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**NOTE**

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| From: | DE Delegation |
| To:   | Delegations   |

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| Subject: | DEU – Specific comments on Articles 8 and 9 and recitals 29 - 32 |
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## DEU – Specific comments on Articles 8 and 9 and recitals 29 - 32

### I. The scope of Articles 8 and 9 in relation to civil judgments

Germany considers that the scope of Articles 8 and 9 needs to be clarified in relation to civil judgments.

According to the oral explanations given by the Commission in the meeting of the Working Party on Civil Law Matters (General Questions) on 16 June, Articles 8 and 9 seem to have been meant to apply to “orders” irrespective of their legal nature. Articles 8 and 9 would thus be applicable to both administrative acts and civil judgments.

However, Germany considers the conditions and requirements set out in Articles 8 and 9 to be in conflict with basic principles of civil procedure law. Civil proceedings are based on the principle of party autonomy – both in the judicial proceedings up to the issuance of a judgment as well as in the enforcement phase. Pursuant to a principle of Private International Law, the court will apply its domestic procedural law to a civil dispute (the *lex fori* governs procedural matters).

In practice, when applied to civil judgments, Articles 8 and 9 will have the following consequences:

According to para. 1 of Article 8 and 9 respectively, the service provider would be obliged to inform the court issuing the civil judgment of the effect given to it, although, pursuant to the principle of party autonomy, it would be solely up to the plaintiff to check if the service provider has complied with the judgment, and in the negative, to decide if he wants to start enforcement proceedings with the competent enforcement authorities against the service provider.

According to para. 2 lit. a (i) of Article 8 and 9 respectively, the civil judgment would necessarily have to state the reasons explaining why the information is illegal content, whereas, depending on the domestic civil procedural law (*lex fori*), a statement of reasons might not be necessary at all (e.g. judgments by default) or be subject to different conditions than those set forth in Article 8 and 9.

According to Article 8 para. 2 lit. a (iii) and Article 9 para. 2 lit. a (ii), the civil judgment would have to contain information about the redress available to the service provider and to the recipient of the service. However, from a civil procedural point of view, it is up to the domestic civil procedural law (*lex fori*) to decide upon the information to be provided on available redress. Moreover, information on available redress will only be provided to the parties to the civil proceeding, not to a third person who is not party to the proceeding.

According to para. 2 lit. c of Article 8 and 9 respectively, the civil judgment would have to be transmitted in the language declared by the service provider, and sent to the electronic point of contact established by the provider. By contrast, pursuant to the domestic civil procedural

law of presumably all Member States, civil judgments will be issued in the language of the *lex fori* (German courts will issue their civil judgments in German). They will be served to the defendant domiciled in the Member State of the adjudicating court according to domestic civil procedural law, or, in case of a cross-border dispute, according to the Regulation on the Service of Documents in Civil and Commercial Matters, under which a translation is not always required.

According to para. 3 of Article 8 and 9 respectively, the court would have to send its civil judgment to the Digital Services Coordinator, whereas, pursuant to the principle of party autonomy, it is exclusively up to the plaintiff to decide on initiating enforcement proceedings with the authorities competent for enforcing a civil judgment.

Therefore, Germany is of the opinion that civil judgments need to be excluded from the scope of Articles 8 and 9.

## II. The scope of Article 9 in relation to the rules on international judicial cooperation in criminal matters

With respect to Article 9, Germany has questions concerning the provision's interplay with the rules on international judicial cooperation in criminal matters, notably the basic principles of Mutual Legal Assistance (MLA) and the envisaged E-Evidence Regulation.

The way we understand Article 9, it presupposes an order to provide information that was issued by a government authority in a given Member State. Article 9 does not address the effect and execution of those orders as such. Instead, it creates a secondary/ancillary obligation upon receipt of such order (and lays down uniform formal requirements that have to be met in order to trigger the secondary obligation).

Thus, Article 9 does not contain empowering provisions with respect to orders to provide information. The question as to whether such orders can have effect outside of the issuing authority's territory therefore has to be answered uniquely by looking at the empowering provision (and the rules of MLA referring thereto).

In this context, it is important to note that national orders to provide information cannot have an effect in a different Member State on the basis of the issuing Member State's law alone. Such effect may be created exclusively through the instruments governing MLA or specific EU law such as the (envisaged) E-Evidence Regulation.

Against this backdrop, we have serious concerns with respect to the second sentence newly added in recital 29 of the compromise proposal, which reads: *„In case of non-compliance with such orders, the issuing Member State should be able to enforce them in accordance with its national law.“*

The same is true for the first sentence of the newly added text in recital 29 of the compromise proposal (*“The applicable Union or national law on the basis of which those orders are issued,*

*should also be the basis for the enforcement of the respective orders, without prejudice to Union or bilateral instruments relating to the cross-border recognition and enforcement of those orders.”).* We have difficulties grasping the exact meaning of the latter part of the sentence (“without prejudice...”). In our understanding, the instruments referenced in that part are the very (and only) basis for the enforcement of the information orders at issue. Thus, it is unclear to us which instruments the first part of the sentence refers to.

In our view, the recitals should avoid any potentially misleading implications as to a possible cross-border effect of national law. They should make it very clear that cross-border effect may only be created through the operation of MLA procedures or on the basis of Union law specifically designed to that effect (such as the E-Evidence Regulation).