

Council Pushes for E-Evidence Law, EP Applies the Brakes

Thomas Wahl



News

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the
Study of Crime, Security and
Law

Published in
2018, Vol. 13(4) [euCRIM](#) p 206
ISSN: 1862-6947
<https://euCRIM.eu>



On 7 December 2018, under the Austrian Presidency, the JHA Council [agreed on its position](#) on a proposal for a regulation on European production and preservation orders for e-evidence in criminal matters. The new legal framework foresees that judicial and law enforcement authorities can quickly obtain and efficiently secure evidence stored electronically by directly sending respective orders to service providers. If service providers do not comply with the orders, they can be sanctioned. The location of the data should no longer play a role.

Debate in the Council was controversial, however, with seven Member States, including Germany, disagreeing with the [general approach of the Council](#). The countries particularly raised concerns about overly harsh infringements of the fundamental rights to privacy and the protection of personal data.

The major amendment proposed by the Council in comparison to the Commission is the establishment of a – limited – notification system: if content data are concerned and if the issuing authority believes the person whose data are sought is not residing on its own territory, the issuing authority must inform the enforcing state and give it an opportunity to flag whether the data requested may fall under the following categories:

- Data protected by immunities and privileges;
- Data subject to rules on determination and limitation of criminal liability related to freedom of expression/the press;
- Data whose disclosure may impact fundamental interests of the state.

The issuing authority shall take these circumstances into account, and it shall not issue or adapt the order. The notification does not entail a suspensive effect. Such notification procedure was requested from several parties, since it follows similar rules in international cooperation in criminal matters, e.g., the interception of telecommunication data without the need for technical assistance of a requested state.

Meanwhile, the European Parliament dampened expectations that it will finalise the legislation by the end of the parliamentary term in May 2019. During a [hearing organised by the \(mainly responsible\) LIBE Committee](#), MEPs voiced critical concerns over the Commission proposal. In a [working document](#), the main rapporteur, *Birgit Sippel* (S&D, Germany), took up the criticism already put forward by legal experts, practitioners, and NGOs (also see in this regard [euCRIM](#) 1/2018, p. 36; 2/2018, pp. 107-108, and 3/2018, pp. 162-163). She pointed out that the serious legal questions must be addressed in a comprehensive manner and concluded:

“With regards to the numerous consultations conducted so far (in shadows’ meetings, the LIBE hearing, as well as in bilateral meetings with involved parties), but also publications received (in particular “An assessment of the Commission’s proposals on electronic evidence, commissioned by the EP Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the LIBE Committee), the Rapporteur together with the shadows has identified several legal areas that will need further clarification, in order to guarantee the drafting of a legally sound legal instrument regarding the production and preservation of e-evidence.”

About eucrim

eucrim is the leading journal which regularly informs about current developments in European criminal and “criministrative” law.

All news items are freely accessible at: <https://eucrim.eu/news/>

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases of issues.

The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).



**Co-funded by
the European Union**