

CCBE Makes Critical Statement on E-Evidence Proposal



Thomas Wahl

News

On 19 October 2018, the Council of Bars and Law Societies in Europe (CCBE) delivered a [critical viewpoint on the Commison’s proposal](#) of April 2018 for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (see [euCRIM 1/2018](#), pp. 35-36).

The CCBE mainly puts forward that the instrument cannot be based on Art. 82 TFEU (as proposed by the Commission) because it does not regulate mutual recognition, but instead orders to private entities. Further questions concern necessity and proportionality. According to the CCBE, the choice of a Regulation instead of a Directive as a legal instrument is not only a paradigm shift in the criminal law area, but also risks lowering the higher national standards by means of EU legislation. The added value of the proposal compared to existing MLA treaties and the European Investigation Order (EIO) is also doubtful.

The CCBE disagrees with the approach of delegating – partly or fully – the protection of fundamental rights to private entities, as it undermines the essential duties of national judicial authorities to ensure that the rights of citizens are not compromised. In this context, the CCBE is also concerned that the proposal abolishes legality checks for requests of judicial cooperation.

Hence, the CCBE suggests restricting the scope of the proposal to preservation orders only and to follow the MLA or EIO procedure when electronic evidence is to be produced. The latter instruments might be improved.

In the event that the European institutions proceed with the proposal, the CCBE further observed and recommends the following:

- Strengthening of possibilities for judicial review in the executing State;
- Clear definition of “evidence”;
- Clarification that the orders may only be issued for the purpose of obtaining evidence in the course of specific criminal proceedings;
- Redrafting of the judicial validation process, including the extension of judicial validation to subscriber and access data and including a procedure in which objections by persons affected can be heard (e.g. on the lawyer-client confidentiality);
- Introduction of the condition that orders can only be issued for serious crimes;
- Further specification of grounds to refuse the execution of an order, including the possibility to refuse if data are covered by professional secrecy/legal professional privilege;
- Possibility for suspected or accused persons or their lawyers to request the issuing of European Production or Preservation Orders – in view of the equality of arms;

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- Increased effectivity of legal remedies, also including a person's right to address remedies in the court of the Member State in which the data are sought.

In the present paper, the CCBE further develops its critical position it issued in [previous comments](#).

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