

Q&A legal contingency

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Introduction

This document aims to address legal questions arising from the late implementation of the e-evidence package. Member States are facing very diverse situations, with different stages of readiness in terms of legal, but also of IT implementation. The document is therefore organised by scenarios and covers both the issuing and receipt of a European Production Order Certificate (EPOC) and a European Preservation Order Certificate (EPOC-PR).

Scenarios

A. A Member State has not yet transposed the Directive nor implemented the Regulation (in particular, competent authorities have not been nominated and notified, and the IT implementation is not yet finalized)

1. *Is a service provider in that Member State bound by the Regulation, i.e. do they have to reply to EPOCs?*

Article 7(1), read in conjunction with Article 3 (6) and (7) of the Regulation, requires that a European Production Order or a European Preservation Order is addressed to either a designated establishment or a legal representative which was designated/appointed by a service provider for the purposes referred to in Article 1(1) and Article 3(1) of the Directive. Most obligations in the Regulation are formally imposed upon the designated establishment or legal representative, not directly upon the service provider, whom they represent.

It is the national law transposing the Directive that should regulate the designation/appointment of such addressees. If a service provider has not yet designated/appointed such an addressee, because the Member State where the addressee is to be designated/appointed has not yet transposed the Directive, it is not possible to address an EPOC or EPOC-PR to them in accordance with the Regulation. Moreover, it is not possible in such a situation to address an EPOC or EPOC-PR directly to the service provider as Article 7(2) of the Regulation allows this only exceptionally in

the emergency cases set out in that provision. The scenario that no designated establishment has been designated or no legal representative has been appointed, including for reasons of non-transposition of the Directive into national law, is not one of the exceptions set out in Article 7(2) of the Regulation.

2. *Can a judge or prosecutor in that Member State issue European Production and Preservation Orders?*

Article 31(1) of the Regulation requires that Member States notify the Commission of their competent authorities. This information should then be made publicly available. This information is important for designated establishments and legal representatives who may receive an EPOC or EPOC-PR from such authorities, and for the authorities of the other Member States. If a Member State has not yet appointed and notified its competent authorities pursuant to Article 31(1) of the Regulation and has not yet defined its internal workflows, there is legal uncertainty as to who should be the competent authorities, and how they should apply the Regulation. This does not only concern issuing authorities, but also the judge or court competent to review conflicts of laws pursuant to Article 17. Moreover, effective remedies may not yet have been put in place, as required by Article 18. In such a context, we would consider it risky in this scenario for any judge or prosecutor in that Member State to issue EPOCs and EPOCs-PR.

3. *Can a service provider that intends to nominate an establishment or legal representative in that Member State be sanctioned by another Member State that has transposed the Directive?*

Pursuant to Article 3(1) of the Directive, Member States have to ensure that service providers offering services in the Union appoint at least one addressee (designated establishment(s) or legal representative(s)) for the receipt of, compliance with and enforcement of decisions for the purpose of gathering evidence in criminal proceedings. Whereas there is in principle freedom of choice for service providers, the Directive also imposes restrictions on this free choice, which are specified in Article 3(1) and (2). Article 3(1) also specifies which Member States are responsible for ensuring the appointment in different situations: If there is an establishment with legal personality, it is the Member State of establishment; if there is no establishment in the Union, it is the Member States on whose territory the services are provided; for providers established in Member States not taking part in the instruments concerned, it is the Member States that do take part in the instruments concerned and on whose territory the services are provided. This means that there are situations where several Member States are responsible for ensuring that service providers comply with their obligations. For providers without establishment in the Union, the provider can choose where to nominate its legal representative, provided it is in a Member State where it offers services. Recital 13 clarifies that Member States should not restrict such freedom of choice.

Because of the delays in transposition in some Member States, a service provider may not be legally able to nominate its designated establishment or legal representative in the Member State of its choice. This is not attributable to the service provider, but to the Member State concerned. It is therefore difficult to defend that a provider can be punished for not being able to do something due to circumstances beyond its control. We would therefore encourage central authorities to refrain from imposing penalties on a service provider pursuant to Article 5 of the Directive for an initial period, if this service provider intends to designate their addressee in a Member State that has not yet transposed the Directive, provided this is in line with the Directive. In this context, Central Authorities may consider confirming with the service provider concerned in which Member State it intends to designate its establishment or appoint its legal representative, in order to ensure that this flexibility is limited to genuine situations where designation is prevented by delayed transposition.

B. A Member State has transposed the Directive and implemented the Regulation (e.g. competent authorities are in place), but is not yet ready with its implementation of the IT system

4. *In this scenario, can a service provider in that Member State be addressed with EPOCs and EPOCs-PR?*

Even if the use of the decentralized IT system is mandatory pursuant to Article 19(1) and (4) for communication between competent authorities and service providers and between competent authorities, this requires that Member States have put in place the infrastructure, accesses and other requirements to make the IT system work. In the absence of these requirements, Article 19(5) can be applied. It provides that where communication through the decentralised IT system is not possible, the transmission shall be carried out by the most appropriate alternative means. This means that a service provider is bound by the other obligations under the Regulation when receiving an EPOC by other means.

5. *In this scenario, can a judge or prosecutor in that Member State issue European Production and Preservation Orders?*

If the legal framework is fully transposed/implemented but the IT system is not yet implemented, it is difficult to argue that the issuing authorities cannot issue orders considering the possibility of alternative ways of communication pursuant to Article 19(5). However, other channels to obtain e-evidence also remain available (cf. Art. 32 Regulation). E.g., it may also be possible to issue a European Investigation Order, a Mutual Legal Assistance request, or resort to existing arrangements to obtain the evidence concerned if in the specific circumstances of the case this

alternative is more effective from a legal and practical point of view. It will be for the issuing authority to make that choice.

C. A Member State has transposed the Directive with some delays and has implemented the Regulation but gives Service Providers a certain period of time to notify their legal representatives/designated establishment, which has not yet elapsed

6. *Is a service provider in that Member State bound by the Regulation, i.e. do they have to reply to EPOCs if they have not yet notified their legal representative/designated establishment?*

If a service provider has not yet nominated a legal representative or designated establishment, EPOCs and EPOCs-PR cannot be addressed to them (cf. reply to question 1 above).

7. *Can a service provider that intends to nominate an establishment or legal representative in that Member State be sanctioned by another Member State that has transposed the Directive?*

If the Member State where the service provider intends to nominate his designated establishment or legal representative gives service providers a period of time for this nomination, the provider should not be sanctioned in another Member State during this period, if there is a choice of the service provider. See reply to question 3 above.

D. A Member State has transposed the Directive, but has not implemented the Regulation (no competent authorities have been nominated and notified to the Commission)

8. *In this scenario, can a designated establishment or legal representative of a service provider in that Member State be addressed with EPOCs that require a notification to the enforcing authority? Can a designated establishment or legal representative of a service provider be addressed with EPOCs that do not require this notification (e.g. for subscriber data)?*

Although the Regulation is based on the principle of mutual trust, the involvement of the enforcing authority under Articles 8, 10-12, 16 and 17 of the Regulation is an essential aspect of the instrument, in particular regarding its role to review the information set out in European Production Orders for traffic and content data to assess whether to raise a ground for refusal in accordance with Article 12(1) of the Regulation. Even in cases in which no notification pursuant to Article

8(1) of the Regulation is required, the involvement of the enforcing authority may be required under Article 10 (5) and Article 11(4) of the Regulation, as the addressee must inform both the issuing authority and the enforcing authority where it considers that the execution of an EPOC or an EPOC-PR could interfere with immunities, privileges or rules on freedom of the press or freedom of expression in other media. Even if there is no formal action required from the enforcing authority in such situation, it could lead to informal contact between the issuing and the enforcing authority. Moreover, the enforcing authority also plays a central role in the enforcement procedure under Article 16, where the addressee does not comply with an EPOC or an EPOC-PR and the issuing authority requests enforcement of the order. It is also informed in the review procedure in the event of conflicting obligations under Article 17 of the Regulation.

If there is no enforcing authority nominated yet, these various roles could not be fulfilled. Hence, issuing authorities should not send orders to addressees located in a Member State that has not yet nominated enforcing authorities in line with the Regulation. The information on authorities nominated by Member States will be published on the website of the European Judicial Network in criminal matters.

9. *In this scenario, can a judge or prosecutor in that Member State issue European Production and Preservation Orders?*

Article 31(1) of the Regulation requires that Member States notify the Commission of their competent authorities. This information should then be made publicly available. This information is important for designated establishments and legal representatives who may receive an EPOC or EPOC-PR from such authorities, and for the authorities of the other Member States. Moreover, the Regulation also entrusts tasks to the competent court in situations of conflicts of laws, and roles and workflows need to be defined. If a Member State has not yet appointed and notified its competent authorities pursuant Article 31(1) of the Regulation and has not yet defined its internal workflows, we consider it risky for any judge or prosecutor in that Member State to issue EPOCs and EPOCs-PR (cf. reply to question 2).

E. A Member State has implemented the Regulation, but not transposed the Directive

10. *Is a service provider in that Member State bound by the Regulation, i.e. do they have to reply to EPOCs?*

If a service provider has not nominated a legal representative or service provider, EPOCs and EPOCs-PR cannot be addressed to them (cf. reply to question 1 above).

11. *Can an issuing authority send an EPOC to a designated establishment or legal representative of a service provider in another Member State?*

It seems difficult to argue that an issuing authority in a Member State that has not yet transposed the Directive could not send an EPOC to a service provider in a Member State that has already implemented the Regulation and transposed the Directive, as the Regulation and the Directive are separate legislative instruments that work together on some aspects, but not on all. In addition, Article 1(2) of the Directive provides that the Directive is applicable not only for the e-evidence Regulation, but also for orders under the EIO directive and the MLA Convention. Hence, it would seem arbitrary to argue that authorities in this Member State could send EIOs to other Member States but not orders under the e-evidence Regulation.