and decision of the Council of 14 March 2014.

⁽²⁾ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45).

⁽³⁾ Council Framework Decision 2008/978/JHA 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 (OJ L 350, 30.12.2008, p. 72).

REGULATION (EU) 2023/2844 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2023

on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation

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 Article 81(2), points (e) and (f), and Article 82(1), point (d), 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⁽¹⁾,

Acting in accordance with the ordinary legislative procedure⁽²⁾,

Whereas:

(1) In its communication of 2 December 2020 entitled 'Digitalisation of justice in the European Union - A toolbox of opportunities', the Commission identified the need to modernise the legislative framework of the Union's cross-border procedures in civil, commercial and criminal law, in line with the 'digital by default' principle, while ensuring that all necessary safeguards are in place to avoid social exclusion, and ensuring mutual trust, interoperability and security.

(2) In order to achieve a fully functional area of freedom, security and justice, it is important that all Member States seek to reduce any existing disparities regarding digitalisation of systems and take advantage of opportunities offered by the relevant Union funding mechanisms.

(3) For the purposes of enhancing judicial cooperation and access to justice, legal acts of the Union providing for communication between competent authorities, including Union bodies and agencies, and between competent authorities and natural and legal persons in civil and commercial matters, should be complemented by establishing the conditions for conducting such communication through digital means.

(4) This Regulation seeks to improve the efficiency and effectiveness of judicial procedures and to facilitate access to justice by digitalising the existing communication channels, which should lead to cost and time savings, a reduction of the administrative burden, and improved resilience in force majeure circumstances for all authorities involved in cross-border judicial cooperation. The use of digital channels of communication between competent authorities should lead to reduced delays in the processing of cases, in the short term as well as in the long term. That should benefit individuals, legal entities and Member States' competent authorities, and strengthen confidence in justice systems. Digitalisation of communication channels would also be of benefit in the area of cross-border criminal proceedings and in the context of the Union's fight against crime. In that regard, the high level of security that digital channels of communication can provide constitutes a step forward, also with respect to safeguarding the rights of the persons concerned, such as the right to respect for private and family life and the right to the protection of personal data.

(5) The fundamental rights and freedoms of all persons concerned by the electronic exchange of data pursuant to this Regulation, in particular the right to effective access to justice, the right to a fair trial, the principle of non-discrimination, the right to respect for private and family life and the right to the protection of personal data, should be fully respected in accordance with Union law.

⁽¹⁾ OJ C 323, 26.8.2022, p. 77.

⁽²⁾ Position of the European Parliament of 23 November 2023 (not yet published in the Official Journal) and decision of the Council of 8 December 2023.

Various instruments

Right to be heard v
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Hearing to gather
evidence

Hearing in mutual
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C 197/8

EN

Official Journal of the European Communities

12.7.2000

Article 10

Hearing by videoconference

1. If a person is in one Member State's territory and has to be heard as a witness or authorities of another Member State, the latter may, where it is not desirable or possible for it to appear in its territory in person, request that the hearing take place by videoconference in accordance with paragraphs 2 to 8.

2. The requested Member State shall agree to the hearing by videoconference provided that the hearing is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means referred to in paragraph 1, it shall inform the requesting Member State of the reasons therefor.

3. Article 11 shall apply to the hearing by videoconference.

Article 24

Hearing by videoconference or other audiovisual transmission

1. Where a person is in the territory of the executing State and has to be heard as a witness or expert by the competent authorities of the issuing State, the issuing authority may issue an EIO in order to hear the witness or expert by videoconference or other audiovisual transmission in accordance with paragraphs 5 to 7.

2. The issuing authority may also issue an EIO for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission.

3. If the requested Member State is of the view that during the hearing the fundamental principles of the law of the requested Member State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;

(b) measures for the protection of the person to be heard shall be agreed, where necessary, by the competent authorities of the requesting and the requested Member States;

(c) the hearing shall be conducted directly by, or under the direction of, the judicial authorities of the requested Member State in accordance with its own laws;

(d) at the request of the requesting Member State or the person to be heard the requested Member State shall ensure that the person to be heard is assisted by an interpreter, if necessary;

(e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of the requested Member State.

OJ L, 27.12.2003

Article 6

Hearing through videoconferencing or other distance communication technology in criminal proceedings

1. This Article shall apply in proceedings under the following legal acts:

(a) Council Framework Decision 2002/584/JHA ⁽⁴²⁾, in particular Article 18(1)(a) thereof;

Directive 2003/57/JHA ⁽⁴³⁾, in particular Article 6(3) thereof;

Directive 2003/61/JHA ⁽⁴⁴⁾, in particular Article 17(4) thereof;

Directive 2003/70/JHA ⁽⁴⁵⁾, in particular Article 19(4) thereof;

Directive 2003/87/JHA ⁽⁴⁶⁾, in particular Article 6(4) thereof;

Directive 2003/109/JHA ⁽⁴⁷⁾, in particular Article 33(1) thereof.

2. Where a Member State requests (the 'requesting competent authority') the presence of a witness, a suspected or an affected person, as defined in Article 2, point 10, or a convicted or accused person, present in another Member State, the competent authority of that other Member State shall ensure that the person concerned has the opportunity to participate in the hearing through videoconferencing or other distance communication technology, provided that:

(a) the particular circumstances of the case justify the use of such technology; and

(b) the suspect, the accused or convicted person or the affected person has given consent for the use of videoconferencing or other distance communication technology for that hearing in accordance with the requirements referred to in the second, third and fourth subparagraphs of this paragraph.

Before giving consent for the use of videoconferencing or other distance communication technology, the competent authority of the Member State in which the person to be heard is located shall ensure that the person to be heard has the possibility of seeking the advice of a lawyer in accordance with Directive 2003/48/JHA ⁽⁴⁸⁾. Competent authorities shall provide the person that is to be heard with information about the procedure for the hearing through videoconferencing or other distance communication technology, as well as about their rights, including the right to interpretation and the right of access to a lawyer before the consent is given.

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publications

Various instruments

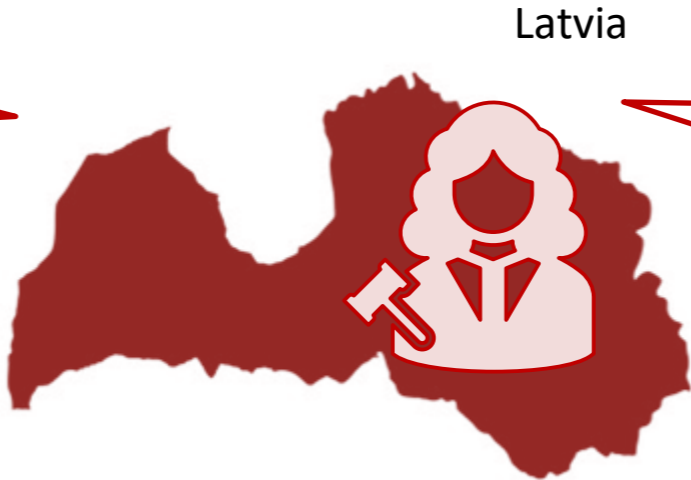
Right to be heard v
right to be present

Hearing to gather
evidence

Hearing in mutual
recognition context

- ***a legal basis*** to request a video conference to allow a person to be present at the trial can be found ***in the EU MLA convention***
- the instrument ***does not contain any additional rules*** that need to be followed or rights that would accrue upon the person involved
- the general rules on the applicable law would need to be followed, which means that – according to article 4 EUMLA – where mutual assistance is afforded, the requested member state shall comply with the ***formalities and procedures expressly indicated*** by the requesting member state, unless that would be contrary to the fundamental principles of the law in the requested member state.
- There are of course a ***lot of possibilities to refuse cooperation*** using the EU MLA convention as a basis
- The ***acceptability of refusing*** cooperation in light of the right to be present is questionable.

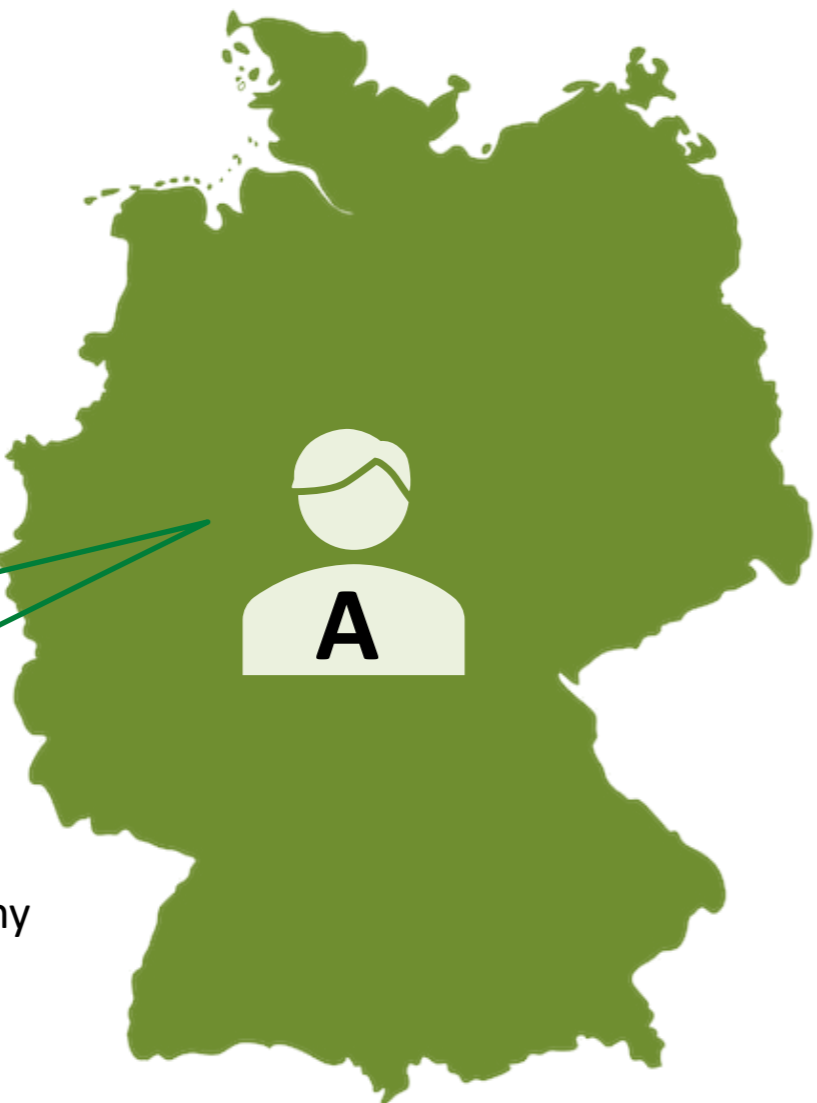
We will issue an MLA request to that end



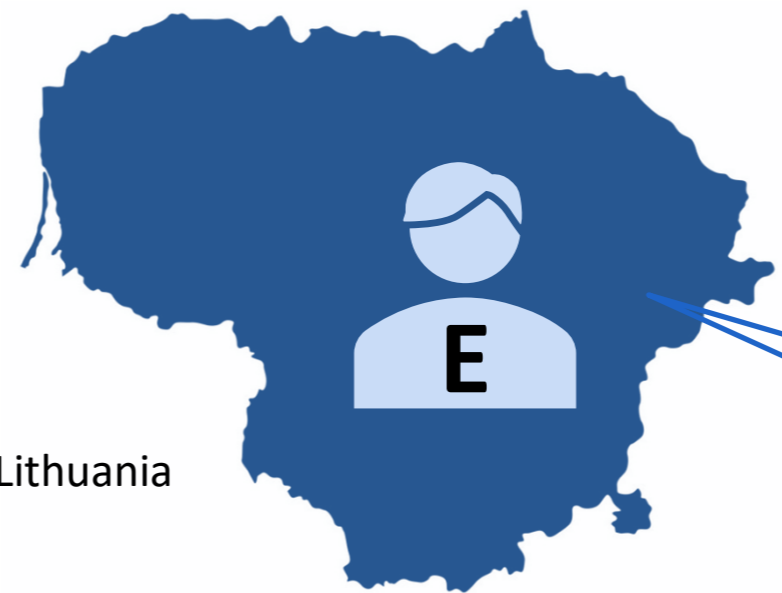
Latvia

We will issue an MLA request to that end.

I would like to participate remotely



Germany



Lithuania

I would like to participate remotely

Must Article 24(1) of *Directive [2014/41] be interpreted* as meaning that the hearing of an accused person by *videoconference includes the situation where the accused person participates in the trial* in a criminal case in a different Member State by videoconference from that person's Member State of residence?



Must Article 8(1) of Directive [2016/343] be interpreted as meaning that the right of accused persons to attend the oral procedure may also be ensured by an accused person participating in the trial in a criminal case taking place in a different Member State by videoconference from that person's Member State of residence?

Does participation by an accused person in the trial in a case that takes place in a different Member State by videoconference from the Member State of residence equate to that person's physical presence at the hearing before the court in the Member State which is hearing the case?

Do Articles 1(1), 6(1)(a) and 24(1), second subparagraph, of *Directive 2014/41 permit* legislation of a Member State according to which a person residing in a different Member State may, *without a European [I]nvestigation [O]rder being issued, participate by videoconference*, as an accused person, in judicial proceedings, where the accused person is not being heard in that phase of the proceedings, that is to say, *where no evidence is being gathered*, provided the person directing the proceedings in the Member State in which the case is being tried is able, by technical means, to verify the identity of the person in the other Member State and provided that person's rights of the defence and assistance by an interpreter are ensured?



Could the consent of the person who is to be heard constitute an independent or supplementary criterion or prerequisite for that person to participate by videoconference in the judicial proceedings in question, where no evidence is being gathered in that phase of the proceedings, if the person directing the proceedings in the Member State in which the case is being tried is able, by technical means, to verify the identity of the person who is in the other Member State and provided that person's rights of the defence and assistance by an interpreter are ensured?



Various instruments

Right to be heard v
right to be present

Hearing to gather
evidence

Hearing in mutual
recognition context

Video conferencing could be the better option

(26) With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an *effective and proportionate* means of pursuing criminal proceedings. The issuing authority *should consider*, in particular, whether issuing an EIO for the hearing of a suspected or accused person by *videoconference* could serve as an effective alternative.

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recognition context

There is no right to be physically present at a hearing

Article 24 Hearing by videoconference or other audiovisual transmission

2. In addition to the grounds for non-recognition or non-execution referred to in Article 11, execution of an EIO *may be refused* if either:

- (a) the suspected or accused person *does not consent*; or
- (b) the execution of such an investigative measure in a particular case would be contrary to the fundamental principles of the law of the executing State.

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Must Article 24(1) of *Directive [2014/41]* be interpreted as meaning that the hearing of an accused person by *videoconference includes the situation where the accused person participates in the trial* in a criminal case in a different Member State by videoconference from that person's Member State of residence?

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Various instruments

Right to be heard v
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Hearing to gather
evidence

Hearing in mutual
recognition context

There is no right to be present via video conference

Article 24 Hearing by videoconference or other audiovisual transmission

2. In addition to the grounds for non-recognition or non-execution referred to in Article 11, execution of an EIO *may be refused* if either:
- (a) the suspected or accused person does not consent; or
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DIRECTIVE 2014/41/EU

Various instruments

Right to be heard v
right to be present

Hearing to gather
evidence

Hearing in mutual
recognition context

Best of both worlds of procedural safeguards

Article 24 Hearing by videoconference or other audiovisual transmission

5. Where a hearing is held by videoconference or other audiovisual transmission, the following rules shall apply:
(e) suspected or accused persons shall be informed in advance of the hearing of *the procedural rights* which would accrue to them, including the right not to testify, *under the law of the executing State and the issuing State.*

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Hearing to gather
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Misconceptions regarding the scope

Article 6 Hearing through videoconferencing or other distance communication technology in criminal matters

1. This Article shall apply in proceedings under the following legal acts:

- (a) Council Framework Decision 2002/584/JHA (42), in particular Article 18(1)(a) thereof;
- (b) Framework Decision 2008/909/JHA, in particular Article 6(3) thereof;
- (c) Framework Decision 2008/947/JHA, in particular Article 17(4) thereof;
- (d) Framework Decision 2009/829/JHA, in particular Article 19(4) thereof;
- (e) Directive 2011/99/EU of the European Parliament and of the Council (43), in particular Article 6(4) thereof;
- (f) Regulation (EU) 2018/1805, in particular Article 33(1) thereof.

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Right to be heard v
right to be present

Hearing to gather
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Hearing in mutual
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Right to be physically present

Article 6 Hearing through videoconferencing or other distance communication technology in criminal matters

2. Where the competent authority of a Member State requests the hearing of a suspect or an accused or convicted person, or an affected person, [...] the competent authority of that other Member State shall allow such persons to participate in the hearing through videoconferencing or other distance communication technology, *provided that:*

- (a) the particular circumstances of the case justify the use of such technology; and
- (b) the suspect, the accused or convicted person or the affected *person has given consent* for the use of videoconferencing or other distance communication technology for that hearing in accordance with the requirements referred to in the second, third and fourth subparagraphs of this paragraph.

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Various instruments

Right to be heard v
right to be present

Hearing to gather
evidence

Hearing in mutual
recognition context

Limitations on the refusal grounds but not far enough

(33) A hearing conducted through videoconferencing or other distance communication technology ***should not be refused solely*** on account of the ***non-existence of national rules governing the use*** of distance communication technology. In such a case, the most appropriate rules applicable under national law, such as rules on the taking of evidence, should apply mutatis mutandis.

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- Video conferencing is *an accepted modality* of being present if the person involved consents
- *There is a legal basis* to request for video conferencing for various purposes
 - Mere presence: EU MLA Convention
 - Evidence gathering: European Investigation Order
 - MR-procedures: REG 2023/2844
- *Refusal grounds* in spite of consent of the person *involved are a questionable* limitation to the right to be present

Must Article 24(1) of *Directive [2014/41] be interpreted* as meaning that the hearing of an accused person by *videoconference includes the situation where the accused person participates in the trial* in a criminal case in a different Member State by videoconference from that person's Member State of residence?

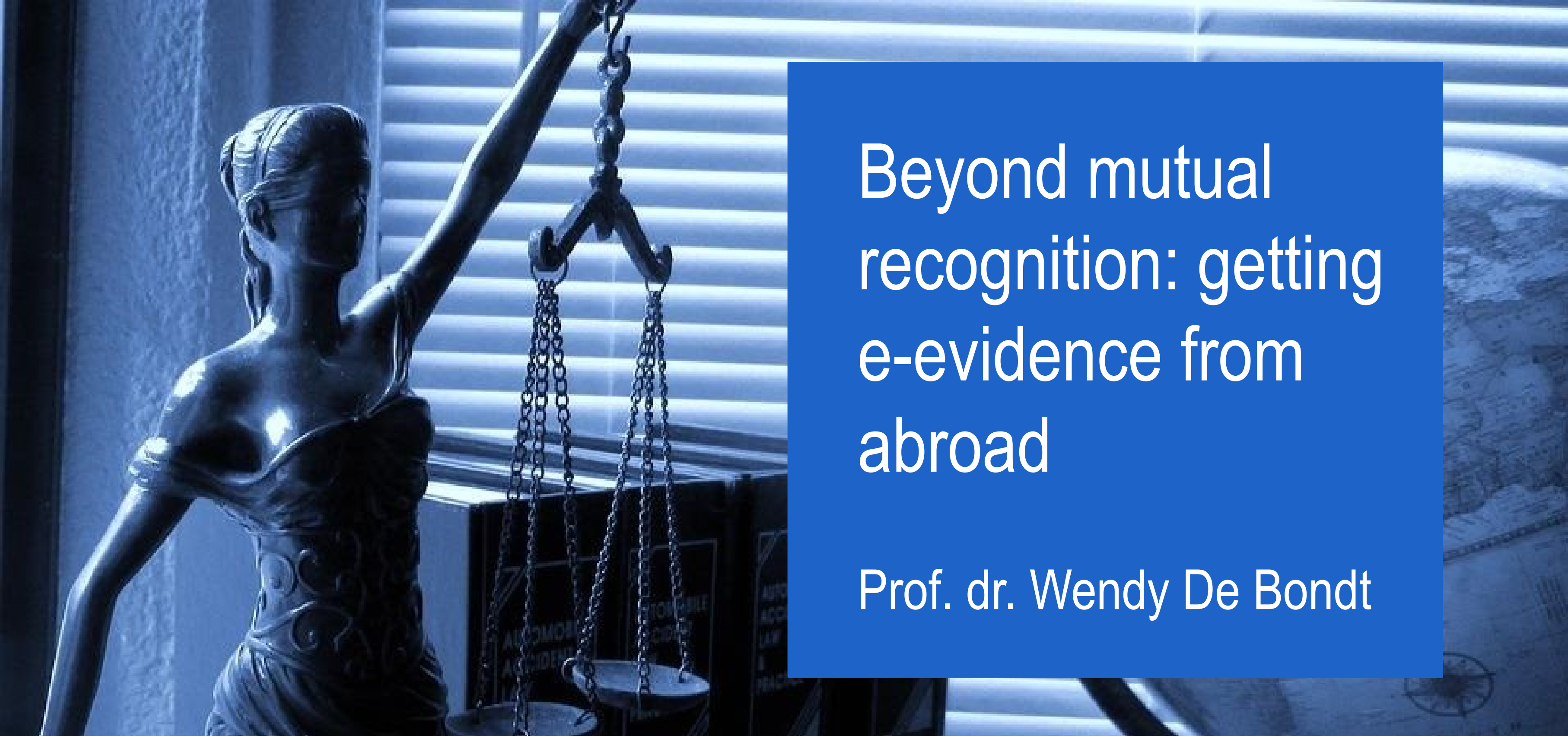
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Beyond mutual recognition: getting e-evidence from abroad

Prof. dr. Wendy De Bondt

Importance

Challenges

EIO-limitations

E-evidence is omnipresent

- digital evidence that is used to investigate or prosecute criminal offences; Among other things, it includes emails, text messages, audiovisual content, information about a user's online account
- 85% of investigations uses E-evidence
- 50% of investigations require cross-border cooperation

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EIO-limitations

Type of evidence

- Evidence needs to be authentic trustworthy and reliable
- Digital data are particularly susceptible to modification, from direct manipulation to actual erasure
- Contamination of electronic data is often irreversible

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Importance

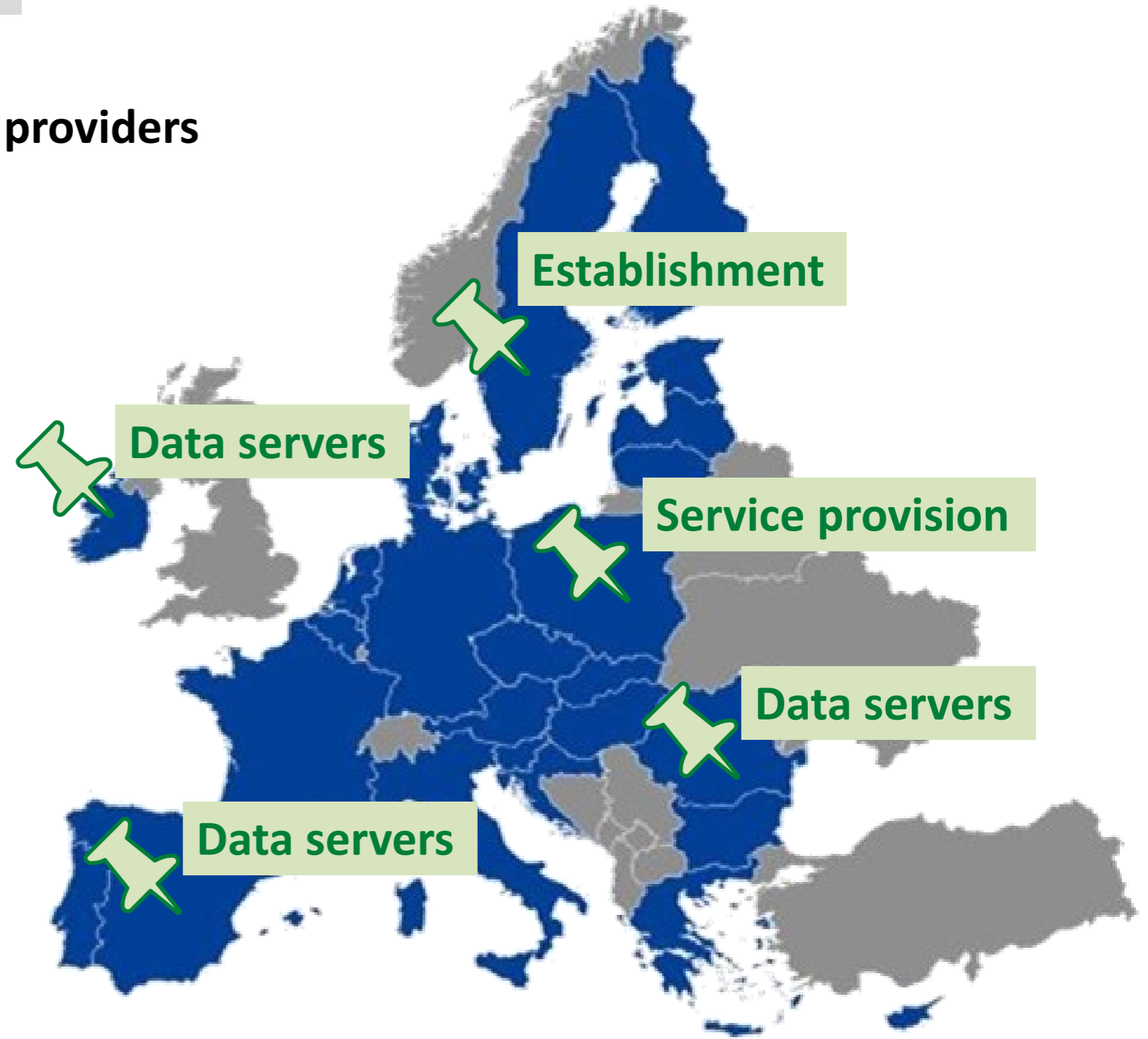
Challenges

EIO-limitations

The functioning of service providers



Competent authority in the issuing member state: who to address?



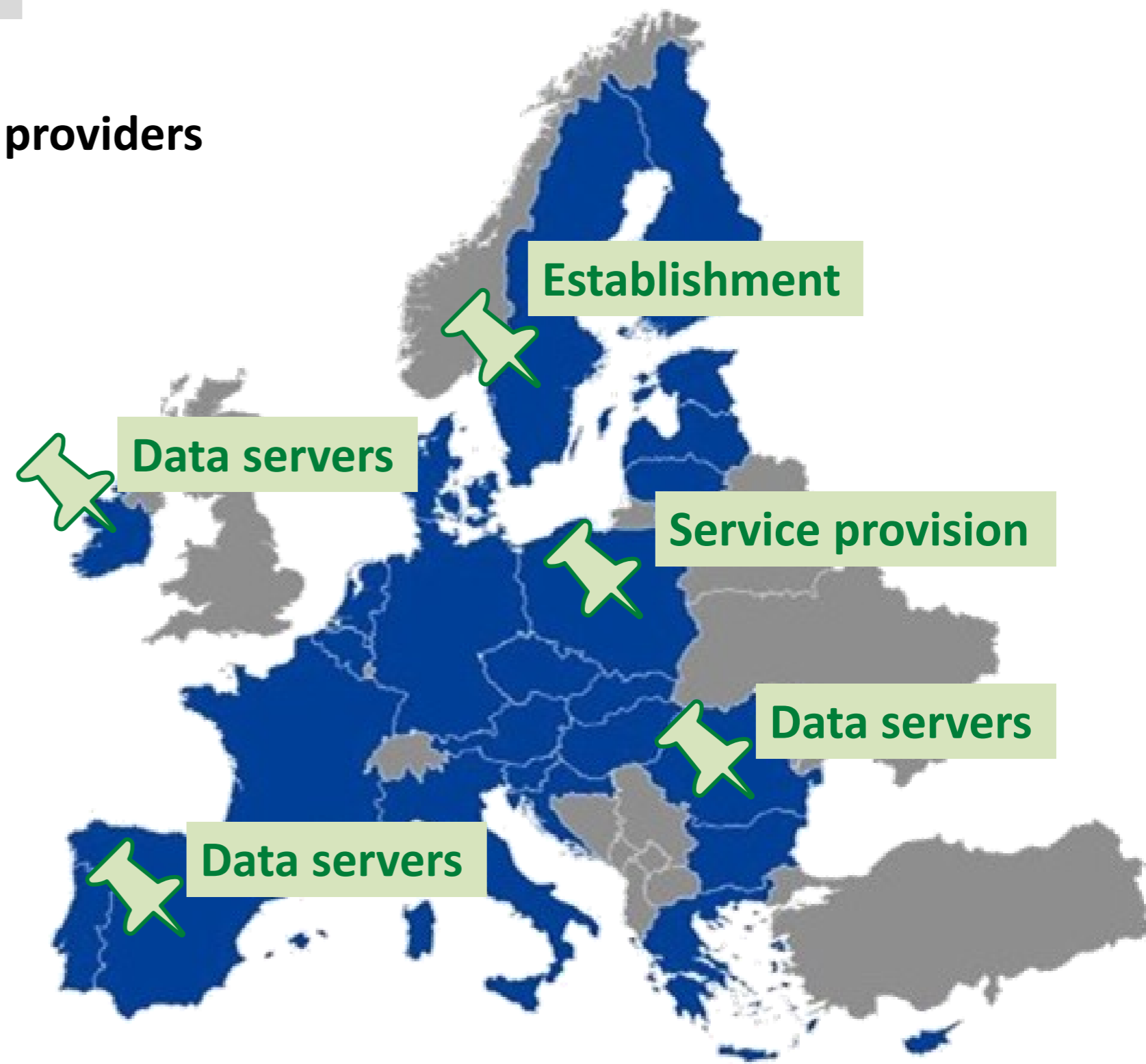
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The functioning of service providers

Cfr. United States vs Microsoft Corp Case, in which the US Supreme Cour examined the correctness of an undertaking by Microsoft to provide US law enforcement authorities with access to data that was physically stored in a data center in Ireland



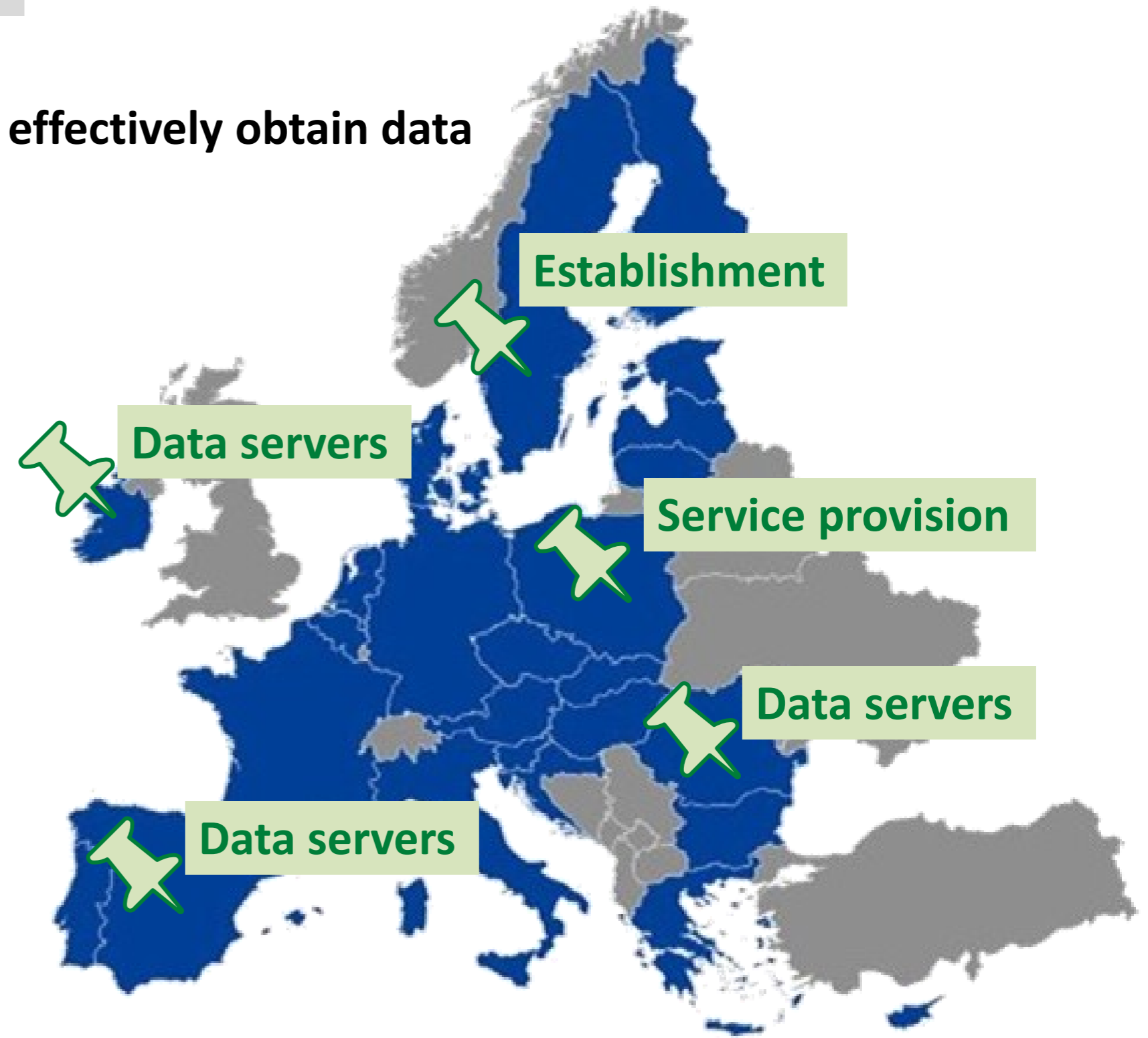
Importance

Challenges

EIO-limitations

Lacks flexibility needed to effectively obtain data

It seems far more logical to introduce a system that allows competent authorities in the issuing member state to directly contact a service provided



Directive

Regulation

Ensuring an addressee

A service provider is a natural or legal person that provides one or more of the following categories of services

- **Electronic communications** services
- **Internet domain name** and IP numbering services
- Other **information society services** that enable users to communicate or make it possible to sort or otherwise process data on behalf of the users to whom the service is provided

Service providers that provide services on the territory of a member state or the union itself:

- Enabling natural or legal persons **to make use** of the services listed
- Having a **substantial connection** based on factual criteria such as having an establishment in that member state, having a significant number of users or targeting activities towards that or one or more member states.

Directive

Regulation

Ensuring an addressee

Any service provider that meets those criteria is required to appoint at least one addressee for the *receipt of, compliance with and enforcement of* decisions and orders falling within the e-evidence framework.

Furthermore the service provider needs to ensure that this person has the necessary *powers and resources* to do so.

Directive

Regulation

Two tracks

European preservation order

A competent authority in one member state can request a service provider to preserve specific data in view of a subsequent request to produce this data via mutual legal assistance, a European investigation order or via a European production order.

➔ the evidence will be safeguarded and it will be ensured that it is not modified or destroyed while the data transfer request is being processed.

European production order

A competent authorities of one member state are able to obtain electronic evidence directly from a service provider in another member state,

➔ The evidence will need to be produced quickly (within 10 days, or even within 8 hours in case of an emergency.)

Directive

Regulation

Data types

Subscriber data is defined as any data held by a service provider relating to the subscription to its services, pertaining to:

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

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Data types

Traffic data is defined as **data related to the provision of a service** offered by a service provider **which serve to provide context or additional information about such service** and **are generated or processed by an information system of the service provider**, such as the source and destination of a message or another type of interaction, the location of the device, date, time, duration, size, route, format, the protocol used and the type of compression, and other electronic communications metadata and data, other than subscriber data, relating to the commencement and termination of a user access session to a service, such as the date and time of use, the log-in to and log-off from the service

Content data is defined as any data in a digital format, such as **text, voice, videos, images** and sound, other than subscriber data or traffic data

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Regulation

Competent authorities involved

The regulation differentiates between the competence to issue a preservation order and the competence to issue a production order as well as the type of data the order relates to.

A preservation order can be issued by

For any data: a judge, a court, an investigating judge or a public prosecutor (or another competent authority that was validated by the former actors)

A production order can be issued by

For subscriber data: a judge, a court, an investigating judge or a public prosecutor (or another competent authority that was validated by the former actors)
For traffic data: judge, a court or an investigating judge competent (or another competent authority that was validated by the former actors)
For content data: no rules are provided; any competent authority without the need for validation?

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Conditions that need to be met

The regulation differentiates between the conditions to issue a preservation order and the competence to issue a production order.

A preservation order can be issued is

- Necessity and proportionality are verified by the issuing authority
- A similar order could have been issued under the same conditions in a similar domestic case
- Any offence and for the execution of a custodial sentence or a detention order of at least four months

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Regulation

Conditions that need to be met

The regulation differentiates between the conditions to issue a preservation order and the competence to issue a production order.

A production order can be issued if

- Necessity and proportionality are verified by the issuing authority
- A similar order could have been issued under the same conditions in a similar domestic case
- The offence is severe enough

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- The offence is severe enough
 - Subscriber data: any offence in the investigative stage or any sentence of at least four months in the sentence execution stage
 - Traffic data:
 - offences punishable in the issuing State by a custodial sentence of a maximum of at least three years
 - harmonised forms of (if committed via information system)
 - fraud and counterfeiting of non-cash means of payment.
 - sexual abuse and sexual exploitation of children and child pornography
 - attacks against information systems
 - harmonised forms of terrorism, regardless how they were committed
 - for the execution of a custodial sentence or a detention order of at least four months
 - Content data: no rules provided

Directive

Regulation

Involvement of authorities in the executing state

There is a notification duty when the orders relate to *traffic or content data*

(unless the case is to be situated in the issuing member state in that the offence was committed in the member state and the person whose data the order relates to resides in the issuing member state.)

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Procedural safeguards and refusal grounds

The only 'refusal ground' that is to be *tested by the addressed service provider* in relation to the orders, is the compatibility of the order with the rights on *immunities and privileges* or with limitations to *criminal liability*

Where the addressee considers, based solely on the information contained in the EPOC, that the execution of the EPOC could ***interfere with immunities or privileges, or with rules on the determination or limitation of criminal liability*** that relate to freedom of the press or freedom of expression in other media, under the law of the enforcing State, the addressee shall inform the issuing authority and the enforcing authority using the form set out in Annex III..

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Procedural safeguards and refusal grounds

In addition thereto – *to the extent that an executing authority was involved through notification* – the executing authority can raise any of the following refusal grounds

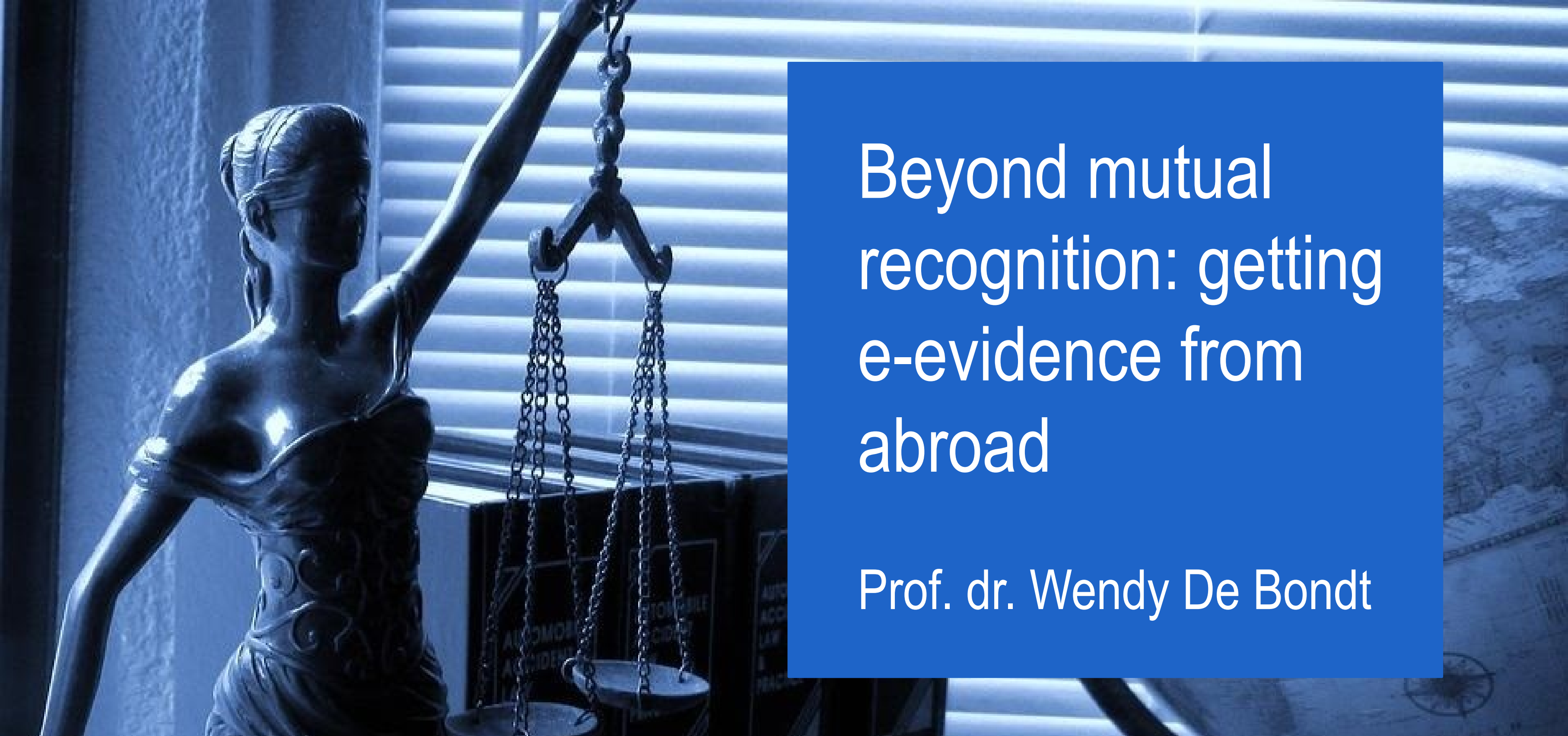
- execution would entail a breach of *immunities or privileges* granted under the law of the enforcing State
- execution would entail a manifest breach of a *relevant fundamental* right as set out in Article 6 TEU and in the Charter
- execution of the order would be contrary to the principle of *ne bis in idem*
- does *not constitute an offence* under the law of the enforcing State (beyond list for which double criminality is lifted, so-called 32 offence list)

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Beyond mutual recognition: getting e-evidence from abroad

Prof. dr. Wendy De Bondt

Importance

Challenges

EIO-limitations

E-evidence is omnipresent

digital evidence that is used to investigate or prosecute criminal offences; Among other things, it includes emails, text messages, audiovisual content, information about a user's online account



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“Almost all criminal nowadays leave some sort of digital footprint”

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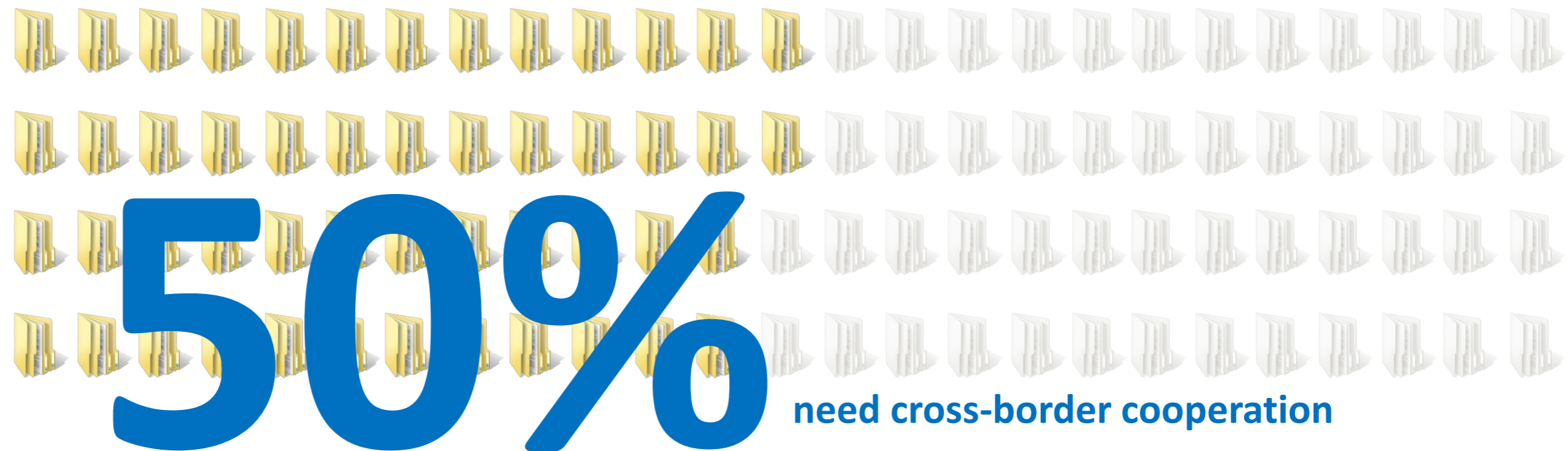
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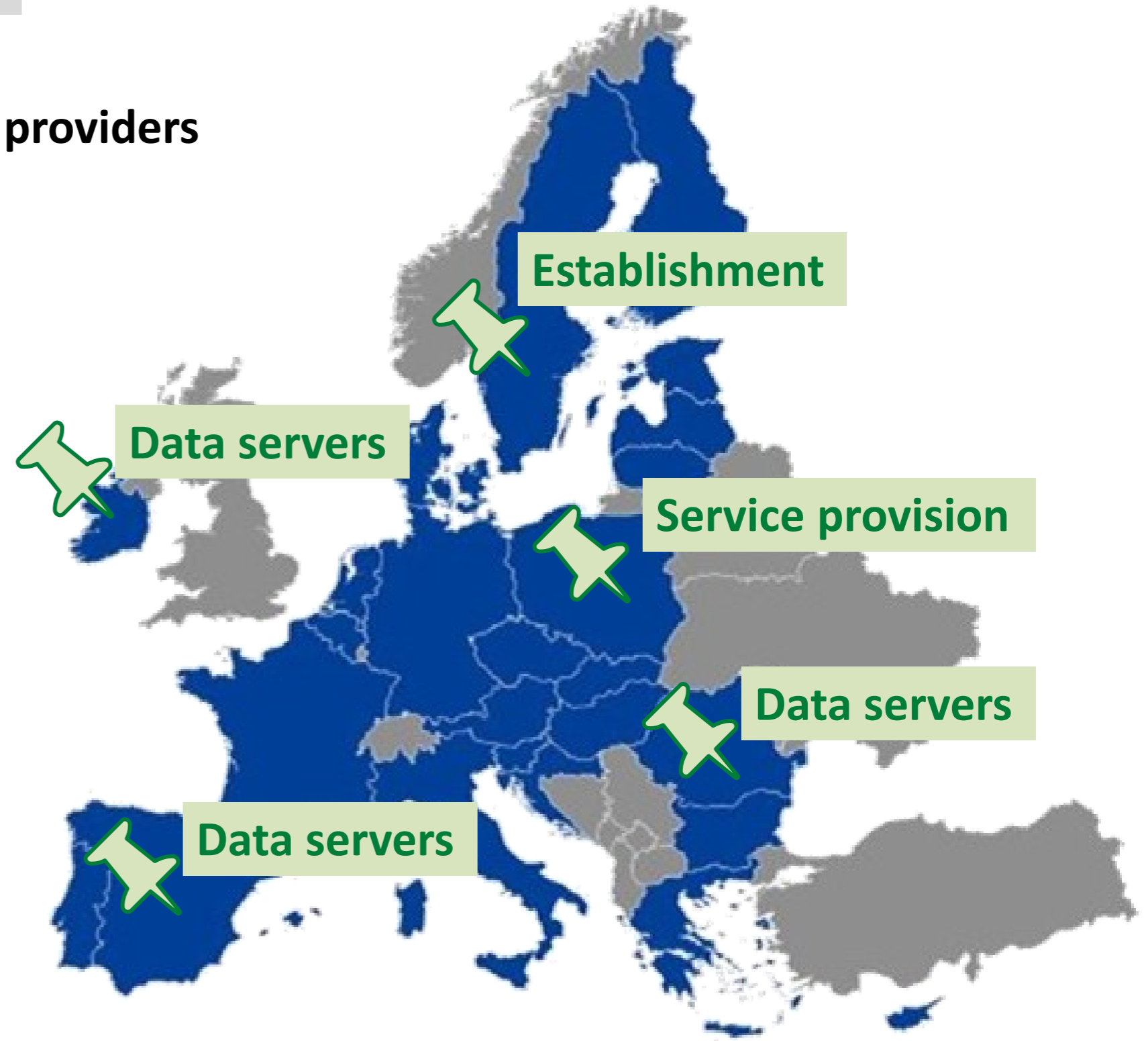
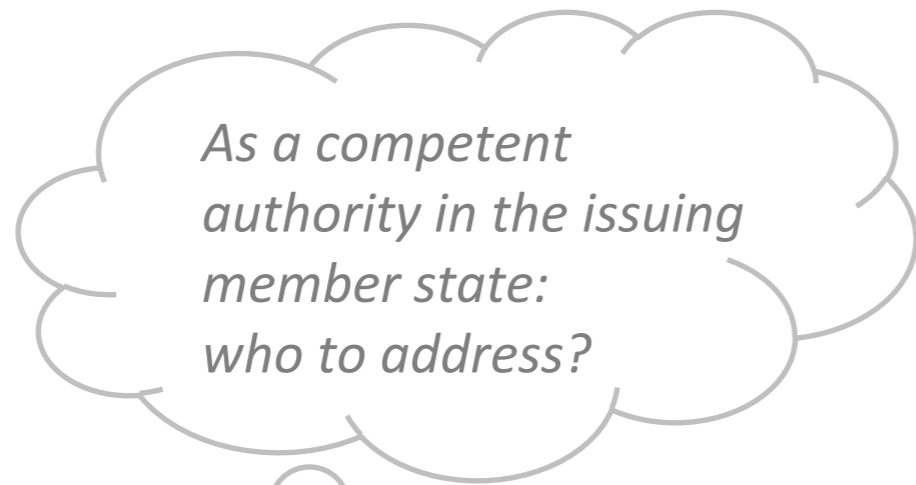
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The functioning of service providers



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Importance

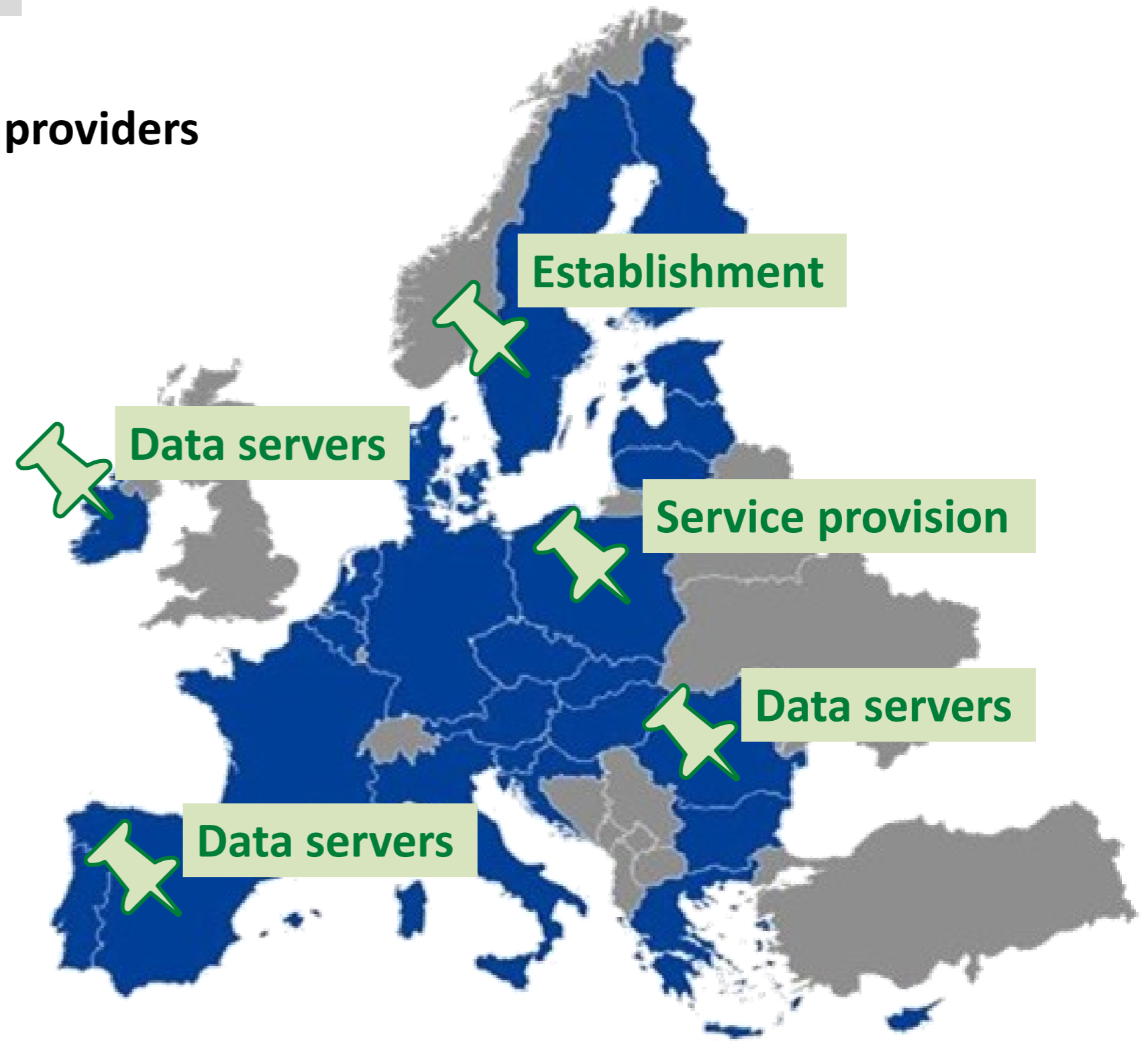
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*Cfr. **United States vs Microsoft Corp Case**, in which the US Supreme Cour examined the correctness of an undertaking by Microsoft to provide US law enforcement authorities with access to data that was physically stored in a data centre in Ireland*

Law of foreign jurisdictions but also procedural safeguards



Importance

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EIO-limitations

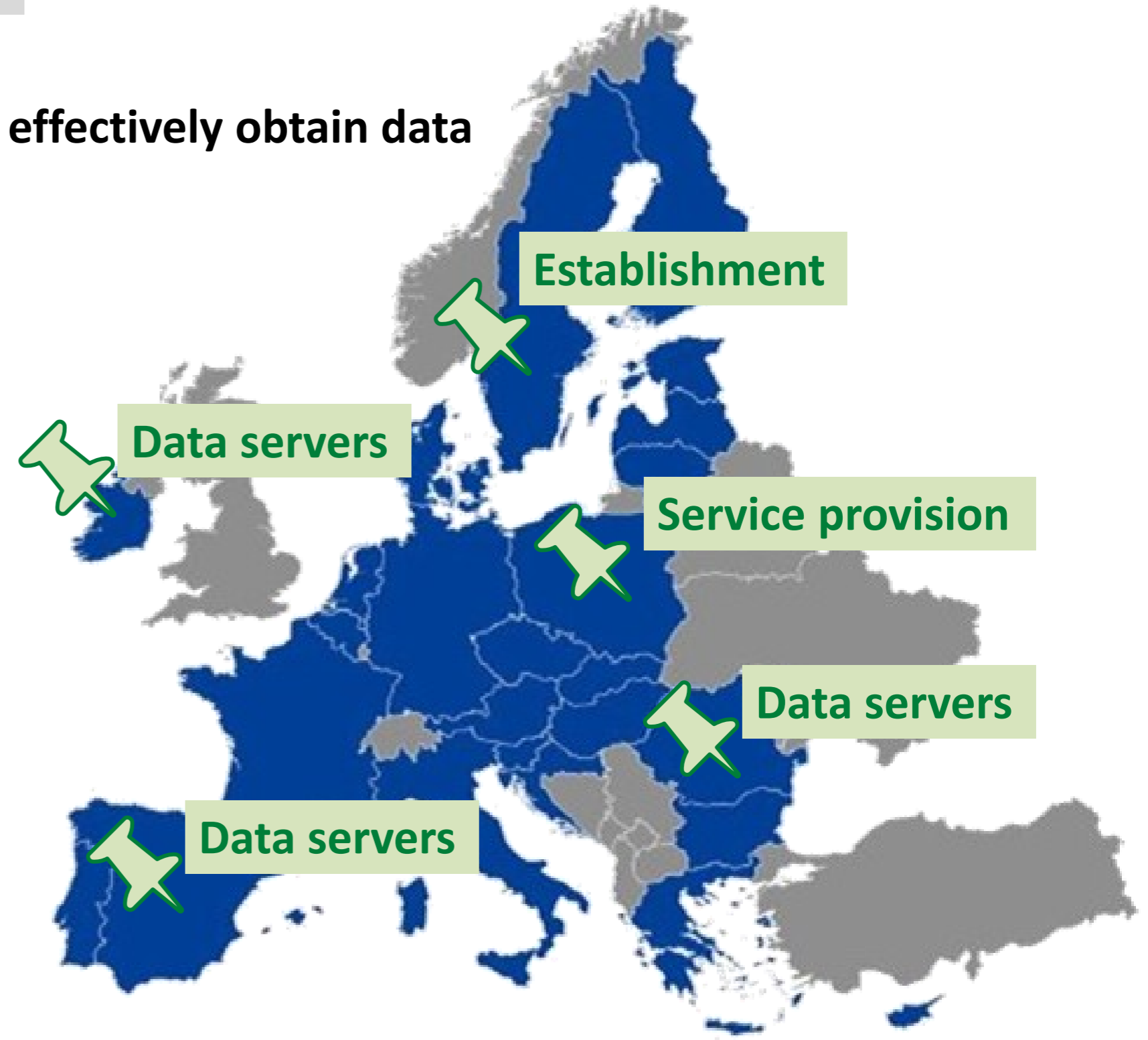
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Two tracks

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Data types

Subscriber data

Traffic data

Content data

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Data types

Subscriber data

Traffic data

Content data

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Directive

Regulation

Competent authorities involved

The regulation differentiates between the competence to issue a preservation order and the competence to issue a production order as well as the type of data the order relates to.

A preservation order can be issued by

For any data: a judge, a court, an investigating judge or a public prosecutor (or another competent authority that was validated by the former actors)

A production order can be issued by

For subscriber data: a judge, a court, an investigating judge or a public prosecutor (or another competent authority that was validated by the former actors)
For traffic data: judge, a court or an investigating judge competent (or another competent authority that was validated by the former actors)
For content data: no rules are provided; any competent authority without the need for validation?

Directive

Regulation

Conditions that need to be met

The regulation differentiates between the conditions to issue a preservation order and the competence to issue a production order.

A preservation order can be issued if

- Necessity and proportionality are verified by the issuing authority
- A similar order could have been issued under the same conditions in a similar domestic case
- Any offence and for the execution of a custodial sentence or a detention order of at least four months

A production order can be issued if

- Necessity and proportionality are verified by the issuing authority
- A similar order could have been issued under the same conditions in a similar domestic case
- The *offence is severe enough*

Directive

Regulation

The offence is severe enough

- Subscriber data: any offence in the investigative stage or any sentence of at least four months in the sentence execution stage
- Traffic data:
 - offences punishable in the issuing State by a custodial sentence of a maximum of at least three years
 - harmonised forms of (if committed via information system)
 - fraud and counterfeiting of non-cash means of payment.
 - sexual abuse and sexual exploitation of children and child pornography
 - attacks against information systems
 - harmonised forms of terrorism, regardless how they were committed
 - for the execution of a custodial sentence or a detention order of at least four months
- Content data: no rules provided

Directive

Regulation

Involvement of authorities in the executing state

There is a notification duty when the orders relate to *traffic or content data*

(unless the case is to be situated in the issuing member state in that the offence was committed in the member state and the person whose data the order relates to resides in the issuing member state.)

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Directive

Regulation

Procedural safeguards and refusal grounds

The only 'refusal ground' that is to be *tested by the addressed service provider* in relation to the orders, is the compatibility of the order with the rights on *immunities and privileges* or with limitations to *criminal liability*

Where the addressee considers, based solely on the information contained in the EPOC, that the execution of the EPOC could ***interfere with immunities or privileges, or with rules on the determination or limitation of criminal liability*** that relate to freedom of the press or freedom of expression in other media, under the law of the enforcing State, the addressee shall inform the issuing authority and the enforcing authority using the form set out in Annex III..

REGULATION 2023/1543

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Directive

Regulation

Procedural safeguards and refusal grounds

In addition thereto – *to the extent that an executing authority was involved through notification* – the executing authority can raise any of the following refusal grounds

- execution would entail a breach of *immunities or privileges* granted under the law of the enforcing State
- execution would entail a manifest breach of a *relevant fundamental* right as set out in Article 6 TEU and in the Charter
- execution of the order would be contrary to the principle of *ne bis in idem*
- does *not constitute an offence* under the law of the enforcing State (beyond list for which double criminality is lifted, so-called 32 offence list)

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The EncroChat case and its impact for criminal defence in Europe

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

ECHR, *A.L. and E.J. v. France* (applications no 44715/20 et
47930/21) Decision of 24 September 2024



Co-funded by
the European Union

Marie Poirot

The Encrochat case

- Police discovered encrypted phones used by criminal groups and impossible to intercept
- EncroChat was an mobile-phone telecommunications tool equipped with end-to-end encryption software which operated as a closed network and had been distributed from 2016 to 2020
- The servers of Encrochat were based in Roubaix, France
- A French criminal investigation was opened in Lille targeting the company distributing Encrochat phones and their users
- A joint investigation team was set up with France and the Netherlands, with the help of Europol and Eurojust

The Encrochat case – the hack

- A French judge allowed the hack of all Encrochat phones
- Data of **33,477 users in 122 countries** were collected during several months, including content of phone conversations
- The operation produced effects outside French territory, by enabling remote access to data from handsets located abroad
- The technique used to hack the phones is covered by national defence secrecy

Criminal proceedings in Germany

- The case in Germany
- Questions referred for a preliminary ruling by the court of Berlin

Interpretation of the Directive 2014/41/EU (the 'EIO' Directive)

- Establishes the framework for the introduction of the European Investigation Order (EIO)
- First referral to the ECJ on the interpretation of the 2014 Directive related to an EIO for the transmission of evidence already in the possession of the executing State

Question 1 of the regional tribunal of Berlin

Article 6 of the EIO Directive

Conditions for issuing and transmitting an EIO

1. The **issuing authority** may only issue an EIO where the following conditions have been met:

(a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and

(b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

1. The notion of « issuing authority »

Article 2 of the EIO Directive

'Issuing authority' means:

(i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or

(ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law.(...)

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

1. The notion of « issuing authority »

To identify the relevant issuing authority, the court ruled that 3 elements must be identified:

- (1) The object of the measure: investigative measure or transmission of data (art. 1 of the EIO Directive);
- (2) Which entity is competent under national law of the issuing State to order such measure;
- (3) Which entity is collecting the data: the Member State law enforcement authorities or intervention of a third party (a telecommunications service provider)

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

The *Directive 2002/58/EC on privacy and electronic communications* does not apply to the Encrochat case as the French authorities have undertaken the data collection directly, without going through a telecommunications service provider.

Therefore, the rules laid down in the *Prokuratuur case* in respect of Article 15 of Directive 2002/58/EC on privacy and electronic communications about prohibition of indiscriminate collection of data and obligation this measure be ordered by a judge, do not apply here.

Questions 2 and 3 of the regional tribunal of Berlin

Article 6 of the EIO Directive

Conditions for issuing and transmitting an EIO

1. The issuing authority may only issue an EIO where the following conditions have been met:

*(a) the issuing of the EIO is **necessary and proportionate** for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and*

*(b) the **investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.***

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

2. The lawfulness of the EIO for the transmission of evidence collected in France is a matter of national law of the State issuing the EIO.

The lawfulness of the EIO must be assessed in the light of the national law of the issuing State applicable to a similar procedure for the transmission of evidence under domestic law.

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

- Principles of mutual recognition and mutual trust

The authority issuing the EIO for the transmission of evidence already in the possession of another Member State **« is not authorised to review the lawfulness of the separate procedure by which the executing Member State gathered the evidence sought to be transmitted. »** (§100)

« Any other interpretation of Article 6(1) of that directive would result in a more complicated and less effective system, which would undermine the objective of that directive. » (§100)

Question 3 of the regional tribunal of Berlin

Article 6 of the EIO Directive

Conditions for issuing and transmitting an EIO

1. The issuing authority may only issue an EIO where the following conditions have been met:

(a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and

(b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

3. The ECJ raises that Article 6(1)(b) of Directive 2014/41, which provides that an EIO may be issued only if the investigative measure or measures indicated in the EIO could have been ordered under the same conditions in a similar national procedure, "*is intended to prevent circumvention of the rules and guarantees provided for by the law of the issuing State*". (§97)

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

Nevertheless, the CJEU considered that "*it does not appear that the collection and transmission, by means of a European Investigation Order, of the evidence thus collected had the purpose or effect of such circumvention, which it is for the referring court to verify*" (§97).

Question 4 of the regional tribunal of Berlin

Article 31 of the EIO Directive - Notification of the Member State where the subject of the interception is located from which no technical assistance is needed

1. *Where, for the purpose of carrying out an investigative measure, the interception of telecommunications is authorised by the competent authority of one Member State (the 'intercepting Member State') and the communication address of the subject of the interception specified in the interception order is being used on the territory of another Member State (the 'notified Member State') from which no technical assistance is needed to carry out the interception, the intercepting Member State shall notify the competent authority of the notified Member State of the interception: (...)*

3. *The competent authority of the notified Member States may, in case where the interception would not be authorised in a similar domestic case, notify, without delay and at the latest within 96 hours after the receipt of the notification referred to in paragraph 1, the competent authority of the intercepting Member State: (...)*

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

4. The notification of interceptions of telecommunications measures is aimed at protecting the Member States's sovereignty **and** the rights of users.

Remaining question: what is the consequence of failure to notify the Member State on which territory the measure has been undertaken.

Question 5 of the regional tribunal of Berlin

Legal consequences of obtaining evidence in a manner contrary to EU law

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

5. The question of admissibility of evidence in domestic criminal proceedings is not governed by European Union law and is regulated solely by domestic law, in accordance with the principle of procedural autonomy.

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

The Member State nevertheless remains bound by the principles of equivalence and effectiveness of EU law.

The ECJ notes that Article 14(7) of Directive 2014/41 "*requires the national criminal court to disregard, in the context of criminal proceedings brought against a person suspected of acts of criminality, information and evidence if that person is not in a position to comment effectively on that information and evidence and it is likely to have a preponderant influence on the assessment of the facts.*" (§131)

ECJ (Grand Chamber), *M.N.*, Judgment C-670/22 of 30 April 2024

- How would this be compatible with the absolute refusal from the French authorities to disclose the method of the collection of evidence, and therefore its integrity and authenticity, because French authorities used means covered by national defense secrecy?

Safeguards

- (1) Verification of misuse of an EIO to circumvent national law by issuing State's courts (Article 6(1)(b) of Directive 2014/41)
- (2) Legal remedy on the legality of evidence (Article 14(7) of Directive 2014/41)
- (3) Effective right to comment on pieces of evidence (principle of effectivity, Prokuratuur caselaw)
- (4) Notification and consequences of its absence on the admissibility of evidence

Principle of mutual trust

- In this case, the principle of mutual trust and effective cooperation between Member States effected the almost absent control of the European courts over the evidence shared between MS through EIO, the protection of privacy rights and fundamental rights relies on domestic courts.
- The Court could have chosen differently and add a control over the collection of data later transmitted to other Member States on the basis of the Charter or Article 1 of the Directive para. 4

The principle of mutual trust

Article 1 (3) and (4) of the Directive 2014/41/EU the European Investigation Order and obligation to execute it

« 4. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the [Treaty on European Union] including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected. »

The Encrochat case: a French domestic remedy

Which judge will assess the validity of the Encrochat interceptions?

ECHR, *A.L. and E.J. v. France* (applications no 44715/20 et 47930/21) Decision of 24 September 2024

The Encrochat case: a French domestic remedy

ECHR, *A.L. and E.J. v. France* (applications no 44715/20 et 47930/21) Decision of 24 September 2024

In case of EIO for transmission of evidence, the only available remedy to challenge the legality of the evidence and the respect of the principle of proportionality lies with the jurisdiction that collected the evidence, in this case the executing State, France.

NEW RULES ON VIDEOCONFERENCING IN CRIMINAL MATTERS IN PRACTICE: THE PERSPECTIVE OF DEFENCE



*CURRENT DEVELOPMENTS IN DIGITALISATION
IN CRIMINAL PROCEEDINGS*

VILNIUS, 7-8 OF NOVEMBER



Amedeo Barletta

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<<Criminal justice is also about participants “having their day in court”, that is, having their side of the story heard and understood. The right of the accused to look the court in the eye in a public hearing, while making his or her statement or pleadings, is a corollary of the fair trial and of human dignity>>.

European Criminal Bar Association, *Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World*, September 2020

The value of presence [physical or online]

An apparent lapalissade

- Physical presence and Remote presence are not the same
- Participating to an hearing in presence or by videoconferencing is not the same, indeed
- Physical presence is not always a better solution than remote (online) presence

Participating in presence is a right...as asking to participate online (A. KLIP, 2024)

Which are the issues at stake

- Participation (physical or remote) of the defendant at the hearing or at pre-trial interviews
- Presence of the defendant at the hearings (right to be present or right to ask for remote participation)
- Presence of witnesses, victims or other parties at hearing (is there a right to pretend physical presence?)

THE EUROPEAN LEGAL FRAMEWORK

pre- digitalisation era

Article 10 of the **Convention** established by the Council in accordance with Article 34 of the Treaty on European Union, **on Mutual Assistance in Criminal Matters** between the Member States of the European Union

Article 24 of the **Directive** 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the **European Investigation Order in criminal matters**

Article 8 of the **Directive** (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of **certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings**

Article 10 Hearing by videoconference – MLA Convention

1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 8.
2. The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for videoconferencing, such means may be made available to it by the requesting Member State by mutual agreement.
3. Requests for a hearing by videoconference shall contain, in addition to the information referred to in Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.
4. The judicial authority of the requested Member State shall summon the person concerned to appear in accordance with the forms laid down by its law.
5. With reference to hearing by videoconference, the following rules shall apply:
 - (a) a judicial authority of the requested Member State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested Member State. If the judicial authority of the requested Member State is of the view that during the hearing the fundamental principles of the law of the requested Member State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;
 - (b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Member States;
 - (c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws;
 - (d) at the request of the requesting Member State or the person to be heard the requested Member State shall ensure that the person to be heard is assisted by an interpreter, if necessary;
 - (e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Member State.
6. Without prejudice to any measures agreed for the protection of the persons, the judicial authority of the requested Member State shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested Member State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the competent authority of the requested Member State to the competent authority of the requesting Member State.
7. The cost of establishing the video link, costs related to the servicing of the video link in the requested Member State, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the requested Member State shall be refunded by the requesting Member State to the requested Member State, unless the latter waives the refunding of all or some of these expenses.
8. Each Member State shall take the necessary measures to ensure that, where witnesses or experts are being heard within its territory in accordance with this Article and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure.
9. Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by videoconference involving an accused person. In this case, the decision to hold the videoconference, and the manner in which the videoconference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

Any Member State may, when giving its notification pursuant to Article 27(2), declare that it will not apply the first subparagraph. Such a declaration may be withdrawn at any time.

Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument.

Article 24 - Hearing by videoconference or other audiovisual transmission – EIO Directive

1. Where a person is in the territory of the executing State and has to be heard as a witness or expert by the competent authorities of the issuing State, the issuing authority may issue an EIO in order to hear the witness or expert by videoconference or other audiovisual transmission in accordance with paragraphs 5 to 7.
The issuing authority may also issue an EIO for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission.
2. In addition to the grounds for non-recognition or non-execution referred to in Article 11, execution of an EIO may be refused if either:
 - (a) the suspected or accused person does not consent; or
 - (b) the execution of such an investigative measure in a particular case would be contrary to the fundamental principles of the law of the executing State.
3. The issuing authority and the executing authority shall agree the practical arrangements. When agreeing such arrangements, the executing authority shall undertake to:
 - (a) summon the witness or expert concerned, indicating the time and the venue of the hearing;
 - (b) summon the suspected or accused persons to appear for the hearing in accordance with the detailed rules laid down in the law of the executing State and inform such persons about their rights under the law of the issuing State, in such a time as to allow them to exercise their rights of defence effectively;
 - (c) ensure the identity of the person to be heard.
4. If in circumstances of a particular case the executing authority has no access to technical means for a hearing held by videoconference, such means may be made available to it by the issuing State by mutual agreement.
5. Where a hearing is held by videoconference or other audiovisual transmission, the following rules shall apply:
 - (a) the competent authority of the executing State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identity of the person to be heard and respect for the fundamental principles of the law of the executing State.
If the executing authority is of the view that during the hearing the fundamental principles of the law of the executing State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with those principles;
 - (b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the issuing State and the executing State;
 - (c) the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws;
 - (d) at the request of the issuing State or the person to be heard, the executing State shall ensure that the person to be heard is assisted by an interpreter, if necessary;
 - (e) suspected or accused persons shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, under the law of the executing State and the issuing State. Witnesses and experts may claim the right not to testify which would accrue to them under the law of either the executing or the issuing State and shall be informed about this right in advance of the hearing.
6. Without prejudice to any measures agreed for the protection of persons, on the conclusion of the hearing, the executing authority shall draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the executing State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the executing authority to the issuing authority.
7. Each Member State shall take the necessary measures to ensure that, where the person is being heard within its territory in accordance with this Article and refuses to testify when under an obligation to testify or does not testify the truth, its national law applies in the same way as if the hearing took place in a national procedure.

Article 8

Right to be present at the trial – Presumption of Innocence Directive

1. Member States shall ensure that suspects and accused persons **have the right to be present at their trial**.
2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her **absence**, provided that:
 - (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or
 - (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.
3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.
4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.
5. This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defence are complied with.
6. This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial.

THE EUROPEAN LEGAL FRAMEWORK

post Covid era

Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation

Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation

...and other coming instruments

Regulation (EU) 2023/2844

Article 1 – Subject Matter and scope

Electronic communication in judicial cooperation procedures in criminal matters

Hearings through videoconferencing or other means of distance in criminal matters

Article 2 - Definition

6) ‘videoconferencing’ means audio-visual transmission technology that allows two-way and simultaneous communication of image and sound, thereby enabling visual, audio and oral interaction.

Article 6 - Hearing through videoconferencing or other distance communication technology in criminal matters

1. This Article shall apply in proceedings under the following legal acts:

(a) Council Framework Decision 2002/584/JHA (42), in particular Article 18(1)(a) thereof; [MAE]

(b) Framework Decision 2008/909/JHA, in particular Article 6(3) thereof; [custodial sentences]

(c) Framework Decision 2008/947/JHA, in particular Article 17(4) thereof; [probation and alternative measures]

(d) Framework Decision 2009/829/JHA, in particular Article 19(4) thereof; [European Supervision Order]

(e) Directive 2011/99/EU of the European Parliament and of the Council (43), in particular Article 6(4) thereof; [EPO]

(f) Regulation (EU) 2018/1805, in particular Article 33(1) thereof. [FCO]

Videoconferencing in the Regulation 2844

The procedure for starting and conducting a videoconferencing is split into 3 steps:

- 1) The Request (Article 6(2));
- 2) The Consent assessment (Article 6(2));
- 3) The Conduction of the hearing (Article 6(3-9))

What about the case law of the European Courts?

EUROPEAN COURT OF HUMAN RIGHTS – COE
COURT OF JUSTICE OF THE EUROPEAN UNION - UE

The main European case law on vide Conferencing in criminal justice (ECtHR)

ECtHR Dijkhuizen v. The Netherlands, 61591/16, 8 June 2021, par. 53

“although the defendant’s participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on it to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention”

ECtHR Marcello Viola v. Italy, no. 45106/04, 5 October 2006, par. 67; ECtHR Sakhnovskiy v. Russia, 2 November 2010, 21272/03, par. 98

“that the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole (...). Furthermore, although the defendant’s participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention (...). It must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments (...)”

The main European case law on vide Conferencing in criminal justice (ECtHR 2)

ECtHR Asciutto c. Italie, 35795/02, 27 novembre 2007, par. 68–72

A la lumière de ce qui précède, la Cour estime que la participation du requérant aux audiences par vidéoconférence poursuivait des buts légitimes à l'égard de la Convention, à savoir la défense de l'ordre public, la prévention du crime, la protection des droits à la vie, à la liberté et à la sûreté des témoins et des victimes des infractions, ainsi que le respect de l'exigence du « délai raisonnable » de la durée des procédures judiciaires. Il reste à vérifier si ses modalités de déroulement ont respecté les droits de la défense. La Cour observe que, en application du paragraphe 3 de l'article 146 bis des dispositions d'exécution du cpp, le requérant a pu bénéficier d'une liaison audiovisuelle avec la salle d'audience, ce qui lui a permis de voir les personnes qui y étaient présentes et d'entendre ce qui était dit. Il était également vu et entendu par les autres parties, par le juge et par les témoins, et avait le loisir de faire des déclarations à la cour depuis son lieu de détention. Certes, il est possible que, à cause de problèmes de nature technique, la liaison entre la salle d'audience et le lieu de détention ne soit pas idéale, ce qui peut entraîner des difficultés de transmission de la voix ou des images. Cependant, en l'espèce, à aucun moment des débats d'appel le requérant n'essaya, lui-même ou par le truchement de ses défenseurs, d'informer le juge de ses difficultés d'audition ou de vision (voir, mutatis mutandis, Stanford précité, p. 11, § 27). La Cour souligne enfin que le défenseur du requérant avait le droit d'être présent à l'endroit où se trouvait son client et de s'entretenir avec lui de manière confidentielle. Cette possibilité était reconnue également au défenseur présent dans la salle d'audience (voir le paragraphe 4 de l'article 146 bis des dispositions d'exécution du cpp; paragraphe 19 ci-dessus). Rien ne démontre qu'en l'espèce le droit du requérant de communiquer avec son avocat hors de portée d'écoute d'un tiers ait été méconnu. Dans ces conditions, la Cour estime que la participation du requérant aux audiences devant la cour d'assises et la cour d'assises d'appel de Turin par vidéoconférence n'a pas placé la défense dans une position de désavantage substantiel par rapport aux autres parties au procès et que l'intéressé a eu la possibilité d'exercer les droits et facultés inhérents à la notion de procès équitable, telle que résultant de l'article 6 de la Convention.

The main European case law on vide Conferencing in criminal justice (ECtHR 3)

ECtHR Bivolaru v. Romania (no. 2), 66580/12, 2 October 2018, par. 137–139

À ce sujet, la Cour observe que, eu égard à l'absence physique du requérant au procès, la Haute Cour a eu recours à l'entraide judiciaire internationale. Dans le cadre de l'assistance judiciaire internationale en matière pénale, la loi no 302/2004 mettait à la disposition des autorités judiciaires deux voies aux fins de l'audition d'un inculpé se trouvant à l'étranger et ne pouvant pas comparaître en personne: la vidéoconférence et la commission rogatoire (paragraphe 103 à 105 ci-dessus). À cet égard, la Cour note que la Haute Cour a proposé au requérant de l'interroger par vidéoconférence – une forme de participation à la procédure qui n'est pas, en soi, incompatible avec la notion de procès équitable et public (Sakhnovski c. Russie [gc], no 21272/03, § 98, 2 novembre 2010, et Marcello Viola, précité, § 67) – et que l'intéressé, entouré par le conseil de ses avocats, a sciemment refusé d'être interrogé par vidéoconférence au motif que la loi interne lui permettait de ne pas consentir à une telle modalité d'audition (paragraphe 60 ci-dessus). S'il est vrai que le droit interne n'imposait pas à la personne refusant de donner son consentement à un interrogatoire par vidéoconférence de justifier sa position, il n'en reste pas moins que, dans la présente espèce – où le requérant reproche à la juridiction ayant prononcé sa condamnation de ne pas l'avoir interrogé –, cette modalité d'interrogatoire pouvait être, de l'avis de la Cour, un moyen approprié pour assurer l'audition directe et diligente de l'intéressé par la Haute Cour.

The main European case law on vide Conferencing in criminal justice (CJEU)

CJEU 15 September 2022, HN (Trial of an accused person removed from the territory), C-420/20

1. Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as:

not precluding national legislation which imposes an obligation on suspects and accused persons in criminal proceedings to be present at their trial.

2. Article 8(2) of Directive 2016/343 must be interpreted as:

precluding legislation of a Member State which permits a trial to be held in the absence of the suspect or accused person, where that person is outside that Member State and is unable to enter its territory because of an entry ban imposed on him or her by the competent authorities of that Member State.

The main European case law on vide Conferencing in criminal justice (CJEU 2)

CJEU 8 December 2022, European arrest warrant proceedings against CJ, C-492/22 ppu, par. 88

The right of an accused person to appear in person at the trial in criminal proceedings, which constitutes an essential element of the right to a fair trial enshrined in the second and third paragraphs of Article 47 and Article 48(2) of the Charter, requires the Member States to guarantee the accused the right to be present at the hearing during his trial (see, to that effect, judgment of 15 September 2022, HN (Trial of an accused person removed from the territory), C-420/20, EU:C:2022:679, paragraphs 54 to 56).

The main European case law on vide Conferencing in criminal justice (CJEU 3)

CJEU 4 July 2024, FP and Others v Sofiyska gradska prokuratura, C-760/22 ppu,

Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings **must be interpreted as not precluding an accused person from being able, at his or her express request, to participate in the hearings in his or her trial by videoconference, provided that the right to a fair trial is guaranteed.**

Looking for principles for remote participation in criminal cases: a different assessment

BALANCE FAIR TRIAL RIGHTS WITH THE
PRACTICAL BENEFITS OF VIDEO-
CONFERENCING

MAIN DISTINCTIONS TO EVALUATE THE USE OF VIDEO-CONFERENCEING

Cross-border vs. domestic cases

Pre-trial vs. trial stages

How to secure

Fair trial rights and defense safeguards

Cross-Border Cases – Pre-Trial Interviews

Purpose of Interviews:

Advance investigation and to Decide on pre-trial detention.

Video-conferencing Benefits:

Cost savings (not less than 20000 euros for the execution of an EAW), avoids unnecessary European Arrest Warrants (EAWs) then limiting the recourse to jail

In the context of an EAW, the prompt organisation of a hearing by the issuing State authorities per video-conference pursuant to Articles 18, para 1, lit. a), and 19 FD 2002/584/JHA, is essential.

Article 18 states that “[w]here the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must: (a) either agree that the requested person should be heard according to Article 19 [“by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court”]; (b) or agree to the temporary transfer of the requested person”.

Cross-Border Cases – Benefits of Video Interviews

Advantages:

- Avoids unnecessary detention and EAWs with related financial and human costs.
- Immediate access to legal processes without travel.

Limitations:

- Video attendance may not substitute physical presence for all legal rights.

Cross-Border Trials

Remote Trials in Cross-Border Cases:

Videoparticipation

May be acceptable if accused consents

Suitable for lower-level offenses

Sometimes participating by videoconferencing has not real alternatives

There is also an issue of proportionality

Challenges: Balancing right to presence with practicality

Legal Safeguards in Cross-Border Cases

Essential Safeguards:

Consent of accused and advise of a lawyer

Option to retract consent.

Right to dual defense.

Importance: Ensures fair trial and defense rights are fully maintained

Action needs for Cross-Border Cases

Recommendations for Authorities:

Develop better legal and technical standards.

Improve interoperability (technical and normative) between jurisdictions.

Ensure access to confidential defense consultations

Domestic Cases – Pre-Trial Video Interviews

Suitability:

Minor cases with consent.

Issues: Physical presence recommended for serious determinations (e.g., pre-trial detention).

The need of physical presence regards the defendant but also the deciding Judge

Domestic Cases - Trial Stage Video Participation

Principle: Physical presence is essential, especially for serious cases

Exceptions can be allowed only with explicit consent of the accused

Action needs for Domestic Cases

Steps for Improvement:

- Comprehensive assessment of the use of remote technology

Protect the right to physical presence (the case of Italy – art. 146bis disp. att. cpp)

Enhance technical and procedural standards (the issue with private platforms).

Monitor the impact on fair trial rights.

Required Technical Safeguards for Videoconferencing

High-quality video/audio

Secure, interruption-free connection

Courtroom simulation for remote parties.

Privacy and Confidentiality Concerns

Defense Rights: Confidential access to lawyers must be protected.

Technology Safeguards: Secure, tamper-proof systems for privacy.

Public Access and Transparency

Public Access in Remote Trials:

The principle that hearings must be public is of outmost importance in criminal matters

Options: Public viewing rooms, online access with safeguards

Challenges: Balance transparency with privacy and fairness.

Balancing Open Trials with Privacy

Concerns:

Protect the presumption of innocence and the identity of the accused.

Prevent public bias from remote trial broadcasts.

Solutions: Controlled public access to certain trial segments only.

Technical Recommendations for Member States

Required Infrastructure:

True-to-life experience (full view of courtroom)

High-quality audiovisual recording

Interpreter availability and multilingual access.

EU Role and Recommendations

EU Involvement:

Define standards for interoperability.

Support judicial infrastructure enhancements.

Consistency Across Member States: Ensure uniform application of standards

A unique European videoconferencing infrastructure?

ECBA's Position on Fair Trial and Remote Technology

Key Points:

Physical presence remains crucial (it is a right)...is emerging also a right to remote participation

Remote trials cannot fully replace in-person hearings but can be an important solutions, it is possible to consider the existence of a right to participate online to a proceeding?

Long-Term View: Preserve the essence of in-person justice where possible or reimagine the model of criminal trials as we know it

THANK YOU
for the attention



Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons

Prof. dr. Raimundas Jurka

7-8, November, 2024



Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons

Questions:

1. Why was it necessary?
2. What are the procedural rights of the targeted persons in the context of this Regulation?



Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons

QUESTION 1 (Why was it necessary?):

It's all in the preamble/recitals.

Recitals form, together with the citations, the preamble of a EU legislative act.

They give effect to Article 296 Treaty on the Functioning of the European Union (hereafter TFEU), which stipulates that all legal acts must state the reasons on which they are based.



Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons

QUESTION 1 (Why was it necessary?):

Recitals:

- *Firstly*, these paragraphs provide a reasoned explanation, e.g. why the EU is acting within the limits of its competence; why the objectives of the proposed legislation cannot be achieved by the Member States alone; that the EU's action does not go beyond what is necessary to achieve the objectives of the Treaties; etc. Recitals are thus crucial to the validity of a legal act.
- *Secondly*, the part of the EU legal act in question has an interpretative function. However, "the preamble of a Community act does not have binding legal effect and may not be relied upon either to derogate from the provisions of the act in question or to interpret those provisions in a manner which is manifestly contrary to their wording" (e.g. cases C-136/04, C-134/08).



Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons

QUESTION 1 (Why was it necessary?):

The preamble to the Regulation (Recital 8) states that:

“the procedures and timelines provided for in Directive 2014/41/EU establishing the EIO and in the Convention on Mutual Assistance in Criminal Matters might not be appropriate for electronic evidence, which is more volatile and could more easily and quickly be deleted”;

“Obtaining electronic evidence using judicial cooperation channels often takes a long time, resulting in situations where subsequent leads might no longer be available”;

“There is no harmonised framework for cooperation with service providers, while certain third-country providers accept direct requests for data other than content data as permitted by their applicable national law”.



Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons

QUESTION 2 (Procedural rights of the targeted persons):

The preamble to the Regulation (Recital 10) states that:

“This Regulation respects fundamental rights and observes the principles recognised by Article 6 TEU and the Charter, by international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States’ constitutions, in their respective fields of application”;

“Such rights and principles include, in particular, the right to liberty and security, the respect for private and family life, the protection of personal data, the freedom to conduct a business, the right to property, the right to an effective remedy and to a fair trial, the presumption of innocence and right of defence, the principles of legality and proportionality, as well as the right not to be tried or punished twice in criminal proceedings for the same criminal offence”.



Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons

QUESTION 2 (Procedural rights of the targeted persons):

The preamble to the Regulation (Recitals 16-17) states that:

The procedural rights in criminal proceedings set out in Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/343, (EU) 2016/800 and (EU) 2016/1919 of the European Parliament and of the Council should apply, within the scope of those Directives, to criminal proceedings covered by this Regulation as regards the Member States bound by those Directives.

In order to guarantee full respect of fundamental rights, the probative value of evidence gathered in application of this Regulation should be assessed in trial by the competent judicial authority, in accordance with national law and in compliance with, in particular, the right to a fair trial and the right of defence.



Regulation 2023/1543 on European Preservation and Production and Orders: the rights of the targeted persons

QUESTION 2 (Procedural rights of the targeted persons):

The preamble to the Regulation (Recitals 38, 49) states that:

A European Production Order should only be issued if it is **necessary, proportionate, adequate** and **applicable** to the case at hand. The issuing authority should take into account the rights of the suspect or the accused person in proceedings relating to a criminal offence and should only issue a European Production Order if such order could have been issued under the same conditions in a similar domestic case. The assessment of whether to issue a European Production Order should take into account whether such order is limited to what is strictly necessary to achieve the legitimate aim of obtaining data that are relevant and necessary as evidence in an individual case.



Rights of the targeted persons

Rights of the suspect/accused:

1. The right to defend the possibility and appropriateness of the commented orders;
2. The right to question/challenge the possibility and appropriateness of the commented orders.



Rights of the targeted persons

The right to defend the possibility and appropriateness of the commented orders:

Article 1(2) of the Regulation contains an important provision that helps ensure effective judicial cooperation and the principle of adversarial justice.

It states that "*The issuing of a European Production Order or of a European Preservation Order may also be requested by a **suspect or an accused person**, or by a lawyer on that person's behalf within the framework of applicable defence rights in accordance with national criminal procedural law*".

The rhetorical question is – why is this right of initiative not granted to the other parties to the proceedings?



Rights of the targeted persons

The right to defend the possibility and appropriateness of the commented orders:

Articles 5(2) and 6(2) of the Regulation generally state, that:

European Production Order and European Preservation Order shall be **necessary** for and **proportionate** to the purpose of the proceedings, taking into account the rights of the suspect or the accused person, and **may only be issued if a similar order could have been issued under the same conditions in a similar domestic case.**



Rights of the targeted persons

The right to question/challenge the possibility and appropriateness of the commented orders:

Article 4(5) of the Regulation:

It is essential to ensure that the person being prosecuted, as well as other persons, **have access to the right of appeal, otherwise to challenge the implementation of Article 4(5) of the Regulation**, which provides that in an emergency (i.e. a duly established urgent case) (Article 3 (18)), the competent authorities may exceptionally issue a European Production Order where confirmation cannot be obtained in time and where those authorities could issue a order in a similar national case without prior confirmation.



Rights of the targeted persons

The right to question/challenge the possibility and appropriateness of the commented orders:

Article 13 of the Regulation:

1. The issuing authority shall, without undue delay, **inform the person whose data are being requested about the production of data on the basis of a European Production Order.**
2. The issuing authority may, in accordance with the national law of the issuing State, delay or restrict informing, or omit to inform, the person whose data are being requested, to the extent that, and for as long as, the conditions in Article 13(3) of Directive (EU) 2016/680 are met, in which case the issuing authority shall indicate in the case file the reasons for the delay, restriction or omission.
3. When informing the person whose data are being requested as referred to in paragraph 1 of this Article, the issuing authority shall include information about available remedies pursuant to Article 18.



Rights of the targeted persons

The right to question/challenge the possibility and appropriateness of the commented orders:

Article 18 of the Regulation (**Effective remedies**):

This Article includes:

- protection of any right-holder (other than the suspect or accused) whose data was sought by the European Production Order in any criminal proceedings;
- protection of the rights of the suspect/accused against an order in question, but only in the criminal proceedings in which he is involved.



Rights of the targeted persons

The right to question/challenge the possibility and appropriateness of the commented orders:

Article 18 of the Regulation (**Effective remedies**):

This Article also includes:

The right to effective remedies shall be exercised before a court **in the issuing State** in accordance with its national law and shall include the possibility of challenging:

- **legality of the measure;**
- **its necessity;**
- **Its proportionality.**



Rights of the targeted persons

The right to question/challenge the possibility and appropriateness of the commented orders:

Article 18 of the Regulation (**Effective remedies**) also:

- 1) leaves to the national law the remedies normally found in criminal procedure laws;
- 2) *expressis verbis* stipulates that such remedies must be effective;
- 3) requires that remedies are made available in a timely manner (i.e. timely information on the availability of remedies under national law);



Rights of the targeted persons

The right to question/challenge the possibility and appropriateness of the commented orders:

- 4) particular emphasis is placed on the protection of the rights of the defence;
- 5) emphasises the right to a fair trial.

All of these aspects are crucial for the evaluation of evidence obtained through a European Production Order in any country.



Rights of the targeted persons

The right to question/challenge the possibility and appropriateness of the commented orders:

It is emphasized that the persons concerned about whom the data are collected or to whom the data relate may also assert their rights in accordance with Directive (EU) 2016/680.

Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA



Rights of the targeted persons

The right to question/challenge the possibility and appropriateness of the commented orders:

It is emphasized that the persons concerned about whom the data are collected or to whom the data relate may also assert their rights in accordance with Regulation (EU) 2016/679.

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)



Thank you for your attention!

Current Developments in Digitalisation in Criminal Proceedings – Training for Defence Lawyers



VILNIUS, 7-8 NOVEMBER 2024

Ciprian Băban – Criminal Defence Attorney

Experience with jurisdiction

ROMANIA

Examples of jurisdiction

- Denied access to file – inadequate time to study
- Intentional bias in transcribing – difficulty to formulate objection
- WhatsApp/FB Messenger videocalls in court/prosecutor

Denied access to file – inadequate time to study

- Witness – Suspect – Indictee
- No rights – limited – limited to 10 days
- Prosecutor can refuse to give access for suspects/indicted persons for reasons of well management of investigation
- Lack of clear provisions of what *adequate time* means
- Presenting lawyers with a huge amount of data in a very short time - > **INADEQUATE DEFENCE**

Intentional bias in transcribing – difficulty to formulate objection

- Abuse in office accusation – 30+ witnesses – same questions: *“Have you seen the contract?”*
- Answer: *“I don’t remember”*
- Transcription: *“I don’t remember seeing the document”*
- Pretense: Thoroughness
- Reality: BIAS

I don't remember if I saw it

- They could either have seen it or not.
- Each scenario possible

I don't remember seeing it

- Nuance: more to the sense: *I don't think I saw it.*
- Excludes the scenario where he saw it.

Difficulty in explaining lies in the very subtle nature of the objection

WhatsApp/FB Messenger videocalls in court/prosecutor

- No clear provision in legislation
- Difficulty to assess identity of witnesses
- Deepfakes
- Security of transmission – possible interferences
- No guarantee of statement being not given under duress
- Other issues...?

PREDICTIVE CRIMINAL LAW AND AI:


HOW IS IT USED BY INVESTIGATORS AND PROSECUTORS –
LEGAL CHALLENGES

Lavinija Levar



Co-funded by
the European Union

PREDICTIVE CRIMINAL LAW

- Predictive policing – *‘the use of analytical techniques to identify promising targets’* (Perry et. al) to forecast criminal activity
- Four general categories: methods for predicting crimes, offenders, perpetrators' identities and victims of crime
- Predictive mapping - identifying potential crime locations
- Predictive identification - the likelihood that an individual will become a victim of a crime or commit a crime
-  Potential human rights implications?
- Predictive policing can help predict crimes more accurately and effectively than traditional police methods?



THE ROLE OF AI IN CRIMINAL LAW

- Predictive Policing
- Data Analytics - quantities of data, speed, facial recognition and surveillance
- Risk Assessment



AI IN INVESTIGATIONS AND PROSECUTIONS

- AI tools (PredPol, HunchLab)
- AI risk assessment tools
- AI-driven investigative tools (FRT)
- AI in digital investigations - cybercrime and financial crimes



LEGAL CHALLENGES

- **Regulation (EU) 2024/1689** of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828
➔ **"Artificial Intelligence Act"**
- Right to privacy
- Presumption of innocence
- Fair trial



RIGHT TO PRIVACY

- Articles 6 - 9 of the EU Charter of Fundamental Rights
- Article 8 of the ECHR
- Article 27, 28, 43, 69 of the "Artificial Intelligence Act"



PRESUMPTION OF INNOCENCE

- Article 48 of the EU Charter of Fundamental Rights
- Article 6 of the ECHR
- Article 42 and 59 of the "Artificial Intelligence Act"



FAIR TRIAL

- Article 47 of the EU Charter of Fundamental Rights
- Article 6 and 7 of the ECHR
- Article 48, 59, 61 of the "Artificial Intelligence Act"



THE FUTURE OF AI IN CRIMINAL LAW

- Human-in-the-Loop (HITL) Systems
- Judicial Training
- Public Awareness



THANK YOU FOR YOUR ATTENTION 😊

ANY QUESTIONS?

