COVER NOTE

From: European Judicial Network
date of receipt: 20 February 2019
To: Delegations
Subject: Annexes to the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters
- conclusions of the 2nd meeting of the EJN e-Evidence Working Group
- comments on Annexes I-III

Delegations will find in Annexes A and B a contribution from the European Judicial Network (EJN) on the Annexes to the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters prepared as a follow-up to the Presidency invitation.

The contribution comprises the conclusions of the 2nd meeting of the EJN e-Evidence Working Group (Annex A) and the EJN comments on Annexes I-III to the Proposal for the above Regulation setting out the certificates to be used (Annex B).

Due to time constraints, the considered joint contribution by EJN, Eurojust and EJCn was not feasible, however the networks and Eurojust consulted each other, shared and exchanged views on specific parts of the certificates.

This contribution is intended to support the discussion on that issue at the upcoming COPEN WP meeting to be held on 1 March 2019.

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Conclusions of the 2nd meeting of the EJN e-Evidence Working Group on the Proposal for a Regulation on European Production and Preservation Orders
28 and 29 January 2019
The Hague

EJN e-Evidence Working Group

At the 50th Plenary Meeting of the EJN, the European Union Institutions and the Contact Points concluded that feedback from the EJN, both on proposals for legal instruments and the practical application of them is invaluable. The EJN Contacts Points deal with judicial cooperation in criminal matters on a daily basis and they are experts in this area.

During the first meeting that took place in September 2018, the EJN discussed the proposals for a Regulation on a European Production Order and a European Preservation Order and a Directive on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings from the perspective of their practical application.

The second meeting of the EJN Working Group took place from 28 to 29 January to continue the discussions on the developments of the proposed instruments and to provide its feedback on the Annexes to the draft Regulation. The EJN Working Group members agreed that the proposed instruments for the gathering of cross-border electronic evidence together with the amendments included in the later negotiations in general would be an improvement to the current procedures in place.

Observations by the EJN e-Evidence Working Group

Further to the comments directly provided in the Annexes to the draft Regulation, the EJN Working Group would like to include the points below, as their discussion and timely clarification could have effect on the text of the Regulation and provide practitioners with a common understanding for uniform and correct application of the legal instrument.
Clarification of the concepts of Order and Certificate

The EJN Working Group has observed that there is lack of clarity with regards of the concept and use of “Orders” - European Production Order and the European Preservation Order – and the concept and use of “Certificates” – EPOC and the EPOC-PR. These two concepts seem to be interwoven since the Regulation makes reference in some articles to “Orders” and “Certificates” in an interchangeable manner.

The EJN Working Group understands that the concept of Orders refers to the national decision which constitutes the legal basis for requesting the relevant data including the grounds for the necessity and proportionality of the measure\(^1\). These Orders might be challenged in court and legal remedies might be sought in this context. Whereas, the concept of Certificates refers to the documents that will be communicated to the service provider or its legal representative, in which is only included the sections of the Orders which are relevant for the addressee, since in principle the issuing authority should not share sensitive and personal data regarding the investigation with the addressee in addition to the fact that providing case details could as well jeopardise the investigation. The addressee would not in any case be entitled to check the proportionality and necessity of the measure of the Order issued by a public prosecutor or a judge. In other words, the addressee would be only able to revise the information in the order as it is echoed in the Certificates.\(^2\) Therefore, these two concepts should be defined and clearly divided throughout the Regulation.\(^3\)

These clarifications are particularly important considering that the current Regulation introduces a division between the legal basis for the request (i.e. the Orders) and the document that is actually transmitted (i.e. the Certificates), which is different from other instruments based on mutual recognition, e.g. the EIO.

- **The need for a form for the Order**

The EJN Working Group has discussed based on the text of the draft Regulation related to the procedure for enforcement, the transmission of the Certificates should in principle be sufficient for the enforcing state as the necessity and proportionality is not considered as a reason for the non-compliance with the request.\(^4\)

However, as stated in the current draft of the Regulation, if the Order - together with the Certificate – should be provided together to the enforcing authority, the EJN Working Group is of the view that there should also be a form for the European Production Order and European Preservation Order annexed to the Regulation. If not, the Enforcing State might receive a different formatted Order from every single Member State.

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\(^1\) See Recital 38.
\(^2\) See EJN’s comment to delete in Annex I, Section D (ii) the possibility of the service provider to indicate “other reasons not listed”.
\(^3\) See, e.g., Recitals 38, 41, 48; Articles 7(3), 9(4), 10(5), 14(4), 14(5)
\(^4\) See Recital 46 and Article 14(1)
This suggestion would be in line with Article 82(1) (a) of the Lisbon Treaty\(^5\) to streamline the **Orders** throughout the EU together with other mutual recognition instruments currently in use, as well as it would facilitate the practical handling of the order by the enforcing authority.

A standardised "**European Order**" that would be used in the national system would facilitate the applicability by the Enforcing Member State. Furthermore, it would also facilitate the drafting of the Certificates which contain most of the elements required for **Orders**.\(^6\) The EJN Working Group also discussed that if such a form for the **Orders** would be introduced, the information included in the **Order** could be automatically used to fill in the Certificates by extracting from the **Order** the mandatory information/elements included in Articles 5 and 6 of the draft Regulation.

In line with other mutual recognition instruments, the standardised **Orders** will promote mutual trust, which is an essential precondition for the proper functioning of this instrument,\(^7\) will assist mutual recognition and facilitate future translations where necessary.\(^8\)

The EJN Working Group suggests that if a form for the **Order** is introduced, this form allow for some flexibility with regard to the information that is not included in the Certificate, i.e. the grounds for the necessity and proportionality of the **Orders** and any additional information that is required according the respective national laws.\(^9\)

- **Validation of the Certificate**

During its discussion, the EJN Working Group also noted that in some Member States the judge will only validate that data that is within their competence, rather than the whole request. The result being, with regard to the same investigation, that the issuing State might have to issue two different **Orders**, for example, one validated by the judge and one validated by the prosecutor.\(^10\)

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\(^5\) Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE V: AREA OF FREEDOM, SECURITY AND JUSTICE - Chapter 4: Judicial cooperation in criminal matters - Article 82 (ex Article 31 TEU)

\(^6\) Recital 38; Articles 5(5), 6(3), 8(3), 8(4).

\(^7\) Recital 11.

\(^8\) See also Article 14.

\(^9\) See Articles 14(1), 18a.

\(^10\) See Articles 5(5)(i), 5(7), 6(1), 6(3)(g), 8(3), 8(4).

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ANNEX B

EJN comments on the certificates set out in Annexes I-III to the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters

EUROPEAN PRODUCTION ORDER CERTIFICATE (EPOC) FOR THE PRODUCTION OF ELECTRONIC EVIDENCE

(Annex I)

Under Regulation (EU) ..., the addressee of the European Production Order Certificate (EPOC) must execute the EPOC and must transmit the requested data to the authority indicated under point (i) of Section G of the EPOC. If the data is not produced immediately, the addressee must, upon receipt of the EPOC, preserve the data requested, unless the information in the EPOC does not allow the addressee to identify the data. Preservation shall be upheld until the data is produced or until the issuing authority or where applicable the enforcing authority indicate that it is no longer necessary to preserve and produce the data. The addressee must take necessary measures to ensure the confidentiality of the EPOC and of the data produced or preserved.

SECTION A:

Issuing State: .............................................................................................................

Name of issuing authority:

Name of validating authority:

Addressee: .............................................................................................................

SECTION B: Deadlines (tick the appropriate box and complete, if necessary)

The data requested must be produced:

☐ within 10 days at the latest

☐ within 6 hours at the latest in the event of an emergency involving:
  ☐ an imminent threat to a person’s life or physical integrity. Justification, if necessary:

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☐ an imminent threat to a critical infrastructure as defined in Art. 2(a) of 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.

**The data is requested to be produced:**

☐ within another time period (specify): ................................................. because of:

☐ an imminent danger that the requested data will be deleted
☐ other urgent investigative measures
☐ an imminent trial date
☐ a suspect / accused in custody
☐ other reasons: ....................................................................................

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**SECTION C: User Information**

The addressee shall not inform the person whose data is being sought unless requested by the issuing authority below:

☐ the addressee is requested to inform the person whose data is being sought and of the following information on the legal remedies against the EPOC:

.................................................................................................................

**SECTION D: Electronic Evidence to be Produced**

(i) This EPOC concerns (tick the relevant box(es)):

☐ **Subscriber** data, including but not limited to:

☐ name, address, date of birth, contact information (email address, phone number) and other relevant information pertaining to the identity of the user/subscription holder
☐ date and time of first registration, type of registration, copy of a contract, means of verification of identity at the moment of registration, copies of documents provided by the subscriber
☐ type of service, including identifier (phone number, IP address, SIM-card number, MAC address) and associated device(s)
☐ profile information (user name, profile photo)
☐ data on the validation of the use of service, such as an alternative email address provided by the user/subscription holder
☐ debit or credit card information (provided by the user for billing purposes) including other means of payment

☐ PUK-codes
☐ other: ............
Access data, including but not limited to:

- IP connection records/logs for identification purposes
- Other: ...........

Transactional data, including but not limited to:

- Traffic data, including but not limited to:
  
  (a) for (mobile) telephony:
  
  - outgoing (A) and incoming (B) identifiers (phone number, IMSI, IMEI)
  - time and duration of connections
  - call attempts
  - base station ID, including geographical information (X/Y coordinates), at the time of initiation and termination of the connection
  - bearer / teleservice used (e.g. UMTS, GPRS)
  - Other: ...........

  (b) for internet:
  
  - routing information (source IP address, destination IP address(es), port number(s), browser, email header information, message-ID)
  - base station ID, including geographical information (X/Y coordinates), at the time of initiation and termination of the connection
  - volume of data
  - Other: ...........

  (c) for hosting:
  
  - logfiles
  - tickets
  
  - purchase history
  - Other transactional data, including but not limited to:
  
  - prepaid balance charging history
  - contacts list
  - Other: ...........
(d) Other additional data: ........................................

- Content data, including but not limited to:
  - (web)mailbox dump
  - online storage dump (user generated data)
  - pagedump
  - message log/backup
  - voicemail dump
  - server contents
  - device backup
  - other: ..................................................

(ii) The information below is made available to you to allow executing the EPOC:

- IP address: ..........................................................
- Telephone number: ..................................................
- Email address: ........................................................
- IMEI number: .....................................................
- MAC address: ....................................................
- The user or other unique identifier such as user name, ID or account name: ..................................
- Name of the service: .............................................
- Other: ..................................................................

(iii) If applicable, the time range requested to be produced: ..........................................................

(iv) Relation to a previous preservation request:

- The requested data was totally/partially preserved in accordance with an earlier request for preservation issued by: ................................ (indicate the authority, and, if available, the date of transmission of request and reference number) and transmitted to ..........................................................

- (indicate the service provider/legal representative/public authority to which it was transmitted and, if available, the reference number given by the addressee)

(vii) Any other relevant information:

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.................................................................................................................................

SECTION X: Conditions for issuing

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1. Nature and legal classification of the offence(s) in relation to which the EPOC is issued and the applicable statutory provision/code:

The current EPOC is issued for transactional and/or content data and concerns (tick the relevant box(es), if applicable):

- ☐ criminal offence(s) punishable in the issuing State by a custodial sentence of a maximum of at least 3 years;
- ☐ the following offence(s), if wholly or partly committed by means of an information system:
  - ☐ offence(s) as defined in Articles 3, 4 and 5 of Council Framework Decision 2001/413/JHA;
  - ☐ offence(s) as defined in Articles 3 to 7 of Directive 2011/93/EU of the European Parliament and of the Council;
  - ☐ offence(s) as defined in Articles 3 to 8 of Directive 2013/40/EU of the European Parliament and of the Council;
  - ☐ the execution of a custodial sentence or a detention order of at least four months imposed for criminal offences pursuant the points before;

2. Please note that:

- ☐ The data sought is stored or processed as part of a corporate infrastructure provided by a service provider to a company or another entity other than natural persons, and the current EPOC is addressed to the service provider because investigatory measures addressed to the company or the entity are not appropriate, in particular because they might jeopardise the investigation.

Other relevant information:

2. Please note that:

- ☐ The data sought is stored or processed as part of a corporate infrastructure provided by a service provider to a company or another entity other than natural persons, and the current EPOC is addressed to the service provider because investigatory measures addressed to the company or the entity are not appropriate, in particular because they might jeopardise the investigation.

Other relevant information:

SECTION E: Details of the authority which issued the EPOC

The type of authority which issued this EPOC (tick the relevant box/boxes):

- ☐ judge, court, or investigating judge
Details of the issuing authority and/or its representative certifying the content of the EPOC as accurate and correct:

Name of authority: .................................................................
Name of its representative: ......................................................
Post held (title/grade): ...........................................................
File No: ...............................................................................
Address: .............................................................................
Tel. No: (country code) (area/city code) .......................................
Fax No: (country code) (area/city code) .......................................
Email: ...................................................................................
If different from above, authority/contact point which can be contacted for any question related to the execution of the EPOC:
Name and contact details ..........................................................
Date: ....................................................................................
Official stamp (if available) and signature: ..................................

SECTION F: Details of the authority which validated the EPOC

The type of authority which has validated this EPOC:
□ judge, court or investigating judge
□ public prosecutor
□ other competent authority as defined by the issuing State
□ competent authority acting in case of emergency

Details of the validating authority and/or its representative certifying the content of the EPOC as accurate and correct:
Name of authority: ........................................................................
Name of its representative: ...........................................................
Post held (title/grade): ...............................................................
SECTION G: Transfer of data

(i) Authority to whom the data has to be transferred:

☐ issuing authority,
☐ validating authority
☐ other competent authority: Name and contact details:

(ii) Authority/contact point which can be contacted for any question related to the execution of the EPOC:

Deleted: and contact details
Deleted: (tick and complete, if necessary)
Deleted: as defined by the issuing State
Deleted: ☐
Deleted: ☐ (Authority/contact point which can be contacted for any question related to the execution of the EPOC)
Deleted: ☐
Deleted: ☐
EUROPEAN PRESERVATION ORDER CERTIFICATE (EPOC-PR) FOR
THE PRESERVATION OF ELECTRONIC EVIDENCE (ANNEX II)

Under Regulation (EU) ... the addressee of the European Preservation Order Certificate (EPOC-PR) must, without undue delay after receiving the EPOC-PR preserve the data requested. The preservation will cease after 60 days, unless the issuing authority confirms that a subsequent request for production has been launched. If the issuing authority confirms within those 60 days that a subsequent request for production has been launched, the addressee must preserve the data for as long as necessary to produce the data once the subsequent request for production is served.

The addressee must take necessary measures to ensure the confidentiality of the EPOC-PR and of the data preserved or produced.

SECTION A:
Issuing State: .................................................................
Name of issuing authority:
Name of validating authority:
Address: ...........................................................................

SECTION B: User information
The addressee shall not inform the person whose data is being sought unless requested by the issuing authority below:
☐ the addressee is requested to inform the person whose data is being sought and of the following information on the legal remedies against the EPOC:
.............................................................................

SECTION C: Electronic evidence to be preserved
(i) The EPOC-PR concerns (tick the relevant box(es)):
☐ Subscriber data, including but not limited to:

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☐ name, address, date of birth, contact information (email address, phone number) and other relevant information pertaining to the identity of the user/subscriber
☐ date and time of first registration, type of registration, copy of a contract, means of verification of identity at the moment of registration, copies of documents provided by the subscriber
☐ type of service, including identifier (phone number, IP-address, SIM-card number, MAC-address) and associated device(s)
☐ profile information (user name, profile photo)
☐ data on the validation of the use of service, such as an alternative email address provided by the user/subscriber
☐ debit or credit card information (provided by the user for billing purposes) including other means of payment
☐ PUK-codes
☐ other: … … … ….

☐ Access data, including but not limited to:
☐ IP connection records/logs for identification purposes

☐ Transactional data, including but not limited to:
☐ traffic data, including but not limited to:
   (a) for (mobile) telephony:
   ☐ outgoing (A) and incoming (B) identifiers (phone number, IMSI, IMEI)
   ☐ time and duration of connections
   ☐ call attempts
   ☐ base station ID, including geographical information (X/Y coordinates), at the time of initiation and termination of the connection
   ☐ bearer/teleservice used (e.g. UMTS, GPRS)
   ☐ other: … … … ….

   (b) for internet:
   ☐ routing information (source IP address, destination IP address(es), port number(s), browser, email header information, message-ID)
   ☐ base station ID, including geographical information (X/Y coordinates), at the time of initiation and termination of the connection
   ☐ volume of data
   ☐ other: … … … ….

[Deleted: access]
[Deleted: transactional data]
(c) for hosting:

- logfiles
- tickets
- purchase history
- other transactional data, including but not limited to:
  - prepaid balance charging history
  - contacts list
  - other

(d) Other additional data:

- Content data, including but not limited to:
  - (web)mailbox dump
  - online storage dump (user generated data)
  - pagedump
  - message log/backup
  - voicemail dump
  - server contents
  - device backup
  - other

(ii) Information below is made available to you to allow executing the EPOC-FR:

- IP address: ...
- Telephone number: ...
- Email address: ...
- IMEI number: ...
- MAC address: ...
- The user or other unique identifier such as user name, ID or account name: ...
- Name of the service: ...
- Other: ...

(iii) If applicable, the time range requested to be preserved: ...

(v) Other relevant information: ...
SECTION X: Conditions for issuing
Nature and legal classification of the offence(s) for which the EPOC-PR is issued and the applicable statutory provision/code:

……………………………………………………………………………………………….. other relevant information:

………………………………………………………………………………………………..

SECTION D: Details of the authority which issued the EPOC-PR
The type of authority which issued this EPOC-PR:
□ judge, court, or investigating judge
□ public prosecutor
□ other competent authority as defined by the law of the issuing State
□ competent authority acting in case of emergency

Details of the issuing authority and/or its representative certifying the content of the EPOC-PR as accurate and correct:
Name of authority:………………………………………………………………………………
Name of its representative:……………………………………………………………………
Post held (title/grade):…………………………………………………………………………
File No.:…………………………………………………………………………………………
Address:…………………………………………………………………………………………
Tel. No: (country code) (area/city code)…………………………………………………………
Fax No: (country code) (area/city code)…………………………………………………………
Email:……………………………………………………………………………………………

If different from above, authority/contact point which can be contacted for any question related to the execution of the EPOC-PR: ………………………………………………………

Deleted: (iv) Deleted: (v) Deleted: Any
Name and contact details........................................................................................................................................

Date: ............................................................................................................................................................

Official stamp (if available) and signature:....................................................................................................

SECTION E: Details of the authority which validated the EPOC-PR

The type of authority which has validated this EPOC-PR:

□ judge, court or investigating judge
□ public prosecutor

Details of the validating authority and/or its representative certifying the content of the EPOC-PR as accurate and correct:

Name of authority: ........................................................................................................................................

Name of its representative: .........................................................................................................................

Post held (title/grade): ...............................................................................................................................

File No.: ......................................................................................................................................................

Address: ....................................................................................................................................................

Tel. No: (country code) (area/city code)......................................................................................................

Fax No: (country code) (area/city code).....................................................................................................

Email: ........................................................................................................................................................

Date: ............................................................................................................................................................

Official stamp (if available) and signature:..................................................................................................

Deleted: (tick the relevant box)

SECTION F: Contact details

The authority which can be contacted for any question related to the execution of the EPOC-PR:

.................................................................................................................................................................
INFORMATION ON THE IMPOSSIBILITY TO EXECUTE THE EPOC / EPOC-PR (Annex III)

SECTION A:
The following information concerns:

☐ the European Production Order Certificate (EPOC)

☐ the European Preservation Order Certificate (EPOC-PR)

SECTION B:
Addressee of the certificate: .............................................................

Authority which issued the certificate: ......................................................

If applicable, authority which validated the certificate: ..................................

SECTION C:
File reference of the addressee of the certificate: ............................

File reference of the issuing authority: .......................................................

If applicable, file reference of the validating authority: ..............................

If available, date of transmission of the certificate: ..............................

SECTION D: Reasons for non-execution
(i) The EPOC/EPOC-PR cannot be executed or cannot be executed within the requested deadline for the following reason(s):

☐ the certificate is incomplete

☐ the certificate contains manifest errors

☐ the certificate does not contain sufficient information

☐ de facto impossibility due to circumstances not created by the addressee or the service provider at the time the order was received.

☐ the European Production Order has not been issued or validated by an issuing authority as specified in Article 4 of Regulation (EU)
☐ the European Preservation Order has not been issued or validated by an issuing authority as specified in Article 4 of Regulation (EU)...

☐ the European Production Order has not been issued for an offence provided for by Article 5(4) of Regulation (EU)...

☐ the service is not covered by the Regulation (EU)....

☐ the European Production Order/the European Preservation Order does not concern data stored by or on behalf of the service provider at the time of receipt of the certificate.

☐ compliance with the European Production Order would conflict with the applicable law(s) of a third country prohibiting disclosure of the data concerned.

(ii) Please explain further the reasons for non-execution:

………………………………………………………………………………………………….

SECTION E: Conflicting obligations, arising from a third country law

In case of conflicting obligations arising from a third country law, please include the following information:

- title of the law(s) of the third country, including the relevant provision(s):

………………………………………………………………………………………………….

- text of the relevant provision(s):

………………………………………………………………………………………………….

- nature of the conflicting obligation, including the interest protected by the law of the third country:

  ☐ fundamental rights of individuals (please specify):

………………………………………………………………………………………………….

  ☐ fundamental interest of the third country related to national security and defence (please specify):

………………………………………………………………………………………………….

  ☐ other interests (please specify):

………………………………………………………………………………………………….

- explain why the law is applicable in this case:

………………………………………………………………………………………………….

- explain why you consider there is a conflict in this case:

………………………………………………………………………………………………….

- deleted: the scope of the EPOC/EPOC-PR, it is apparent that the EPOC/EPOC-PR manifestly violates the Charter or is manifestly abusive.

- deleted: in this case, including, where necessary, an indication of other reasons not listed under point (i) of this Section.
- explain the link between the service provider and the third country in question:

- possible consequences for the addressee of complying with the European Production Order, including the sanctions that may be incurred:

SECTION F: Information that is requested

Further information is required from the issuing authority for the EPOC/EPOC-PR to be executed (complete, if applicable):

SECTION G: Preservation of data

The requested data (tick the relevant box):

- □ is being preserved until the data is produced or until the issuing authority or where applicable the enforcing authority informs that it is no longer necessary to preserve and produce data

- □ has not been preserved since the information provided in the EPOC/EPOC-PR does not allow to identify it.

SECTION H: Contact details of the contact person of the service provider/legal representative

Name of the service provider/legal representative: ..............................................................

Name of the contact person: ...............................................................

Post held: ......................................................................................

File No (if applicable): .................................................................

Address: ......................................................................................

Tel. No: (country code) (area/city code) ...........................................

Fax No: (country code) (area/city code) ............................................

Email: ........................................................................................
Name of the authorised person: ……………………………………………………………………….

Official stamp (if available) and signature: ………………………………………………………..