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E-EVIDENCE COALITION REMARKS ON THE RAPPORTEUR PACKAGE PROPOSAL

Notification for traffic and content data

We warmly welcome the Parliament's persistent requirement that content and traffic data are treated with the same high procedural protections. Traffic data enables to draw sensitive inferences on people's lives, through the mapping of their social networks, location tracking, Internet browsing tracking, mapping of communication patterns. It is widely recognised, including by the case law of the CJEU and the European Court of Human Rights, that traffic data is no less sensitive than the actual content of communications. Therefore, access to traffic data and content data should be given the same legal protection. Furthermore, requiring a mandatory notification with suspensive effects to the executing State for traffic and content data would be in line with the European Investigation order (EIO) Directive, as it would allow the executing State to apply grounds for refusal where necessary to protect e.g. fundamental rights, immunities or a privileges and national security interests.

Residence criterion

Likewise, we support the Rapporteur in dismissing a residence criterion (i.e. notification only when there are reasonable grounds to believe the person is not residing in the issuing State). Introducing a residence criterion will severely limit the human rights safeguards offered by the notification regime. The assessment of the residence of the person concerned is made by the issuing State which has clear incentives to believe there is a local residence, as this avoids the 'red tape' of the notification. Furthermore, mandatory notification is critical for protecting fundamental rights of individuals residing in Member States with rule-of-law issues.

Grounds for refusal

We stand behind the Parliament's request to include a substantive list of grounds for refusal similar to Article 11 of the EIO Directive. Important principles such as ne bis in idem, double criminality as well as the respect of higher protections granted by national constitutions in the executing State and of special privileges given to journalists, media, lawyers, doctors and other specific status are key to an effective, trustworthy judicial cooperation mechanism. Limiting the list of grounds for refusal would risk depriving the notification regime of its purpose. The purpose of the e-evidence proposal is not to harmonise Member States' criminal procedure law. Accordingly, if access to content or traffic data is not available in the executing State for a particular criminal offence, the investigative measure should be excluded from cross-border access as well.



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Consistency with the GDPR

We agree with the Parliament's package approach that orders should be addressed by default to the data controllers, in line with the GDPR. As the EDPB noted in its opinion adopted on 26 September 2018: "it is the responsibility of the controller to ensure the rights of data subjects are respected, and to provide them with the relevant information, including with regards to recipients of their data, for instance in the context of the exercise of their right of access. The processor will not receive these requests from data subjects and will not be in a position to answer, unless expressly asked by the controller." This also means data subjects won't be able to exercise their rights efficiently if the controller is not in a position to provide complete information. It is therefore recommended that where the service provider addressed is not the controller, it shall inform the controller.

Notification for subscriber data and other identifiers

The human rights safeguards afforded by mandatory notification of the executing State are also highly relevant for subscriber data. Even though subscriber data overall is less sensitive than traffic data, there are notable exceptions, especially when privileges and immunities are involved. The particular concerns of cross-border access to subscriber data by authorities in Member States with rule-of-law problems can only be properly mitigated by notification of the executing State. Moreover, in its draft Council Decision for authorising Member States to sign and ratify the Second Additional Protocol to the Cybercrime Convention, the European Commission clearly states that mandatory notification for access to subscriber data is necessary to ensure compatibility with Union law. We encourage both co-legislators to consider the importance of this safeguard in the e-evidence proposals.

Emergency procedure

We understand that in case of emergency, shorter deadlines imposed on the execution of an order might be necessary. However, these deadlines must nonetheless take into account the capacities of

smaller service providers to produce and send the requested data as well as the availability of executing authorities to validate the order before it is executed. Therefore, it seems to us more reasonable to set a 16-hour deadline, as proposed by the European Parliament's own report.

Common European Exchange System

For a swift implementation of the Regulation and Directive, it is preferable to foresee the use of a Common European Exchange System, that will ensure the authenticity and security of requests and data transmissions. This system should be in place when the legislation enters into force.



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Martin Sacleux, Legal Advisor, Council of Bars and Law Societies of Europe (CCBE)
sacleux@ccbe.eu

Sara Roda, Senior Policy Advisor, Standing Committee of European Doctors (CPME)
sara.roda@cpme.eu

Dorothee Wildt, Legal Adviser, Deutscher Anwaltverein (DAV)
Wildt@eu.anwaltverein.de

Julie Lenoir, EU Policy Advisor, European Broadcasting Union (EBU)
lenoir@ebu.ch

Chloé Berthélémy, Policy Advisor, European Digital Rights (EDRi)
chloe.berthelemy@edri.org

Ilias Konteas, Executive Director, European Magazine Media Association (EMMA) – European Newspaper Publishers' Association (ENPA)
Ilias.Konteas@magazinemedi.eu; Ilias.Konteas@enpa.eu

Wout Van Wijk, Executive Director, News Media Europe (NME)
wout.vanwijk@newsmediaeurope.eu