



The e-evidence package

Update by the Commission

52nd Plenary Meeting of the European Judicial Network, Bucharest, 26 - 28 June 2019

Electronic evidence

- Relevant in the framework of nearly all criminal proceedings
- Often stored by service providers that are established or store data in another country
- Data storage location can move regularly and swiftly





Current procedures and why we need change

- Currently cross-border requests are processed through:
 - **Mutual Legal Assistance** (10 months on average),
 - **European Investigation Order** (up to 120 days) or
 - **voluntary cooperation**
- Not adapted to the challenges of volatile electronic evidence: too slow (data may be already deleted) and burdensome or lack transparency and accountability
(<http://data.consilium.europa.eu/doc/document/ST-15072-2016-REV-1/en/pdf>)



Security Union package, 17 April 2018

Two self-standing proposals:

- A proposal for a **Regulation** on European Production and Preservation Orders for electronic evidence in criminal matters

and

- a proposal for a **Directive** laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.



The COM proposals in a nutshell

- The **Regulation**: new form of judicial cooperation → judicial authority in MS A issues mandatory Order for the preservation or production of e-evidence sent directly to the service provider/its legal representative in MS B; irrespective of the location of the data; no systematic prior involvement of the MS where the service provider/legal representative is located/no notification
- The **Directive** → to ensure a level playing field, all service providers offering services in the Union need to designate a legal representative



Overview: Regulation (1)

- measures: a **European Production Order** and a **European Preservation Order**; served only cross-border;
- in the framework of **criminal proceedings** only (not for prevention of crime);
- only **stored** data upon receipt of the order; no real-time interception, no data retention obligations;
- **data categories**: subscriber data, access data, transactional data, content data;

Overview: Regulation (2)

- **related to the data categories** (subscriber/access or transactional/content data) different set of conditions/safeguards applicable;
 - Orders to produce **subscriber** and **access** data and Orders to preserve data (irrespective of the data category): only by a prosecutor, judge or court; (issued or validated); for all criminal offences
 - Orders to produce **transactional** and **content** data: only by a court or judge, not by a prosecutor (issued or validated); only for offences with a
 - maximum custodial sentence of at least 3 years or
 - one of the offences listed in Directives/FD Art. 5 (4) (b) or (c);

COPEN: Discussion on notification

- **Majority** of the MS in favour of COM proposal;
- **blocking minority** was in favour of a systematic notification;
- if notification: question whom to notify?
 - MS where the subject resides?
 - MS where the LR is located?
- need for a **suitable compromise** majority of the MS can support and at the same time adapted to the digital world/maintain the added value compared to current instruments

General Approach on the Regulation– new: notification

- **Notification** of the MS, where the LR is located;
- for **content data** only;
- only in cases, where the issuing authority has **reasonable grounds** to believe the person whose data is sought is **not** residing on the own territory;
- notified MS can raise specific issues (Art. 5(7) (b)), **no formal right to object**; but on the other hand **no forfeit** – MS/person can always raise these issues (also in the enforcement phase);
- issuing state **has to take these circumstances into account** in the same way as if provided for under its own law;



Overview: Directive

Scope is wider: not limited to *electronic* evidence

MS shall ensure that ...

- **Service providers, offering services in the Union**, designate at least one legal representative (LR) in the Union (in a MS where the service provider is established or offers services);
exemption: purely national service providers;
- Service providers have to **equip LR with the legal and actual infrastructure** to comply with orders; no possibility to exculpate themselves due to missing or ineffective internal procedures (Art. 7 (8));

General Approach

- **Regulation:** on 06.12.2018, not supported by DE, NL, FI, HU, LV, EL and CZ; on the annexes (forms): on 06./07.06.2019
- **Directive:** on 08.03.2019, DE abstained.

=> Council is ready to start negotiations.



Position of the EP

- responsible committee: **LIBE**;
 - rapporteur for the files MEP Birgit SIPPEL (DE/S&D); published with shadows **working documents** re specific topics;
 - no draft report;
 - up to the new EP, probably the same rapporteur;
- => As soon as EP found a position trilogues can begin.



Thank you for your attention!

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