DIGITALEUROPE

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# Legal Uncertainty and Harmonization

## Legal representative (Art. 7 Regulation and Arts. 1,2,3 Directive)

It is presumed that legal representatives are established in a separate legal instrument in order to ensure that they are the applicable addressee not only for EPOC(-PR)s, but also for other instruments available under domestic law. This adds an unnecessary layer of confusion and we continue to advocate converting the Directive to a Regulation or a separate Regulation as a more appropriate legal instrument.

The clause allowing national authorities to address service providers established on their territory contradicts the stated goal to simplify and harmonise the point of contact. This may be appropriate where service providers are only established in that Member State, it does not make sense for international service providers.

We believes that EPOC(-PR)s or other Union-level instruments should be the only instruments used in a cross-border context.

Authorities should not be allowed to address any establishment of a service provider when the legal representative does not comply with an EPOC(-PR). Authorities should not be permitted to go forum shopping for a less knowledgeable branch of the same service provider simply because the representative did not comply. The only circumstance this should apply where the legal representative does not respond in the allotted time in emergency cases. Entities that do not have possession and control over the information sought should only be responsible for forwarding the request to the establishment of the provider that does have possession.

Liability for non-compliance should be applied to the service provider or other legal entity and not the identified legal representative. It should be clear that the natural person cannot be held personally liable for pecuniary sanctions.

## GDPR main establishment analysis

The GDPR's 'lead supervisory authority' mechanism ensures that in cases of cross-border data processing, a single Member State's data protection authority (DPA) has primary oversight of that processing. However, the Directive could inadvertently impact and create confusion around this important measure.

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Under the Directive, legal representatives must have the authority to receive, comply with and enforce Member State decisions and orders issued for the purpose of gathering evidence in criminal proceedings.' It is unclear what this obligation requires in practice or how it intersects with the GDPR's main establishment test.

This issue will be particularly acute for service providers whose current main establishment is in Ireland, because those providers will be required to locate at least one legal representative outside of Ireland, as long as Ireland continues not to participate in the EIO Directive.

We propose adding language to the Directive to clarify that the requirement for the legal representative to have 'powers and resources' is satisfied so long as the legal representative can accept and process orders served under EU instruments and can disclose data in response to those orders, but need not be the locus of decision-making authority as to whether an order is lawful, and/or should be complied with.

We welcome the Council's text which amends Recital 15 stating: 'The sole designation of a legal representative should not be considered to constitute an establishment of the service provider.' If there is no establishment, there cannot be a 'main establishment' and it arguably follows that the 'sole designation' of a legal representative likewise should not be indicative of a main establishment under the GDPR. It could also be interpreted to mean that the mere act of designating a legal representative does not create an establishment, without bearing on the question of whether an establishment exists after that representative is vested with the 'powers and resources'. Moreover, the recital language is non-binding, hence it remains possible under the Directive that a court would hold that the powers vested in a legal representative does constitute an 'establishment' in relation to the relevant processing.

## Double criminality

We support harmonisation in this field, which will be particularly helpful for our SME members. The EIO contains a list of crimes to which an EIO can be submitted.

However, from a legal certainty perspective it would be beneficial to include a reference as to what some of these crimes mean, in particular when they contain a definition at EU level. For example, the EIO list contains 'computer-related crimes': the EU has a Directive on attacks against information systems, so the definitions should be aligned across the legal instruments.

FOR MORE INFORMATION, PLEASE CONTACT:

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