

Electronic evidence regulation: European production and preservation orders for electronic evidence in criminal matters

2018/0108(COD) - 17/04/2018 - Legislative proposal

PURPOSE: to lay down the rules on the European Production and Preservation Orders under which a service provider offering services in the Union may be compelled to produce or preserve electronic evidence.

PROPOSED ACT: Regulation 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: social media, webmail, messaging services and applications connect hundreds of millions of users to one another and generate significant benefits. However, they can also be **misused as tools to commit crimes**, including serious crimes such as terrorist attacks. When that happens, these services and apps are often the only place where investigators can find leads to determine who committed a crime and obtain evidence that can be used in court.

The [Council Conclusions](#) of 9 June 2016 underlined the increasing importance of electronic evidence in criminal proceedings, and of protecting cyberspace from abuse and criminal activities for the benefit of economies and societies.

The current EU legal framework consists of Union cooperation instruments in criminal matters, inter alia, the [Directive 2014/41/EU](#) regarding the **European Investigation Order** in criminal matters (EIO Directive), and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union,

The European Parliament, in its [resolution on the fight against cybercrime](#) of 3 October 2017, highlighted the challenges that the **currently fragmented legal framework** can create for service providers seeking to comply with law enforcement requests and calling on the Commission to put forward a Union legal framework for electronic evidence, including safeguards for the rights and freedoms of all concerned

By introducing European Production Orders and European Preservation Orders, the proposal makes it easier to **secure and gather electronic evidence for criminal proceedings** stored or held by service providers in another jurisdiction. The new instrument will **not replace the EIO** for obtaining electronic evidence but provides an additional tool for authorities. There may be situations, for example when several investigative measures need to be carried out in the executing Member State, where the EIO may be the preferred choice for public authorities. Creating a new instrument for electronic evidence is a better alternative than amending the EIO Directive because of the specific challenges inherent in obtaining electronic evidence which do not affect the other investigative measures covered by the EIO Directive.

IMPACT ASSESSMENT: four main policy options were considered besides the baseline scenario of taking no action. The preferred solution is a legislative instrument for a European Production Order and measures to improve access to databases that provide subscriber information.

CONTENT: the proposed Regulation **introduces binding European Production and Preservation Orders**. Both Orders need to be issued or validated by a judicial authority of a Member State. Such Orders may only be issued if a similar measure is available for the same criminal offence in a comparable domestic situation in the issuing State. Both Orders can be served on providers of electronic communication services, social networks, online marketplaces, other hosting service providers and providers of internet infrastructure such as IP address and domain name registries, or on their legal representatives.

European Production Order: this will allow a judicial authority in one Member State to request electronic data that are necessary as evidence in criminal investigations or criminal proceedings (such as emails, text or messages in apps) directly from a service provider offering services in the Union and established or represented in another Member State, regardless of the location of data.

The proposal introduces mandatory **deadlines** for addressees. The normal deadline is 10 days, while authorities may set a shorter deadline where justified. Moreover, in **emergency cases**, defined as a situation where there is an imminent threat to life or physical integrity of a person or to a critical infrastructure, the deadline is 6 hours (as compared to 120 days for the existing European Investigation Order or 10 months for a Mutual Legal Assistance procedure).

European Production Orders to produce **transactional or content data** (as opposed to subscriber and access data) may only be issued for criminal offences punishable in the issuing State by a **custodial sentence of a maximum of at least 3 years**, or for specific cyber-dependent, cyber-enabled or terrorism-related crimes.

European Preservation Order: this will allow a judicial authority in one Member State to oblige a service provider offering services in the Union and established or represented in another Member State to prevent data from being deleted and preserve specific data to enable the authority to request this information later via mutual legal assistance, a European Investigation Order or a European Production Order.

The European Preservation Order only allows preserving data that is **already stored** at the time of receipt of the Order, not the access to data at a future point in time after the receipt of the Order.

Safeguards: the proposal sets out procedural safeguards as well as rules on data protection. A judicial authority must validate Orders. Personal data covered by this proposal may only be processed in accordance with Regulation (EU) 2016/679 (the General Data Protection Regulation) and Regulation (EU) 2016/680 (Data Protection Directive for Police and Criminal Justice Authorities).

For the serving and execution of orders under this instrument, authorities should rely on the **legal representative** designated by the service providers. The Commission has presented a [proposal](#) to ensure that such legal representatives are effectively designated.