

Re: CCBE contribution to the trilogue on the e-evidence proposal

To whom it may concern,

I am writing to you on behalf of the Council of Bars and Law Societies of Europe (CCBE) which represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

In its [position paper](#), adopted in 2018, the CCBE raised concerns regarding the proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (hereafter the “e-evidence proposal”). The CCBE stressed that a number of the proposed provisions undermine fundamental rights and contain serious shortcomings. In this regard, the CCBE considers that the original draft report of the European Parliament addressed most of these concerns and regrets that the final report adopted in December 2020 does not include all the significant improvements which were proposed.

With this letter, the CCBE would like to support several amendments which ensure minimum safeguards of fundamental rights and which should be included in a final agreement, if such text is to be adopted during the trilogue negotiations. Indeed, the CCBE considers that the guarantees proposed by the European Parliament are only the bare minimum to respect fundamental rights such as access to Justice, the right to a fair trial, the principle of equality of arms and the rights of the defence. Further safeguards must be provided. Otherwise, if such minimum safeguards are not included, the e-evidence proposal should be discarded.

Regarding the possibility to issue a European Production or Preservation Orders (EPOC) on behalf of a suspected or accused person, the CCBE strongly support the amendment presented by the European Parliament (Article 1.a.) which provides that *“The issuing of a European Production or Preservation Order may also be requested on behalf of a suspected or accused person, within the framework of applicable defence rights in accordance with national criminal procedures”*.

The CCBE considers that, as with the European Investigation Order, suspected or accused persons or their lawyers should be able to request the issuing of a European Production or Preservation Orders in an equally efficient way as prosecutors can. If not, the proposal undermines the principle of equality of arms between the prosecution and defence, placing the defendant at a significant disadvantage. Moreover, addressed entities should be required to hand over only data that are relevant for the purposes of the criminal investigation.

Regarding the requirements for issuing a European Production Order in Article 5 §7, the CCBE strongly welcomes the European Parliament's position, as it refers to the immunities and privileges granted by, not only the law of the Member State of the service provider, but also by the law of the Member State *"where the person whose data is sought resides or is bound by an obligation of professional secrecy or lawyer-client privilege"*. Such wording shall also be included in Article 6 §3a regarding the requirements for issuing a European Preservation Order. The European Parliament has rightly identified that there was a need to address a potential legal gap in the original proposal by the European Commission.

Regarding the grounds for non-recognition or non-execution of EPOC, the CCBE considers that the grounds mentioned in the legislative proposal are too restrictive. There requires to be set out further specific grounds to refuse the execution of an EPO, including the absence of double criminality or the fact that the requested data are covered by professional secrecy/legal professional privilege. **Therefore, the CCBE strongly supports the new article 10.a. introduced by the European Parliament which includes the reference to "privileges" enabling addressees of EPOC's to refuse execution of the request if the targeted data is protected by professional secrecy and, more generally, where the conditions for issuing a European Production Order as laid down in Art. 5 are not fulfilled.**

This includes the possibility to refuse an EPOC where it does not contain sufficient information as regards the necessity and proportionality of the measure. **Hence, the CCBE also proposes to include in Art. 5 §5(i) a direct reference to the facts of the case, and make a similar provision in the respective annexes. This requirement should be inserted for both, European Production Orders as well as European Preservation Orders.** This would allow an executing authority to effectively assess the necessity and proportionality of the measure.

Regarding the notification requirements provided for in Article 11, the CCBE considers that the imposition of confidentiality restrictions on EPOC's must be subject to the approval of an independent judicial authority and in each case be duly motivated and justified by the issuing authority based on meaningful and documented assessments. With regard to European Preservation Orders, the CCBE also submits that the issuing authority must be obliged to inform the data subject.

The CCBE therefore welcomes the amendments of Article 11 presented by the European Parliament which provides that "the service provider shall inform the person whose data is being sought without undue delay". Further, the CCBE supports the new provision of Article 11 §1a., according to which **the imposition of confidentiality restrictions must be based on a justified and limited judicial order.**

Finally, **regarding effective remedies and judicial review**, the CCBE considers that persons affected by an EPOC should not only be able to exercise their remedies before the court in the issuing state, but also in the court of the Member State where the data are sought. The CCBE considers that it is necessary also to extend the right to effective remedies to European Preservation Orders. **In this regard, the amendments of Article 17 §3 should be included in the final agreement** as it provides that *"Such right to an effective remedy shall be exercised before a court in the issuing State or the executing State in accordance with national law and shall include the possibility to challenge the legality of the measure, including its necessity and proportionality"*.

Beyond these amendments presented by the European Parliament, the CCBE considers that additional safeguards should be provided.

Regarding the involvement of the executing authorities, the CCBE considers that it should be mandatory for the executing authority to give its explicit approval before a production or preservation order can be executed. This guarantees that executing authorities assess and take a

decision about requests, that all the orders are verified against the judicial principles of *ne bis in idem* and dual criminality and that all fundamental rights and special protections are respected. **Also, regarding judicial review, the CCBE considers Art 2(14) should be clarified, providing that “the executing authority shall require a court authorisation in the executing State”.** The aim to preserve and transmit electronic evidence in a swift manner by directly addressing the service providers must not disregard the fact that service providers are no judicial authorities that can assess the legality of an order. It is therefore crucial to provide for judicial control in the executing State.

Further, the CCBE notes that the judicial authorities of the affected person’s country of residence are not consulted nor required to validate production orders and are therefore unable to block infringing foreign data requests. This is very unfortunate as the affected person’s Member State of residence is usually best placed to protect their fundamental and procedural rights and to know about potential special protections of lawyers. The lack of involvement of the affected authorities could undermine the affected person's right to access to justice.

Hence, the CCBE regrets that the involvement of the affected authorities in the execution of an EPOC, initially foreseen by the Parliament's rapporteur in the draft report, has not been retained. Article 8 and 9 of the proposal should be modified to involve the affected authorities. An EPOC should not only be addressed to the executing authority, but also to the affected authority where the identity of the person concerned is already known to the issuing authority and it is clear that the State of permanent residence of the person is neither the issuing nor the executing State.

Finally, the CCBE is of the opinion that the use of preservation orders as an intermediate measure should be considered in cases where the legality of a production order needs to be checked or is disputed. Such compromise would serve the interests of the state, the affected providers and affected persons alike.

In conclusion, the CCBE would like to recall that the safeguards proposed by the European Parliament are the very minimum which should be included in any final agreement between the EU institutions. If it does not appear possible to provide sufficient guarantees for the protection of fundamental rights, the e-evidence proposal should be discarded.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. von Galen', with a long horizontal flourish extending to the right.

Margarete von Galen
CCBE President