Cross-border access to electronic evidence

During the June plenary session, the Parliament is expected to vote on the trilogue agreement reached with the Council on two Commission proposals revolutionising cross-border access to electronic evidence across the EU.

Background
Criminal investigations increasingly rely on electronic evidence, covering both ‘content data’ (such as e-mails and photographs), and ‘non-content data’, such as subscriber and traffic data. However, given that many service providers are located or store data outside the country of investigation, judicial and law enforcement authorities across the EU often encounter difficulties in accessing such data. Whereas there are various formal and informal channels for requesting cross-border access – including mutual legal assistance under international conventions and bilateral agreements, as well as direct exchanges with service providers sharing data on a voluntary basis – it is argued that none of these are adequate to ensure swift and consistent exchange of electronic evidence.

European Commission proposals
Against this backdrop, on 17 April 2018 the Commission proposed rules on access to electronic evidence in the EU in the form of a regulation and a directive. Based on Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), the proposed regulation would allow an authority of one Member State to request directly from a service provider established or represented in another Member State to produce or preserve electronic data needed for the investigation and prosecution of crimes, regardless of the location of this data. To this end, the text introduces two new investigative measures: the European production order and the European preservation order. The latter would be used with a view to a subsequent request for the production of data. The proposed directive – based on the internal market provisions of Articles 53 and 62 TFEU – would require service providers based or operating in the EU to designate a legal representative in at least one EU Member State as a contact point in charge of receiving and enforcing orders issued by competent authorities from across the EU.

European Parliament position
In Parliament, the proposals were assigned to the Civil Liberties, Justice and Home Affairs (LIBE) Committee (rapporteur: Birgit Sippel, S&D, Germany). The Internal Market and Consumer Protection (IMCO) Committee decided not to give opinions on the files. In the respective reports, adopted in plenary in December 2020, Parliament made numerous changes to the proposed regulation and recommended integrating the relevant parts of the directive into the regulation, instead of having two separate instruments. However, in November 2022 the co-legislators reached a provisional agreement on both proposals, which was endorsed by the Council and the LIBE committee in January 2023. The compromise provides for a mandatory deadline of 10 days for responding to a production order, which could be reduced to 8 hours in emergency cases. Moreover, a notification system for some categories of data would be created, in which the enforcing state’s national authorities would take part. They would be able to halt the execution of the order – within 10 days or, in emergency cases, 96 hours – by raising one of the grounds set out in the regulation. The agreed texts now need to be formally adopted by the Parliament and the Council.

First-reading reports: 2018/0107(COD) and 2018/0108(COD); Committee responsible: LIBE; Rapporteur: Birgit Sippel (S&D, Germany). For further information see our ‘EU Legislation in progress’ briefing.