Electronic evidence in criminal proceedings: legal representatives directive

2018/0107(COD) - 17/04/2018 - Legislative proposal

PURPOSE: to ensure that a service provider offering services in the Union designates legal representation in the Union for the receipt of decisions and orders issued by Member States for the purpose of gathering evidence in criminal proceedings.

PROPOSED ACT: Directive of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: the European Parliament decides in accordance with the ordinary legislative procedure on an equal footing with the Council.

BACKGROUND: online service providers such as electronic communications services or social networks are important drivers of innovation and growth in the digital economy. However, these services can also be misused as tools to commit or facilitate crimes, including serious crimes such as terrorist attacks. When that happens, these services and applications often are the only place where investigators can find leads to determine who committed a crime and to obtain evidence that can be used in court.

Many criminal investigations include a cross-border request to obtain **electronic evidence held by service providers based in another Member State or outside the EU**. To obtain such data, judicial cooperation and mutual legal assistance is needed. However, the **process is slow and cumbersome** at present. In the absence of a general requirement for service providers to ensure a physical presence within the territory of the Union, Member States have taken steps at national level to ensure compliance with national legal obligations. This includes measures for requiring service providers to obtain electronic evidence that is of relevance to criminal proceedings. To that end, some Member States have adopted legislation imposing mandatory legal representation within their own territory, for a number of service providers offering services in that territory. Such requirements create **obstacles to the free provision of services** within the internal market. Avoiding fragmentation of the market entails setting out harmonised rules on the legal representation in the Union of certain service providers.

IMPACT ASSESSMENT: four main policy options were considered besides the baseline scenario of taking no option. The impact assessment revealed that legislative options requiring service providers offering services in the EU to nominate a legal representative in the Union would add clear value compared to the other options.

CONTENT: the aim of the proposal is to lay down **rules on the legal representation in the Union of certain service providers of telecommunications and electronic communication services for the purpose of gathering evidence in criminal proceedings**.

The type of obligations requested from service providers may take several forms, such as: (i) receiving an order in criminal proceedings from a prosecutor or a judge with legal consequences, (ii) providing data needed in those criminal proceedings, (iii) taking certain measures for data preservation in criminal proceedings or being addressed with an enforcement procedure in case of non-compliance.

Member States shall not put additional obligations on service providers, such as obliging them to establish a legal representative in their own territory instead of anywhere in the Union where they offer services. Harmonised rules on legal representation should not limit the powers given under Union and national law to competent authorities to address service providers established on their territory. In such cases, if

national authorities decide to address their orders directly to the establishment of the service provider, the responsibility of the legal representative as set out in the Directive does not apply.

Service provider: the following types of service providers fall under the scope of the proposed Directive: (i) providers of electronic communications services; (ii) providers of information society services that store data as part of the service provided to the user (including social networks such as Twitter and Facebook); (iii) online marketplaces and other hosting service providers; and (iv) providers of names and numbering services for the internet.

Legal representatives:

- **Service providers established in the Union** have to designate at least one legal representative in the Union, more specifically in a Member State where they offer services or are established.
- **Service providers that are not established in the Union** should designate a legal representative in one of the Member States where they offer services.
- **Service providers** offering services in Member States **participating in a judicial cooperation instrument under Title V of the Treaty** (in which only some Member States participate) are required to designate a legal representative in one of them. These instruments include the Directive on the **European Investigation Order** and the Mutual Legal Assistance Convention of 2000. The **European Production Order** will add to this legal regime (Please see COD/2018/0108).

Liability: Member States have to ensure in national law that a **designated legal representative can be held liable for non-compliance,** without prejudice to the liability of service provider itself. Service providers should not be able to claim they are not responsible for the non-compliance of their legal representative. Nor should the legal representative be able to exculpate himself by claiming for example he is not empowered to deliver data.

Coordination mechanism: to ensure a coherent approach, the proposed directive provides for a coordination mechanism on the basis of **central authorities designated by Member States**. This will enable Member States to exchange information, provide for assistance and cooperate in their enforcement approach, e.g. by identifying the most appropriate Member State to take action in a given case of non-compliance.