



TRILOGUE NEGOTIATIONS ON THE E-EVIDENCE PROPOSAL

European media and journalists call on decision makers to protect media freedom and fundamental rights

4 February 2021

In line with an [earlier joint statement](#), **AER**, the Association of European Radios; **EBU**, the European Broadcasting Union; **EFJ**, the European Federation of Journalists; **EMMA**, the European Magazine Media Association; **ENPA**, the European Newspaper Publishers' Association; **EPC**, the European Publishers Council, **NME**, News Media Europe, and **UNI MEI Global Union** are calling on the European Commission, the Council as well as the European Parliament to ensure that media freedom and fundamental rights are treated amongst the priorities in the forthcoming trilogue negotiations on the e-evidence proposal. **Media freedom and fundamental rights cannot take a backseat to efficiency in cross-border investigations.**

While we recognise the importance of the proposal's objective to facilitate cross-border gathering of electronic evidence in criminal investigations, we regret that none of the three negotiating positions have fully taken into account our concerns. In our perspective, media freedom and the protection of fundamental rights can only be guaranteed if the **fundamental rights assessment** is carried out by the **authorities in the executing Member State according to its national standards**. As such, in light of the e-Evidence proposal, it is of utmost importance that any order is addressed simultaneously to the executing authority and to the service provider, and that data can only be issued if the executing authority has validated the order within the 10-day deadline. Furthermore, to ensure an adequate protection of fundamental rights and consistency with the principles of mutual recognition and judicial cooperation, it is important to maintain that if the executing authority fails to provide its assessment within the deadline, the service provider should not assume a green light.

This being said, we support the **procedural changes** introduced by the **European Parliament** which provide **superior protection** and an **increased involvement and role of the executing authority**. Maintaining these safeguards in the final compromise is therefore of utmost importance to preserve media freedom and its building blocks such as editorial secrecy and the protection of sources.

The European Parliament's two-tier procedure in articles 8a and 9 – depending on the type of data requested – ensures that the **executing authority must be notified** about any order simultaneously with the service provider. The executing authority is also **provided with the competence to assess and object an order** on the basis of grounds for non-recognition or non-execution (article 10a of the EP report).

The European Parliament's **grounds for non-recognition and non-execution** in combination with **recital 35** explicitly recognize that journalists and rules relating to freedom of the press



and freedom of expression in other media are covered and protected by immunities and privileges and ensure that **executing states can object to any orders which violate media freedom.**

While we believe that **all types of journalistic data** warrant the **same high level of protection**, and while we also believe that **no data should be issued** by the hosting provider **before the executing authority has approved the order**, the procedure proposed by the European Parliament introduced **important procedural improvements** and safeguards which must be preserved in trilogue.

We recognize the Council's efforts in addressing the shortcomings of the European Commission proposal by clarifying in particular in recitals on immunities and privileges the limited criminal liability relating to press and media freedom. Nevertheless, according to the General Approach of the Council, the **involvement of the executing authority remains limited** and **at the discretion of the issuing Member State**, which would have to have reasonable grounds to believe that the person whose data is sought is not residing in its territory and that the data requested is subject to immunities and privileges.

Last, with regard to **immunities and privileges**, it must be ensured that **all journalistic activities are covered**. We generally welcome the efforts of both the European Parliament and the Council to improve the protection of journalists by adding a clarification that "*limitations of criminal liability relating to freedom of press and freedom of expression in other media*" are covered. Yet, this clarification is **limited to substantive criminal law** and **does not cover all journalistic activities in all Member States**. For example, in several Member States, the protection of sources or exemptions from confiscations are enshrined in criminal procedural law and would therefore not be covered by such a wording. In order to cover all journalistic activities, it should therefore be **clarified in the recital that all journalistic activities** are covered by immunities and privileges. At the very least, the **clarification provided by the European Parliament in recital 35**, providing that "*rules relating to freedom of the press and freedom of expression in other media (such as journalists)*" are covered by immunities and privileges, must be maintained.

Considering all of the above, we would like to reiterate that **media freedom should not be sacrificed for faster and more efficient cross-border criminal investigation**. We believe that **they are not mutually exclusive**, and it is possible to ensure both the protection of media freedom and fundamental rights as well as more efficient procedures to obtain electronic evidence. **As such, the procedural safeguards introduced by the European Parliament as described should be considered as an utmost necessity to protect media freedom and fundamental rights** and must be preserved in upcoming negotiations.