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NOTE

From:	Incoming Presidency
To:	Delegations
Subject:	Draft Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (e-evidence) - Preparation of the 4th trilogue

In view of the upcoming informal COPEN meeting on 2 July, the incoming Slovenian Presidency would invite delegations to reflect on the questions contained in this note.

The intention of the incoming Presidency is to first explore what room there is for a balanced compromise text on the key issues of notification and grounds for refusal. Building on the excellent work conducted by the Portuguese Presidency and the informal discussions with the Parliament that have taken place during the last few months, the incoming Presidency has analysed in what ways a package encompassing Articles 5, 7, 7a and 10a, as described in Annex I to this note, could constitute the basis for a balanced compromise acceptable to both legislators. It appears timely to now engage in a discussion on the concrete details of such a compromise package.

Ideally, the political trilogue scheduled for 9 July would be used to define the main pillars that a compromise on the issues of notification and grounds for refusal would be based on. It is in this light that option A, as described in Annex I to this note, indicates a possible direction that the negotiations could take. Whether it will be possible to move in this direction obviously depends on both institutions, but in any case, the Presidency is convinced that a thorough understanding of the positions of all delegations in relation to this option and its components will be a very useful tool in the upcoming meetings with the Parliament.

The incoming Presidency invites delegations to carefully consider the options and questions in Annex I and to indicate their positions, suggestions and possible red lines. It should be underlined that option A has been drafted on the basis of indications gathered by the incoming Presidency in formal and informal meetings and consultations throughout the last few months; it does not express a preference or a defined position of the incoming Presidency. Annex I also includes a few concrete questions to delegations.

In Annex II to the Presidency note, delegations will find an indicative consolidated version of the text of the Regulation.

1. OPTION A (modified position in relation to the General Approach):

This option, which should be seen as part of a limited or broad compromise package, builds on the main hypotheses that

- ✓ The notification regime needs to be structured in a manner to take into account the specific characteristics of the different data categories. Orders regarding data that would imply a larger degree of intrusiveness (i.e. content data) needs to be treated differently from, for example, subscriber data;
- ✓ A compromise would have to include a notification obligation for content and traffic data, other than traffic data used for the sole purpose of identifying the user, with consequences as suggested for content data in the general approach;
- ✓ A provision with limited optional grounds of refusal linked to this notification must be considered;
- ✓ The service provider in question would not be given the right to object to an order;
- ✓ Where a notification would be in place no pre-consultation would be required;
- ✓ The residence criterion of the general approach would be maintained (i.e. ‘reasonable grounds that the person is not residing on the own territory’);
- ✓ There would be no notification obligation as regards subscriber data and traffic data used for the sole purpose of identifying the user.

In detail, this would mean that Articles 5, 7, 7a and 10a would be drafted or redrafted in the following way:

Article 5

- The Article could be maintained unchanged in the first part, meaning that the requirements for the issuing of an order will remain unchanged.
- The reference to the residence criteria (i.e. the person whose data are sought is not residing on the territory of the issuing state) will be kept.
Paragraphs 7 and 8 on privileges and immunities would be deleted (as covered elsewhere in the text and to avoid duplication).

Article 7

- A new paragraph could be added, to differentiate between preservation orders and those production orders that do not necessitate a notification, on the one hand and production orders regarding content and traffic data, other than traffic data used for the sole purpose of identifying the user, on the other (i.e. to clarify that preservation orders will not be transferred to the authorities in the state of the service provider or its legal representative).
- The rest of the article would remain unchanged.

Article 7a

- There would be no notification obligation for Production orders for subscriber data and traffic data used for the sole purpose of identifying the user;
- For content and traffic data, other than traffic data used for the sole purpose of identifying the user, the grounds in Article 7a(2) of the general approach would be transferred to grounds for refusal with a right to object;¹
- No suspensive effect would follow from a notification, but it would be made clear that optional grounds for refusal may apply;
- A reference to grounds for refusal applicable to content and traffic data, other than traffic data used for the sole purpose of identifying the user, will be introduced;
- The reference to the residence criterion would be kept.

Article 10a (based on the proposal of the EP)²

- A list of optional grounds for refusal would be introduced, such as cases where
 - ✓ the production order does not fulfil the criteria for issuing in Article 5;
 - ✓ the execution would harm national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
 - ✓ the order would be incompatible with Article 6 TEU and fundamental rights, whereby it could be provided that the enforcing state should thereby in particular take into consideration whether the issuing state is subject to an Article 7 TEU procedure;
 - ✓ immunities and privileges are at stake, freedom of press and expression and other media;
 - ✓ a conflict with the law of a third country is at hand.³

¹ These privileges and immunities would now be a ground for refusal and not as a pre-consultation procedure.

² This article could at term be moved or merged with Article 7a when considering the exact drafting of the compromise package.

- The list of grounds for refusal should be linked to a consultation obligation between the notified state and the issuing state; i.e. the notified state should be obliged to consult the issuing state before a refusal. Particularly strong rules in this sense could apply to subjects benefiting from immunities and privileges.
- The procedure in relation to conflict with third country laws should be determined at a later stage.

2. OPTION B (general approach based position)

Explanation:

This option builds on the main idea that the Council will continue to strongly defend the general approach as regards notification and grounds for refusal. To the extent this is a preferred option for delegations, they are invited to indicate what parts of the relevant provisions they believe could be open for modifications with a view to meet the positions expressed by the Parliament.

3. QUESTIONS

The following questions aim at clarifying the position of delegations on a few specific components of the relevant provisions:

- a) Would you prefer option A or B as described above? Could you provide comments as to why it is the preferred option?
- b) For the case that the inclusion of an Article 10a would be agreed upon as part of a general compromise package, do you think that the list of optional refusal grounds in the suggested text of Article 10a in option A above is appropriate, or should grounds be deleted and/or added to the list? In particular, regarding the refusal grounds in relation to fundamental rights, what limited conditions might be considered appropriate?
- c) The European Parliament has expressed strong doubts as regards the appropriateness of the residence criterion included in the general approach (Article 7a point 1), and appears to consider that the notification obligation should not be affected by the residence of the person concerned. Would you see any room to meet their concerns in this matter?

³ This would have to be discussed in relation to other provisions, in particular Article 16 of the general approach.

[...]

Chapter 1: Subject matter, definitions and scope

Article 1 *Subject matter*

1. This Regulation lays down the rules under which an authority of a Member State may order a service provider offering services in the Union, to produce or preserve electronic evidence, regardless of the location of data. This Regulation is without prejudice to the powers of national authorities to compel service providers established or represented on their territory to comply with similar national measures.
- 1a. The issuing of a European Production or Preservation Order may also be requested by a suspected or accused person, or by a lawyer on his behalf within the framework of applicable defence rights in accordance with national criminal procedures.**⁴
2. This Regulation shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on law enforcement or judicial authorities in this respect shall remain unaffected.

Article 2 *Definitions*

For the purpose of this Regulation, the following definitions shall apply:

- (1) ‘European Production Order’ means a binding decision by an issuing authority of a Member State compelling a service provider offering services in the Union and established or represented in another Member State, to produce electronic evidence;
- (2) ‘European Preservation Order’ means a binding decision by an issuing authority of a Member State compelling a service provider offering services in the Union and established or represented in another Member State, to preserve electronic evidence in view of a subsequent request for production;
- (3) ‘service provider’ means any natural or legal person that provides one or more of the following categories of services, with the exception of financial services referred to in Article 2(2)(b) of Directive 2006/123/EC **[and, where it concerns personal data, acts as a data controller within the meaning of Regulation (EU) 2016/679]**⁵:
 - (a) electronic communications service as defined in Article 2(4) of [Directive establishing the European Electronic Communications Code];
 - (b) **internet domain name and IP numbering services such as IP address providers, domain name registries, domain name registrars and domain name related privacy and proxy services;**⁶

⁴ Provisionally agreed at political level on 18/03/21.

⁵ The text in brackets has been suggested by EP and is under discussion.

⁶ Point (b) has been provisionally agreed at political level on 18/03/21.

- (c) other information society services as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council⁷ that provide:
 - the ability to its users to communicate with each other; or
 - **the ability** to process or store data on behalf of the users to whom the service is provided **where the storage of data is a defining component of the service provided to the user**^{8,9}
- (4) ‘offering services in the Union’ means:
 - (a) enabling legal or natural persons in one or more Member State(s) to use the services listed under (3) above; and
 - (b) having a substantial connection based on specific factual criteria to the Member State(s) referred to in point (a) **such a substantial connection to the Union shall be considered to exist where the service provider has an establishment in the Union, or, in the absence of such an establishment, based on the existence of a significant number of users in one or more Member States, or the targeting of activities towards one or more Member States**.¹⁰
- (5) ‘establishment’ or ‘being established’ means the actual pursuit of an economic activity for an indefinite period through a stable infrastructure from where the business of providing services is carried out or the business is managed;
- (6) ‘electronic evidence’ means evidence stored in electronic form by or on behalf of a service provider at the time of receipt of a production or preservation order certificate, consisting in stored subscriber data, access data, transactional data and content data¹¹;

⁷ [Directive \(EU\) 2015/1535](#) of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

⁸ Provisionally agreed at political level on 20/05/21. The relation between this text and recital 16 will be discussed later.

⁹ Finland, Latvia and Luxemburg have a reservation because public authorities should not be obliged to comply with a European Production or Preservation Order (Finland) and the definition being still too vague and legally uncertain (Luxemburg); on the necessity to explore the definition further, especially with relation to the proposal of the Directive laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings (Latvia).

¹⁰ Provisionally agreed at political level 18/03/21.

¹¹ The EP has proposed the following compromise text for point 6:
 “‘electronic *information*’ means *subscriber data, traffic data, or content data* stored *in accordance with applicable EU and national law* by or on behalf of a service provider at the time of the *issuing* of a *European Production or Preservation order, that is requested for the purpose of serving as evidence during the investigation, prosecution and court proceedings relating to a criminal offence in a Member State, in accordance with national law*” and subsequent changes to recital 19. It has not been discussed yet.

(7) ‘subscriber data’ means any data **held by a service provider relating to the subscription to the services**¹², pertaining to:

- (a) the identity of a subscriber or customer such as the provided name, date of birth, postal or geographic address, billing and payment data, telephone **number**, or email **address**;¹³
- (b) the type of service and its duration including technical data and data identifying related technical measures or interfaces used by or provided to the subscriber or customer ~~at the moment of initial registration or activation,~~ **at the moment of initial registration or activation**¹⁴ and data related to the validation of the use of service, excluding passwords or other authentication means used in lieu of a password that are provided by a user, or created at the request of a user;
- (c) ~~‘access data’ means data related to the commencement and termination of a user access session to a service, which is strictly necessary for the sole purpose of identifying the user of the service, such as the date and time of use, or the log in to and log off from the service, together with the IP address allocated by the internet access service provider to the user of a service, data identifying the interface used and the user ID. This includes electronic communications metadata as defined in point (c) of Article 4(3) of [Regulation concerning the respect for private life and the protection of personal data in electronic communications];~~¹⁵

[DELETED, but special regime for some types of traffic data where requested for the sole purpose of identifying the user: “for the sole purpose of identifying the user, the IP addresses and, where necessary, the relevant source ports and time stamp (date/time), or technical equivalents of these identifiers].¹⁶

¹² Provisionally agreed at political level, on 20/05/2021.

¹³ Provisional agreed at political level on 18/03/2021.

¹⁴ Provisionally agreed at political level on 20/05/21.

¹⁵ It has been provisionally agreed at political level on 20/05/21 at political level to delete this point, under condition that a special regime for some types of traffic data where requested for the sole purpose of identifying the user is introduced "*for the sole purpose of identifying the user, the IP addresses and, where necessary, the relevant source ports and time stamp (date/time), or technical equivalents of these identifiers.*" The best location of this phrase is still to be decided.

¹⁶ Provisional agreement at political level 20/05/2021. It is still unclear how the wording will be inserted in the text so that the article will be readable.

- (8) [~~‘transactional~~**traffic** data’] means data related to the provision of a service offered by a service provider that serves to provide context or additional information about such service and is generated or processed by an information system of the service provider, such as the source and destination of a message or another type of interaction, data on the location of the device, date, time, duration, size, route, format, the protocol used and the type of compression ~~unless such data constitutes access data. This includes~~ **including** electronic communications metadata as defined in point (c) of Article 4(3) of [Regulation concerning the respect for private life and the protection of personal data in electronic communications] **and data relating to the commencement and termination of a user access session to a service such as the data and time of use, the log-in to and log-off from the service other than subscriber data**,¹⁷
- (9) ‘content data’ means any data in a digital format such as text, voice, videos, images, and sound other than subscriber, ~~access or~~ **traffic**~~transactional~~ data¹⁸;
- (10) ‘information system’ means information system as defined in point (a) of Article 2 of Directive 2013/40/EU of the European Parliament and of the Council¹⁹;
- (11) ‘issuing State’ means the Member State in which the European Production Order or the European Preservation Order is issued;

¹⁷ Provisionally agreed at political level on 20/05/2021.

¹⁸ The text has been provisionally agreed at political level on 20/05/2021, whereby EP has noted that it will request that the following text is added in a recital: "*With regard to content data, this Regulation does not allow any access to any data beyond data related to the services offered to the user by the service provider.*"

The Council proposal for the recital was: "*With regard to content data, this Regulation does not allow the unauthorised installation of software on the user’s device that would give access to content data under the sole control of the user*". This will be analysed when the recitals are discussed.

¹⁹ [Directive 2013/40/EU](#) of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218, 14.8.2013, p. 8).

- (12) 'enforcing State' means the Member State in which the addressee of the European Production Order or the European Preservation Order resides or is established and to which, if necessary, the European Production Order and the European Production Order Certificate or the European Preservation Order and the European Preservation Order Certificate are transmitted for enforcement;
- (13) 'enforcing authority' means the competent authority in the enforcing State to which the European Production Order and the European Production Order Certificate or the European Preservation Order and the European Preservation Order Certificate are transmitted by the issuing authority for enforcement;
- (14) 'emergency cases' means situations where there is an imminent threat to life or physical integrity of a person or to a critical infrastructure as defined in Article 2(a) of Council Directive 2008/114/EC^{20 21}.

Article 3 Scope

- 1. This Regulation applies to service providers which offer services in the Union.
- 1a. The Regulation shall not apply to proceedings initiated by the issuing authority for the purpose of providing mutual legal assistance to another Member State or a third country.
- 2. The European Production Orders and European Preservation Orders may only be issued for criminal proceedings, and for the execution of custodial sentences or detention orders that were not rendered in absentia in case the convict absconded from justice. The Orders may also be issued in proceedings relating to a criminal offence for which a legal person may be held liable or punished in the issuing State.²²
- 3. The Orders provided for by this Regulation may be issued only for data pertaining to services as defined in Article 2(3) offered in the Union.

²⁰ [Council Directive 2008/114/EC](#) of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (OJ L 34523.12.2008. p 75).

²¹ The Council proposed the following compromise text for point 15 on 15/06/2021: "‘emergency cases’ means situations where there is an imminent threat to life or physical integrity of a person or to a critical infrastructure as defined in Article 2 (a) of Council Directive 2008/114/EC ***which is essential for the maintenance of vital societal functions such as health, safety, security, and the disruption or destruction of which would imply a risk of serious harm to the functioning of the State, the provision of basic supplies to the people or the safety of the people.***"

The EP has proposed the following compromise text on 16/06/2021: "‘emergency cases’ means ***validly established*** situations where there is an imminent threat to life or physical integrity of a person or, ***where the disruption or destruction of to*** a critical infrastructure as defined in Article 2(a) of Council Directive 2008/114/EC²¹ ***would imply an imminent risk/threat to the life, physical integrity or safety of a person.***" No agreement has been found yet.

²² Czech Republic, Finland, Latvia and Germany have a reservation on the extension of the scope regarding convicts who absconded from justice; also for the parallel provisions in Article 5(3) and 6(2).

Chapter 2: European Production Order, European Preservation Order and Certificates

Article 4 *Issuing authority*

1. A European Production Order for subscriber data and access data may be issued by:
 - (a) a judge, a court, an investigating judge or prosecutor competent in the case concerned; or
 - (b) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. Such European Production Order shall be validated, after examination of its conformity with the conditions for issuing a European Production Order under this Regulation, by a judge, a court, an investigating judge or a prosecutor in the issuing State.
2. A European Production Order for transactional and content data may be issued only by:
 - (a) a judge, a court or an investigating judge competent in the case concerned; or
 - (b) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. Such European Production Order shall be validated, after examination of its conformity with the conditions for issuing a European Production Order under this Regulation, by a judge, a court or an investigating judge in the issuing State.
3. A European Preservation Order may be issued by:
 - (a) a judge, a court, an investigating judge or prosecutor competent in the case concerned; or
 - (b) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. Such European Preservation Order shall be validated, after examination of its conformity with the conditions for issuing a European Preservation Order under this Regulation, by a judge, a court, an investigating judge or a prosecutor in the issuing State.
4. Where the Order has been validated by a judicial authority pursuant to paragraphs 1(b), 2(b) and 3(b), that authority may also be regarded as an issuing authority for the purposes of transmission of the European Production Order Certificate and the European Preservation Order Certificate.

5. In validly established emergency cases, the authorities mentioned under paragraphs 1(b) and 3(b) may issue the respective Order for subscriber and access data, without prior validation if the validation cannot be obtained in time and if these authorities could issue the Order in a similar domestic case without validation. The issuing authority shall seek validation ex-post without undue delay, at the latest within 48 hours. Where such ex-post validation is not granted the issuing authority shall withdraw the Order immediately and shall, in accordance with its national law, either delete any data that was obtained or ensure that the data are not used as evidence.²³
6. Each Member State may designate one or more central authority responsible for the administrative transmission of Certificates, Orders and notifications, the receipt of data and notifications as well as transmission of other official correspondence relating to the Certificates or Orders.

Article 5

Conditions for issuing a European Production Order

1. An issuing authority may only issue a European Production Order where the conditions set out in this Article are fulfilled.
2. The European Production Order shall be necessary and proportionate for the purpose of the proceedings referred to in Article 3 (2) and may only be issued if a similar measure would be available for the same criminal offence in a comparable domestic situation in the issuing State.
3. European Production Orders to produce subscriber data or access data may be issued for all criminal offences and for the execution of a custodial sentence or a detention order of at least 4 months.

²³ Greece and Luxemburg have a reservation on the possibility for ex-post validation. The EP has proposed the following compromise text on point 5 (16/06/2021), subject to the acceptance of their definition in Article 2(15): **"In validly established emergency cases, as defined in Art. 2 (15), the authorities mentioned under paragraphs 1(b) and 3(b) may exceptionally issue the respective Order for subscriber data and, for the sole purpose of identifying the user, IP addresses and, where necessary, the relevant identifiers—access data, without prior validation if where the validation cannot be obtained in time and if where these authorities could issue the Order in a similar domestic case without validation. The issuing authority shall seek validation ex-post without undue delay, at the latest within 48 hours. Where such ex-post validation is not granted, the issuing authority shall withdraw the Order immediately and shall, in accordance with its national law, either delete any data that was obtained or ensure that the data are not used as evidence."** No agreement has been found yet.

4. European Production Orders to produce transactional data or content data may only be issued²⁴:
- (a) for criminal offences punishable in the issuing State by a custodial sentence of a maximum of at least 3 years²⁵, or
 - (b) for the following offences, if they are wholly or partly committed by means of an information system:
 - offences as defined in Articles 3, 4 and 5 of the Council Framework Decision 2001/413/JHA²⁶;
 - offences as defined in Articles 3 to 7 of Directive 2011/93/EU of the European Parliament and of the Council²⁷;
 - offences as defined in Articles 3 to 8 of Directive 2013/40/EU, of the European Parliament and of the Council;
 - (c) for criminal offences as defined in Article 3 to 12 and 14 of Directive (EU) 2017/541 of the European Parliament and of the Council²⁸.
 - (d) for the execution of a custodial sentence or a detention order of at least four months imposed for criminal offences pursuant to point (a), (b) and (c) of this paragraph;
5. The European Production Order shall include the following information:
- (a) the issuing and, where applicable, the validating authority;
 - (b) the addressee of the European Production Order as referred to in Article 7;
 - (c) the user, except where the sole purpose of the order is to identify the user, or any other unique identifier such as user name, ID or account name to determine the data that are being sought;
 - (d) the requested data category (subscriber data, access data, transactional data or content data);
 - (e) if applicable, the time range requested to be produced;
 - (f) the applicable provisions of the criminal law of the issuing State;
 - (g) in case of emergency or request for earlier disclosure, the reasons for it;
 - (h) in cases where the data sought is stored or processed as part of an infrastructure provided by a service provider to a company or another entity other than natural persons, a confirmation that the Order is made in accordance with paragraph 6;
 - (i) the grounds for the necessity and proportionality of the measure.

²⁴ Finland and Slovenia would prefer a list approach.

²⁵ Cyprus has a reservation regarding the conditions to issue a European Production Order for criminal offences punishable for less than 5 years;

²⁶ [Council Framework Decision 2001/413/JHA](#) of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ L 149, 2.6.2001, p. 1).

²⁷ [Directive 2011/93/EU](#) of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1).

²⁸ [Directive \(EU\) 2017/541](#) of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, p. 6).

6. In cases where the data sought is stored or processed as part of an infrastructure provided by a service provider to a company or another entity other than natural persons, the European Production Order may only be addressed to the service provider where investigatory measures addressed to the company or the entity are not appropriate, in particular because they might jeopardise the investigation.
- 6a. A European Production Order to produce data stored or processed as part of an infrastructure provided by a service provider to a public authority may only be issued if the public authority for which the data is stored or processed is in the issuing State.
7. In cases where the Order concerns transactional data and where the issuing authority has reasonable grounds to believe that
- a) the person whose data are sought is not residing on the territory of the issuing State, and
 - b) the data requested is protected by immunities and privileges granted under the law of the enforcing State or it is subject in that Member State to rules on determination and limitation of criminal liability relating to freedom of press and freedom of expression in other media its disclosure may impact fundamental interests of the enforcing State such as national security and defence, the issuing authority shall seek clarification on the circumstances referred to in point b) before issuing the European Production Order, including by consulting the competent authorities of the enforcing Member State concerned, either directly or via Eurojust or the European Judicial Network. If the issuing authority finds that the requested transactional data are protected by such immunities and privileges or rules on determination and limitation of criminal liability relating to freedom of press and freedom of expression in other media or its disclosure would impact fundamental interests of the other Member State such as national security and defence, it shall take these circumstances into account in the same way as if they were provided for under its national law and it shall not issue or shall adapt the European Production Order where necessary to give effect to these grounds.²⁹
8. Where the power to waive the privilege or immunity lies with an authority of the enforcing State, the issuing authority may request the enforcing authority to contact the competent authority to request it to exercise its power forthwith. Where power to waive the privilege or immunity 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.

²⁹ Germany and Czech Republic advocates for the addition of content data. Germany also requested the inclusion of a fundamental rights clause both in this provision and in Article 12a. Hungary entered a substantial reservation due to the logic of the provision as in its view when there are reasonable grounds to believe that denial is foreseeable a prior consultation should be available in general, also for parallel provisions in Article 5(7), 7a, 9(5), 12a and 14.

Article 6
Conditions for issuing a European Preservation Order

1. An issuing authority may only issue a European Preservation Order where the conditions set out in this Article are fulfilled. Article 5 (6a) shall apply *mutatis mutandis*.
2. It may be issued where necessary and proportionate to prevent the removal, deletion or alteration of data in view of a subsequent request for production of this data via mutual legal assistance, a European Investigation Order or a European Production Order. European Preservation Orders to preserve data may be issued for all criminal offences and for the execution of a custodial sentence or a detention order of at least 4 months.
3. The European Preservation Order shall include the following information:
 - (a) the issuing and, where applicable, the validating authority;
 - (b) the addressee of the European Preservation Order as referred to in Article 7;
 - (c) the user, except where the sole purpose of the order is to identify the user, or any other unique identifier such as user name, ID or account name to determine the data that are being sought;
 - (d) the data category to be preserved (subscriber data, access data, transactional data or content data);
 - (e) if applicable, the time range requested to be preserved;
 - (f) the applicable provisions of the criminal law of the issuing State;
 - (g) the grounds for the necessity and proportionality of the measure.

Article 7
Addressee of a European Production Order and a European Preservation Order

1. The European Production Order and the European Preservation Order shall be addressed directly to a legal representative designated by the service provider for the purpose of gathering evidence in criminal proceedings.
2. If no legal representative has been appointed, the European Production Order and the European Preservation Order may be addressed to any establishment of the service provider in the Union.
3. Where the legal representative does not comply with an EPOC in an emergency case pursuant to Article 9(2), the European Production Order may be addressed to any establishment of the service provider in the Union.
4. Where the legal representative does not comply with its obligations under Articles 9 or 10 and the issuing authority considers that there is a serious risk of loss of data, the European Production Order or the European Preservation Order may be addressed to any establishment of the service provider in the Union.

Article 7a
*Notification*³⁰

1. In cases where the European Production Order concerns content data, and the issuing authority has reasonable grounds to believe that the person whose data are sought is not residing on its own territory, the issuing authority shall submit a copy of the EPOC to the competent authority of the enforcing State at the same time the EPOC is submitted to the addressee in accordance with Article 7.
2. The notified authority may as soon as possible inform the issuing authority of any circumstances pursuant to Article 5 (7) (b) and shall endeavour to do so within 10 days. The issuing authority shall take these circumstances into account in the same way as if they were provided for under its national law and shall withdraw or adapt the Order where necessary to give effect to these grounds if the data were not provided yet. In case of withdrawal the issuing authority shall immediately inform the addressee.
3. Where power to waive the privilege or immunity lies with an authority of the enforcing State, the issuing authority may request the notified authority to contact the competent authority to request it to exercise its power forthwith. Where power to waive the privilege or immunity 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.
4. The notification shall not have suspensive effect on the obligations of the addressee under this Regulation.

³⁰ Czech Republic, Finland, Germany, Greece, Hungary and Latvia have a reservation on the notification procedure advocating for a procedure with more effect that also includes transactional data and a fundamental rights clause, i.e. providing for grounds for refusal to the notified authority; furthermore also rule on what should be considered a “national case” should be reversed; finally Germany advocating for submission of the Order instead of the Certificate, whereas Czech Republic is of the view that both the Order and the Certificate should be submitted.

Belgium, Bulgaria, Estonia, France, Ireland, Italy, Poland, Portugal and Spain have a reservation on the notification procedure and provisions linked to the introduction of a notification procedure, in particular Article 5(7), 9, 12a and 14 as well as the related recitals stating that the Commission’s proposal without notification would be preferred; Belgium, Luxembourg, Ireland, Slovenia and Poland would prefer, if at all, a notification to the Member State where the person whose data are sought is residing.

Article 8
European Production and Preservation Order Certificate

1. A European Production or Preservation Order shall be transmitted to the addressee as defined in Article 7 through a European Production Order Certificate (EPOC) or a European Preservation Order Certificate (EPOC-PR).
The issuing or validating authority shall complete the EPOC set out in Annex I or the EPOC-PR set out in Annex II, shall sign it and shall certify its content as being accurate and correct.
2. The EPOC or the EPOC-PR shall be transmitted by or on behalf of the issuing authority in a secure and reliable way allowing the addressee to produce a written record and to establish the authenticity of the Certificate.
Where service providers, Member States or Union bodies have established dedicated platforms or other secure channels for the handling of requests for data by law enforcement and judicial authorities, the issuing authority may also choose to transmit the Certificate via these channels.
3. The EPOC shall contain the information listed in Article 5(5) (a) to (h), including sufficient information to allow the addressee to identify and contact the issuing authority. The grounds for the necessity and proportionality of the measure or further details about the investigations shall not be included.
4. The EPOC-PR shall contain the information listed in Article 6(3) (a) to (f), including sufficient information to allow the addressee to identify and contact the issuing authority. The grounds for the necessity and proportionality of the measure or further details about the investigations shall not be included.
5. Where needed, the EPOC or the EPOC-PR shall be translated into an official language of the Union accepted by the addressee. Where no language has been specified, the EPOC or the EPOC-PR shall be translated into one of the official languages of the Member State where the legal representative resides or is established.

Article 9
Execution of an EPOC

1. Upon receipt of the EPOC, the addressee shall ensure that the requested data are transmitted in a secure and reliable way allowing the establishment of authenticity and integrity directly to the issuing authority or the law enforcement authorities as indicated in the EPOC at the latest within 10 days upon receipt of the EPOC, unless the issuing authority indicates reasons for earlier disclosure.³¹
2. In emergency cases the addressee shall transmit the requested data without undue delay, at the latest within 6 hours upon receipt of the EPOC.
3. If the addressee cannot comply with its obligation because the EPOC is incomplete, contains manifest errors or does not contain sufficient information to execute the EPOC, the addressee shall inform the issuing authority referred to in the EPOC without undue delay and ask for clarification, using the Form set out in Annex III. It shall inform the issuing authority whether an identification and preservation was possible as set out in paragraph 6. The issuing authority shall react expeditiously and within 5 days at the latest. The deadlines set out in paragraphs 1 and 2 shall not apply until the clarification is provided.
4. **Where** If the [addressee/service provider] cannot comply with its obligation because of de facto impossibility due to circumstances **not attributable** ~~not created by~~ to the [addressee or service provider] ~~at the time the order was received~~ [the addressee/service provider] shall inform the issuing authority [as well as the executing authority referred to] set out in the EPOC without undue delay explaining the reasons, using the Form set out in Annex III. **Where these conditions are fulfilled, the issuing authority shall inform the [addressees] that the EPOC does not longer need to be executed.**³²
5. In all cases where the addressee does not provide the requested information, does not provide it exhaustively or does not provide it within the deadline, for other reasons, it shall inform the issuing authority without undue delay and at the latest within the deadlines set out in paragraphs 1 and 2 of the reasons for this using the Form in Annex III. The issuing authority shall review the order in light of the information provided by the service provider and if necessary, set a new deadline for the service provider to produce the data.³³

³¹ Germany proposes at least the addition of a new recital requesting the Commission and the Member States to work on and establish as soon as possible secure electronic channels of communication allowing the establishment of authenticity and integrity.

³² A provisional agreement at political level on this provision was reached on 20/05/21, to mirror the wording on Article 10 (5). The EP proposes to shift the deleted examples to the respective recital 41a or 42a , line 79 or 81 “*notably because the person whose data is sought is not their customer, or the data has been deleted before receiving the EPOC-PR*”. The Council maintains the need to clarify in the recital the meaning of “*not attributable to the [addressee/service provider]*” in the sense that it must encompass “*not created by the [addressee or service provider] at the time the order was received*”.

³³ Hungary has a reservation on the deletion of the previous second paragraph of this provision.

6. The addressee shall preserve the data requested, if it does not produce it immediately, unless the information in the EPOC does not allow it to identify the data requested, in which case it shall seek clarification in accordance with paragraph 3. The preservation shall be upheld until the data is produced, whether it is on the basis of the clarified European Production Order and its Certificate or through other channels, such as mutual legal assistance. If the production of data and its preservation is no longer necessary, the issuing authority and where applicable pursuant to Article 14(8) the enforcing authority shall inform the addressee without undue delay.

Article 10
Execution of an EPOC-PR

1. Upon receipt of the EPOC-PR, the addressee shall, without undue delay, preserve the data requested. The preservation shall cease after 60 days, unless the issuing authority confirms that the subsequent request for production has been launched.³⁴
2. If the issuing authority confirms within the time period set out in paragraph 1 that the subsequent request for production has been launched, the addressee shall preserve the data as long as necessary to produce the data once the subsequent request for production is served.³⁵

³⁴ The following compromise text was discussed at technical level on 18/06/2021, without any conclusive outcome:

Upon receipt of the EPOC-PR, the [addressee/*service provider*] shall, without undue delay, preserve the data requested. The preservation shall cease after **90 days**, unless the issuing authority confirms that the subsequent request for production has been ~~launched~~/issued].

~~[The EPOC-PR can be extended by additional 30 days, where necessary to allow for the issuing of the subsequent request for production].~~

The fundamental disagreement between the Council and the EP refers to the confirmation that the order has been issued. The circumstance that the procedure has been initiated is not a sufficient criterion for the EP whereas the Council argue that the confirmation cannot entail all the procedural steps needed to launch the subsequent request (e.g. translation). See WK 6945/21 as regards this issue.

³⁵ The Council proposed the following compromise on 14/06/2021:

"Where within the time period set out in paragraph 1 or within the time period of renewal the issuing authority confirms that the subsequent request for production has been [launched/issued], the [addressee/service provider] shall preserve the data as long as necessary to produce the data once the subsequent request for production is served." with the following change in Recital 42: ***"Where the requesting authority confirms within 90 days that a subsequent request for production has been issued, the service provider shall preserve the data as long as is necessary to ensure the completion and due reception of the production request. For such a confirmation to be valid and the preservation time prolonged beyond 90 days, it is sufficient that the competent national authority has issued or validated the underlying production order. It is not required that the production order has already been translated or that all formalities such as those required in a mutual legal assistance procedure have been fulfilled."*** It was not discussed with the EP yet.

3. **Where** the preservation is no longer necessary, the issuing authority shall inform the [addressee] without undue delay **and the preservation for the purpose of the relevant Order shall cease.**³⁶
4. **Where** ~~if~~ the [addressee/service provider] cannot comply with its obligation because the Certificate is incomplete, contains manifest errors or does not contain sufficient information to execute the EPOC-PR, the [addressee/service provider] shall inform the issuing authority **[as well as the executing authority]** set out in the EPOC-PR without undue delay and ask for clarification, using the Form set out in Annex III. The issuing authority shall react expeditiously and within 5 days at the latest. The [addressee/service provider] shall ensure that **the needed clarification or any correction provided by the issuing authority can be received in order for the [addressee/service provider]** ~~on its side the needed clarification can be received in order to fulfil its obligations~~ set out in paragraphs 1, 2 and 3. **In the absence of a reaction from the issuing authority, the service provider shall be exempt from the obligations under paragraphs 1 and 2.**³⁷
5. **Where** ~~If~~ the [addressee/service provider] cannot comply with its obligation because of de facto impossibility due to circumstances **not attributable not created by** to the [addressee ~~or service provider the service provider~~] ~~at the time the order was received~~ [the addressee/service provider] shall inform the issuing authority **[as well as the executing authority referred to]** set out in the EPOC-PR without undue delay explaining the reasons, using the Form set out in Annex III. **Where these conditions are fulfilled, the issuing authority shall inform the [addressees] that the EPOC-PR does not longer need to be executed.**³⁸
6. In all cases where the addressee does not preserve the requested information, for other reasons, the addressee shall inform the issuing authority without undue delay of the reasons for this in the Form set out in Annex III. The issuing authority shall review the Order in light of the justification provided by the service provider.

³⁶ The text has been provisionally agreed at political level on 20/05/2021. The correspondent recital 42 will have to be adapted.

³⁷ The text has been provisionally agreed at political level on 20/05/2021.

³⁸ This compromise text was provisionally agreed at political level on 20/05/21. The EP proposes to shift the deleted examples to the respective recital 41a or 42a , line 79 or 81 “*notably because the person whose data is sought is not their customer, or the data has been deleted before receiving the EPOC-PR*”.

The Council maintains the need to clarify in the recital the meaning of “not attributable to the [addressee/service provider] in the sense that it must encompass “not created by the [addressee/ service provider or the service provider] at the time the order was received”.

Article 11
*Confidentiality and user information*³⁹

1. Addressees and, if different, service providers shall take the necessary measures to ensure the confidentiality of the EPOC or the EPOC-PR and of the data produced or preserved and shall refrain from informing the person whose data is being sought in order to avoid obstructing the relevant criminal proceedings. They shall only inform the person whose data are being sought if explicitly requested by the issuing authority. In this case the issuing authority shall also provide information pursuant to paragraph 4 of this Article to the addressee or, if different, to the service provider.
2. Where the issuing authority did not request the service provider to inform the person whose data were sought in accordance with paragraph 1, the issuing authority shall inform this person. The issuing authority may delay informing the person whose data were sought as long as it constitutes a necessary and proportionate measure to avoid obstructing criminal proceedings.
3. The issuing authority may abstain from informing the person whose subscriber or access data was sought where necessary and proportionate to protect the fundamental rights and legitimate interests of another person, and in particular where these rights and interests outweigh the interest to be informed of the person whose data were sought.
4. Information about available remedies pursuant to Article 17 shall be included.

Article 12
Reimbursement of costs

The service provider may claim reimbursement of their costs by the issuing State, if this is provided by the national law of the issuing State for domestic orders in similar situations, in accordance with these national provisions. Member States shall inform the Commission about rules for reimbursement who shall make them public.

³⁹ Finland and Germany have reservations advocating for further details (provisions on language, legal aid, detailed information on legal remedies etc.) and in addition, Germany stating that persons concerned (not only person whose data are sought) should be informed.

Article 12a
Limitations to the use of data obtained

1. In case the person whose data are sought is not residing on the territory of the issuing State, and transactional or content data has been obtained by the European Production Order and the issuing authority receives information that these data are protected by privileges or immunities granted under the law of the enforcing State, or is subject, in the enforcing State, to rules on determination and limitation of criminal liability relating to freedom of press and freedom of expression in other media, or if invoked by that Member State, disclosure of these data would impact its fundamental interests such as national security and defence, the competent authorities in the issuing State shall ensure during the criminal proceedings that these grounds are taken into account in the same way as if they were provided for under their national law. The competent authorities may consult the authorities of the relevant Member State, the European Judicial Network in criminal matters or Eurojust.
2. Where power to waive the privilege or immunity lies with an authority of the enforcing State, the competent authority in the issuing State may request the enforcing or notified authority to contact the competent authority of the enforcing State to request it to exercise its power forthwith. Where power to waive the privilege or immunity lies with an authority of another Member State or a third country or with an international organisation, the competent authority in the issuing State may request the authority concerned to exercise that power.

Article 12b
Speciality principle

1. Electronic evidence shall not be used for the purpose of proceedings other than those for which it was obtained in accordance with this Regulation, except:
 - (a) for the purpose of proceedings for which a European Production Order could have been issued in accordance with Article 5(3) and (4); or
 - (b) for preventing an immediate and serious threat to public security of the issuing State or its essential interests;
2. Electronic evidence obtained in accordance with this Regulation may only be transmitted to another Member State:
 - a) for the purpose of proceedings for which a European Production Order could have been issued in accordance with Article 5(3) and (4); or
 - b) for preventing an immediate and serious threat to public security of that Member State or its essential interests.
3. Electronic evidence obtained in accordance with this Regulation may only be transferred to a third country or to an international organisation pursuant to conditions of paragraph 2, points a) and b) of this Article and Chapter V of the Directive (EU) 2016/680.

Chapter 3: Sanctions and enforcement

Article 13 Sanctions⁴⁰

Without prejudice to national laws which provide for the imposition of criminal sanctions, Member States shall lay down the rules on pecuniary sanctions applicable to infringements of the obligations pursuant to Articles 9, 10 and 11 (1) of this Regulation and shall take all necessary measures to ensure that they are implemented. Member States shall, without delay, notify the Commission of those rules and of those measures and shall notify it, without delay, of any subsequent amendment affecting them.

The Member States shall ensure that pecuniary sanctions provided for are effective, proportionate and dissuasive.

Member States shall ensure that pecuniary sanctions of up to 2% of the total worldwide annual turnover of the service provider's preceding financial year can be imposed.

Article 14 Procedure for enforcement

1. If the addressee does not comply with an EPOC within the deadline or with an EPOC-PR, without providing reasons accepted by the issuing authority, the issuing authority may transfer to the competent authority in the enforcing State the European Production Order with the EPOC or the European Preservation Order with the EPOC-PR as well as the Form set out in Annex III filled out by the addressee and any other relevant document with a view to its enforcement by any means capable of producing a written record under conditions allowing the enforcing authority to establish authenticity. To this end, the issuing authority shall translate the Order, the Form and any other accompanying documents into one of the languages accepted by this Member State and shall inform the addressee of the transfer.
2. Upon receipt, the enforcing authority shall without further formalities recognise and take the necessary measures for enforcement of
 - (a) a European Production Order unless the enforcing authority considers that one of the grounds provided for in paragraph 4 apply, or
 - (b) a European Preservation Order unless the enforcing authority considers that one of the grounds provided for in paragraph 5 apply.The enforcing authority shall take the decision to recognise the Order without undue delay and no later than 5 working days after the receipt of the Order.
- 2a. Article 5(8) shall apply mutatis mutandis.

⁴⁰ Finland, Germany and Latvia have a reservation on the harmonisation of sanctions.

3. Where the enforcing authority recognises the Order, it shall formally require the addressee to comply with the relevant obligation, informing the addressee of the possibility to oppose the enforcement by invoking the grounds listed in paragraphs 4 point (a) to (e) or paragraph 5, as well as the applicable sanctions in case of non-compliance, and set a deadline for compliance or opposition.
4. Recognition or enforcement of the European Production Order may only be denied on the basis of the following grounds:
 - (a) the European Production Order has not been issued or validated by an issuing authority as provided for in Article 4;
 - (b) the European Production Order has not been issued for criminal offence provided for by Article 5(4);
 - (c) the addressee could not comply with the EPOC because of de facto impossibility or because the EPOC contains manifest errors;
 - (d) the European Production Order does not concern data stored by or on behalf of the service provider at the time of receipt of EPOC;
 - (e) the service is not covered by this Regulation;
 - (f) one of the grounds referred to in Article 12a (1) apply.⁴¹
5. Recognition or enforcement of the European Preservation Order may only be denied on the basis of the following grounds:
 - (a) the European Preservation Order has not been issued or validated by an issuing authority as specified in Article 4;
 - (b) the service provider could not comply with the EPOC-PR because of de facto impossibility or because the EPOC-PR contains manifest errors;
 - (c) the European Preservation Order does not concern data stored by or on behalf of the service provider at the time of the EPOC-PR;
 - (d) the service is not covered by the scope of the present Regulation.
6. In case of an objection by the addressee pursuant to paragraphs 4 point (a) to (e) and 5, the enforcing authority shall decide whether to enforce the Order on the basis of the information provided by the addressee and, if necessary, supplementary information obtained from the issuing authority in accordance with paragraph 7.
7. Before deciding not to recognise or enforce the Order in accordance with paragraph 2 and 6, the enforcing authority shall consult the issuing authority by any appropriate means. Where appropriate, it shall request further information from the issuing authority. The issuing authority shall reply to any such request within 5 working days.
8. All decisions shall be notified immediately to the issuing authority and to the addressee by any means capable of producing a written record.

⁴¹ Czech Republic, Finland, Hungary, Germany, Latvia have a reservation on the deletion of Article 14(4) point f) and paragraph (5), point e) advocating that the deletion could only be supported in case a clause on fundamental rights as well as on respect for national constitutional rules would be added to Articles 5, 7a(2) and 12a(1).

9. If the enforcing authority obtains the data from the addressee, it shall transmit it to the issuing authority within 2 working days, unless the data concerned is protected by an immunity or privilege or by rules on determination and limitation of criminal liability relating to freedom of press and freedom of expression in other media under its own domestic law or it impacts its fundamental interests such as national security and defence. In such case, it shall inform the issuing authority of the reasons for not transmitting the data.
10. In case the addressee does not comply with its obligations under a recognised Order whose enforceability has been confirmed by the enforcing authority, that authority shall impose a pecuniary sanction in accordance with its national law. An effective judicial remedy shall be available against the decision to impose a fine.

Chapter 4: Remedies

[...]

Article 16

Review procedure in case of conflicting obligations

1. If the addressee considers that compliance with the European Production Order would conflict with applicable laws of a third country, it shall inform the issuing authority of its reasons for not executing the European Production Order in accordance with the procedure referred to in Article 9(5) and (6).
2. The reasoned objection must include all relevant details on the law of the third country, its applicability to the case at hand and the nature of the conflicting obligation. It cannot be based on the fact that similar provisions concerning the conditions, formalities and procedures of issuing a production order do not exist in the applicable law of the third country, nor on the only circumstance that the data is stored in a third country. It shall be filed no later than 10 days after the date on which the addressee was served with the EPOC. Time limits shall be calculated in accordance with the national law of the issuing authority.
3. The issuing authority shall review the European Production Order on the basis of the reasoned objection. If the issuing authority intends to uphold the European Production Order, it shall request a review by the competent court in its Member State. The execution of the Order shall be suspended pending completion of the review procedure.
4. The competent court shall first assess whether a conflict exists, based on an examination of whether
 - (a) the third country law applies based on the specific circumstances of the case in question and if so,
 - (b) the third country law, when applied to the specific circumstances of the case in question, prohibits disclosure of the data concerned.

5. If the competent court finds that no relevant conflict within the meaning of paragraphs 1 and 4 exists, it shall uphold the Order. If the competent court establishes that the third country law, when applied to the specific circumstances of the case under examination, prohibits disclosure of the data concerned, the competent court shall determine whether to uphold or lift the Order. That assessment shall in particular be based on the following factors while giving particular weight to the factors referred to in points (a) and (b):
- (a) the interest protected by the relevant law of the third country, including fundamental rights as well as other interests preventing disclosure of the data in particular national security interests of the third country;
 - (b) the degree of connection of the criminal case for which the Order was issued to either of the two jurisdictions, as indicated *inter alia* by:
 - the location, nationality and residence of the person whose data is being sought and/or of the victim(s),
 - the place where the criminal offence in question was committed;
 - (c) the degree of connection between the service provider and the third country in question; in this context, the data storage location by itself does not suffice in establishing a substantial degree of connection;
 - (d) the interests of the investigating State in obtaining the evidence concerned, based on the seriousness of the offence and the importance of obtaining evidence in an expeditious manner;
 - (e) the possible consequences for the addressee or the service provider of complying with the European Production Order, including the sanctions that may be incurred.
- 5b. The court may seek information from the competent authority of the third country taking into account Directive 2016/680, in particular its Chapter V and to the extent that such the transmission does not obstruct the relevant criminal proceedings.
6. If the competent court decides to lift the Order, it shall inform the issuing authority and the addressee. If the competent court determines that the Order is to be upheld, it shall inform the issuing authority and the addressee, who shall proceed with the execution of the Order.

Article 17
*Effective remedies*⁴²

1. Without prejudice to further legal remedies available in accordance with national law, any persons whose data was sought via a European Production Order shall have the right to effective remedies against the European Production Order. Where that person is a suspect or accused person, the person shall have the right to effective remedies during the criminal proceedings ~~for~~ in which the data were being used. Such remedies shall be without prejudice to remedies available under Directive (EU) 2016/680 and Regulation (EU) 2016/679.
- [...]
3. Such right to an effective remedy shall be exercised before a court in the issuing State in accordance with its national law and shall include the possibility to challenge the legality of the measure, including its necessity and proportionality.
4. Without prejudice to Article 11, the issuing authority shall take the appropriate measures to ensure that information is provided about the possibilities under national law for seeking remedies and ensure that they can be exercised effectively.
5. The same time-limits or other conditions for seeking a remedy in similar domestic cases shall apply here and in a way that guarantees effective exercise of these remedies for the persons concerned.
6. Without prejudice to national procedural rules, Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the European Production Order.

[...]

⁴² Germany has a reservation stating that every person that is concerned by an Order should be entitled to a legal remedy not only a person whose data were sought and that legal remedies should also be made available in criminal proceedings against Preservation Orders.

Chapter 5: Final provisions

Article 18a

Language

~~Each Member State shall indicate, if and which language(s) in addition to their official language(s) they will accept for the transmission of the EPOC or EPOC-PR, and/or of a European Production Order and a European Preservation Order in case of enforcement.~~

Member States may decide, at any time, that they will accept translations of EPOCs and EPOC-PRs in one or more official language(s) of the Union in addition to their official language(s) and shall indicate such a decision in a written declaration submitted to the Commission. The Commission shall make the declarations available to all Member States and to the European Judicial Network.⁴³

Article 19

Monitoring and reporting

1. By *[date of application of this Regulation]* at the latest, the Commission shall establish a detailed programme for monitoring the outputs, results and impacts of this Regulation. The monitoring programme shall set out the means by which and the intervals at which the data and other necessary evidence will be collected. It shall specify the action to be taken by the Commission and by the Member States in collecting and analysing the data and other evidence.⁴⁴

⁴³ The text has been preliminarily agreed at technical level on 18/06/2021, and respective adaptations will be made in Recital 38.

⁴⁴ EP has proposed the following compromise text: "By... *[date of application of this Regulation]* at the latest, the Commission shall establish a detailed programme for monitoring the outputs, results and impacts of this Regulation. The monitoring programme shall set out the means by which and the intervals at which the data and other necessary ***[information]*** will be collected. It shall specify the action to be taken by the Commission and by the Member States in collecting and analysing the data and other ***[information]***." Not discussed yet.

2. In any event, Member States shall collect and maintain comprehensive statistics from the relevant authorities. The data collected shall be sent to the Commission each year by 31 March for the preceding calendar year and shall, as far as possible, include⁴⁵:
 - (a) the number of EPOCs and EPOC-PRs issued by type of data requested, service providers addressed and situation (emergency case or not, ex-post validation);
 - (b) the number of fulfilled and non-fulfilled EPOCs by type of data requested, service providers addressed and situation (emergency case or not);
 - (c) for fulfilled EPOCs, the average duration for obtaining the requested data from the moment the EPOC is issued to the moment it is obtained, by type of data requested, service provider addressed and situation (emergency case or not);
 - (d) the number of European Production Orders transmitted and received for enforcement to an enforcing State by type of data requested, service providers addressed and situation (emergency case or not) and the number thereof fulfilled⁴⁶;
 - (e) the number of legal remedies against European Production Orders in the issuing State and in the enforcing State by type of data requested⁴⁷;
 - (f) the number of cases where no ex-post validation was granted.
3. Service providers may collect, maintain and publish statistics if any such data were collected they may be sent to the Commission by 31 March for the preceding calendar year and may, as far as possible, include⁴⁸:
 - (a) the number of EPOCs and EPOC-PRs received by type of data requested, Member States and situation (emergency case or not);
 - (b) the number of fulfilled and non-fulfilled EPOCs by type of data requested, Member States and situation (emergency case or not);
 - (c) for fulfilled EPOCs, the average duration for providing of the requested data from the moment the EPOC is received to the moment it is provided, by type of data requested, Member State and situation (emergency case or not).

⁴⁵ EP has proposed the following compromise text: "In any event, Member States shall collect and maintain comprehensive statistics from the relevant authorities. The data collected shall be sent to the Commission each year by 31 March for the preceding calendar year and shall [, **as far as possible,**] include:" Not discussed yet.

⁴⁶ EP has proposed the following compromised text: "d) the number of European Production Orders *or European Preservation Orders* transmitted and received for enforcement to an [enforcing/*executing*] State by *the* type of data requested, the [*addressees*] and *the* situation (emergency case or not) and the number thereof fulfilled;" Not discussed yet.

⁴⁷ EP has proposed the following compromise text: "the number of legal remedies *used* against European Production Orders [*and European Preservation Orders*] in the issuing State and in the [*executing*] State by *the* type of data requested"; Not discussed yet.

⁴⁸ EP has proposed the following compromise text: "**Service providers may collect, maintain and publish statistics, in accordance with existing data protection principles. If any such data were collected, they may be sent to the Commission by 31 March for the preceding calendar year and may, as far as possible, include:**" Not discussed yet.

Article 20
Amendments to the Certificates and the Forms

The Commission shall adopt delegated acts in accordance with Article 21 to amend Annexes I, II and III in order to effectively address a possible need for improvements regarding the content of EPOC and EPOC-PR forms and of forms to be used to provide information on the impossibility to execute the EPOC or EPOC-PR.

Article 21
Exercise of delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Article 20 shall be conferred for an indeterminate period of time from *[date of application of this Regulation]*.
3. The delegation of powers referred to in Article 20 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016⁴⁹.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Article 20 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or of the Council.

⁴⁹ OJ L 123, 12.5.2016, p. 13.

Article 22
Notifications

1. By *[date of application of this Regulation]* each Member State shall notify the Commission of the following⁵⁰:
 - (a) the authorities which, in accordance with its national law, are competent in accordance with to Article 4 to issue, validate, transmit and/or receive European Production Orders and European Preservation Orders or the notifications thereof⁵¹;
 - (b) the enforcing authority or authorities which are competent to enforce European Production Orders and European Preservation Orders on behalf of another Member State⁵²;
 - (c) the courts competent to deal with reasoned objections by addressees in accordance with Article 16⁵³;
 - (d) languages accepted for the transmission of the EPOC or EPOC-PR and/or a European Production Order and a European Preservation Order, in case of enforcement in accordance with Article 18a.⁵⁴
2. The Commission shall make the information received under this Article publicly available, either on a dedicated website or on the website of the European Judicial Network referred to in Article 9 of the Council Decision 2008/976/JHA^{55 56}.

⁵⁰ The EP has preliminarily suggested the following wording " By... *[12 months before the date of application of this Regulation]* each Member State shall notify the Commission of the following". Not discussed yet.

⁵¹ The EP has preliminarily proposed to agree to the Council text.

⁵² The EP has preliminarily proposed to agree to the Council text, if the word "enforcing is deleted". Not discussed yet.

⁵³ The EP has preliminarily suggested the following wording "the competent **authorities** to deal with reasoned objections by addressees in accordance with Articles [15/16]". Not discussed yet.

⁵⁴ The EP has preliminarily proposed to agree to the Council text.

⁵⁵ The EP has suggested the following compromise text:

"The Commission shall make the information received under this Article publicly available, either on a dedicated website or on the website of the European Judicial Network **in criminal matters** referred to in Article 9 of the Council Decision 2008/976/JHA". Referred to in the discussion held in relation with Article 18a.

⁵⁶ Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ L 348, 24.12.2008, p. 130).

Article 23
Relationship to other instruments, agreements and arrangements

This Regulation does not affect EU and other international instruments, agreements and arrangements on the gathering of evidence that would also fall within the scope of this Regulation.

Article 24
Evaluation

By [5 years from the date of application of this Regulation] at the latest, the Commission shall carry out an evaluation of the Regulation and present a report to the European Parliament and to the Council on the functioning of this Regulation, which shall include an assessment of the need to enlarge its scope. If necessary, the report shall be accompanied by legislative proposals. The evaluation shall be conducted according to the Commission's better regulation guidelines. Member States shall provide the Commission with the information necessary for the preparation of that Report.

Article 25
Entry into force

This Regulation shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

It shall apply from [24 months after its entry into force].

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg,
For the European Parliament

For the Council

The President

The President
