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**BSA Position Paper on the e-Evidence Regulation**

BSA | The Software Alliance ("BSA"),[1] the leading advocate for the global software industry, welcomes upcoming Trilogues on the European Commission's proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters ("e-Evidence Regulation"). Our Members support the efforts of the Regulation to address the challenges facing cross-border law enforcement requests for e-Evidence. We share the desire to achieve greater harmonization and legal certainty for national authorities, service providers and citizens.

The Regulation represents an improvement on the current EU regime, under which law enforcement authorities seek e-Evidence either through formal cooperation channels between the relevant authorities of two countries, e.g., through Mutual Legal Assistance Treaties ("MLATs"), or via the exercise of unilateral national powers. The proposal is also an improvement over the possibility of having to comply with different, potentially conflicting individual Member State laws and requirements. Consistent with the objective of a more integrated and harmonized Digital Single Market, it is important that the Regulation clearly be the exclusive mechanism for law enforcement in Member States to request e-Evidence from service providers across national borders.

In addition, while crafted as an intra-EU law, the Regulation is also an important step towards the creation of international agreements with many of the EU's main trading partners to further facilitate cross-border law enforcement access to data and to promote stronger safeguards for individuals and enterprises.

BSA welcomed the recent Report of the European Parliament, which includes several important modifications to the original proposal, both from the perspective of fundamental rights, and from an operational perspective for service providers. We would like in particular to recommend that the final version of the Regulation includes:

- **Exclusive means:** the Regulation should be the main instrument for cross-border data access requests, as the European Parliament added in the modified Art. 1 of its Report. This would ensure the necessary legal certainty for most requests, and especially help in harmonizing the various national processes that currently may create confusion and potential conflicts of law.
- **Enterprise first:** The co-legislators should endorse the principle that where an access request targets the data of an enterprise, the data should be sought in the first instance from that enterprise itself (i.e. the data controller). An access request should only be directed to a service provider (i.e. the data processor) when seeking data directly from the enterprise would jeopardize a criminal investigation. Both the original Commission

[1] *BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.*
*BSA's members include: Adobe, Akamai, Atlassian, Autodesk, Bentley Systems, Box, Cloudflare, CNC/Mastercam, DocuSign, Dropbox, IBM, Informatica, Intel, Intuit, MathWorks, McAfee, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.*

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proposal and the General Approach explicitly included this important distinction in Recital 34 and Art. 5(6). The European Parliament has similar language – especially with regards to personal data – but we believe that these important distinctions would provide further helpful clarifications.

- **Notice to users:** users should be notified when their data is sought by law enforcement agencies, "gag orders" should be issued only in limited circumstances and with a defined duration. The European Parliament introduced this important distinction in the modified Art. 11.

- **Good faith compliance:** In accordance with international best practices, the co-legislators should include a "safe harbor" provision that would protect service providers from any liability under both Union and Member State law for any actions taken in good faith to respond to or comply with an access request under the draft Regulation. The European Parliament added this principle in Art. 13. We also believe that maintaining Recital 43f is of paramount importance to fully reflect this safe harbor principle and address situations whereby services providers cannot access the data.

- **Safeguards and executing authority:** BSA agrees with the modifications suggested by the European Parliament, which would entail an increased role for executing authorities and for the judicial authorities of the issuing state. The European Parliament Report significantly strengthens the role of both the executing and affected States, ensuring a more robust protection of fundamental rights. The system put forward by the European Parliament raises some concerns on the ability of executing authorities to carry out all the required checks which would be introduced by the Regulation. The European Parliament Report establishes a distinction – and corresponding different requirements – between requests for "subscriber data and IP addresses for the sole purpose of identifying a person" and requests for "traffic or content data". BSA believes this is a good compromise between establishing the necessary safeguards to protect fundamental rights while ensuring that the executing authorities have the material ability to verify all requests.

- **Encryption:** Authorities' requests for data or assistance should not require a service provider to weaken the security of its technology or introduce vulnerabilities. Also, the e-Evidence Regulation should not require providers to disclose encrypted data in decrypted form. This is of paramount importance, as encryption is a fundamental component of strong cybersecurity and privacy protection. The e-Evidence Regulation appropriately reflects this in Recital 13a. The Commission proposal and the Council General Approach would require service providers to disclose data regardless of whether it is encrypted (Recital 19), they do not further clarify that no obligation for decryption is provided by the Regulation. The European Parliament Report's deletion of the sentence in Recital 19 "[d]ata should be provided regardless of whether it is encrypted or not" has clarified this. BSA recommends adopting the language put forward by the European Parliament, while keeping Recital 13a. This approach is essential to protect user privacy, and to ensure that service providers can offer cloud encryption key recovery services.

- **Timeline for responding to requests:** the European Parliament Report has slightly extended the deadlines for responding to ordinary and emergency requests. BSA is aware of the necessity to ensure rapid access to e-Evidence for law enforcement agencies and authorities, nevertheless at the same time service providers need to be allowed enough time both to be able to technically execute the requests and verify that all the legal conditions to respond are fulfilled. The European Parliament extended

timelines would constitute a good compromise to mediate between these two important priorities. Additionally, similarly to the language of Art. 33 of GDPR, BSA recommends adding a clarification whereby if it is not possible to provide all the data required at the same time, it could be provided in phases without undue delay.

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