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Open Letter **to the participants in the trilogue negotiations** **on the regulation on the disclosure of electronically stored evidence** **in cross-border criminal investigations**

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Transparency Germany welcomes the efforts of the EU institutions to improve the cooperation of investigative authorities between EU member states. However, the coming rounds of negotiations will deal with electronically stored information that is protected by professional secrecy or subject to the obligation of confidentiality. Therefore, the highest standards must be applied to the release of protected data. Specifically, you will set out the conditions under which foreign judicial authorities or lawyers may order domestic online service providers to hand over sensitive data.

You have already received numerous statements on this from associations of those affected. *Transparency Germany* appeals to you to transfer the decision as to whether data requiring special protection may be released to an "issuing state" to the competent institutions of the "executing state" in any case. On the other hand, online service providers cannot be expected to decide whether the order from another EU country is lawful and proportionate.

Information requiring special protection also includes patients' data. According to the present proposals for the handing-out-regulations, electronic patient records may also be requested across borders within the EU. Law enforcement authorities or lawyers of one EU country are allowed to request this from the online provider of another EU country directly. The determining factor is whether it is legal in the requesting EU state: That is, whether the act being prosecuted is punishable there, such as abortion in Poland or assisted suicide in Ireland. For data subject to confidentiality, the foreign judicial authority should take into account the law of the other country "as far as possible".

None of the proposals envisage making the release of patient data conditional of the consent of domestic authorities. If the issuing procedure is not fundamentally changed, necessary protections for patients are no longer guaranteed.

Therefore, *Transparency Germany* demands the following points to be included in the planned EU regulation:

- Patient records are subject to a ban on seizure within the EU in principle.
- The right to refuse to testify is explicitly confirmed for professional groups subject to the duty of confidentiality (physicians and psychotherapists) or the obligation to maintain secrecy (medical staff, social workers).
- Requests for protected data by foreign EU judicial authorities or lawyers (e.g. electronic patient records) are decided by domestic courts without exception. Such data may only be released in the case of criminal offences that are considered particularly serious domestically (e.g. murder, manslaughter, genocide or extortionate kidnapping of human beings).
- Persons whose data are requested must be informed of this in principle and are entitled to appeal against the decision of the domestic court. Exceptions must be applied for and ordered by the court, e.g. if this would thwart criminal prosecution or the gathering of evidence.

Furthermore, *Transparency Germany* agrees with the statement of the so-called "E-Evidence Coalition" of European internet companies, journalists, media representatives and non-governmental organisations of 18 May 2021.

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