Remarks on the e-Evidence Regulation Draft

Berlin, 02.05.2022

The European Commission published the draft of an e-Evidence Regulation (the “Regulation”) in April 2018. The trilogue started in early 2021. The current French presidency of the Council of EU has declared this draft regulation to be one of its priorities. The Regulation shall introduce binding European Production and Preservation Orders. Both types of orders must be issued or validated by a judicial authority of a Member State. An order may be issued to seek the preservation or production of data stored by a service provider located in another jurisdiction that is necessary as evidence in criminal investigations or proceedings. Such orders may only be issued if a similar measure is available for the same criminal offence in a comparable domestic situation in the issuing state.

eco welcomes the French Presidency’s active engagement and ambition to find a political agreement on the proposal. The Regulation will create a much needed harmonised framework for cross border user data disclosure requests. This will bring more clarity and will significantly reduce administrative burden for law enforcement authorities and service providers. However, eco regrets that the trilogue negotiations have not been settled yet because there are still a number of important unresolved issues and negotiation points on the agenda that need to be reconciled.

eco understands and respects the necessities of legitimate criminal investigations and proceedings. To be legitimate, the provisions of the Regulation must align with the Charter of Fundamental Rights of the European Union (EuCFR). The specific fundamental rights are, inter alia:
- Respect for private and family life,
- Protection of personal data
- Freedom to conduct a business,
- Right to a fair trial; and
- Right to defence.

Regarding the developments in relation to the rule of law in certain member states, a specific reason for refusal of a European Production Order and Preservation Order must be provided. This point and others shall be presented here in more detail, due to the ongoing trilogue negotiations.

I. In General

There is an undisputed need for a harmonised framework for the exchange of e-evidence between Member States. However, the aim of harmonisation should not lead to a reduction in safeguards for fundamental rights for the sake of compromise. Moreover, the co-legislators should engage in practical provisions which fully respect the rule of law and fundamental rights.

We encourage the adoption of the Commission's proposed Article 5(6)/Recital 34, which limits the circumstances in which e-evidence requests may be issued to cloud/enterprise service providers. We support the principle that such requests should be addressed to the cloud/enterprise customer, rather than to the service provider, save for limited circumstances laid down by law. We believe that linking the service provider and data controller concepts risks creating unnecessary friction between issuing authorities and service providers. In particular, establishing that link will inevitably lead to disputes between service providers and issuing authorities over whether the service provider is acting in a controller or processor capacity in respect of different categories of personal data.
eco calls on the co-legislators to apply consistency to the ongoing proposals on the digitalisation of justice. The interfaces required by the proposed e-CODEX regulation (e-Justice Communication via Online Data Exchange – the e-CODEX system) should be compatible with the proposed interfaces of the Common European Exchange System or the existing systems service providers have in place for law enforcement requests and the related transmission of electronic evidence. A secure and well-functioning digital Exchange System can also facilitate and speed up the notification process. It is also very important for data security.

II. Notification

a) Traffic and content data

In eco's view, traffic data should only be accessible if the same safeguards that apply for content data also apply to traffic data meaning that a notification is also mandatory when accessing traffic data. This kind of data can sometimes reveal even more than content data.

For example, take an intercepted phone call between person A and person B:

> *A: "Do you have time tomorrow?"*
> *B: "No"*
> *End of call.*

This conversation does not reveal much. However, the traffic data record

might show six calls between A and B on one day, with some late in the night. This record indicates a close relationship between A and B. The European Court of Justice (CJEU), for example, in its case law on data retention, as well the European Court of Human Rights have judged that the analysis of traffic data can lead to very close and exact conclusions about private and family lives.

eco also believes that a notification should be required if the traffic data is requested only for identification purposes, unless other purposes can not be excluded, for example, by the amount of data which is delivered to the issuing authority.

b) Residence criterion
It may prove difficult to actually pinpoint or confirm a data subject's exact location due to the use of VPNs or cross-border signals from a moving data subject leading to an inaccurate location prediction. Instead, we are of the view that allowing the service provider to notify the executing authority in certain circumstances of potential issues with a request will provide a necessary opportunity for the executing authority to assess the request and raise any concerns regarding execution and compliance. These concerns may relate to matters such as (but not limited to) freedom of expression, violation of fundamental rights or potential conflict of laws.

III. Grounds for refusal
eco is convinced that at least the following grounds for refusal of the execution of European Production and Preservation Orders are necessary:

1. Ne bis in idem principle,

2. Double criminality,

3. Media freedoms, special privileges,

4. Fundamental rights violations,

5. National security,

6. If safeguards are higher in the executing State than in the issuing State and the order does not respect these, then the order can be refused.

In eco's opinion, grounds 1, 3, and 4 for refusal must be included in order to comply with the European Charter of Fundamental Rights.

As criminal investigations and proceedings are more difficult to assess in a cross-border context, Ground no. 4 in particular would address rights such as the right to fair trial and the right to defence.

The requirement of double criminality additionally could reduce the impact of any worrying developments in relation to upholding the rule of law.

Regarding the refusal ground under No. 6, we note that in Germany, the requirements for access to subscriber data have become more restrictive, due to a judgement of the German Constitutional Court. The German legislator has since amended the relevant law.

Moreover, in order to be in compliance with the European Charter of Fundamental Rights, it is imperative that requested operators have the right to refuse to grant a response if factual indications indicate that the law enforcement authorities of a Member State have been hacked or if there are reasonable suspicions about the authenticity of a particular query.

IV. Single-Regulation approach

eco calls for a single-regulation approach so that no accompanying directives on the matter of e-evidence are necessary. We understand that the European Parliament (EP) and the Council of Europe are currently discussing the possibility of an additional directive for the ["legal representative" of the service provider]. We are of the view that this single-regulation approach is preferable in regard to the Common European Exchange System and implementing numerous, separate laws on the same subject increases the risk of inconsistencies and incorrect application.

V. Emergency cases

a) Longer deadlines for MSM enterprises are necessary

eco is of the opinion that a minimum deadline of 16 hours in emergency cases is necessary. MSM (micro, small and medium) enterprises have neither the staff nor the possibility to increase staff to comply with an eight-hour deadline in the case of an emergency. To meet the requirements, special teams would have to be set up to respond to requests outside of normal working hours and days. Just having to maintain the necessary personnel resources is a massive cost burden for MSM enterprises. The compensation for single requests from issuing states are neither meant nor suited to fully offset the costs of the staff required to be able to respond within in eight hours. Overly short deadlines violate the freedom to conduct a business (Art. 16 EuCFR) in the light of the principle of proportionality (Art. 52 (1)(2) EuCFR).

b) **Ex-post validation conceivable**
We are of the view that an ex-post judicial validation of orders in cases of emergencies where the issuing authorities could usually issue the order in a similar domestic case without validation, is conceivable.

VI. Common European Exchange System
eco is of the opinion that the Common European Exchange System should be compatible with a majority of used interfaces in the Member States and should conform to ESTI standards. eco believes that the focus for this provision should be on the integrity and security of any solution used by a service provider. Where service providers have been working with law enforcement authorities on how best to implement secure and efficient systems for transmission of user data in response to these requests, they are uniquely placed with the insight to deliver the best solution focusing on integrity and security as the key measures of success.

Whilst EU-wide conformity could be beneficial, efforts to ensure uniformity should not be to the detriment of the integrity of the proposed system. Therefore, eco would suggest that providers who currently have systems in place for receipt of law enforcement requests and the related transmission of electronic evidence, be allowed to continue using these systems.

Furthermore, exceptions for MSM enterprises are necessary. To this end, a de-minimis threshold of 100,000 subscribers of each obliged company is recommended. The freedom to conduct a business (Art. 16 EuCFR) in the light of the principle of proportionality (Art. 52 I 2 EuCFR) requires such exceptions.
