

## Answer to public consultation on access to e-evidence

Telenor believes that while economic integration creates new challenges that must be addressed through European cooperation, EU should stay committed to effective protection of human rights in enforcement of criminal law.

Telenor is a large provider of electronic communications services with a foot print covering both Asia and Europe. We have worked in a structured and dedicated manner for many years to make sure that access to personal data by public authorities happens in accordance with established International and European human rights law<sup>1</sup>. Our customers entrust us with their data and they trust us to keep their communications confidential. Through a strong protection of our customers' right to privacy, we and the technology we use contribute to their ability exercise their freedom of speech and to engage as active citizens in modern society.

We very much appreciate this chance to provide our views and insights to the deliberations of the Commission. The topic is not only important for law enforcement and for those whose human rights may be affected. The topic is also important for the future trajectory of EU law and for the positive normative impact that the European legal order historically has had on standards for human rights protection in other parts of the world.

### **Faster and more efficient cross-border access to e-evidence is necessary**

Telenor appreciate the objective of ensuring faster and efficient cross-border access to e-evidence; it is an important enabler of a vibrant European economy characterized by rule of law.

We believe that the European Investigation Order provides a solid legal mechanism for governing the cross-border access to our customers' personal data by law enforcement agencies. Whether the mechanism is fast and efficient is too early to say as it fairly recently entered into force. Considering the importance of the issue, EU should avoid taking immediate action as long we do not know that it is necessary. A proper evaluation of the European Investigation Order should be a prerequisite, rather than creating a new mechanism. Considering that cross border relations in general are more challenging than purely national *ditto*, it should be expected that equal speed and efficiency cannot be achieved for cross border requests for access to e-evidence as in purely national *ditto*. If equal speed and efficiency is achieved it is a sign that we have offset the fine balance of rights and interests that we through years legal cases have judged to be rational and just in the liberal democratic tradition.

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<sup>1</sup> Read more here: <https://www.telenor.com/sustainability/responsible-business/privacy-and-data-protection/handling-access-requests-from-authorities/>

## The clearest challenges we see

From a practical perspective, we expect two challenges to prove especially difficult to deal with if the legislator decides to introduce an opportunity for authorities in one member state to request or order access to personal data held by a natural or legal person in a different member state.

### 1) Assessing the legal basis

When we receive a request for access to personal data, our policies require us to check if there is a valid legal basis. This includes examination both of material and procedural validity. Thereby, we become able to say that we only hand over information to individuals who are indeed acting on behalf of a competent public authority.

If it would be made possible to make cross-border request or to issue cross-border orders, this would require all providers of electronic communications services to establish contact-points and procedures in dialogue with competent authorities in all member states. Due to the low volume of cross border requests on each link, the opportunity to improve procedures for each link would be limited.

Related challenges would exist for the legal evaluation of the claimed material legal basis. Data controllers rarely have within their legal department experts on the national legal systems of other member states. To do a proper evaluation of the request, the data controller would therefore have to purchase external legal counsel from a foreign law firm. This would delay the process and result in large costs. Under the European Investigation Order, a national authority will issue the order, and it will therefore not be difficult to do a proper assessment of the legal basis of the request.

### 2) Assessing the human rights impact

It is also part of our procedures to conduct human rights impact assessment before handing over personal information. In rare cases, a request may on the surface have a valid legal basis but in the end prove to be potentially contrary to the human rights of the data subject.

The human rights impact assessment must be done based on an understanding of facts. Such understanding can reasonably be achieved if the request is national in character. However, it is much more challenging to gather the necessary facts if the case concerns activities and relations in other states. It will be challenging to know if the necessary facts have been gathered or if circumstances exist that should be further investigated. This puts an unreasonable burden on the data controller, or rather, its employees; considering the potential impact on the data subject, it would be problematic to institutionalize a practice of demanding of individuals that they judge if they have the right factual basis to conclude on the potential human rights impact if said individuals have no contextual experience for making such a judgement.

## Conclusion

Telenor see considerable challenges in the idea to enable direct requests from authorities in one member state to data controllers in another. The European Investigation Order includes a clear division of responsibilities between public and privacy actors that fit the ability of said actors to lift the tasks they are given, and the order should therefore not be set aside by fast and more efficient processes that do not do justice to the rights of citizens. The best actor to

ensure speedy execution as well as strong human rights protection where requests are received from other member states are national authorities since they have factual and legal insights on other member states. Requests should therefore continue to be channeled through those. If the Commission nonetheless decides to exercise their powers to propose a new legal instrument, we encourage that the competence to order access is limited to Courts, excluding public prosecutors.

Telenor is an active member of ETNO and the Global Network Initiative (GNI). We support the content of the replies submitted by these two organization and encourage the Commission to give due considerations to their submissions.

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