

Council Takes Position on Role of Legal Representatives in E-Evidence Cases

News

Thomas Wahl

The European Parliament signalled that it is not eager to enter into trilogue negotiations on the proposed European Production and Preservation Orders for electronic evidence in criminal matters before the end of the parliamentary term in May 2019. The Council, however, went ahead with the second piece of the possible future legal framework on e-evidence, i.e., the proposed Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings (COM(2018) 226 final, see [euCRIM 1/2018, 35-36](#)).

The Ministers of Justice [adopted a general approach on the Directive at the JHA Council meeting on 8 March 2019](#). The Directive will complement the Regulation by making it mandatory for service providers to designate a legal representative to receive, comply with, and enforce judicial orders on gathering e-evidence on the service providers' platforms. This is particularly relevant for service providers with headquartered in non-EU countries.

The [general approach](#) of the Council mainly changes the Commission proposal as follows:

- Extension of the applicability of the Directive, which should not only encompass electronic communications service providers, but also domain name registrars and related privacy and proxy services, in addition to “other information society providers that offer their users the ability to communicate with each other or offer their users services that can be used to process or store data on their behalf;”
- Legal representatives may not only be involved in gathering e-evidence, but also for orders based on other instruments of Title V, Chapter 4 TFEU, such as the Directive on the European Investigation Order or the 2000 EU Mutual Legal Assistance Convention;
- The designated legal representative under the Directive could be used for domestic procedures as well;
- Service providers and legal representatives should be held jointly and severally liable for non-compliance with their obligations deriving from the relevant legal framework on evidence;
- The obligations of service providers have been extended to make them responsible for providing the necessary resources and powers to guarantee compliance with orders and national decisions;
- The Council follows the Commission proposal as regards the Member States' obligation to establish effective, proportionate, and dissuasive sanctions against service providers if they do not comply with their duties; it has been clarified, however, that the financial capacity of the service provider must be taken into account when determining the sanction. This should especially reduce the burden for small- and medium-sized business entities (SMEs);

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- Other specific arrangements for SMEs have been included, for instance the possibility to “share” a legal representative;
- A full list of legal representatives shall be made publicly available to ensure easy access for law enforcement authorities (primarily but not only) via the European Judicial Network on criminal matters.

The European Parliament did not assess the proposal on the Directive before the end of the parliamentary term. It is anticipated that negotiations on the e-evidence legislative framework will be resumed after the new European Parliament takes up its work in autumn 2019.

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