

CCBE recommendations for Bars on the implementation of the e-Evidence Regulation

21/11/2024

INTRODUCTION

The CCBE has followed since the beginning the legislative developments regarding the [e-evidence Regulation](#) (Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings). After five years of negotiations, the Regulation was agreed on 12 July 2023 and has to be implemented by 18 August 2026.

This paper sets out recommendations on the implementation of the Regulation 2023/1543 and focuses on issues which are both relevant and of importance to Bars and the legal profession. The recommendations have also been prepared to assist Bars in their engagement with their respective Ministries during the national implementation process.

The recommendations are based on a report by the European Lawyers Foundation (ELF) which was drafted in close consultation with experts from the CCBE Criminal Law Committee and Surveillance Working Group. The report was also circulated more widely within the CCBE membership in which comments were invited. The report was then submitted to the 4 October 2024 Standing Committee of the CCBE.

Background

1. The EU [e-evidence Regulation](#) (Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings) establishes rules under which the competent authorities of a Member State can issue a European Production Order or a European Preservation Order to compel service providers to produce or to preserve electronic evidence in criminal proceedings. One of its novelties lies in the ability of competent authorities to send production or preservation orders directly to service providers in another Member State (but only in relation to stored data, not for real-time interception).
2. For lawyers, its chief novelty lies in lawyers' ability directly to request the issuance of a production or preservation order on behalf of clients.

3. The Regulation depends in a number of places on national rules, which may differ in Member States, despite it being a regulation and so directly applicable in all Member States without further legislation.
4. As a result, national differences will affect the eventual implementation of the Regulation, and Member States are currently preparing themselves for the implementation date of 18 August 2026.
5. The European Commission has set up an expert group with the Member States focused on the decentralised IT system which will link competent authorities and service providers. It will be a network of IT systems and interoperable access points, operating under the individual responsibility and management of each Member State or EU body, which will enable the cross-border exchange of information to take place in a secure and reliable manner - it is obviously crucial for the Regulation to operate properly.
6. The European Commission has also started a dialogue with Member States about how to implement the Regulation in practice. It is accordingly important that Bars begin an urgent dialogue with the relevant authorities in their own Member State responsible for implementation, to be sure that national rules which affect lawyers are both respected and aligned with the Regulation. The urgency arises from the fact that the implementation process has started, and decisions could be being taken now within the Member States.
7. The Regulation raises various issues, some relevant to Bars (mainly around the issue of lawyer-client confidentiality), and some relevant to defence lawyers on whose everyday practice the Regulation will have an impact.
8. There are two main urgent actions that are recommended to Bars.
9. First of all, Bars are encouraged to begin a dialogue urgently with the relevant competent authorities in their own Member State, to take up the issues raised in the 'Guidance for Bars on possible national differences in the implementation of the e-Evidence Regulation' prepared by the European Lawyers Foundation.
10. Secondly, in particular Bars are recommended to take up the following two principal issues:
 - (a) the procedure by which a lawyer can request a production or preservation order; and
 - (b) how lawyer-client confidentiality, as understood and protected at national level, can continue to be protected when the Regulation is implemented.

The details of these two points are set out below.

Procedure by which a lawyer can request a production or preservation order (Article 1.2)

11. Article 1.2, which grants lawyers the right to request a production or preservation order, states that: '2. The issuing of a European Production Order or of a European Preservation Order may also be requested by a suspect or an accused person, or by a lawyer on that person's behalf within the framework of applicable defence rights in accordance with national criminal procedural law.'
12. While it is clear that the Regulation intends to grant a lawyer the right to make such a request, the right is phrased as being granted 'within the framework of applicable defence rights in accordance

with national criminal procedural law'. The procedure for such a request may differ in each Member State, and it is important for the Bar to ensure with the relevant authority in the Member State that the lawyer's right to request a production or preservation order becomes a reality on the implementation of the Regulation.

13. Therefore, the following points are relevant for Bars to raise with their appropriate authorities in relation to a lawyer's right to request a production or preservation order:
 - a. it needs to be clear which authorities are responsible in the Member State for issuing and enforcing production and preservation orders;
 - b. there should be a clear procedure for the lawyer to make such a request;
 - c. if the procedure does not presently exist, it will need to be created;
 - d. the relevant issuing authority will need to be aware that lawyers can make such requests, and under what conditions;
 - e. the issuing authority will need to be aware of who is and who is not a lawyer, to be sure that legitimate requests are granted, and so thought should be given as to how lawyers will be identified by the relevant authorities; and
 - f. given the complexity of the forms attached as Annex I and Annex II to the Regulation, and the detail of the information required for their completion, there should be agreement between the Bars and the relevant authorities as to what information needs to be completed by lawyers, since not all the information requested may be in the possession of the lawyer seeking a production or preservation order.

Protection of lawyer-client confidentiality under the Regulation (Articles 5.9, 5.10, 10.5, 11.4, 12 and 16)

14. Article 5.9 covers the situation where data protected by professional privilege under the law of the issuing State are stored or otherwise processed by a service provider as part of an infrastructure provided to professionals covered by professional privilege in their business capacity (the professional is then called a 'privileged professional'). A European Production Order to obtain traffic data, except for data requested for the sole purpose of identifying the user, or to obtain content data may in those circumstances only be issued:
 - where the privileged professional resides in the issuing State;
 - where addressing the privileged professional might be detrimental to the investigation; or
 - where the privileges were waived in accordance with the applicable law.
15. Article 5.10 deals with the point where the issuing authority has reasons to believe that the traffic data, except for data requested for the sole purpose of identifying the user, or the content data requested by the European Production Order, are protected by immunities or privileges granted under the law of the enforcing State. The issuing authority may then seek clarification before issuing the European Production Order as explained, including by consulting the competent authorities of the enforcing State, either directly or via Eurojust or the European Judicial Network. It goes on to state that the issuing authority must not issue a European Production Order if it finds that the requested traffic data, except for data requested for the sole purpose of identifying the

user, or the content data are protected by immunities or privileges granted under the law of the enforcing State.

16. These two articles raise the following points, which will need to be taken up by Bars with their own Member States:
 - a. it is assumed that the conditions outlined in Article 5.9 are not cumulative but individual, given the 'or' at the end of the second bullet point – if so, this will need to be impressed on the relevant authority in the Member State;
 - b. the definition of the 'residency' of the professional in the issuing Member State in the second bullet-point will need to be settled at Member State level;
 - c. lawyer-client privilege cannot be waived in certain Member States, and so the third bullet-point in Article 5.9 will have no meaning in those jurisdictions;
 - d. there needs to be consideration of the position where the privileged professional resides in a Member State other than the issuing or enforcing State or indeed in a third country outside the EU;
 - e. the outcome where the extent of privilege is different in the issuing and enforcing jurisdictions, or indeed in the third country, needs to be examined: for instance, in-house counsel may have privilege at a domestic level in some jurisdictions, but not in others, and the treatment of metadata or the identity of the client may be treated differently jurisdiction by jurisdiction;
 - f. it is important that all competent authorities in the Member States, plus the relevant contacts in Eurojust and the European Judicial Network, have identical and up-to-date information on lawyer-client privilege at European level and in all the Member States, given their role as consultants in Article 5.10.
 - g. Bars might be consulted as competent authorities under Article 5.10 above, and indeed under other similar articles in the Regulation, and so should be ready to provide information.
17. Articles 10.5, 11.4, 12 and 16 deal with lawyer-client privilege as a ground for refusing to enforce a production or preservation order.
18. Article 10.5 covers the situation where the addressee of the European Production Order (which will normally be the service provider) considers, based solely on the information contained in the Order, that the execution of the Order could interfere with immunities or privileges under the law of the enforcing State.
19. Article 11.4 covers the situation where the addressee (again, normally the service provider) considers, based solely on the information contained in the European Preservation Order, that the execution of the Order could interfere with immunities or privileges under the law of the enforcing State.
20. Article 12.1(a) makes clear that one of the grounds which can be raised by the enforcing authority for refusing the production order is that the data requested are protected by immunities or privileges granted under the law of the enforcing State which prevent the execution or enforcement of the order. (Article 16.4(f) and Article 16.5(e) confirm that privilege under the law of the enforcing state is a ground for denying enforcement of either the production order or the preservation order respectively.)

21. Article 12.5 states that where the power to waive the privilege lies with an authority of the enforcing State, the issuing authority may request the enforcing authority to contact that authority of the enforcing State to request it to exercise that power without delay. Where the power to waive the privilege lies with an authority of another Member State or a third country or with an international organisation, the issuing authority may request the authority concerned to exercise that power.
22. These are the points for the Bars to consider with their appropriate authorities:
 - a. the Regulation is not clear as to what should happen if the addressee (i.e. normally the service provider) has information about the privileged nature of the data based on information available to it which is not included in the European Production or Preservation Order, this should be taken into account as well; the interplay between the protection of lawyer-client privilege and the possibility to refuse an European Production or Preservation Order allows the service provider to refuse a request based on information regarding such privilege which does not stem from the order of the issuing authority, see, for instance, Article 10 para 8 and Art. 12 (1) (a); since the Regulation is not very precise on this point, discussions with relevant authorities and service providers should take place.
 - b. given that service providers have such an important role in passing back information to the issuing and enforcing authorities about interference with lawyer-client privilege, it is important that Bars check with their relevant authorities as to how service providers will be informed about the extent of lawyer-client privilege in the Member State, and to whom it applies (i.e. lawyers).

Conclusion

The above recommendations aim to be as comprehensive as possible. It is hoped that they will be of assistance in highlighting the most relevant issues for Bars and the legal profession, as well as providing a useful reference document during the national implementation process.