

Regulation on cross border access to e-evidence : Council agrees its position

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The EU is taking steps to improve cross-border access to e-evidence by creating a legal framework which will enable judicial orders to be addressed directly to service providers based in another member state.

The Council today agreed its position on a proposal for a regulation on European production and preservation orders for e-evidence in criminal matters. It is now ready to start negotiations with the European Parliament with the aim of reaching an agreement before the end of the parliamentary term.

Electronic evidence is becoming a vital element in criminal proceedings. Nowadays criminals use rapid cutting-edge communication technology which does not stop at borders. These new rules will replace the existing cumbersome methods with quick and efficient tools to gather and exchange e-evidence across borders. This will help protect our citizens, and will do so without compromising their rights and freedoms.

Josef Moser, minister of justice of Austria

Main elements of the text

The regulation seeks to introduce an alternative mechanism to the existing tools of international cooperation and mutual legal assistance. It specifically addresses the problems stemming from the volatile nature of e-evidence and the “loss of location” aspect by setting new procedures for quick, efficient and effective cross-border access.

The main features of the new rules are:

- the creation of **European production and preservation orders** that can be issued to obtain or preserve e-evidence regardless of the location of the data;

- the Orders can cover **any category of data** – subscriber, access, transactional and content – with a threshold for the latter two which can be requested only for crimes punishable in the issuing country by a maximum sentence of at least 3 years, or for specific cyber/terrorism related crimes;
- the **requested data may not be used for purposes** other than those for which they were obtained, except to: prevent an immediate and serious threat to public security of the issuing state or its essential interests, or for proceedings for which a production order could have been issued;
- A **mandatory deadline of 10 days for the execution** of a production order. In case of validly established **emergency cases**, the deadline may be reduced to **6 hours**. Moreover, in case the Order regards subscriber and access data, it may be, under certain conditions, sent without prior validation from the competent judicial authority. In this case, ex-post validation will have to be sought as soon as possible and within 48 hours.
- **Service providers may be sanctioned** if they don't comply with an Order. They can be imposed pecuniary sanctions of up to 2% of total worldwide annual turnover of the preceding financial year.
- the creation of **a notification system for content data** in cases when the issuing authority believes the person whose data are sought is not residing on its own territory. This notification aims at informing the enforcing state and giving it an opportunity to flag whether the data requested is: protected by immunities and privileges; or subject to rules on determination and limitation of criminal liability related to freedom of expression/press; or its disclosure may impact fundamental interests of the state. The issuing authority shall take into account these circumstances and it shall not issue or adapt the Order. The notification is not with a suspensive effect.

Next steps

The Council is now ready to start trilogue negotiations with the Parliament as soon as the latter has agreed its position.

In the meantime, work continues at the Council on the directive on harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings with a view to reach an agreement as soon as possible under the Romanian presidency.

Background

The regulation on European production and preservation orders for e-evidence in criminal matters is part of a package tabled by the Commission in April 2018 which also includes a directive laying down harmonised rules on the appointment of legal representatives for the purposes of gathering evidence in criminal proceedings. The work on this directive is still ongoing within the Council.

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