

General Scheme of Criminal Justice (Protection, Preservation and Access to Data on Information Systems) Bill 2024

Purpose

The primary purpose of the General Scheme is to give effect to the outstanding provisions of the 2001 Council of Europe Budapest Convention on Cybercrime (the Budapest Convention) other than 4 articles relating to the “real time” collection/recording of data which is being looked at in the context of separate legislation.

The Budapest Convention is the main international instrument on cybercrime and has been given effect by nearly 70 states including all the member states of the EU other than Ireland.

The majority of articles of the Budapest convention have already been given effect in Irish Law, mainly by the Criminal Justice (Offences Relating to Information Systems) Act 2017.

Production Orders

The main new provisions of substance introduced by the Scheme relate to Preservation Orders and Production Orders required by the Budapest Convention and addressed in Heads 5 and 6 of the Scheme.

There are already statutory provisions to provide for access to records held on paper or computers. These existing procedures include

- search warrants (e.g. Criminal Justice (Search Warrants) Act 2012) ,
- Orders to make material available (Section 63 Criminal Justice Act 1994/section 14A of the Criminal Assets Bureau Act 1996) and
- Orders to produce documents or provide information (Criminal Justice Act 2011).

However these mechanisms are not comprehensive and were introduced at a time when most data was held either in paper form or on a particular computer in a known physical location and under the control of a person. Data is still held in this way and these provisions are still required.

However, most data, whether personal or business, is now held in the **Cloud** under the control of multinational, internet service providers.

Records held in this way may be temporarily broken up into multiple segments or shards and stored in different servers in different jurisdictions and moved to different servers in different geographic areas depending on availability at particular times of the day.

This means it is not viable to establish the physical location of the data to establish jurisdiction and this has implications for some of the existing provisions.

The role of multinational, internet service providers also complicates issues.

The purpose of Heads 5 and 6 is to provide a modern, comprehensive procedure to protect and access such data - via preservation and production orders which can be served direct on internet service providers - for the purpose of criminal investigations and prosecutions, subject to the appropriate safeguards. Accompanying these are provisions to deal with admissibility of evidence and where information might be privileged (such as legal advice or journalists' sources).

The Heads follow the requirements of the 2001 Budapest Convention and the procedures set out also follow the most up-to-date template provided by the EU Regulation 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings which was adopted in July 2023 and which applies from 18 August 2026. I will come back to this Regulation.

The purpose of a Preservation Order is to preserve targeted data for a temporary period with a view to giving effect to a subsequent Production Order. It is temporary and does not allow any access to the data itself.

To avoid confusion I should explain the difference between the concept of “**data retention**” and a Preservation Order.

The European Court of Justice has held that EU law precludes the general and indiscriminate retention of traffic and location data relating to electronic communications for the purpose of combating crime. In this context “data retention” relates to the mass storage of data in the future.

This Scheme only relates to data already being stored as part of their services on the date the court order is served on a service provider. It does not require the future storage of data yet to be generated. The Preservation Order provided for in Head 5 requires temporary preservation of targeted data being held by the service provider on the date the order was served, normally for a period not exceeding 90 days (Head 5 (9)).

Jurisdiction as set out in Head 6B for both Preservation and Production Orders is based primarily on where the person who has control or lawful access to the data is based regardless of where the data itself is held.

Safeguards

I mentioned that the procedure is subject to appropriate safeguards.

The Budapest Convention itself (article 15) contains a number of safeguards and we sought and obtained legal advice that these are complied with.

In addition, the Scheme is intended to comply with EU Data Protection law and the Data Protection Act 2018 and we have initiated a formal consultation process with the Data Protection Commission to ensure that they have no issues.

All orders must be considered and determined upon by a Judge. For example, in the case of a production order seeking traffic or content data, the judge must be satisfied that it relates to a serious criminal offence and that the issuing of the order is necessary and proportionate.

Other Budapest Provisions

There are a number of technical Budapest provisions still outstanding and these are given effect by Head 4, Head 7 A& B and Head 8 A & B.

HEAD 12 Measures related to the EU E-evidence Regulation - Regulation (EU) 2023/1543 of 12 July 2023 on European Production and Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (the EU E-evidence Regulation).

The EU E-evidence Regulation forms part of the EU E-evidence Package, a Directive and Regulation aimed at making it easier and faster for law enforcement and judicial authorities to obtain the electronic evidence they need to investigate and prosecute criminals, which will have direct effect in Irish law from August 2026. The Regulation provides for an EU cross-border regime whereby law enforcement authorities in a given member state can request data controlled by internet service providers based in other EU member states in the form of “European Production and Preservation Orders.”

The EU Regulation has direct effect but Ireland must designate the Irish Authority competent to issue European Production Orders. To ensure consistency for both practitioners and internet service providers based in Ireland, it was decided that the procedures to be followed for obtaining a domestic production order should mirror those required for a European Order.

Head 12 identifies the Irish authority (District Court judges) that will issue European Production Orders and European Preservation Orders sought by Irish competent authorities like An Garda Síochána in respect of data being held by internet service providers based elsewhere in EU.

Just to note that there are other measures to be implemented to give full effect to the E-evidence package, in particular the designation of an enforcing authority (who can raise grounds for refusing a European Production Order from another member state) and the designation of a central authority.

Head 13 Measures related to the EU Terrorist Content Online (TCO) Regulation

- Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online (the TCO Regulation).

This Regulation provides a mechanism for the issuing of EU-wide orders requiring service providers that host online content to remove terrorist content within a very short timeframe. The Regulation came into effect on 7 June 2022. As an EU Regulation it has direct effect in Irish law and the Gardaí have been designated as the competent authority to issue removal orders.

The Regulation also requires designation of a national body to oversee the imposition of sanctions for non-compliance. The Attorney General has advised that primary legislation is required to give necessary powers to a national body to issue such financial penalties. The Government have decided that Coimisiún na Meán should be designated as the national body, and the scheme amends the Online Safety and Media Regulation Act 2022 to provide it with the necessary powers, after which formal designation can take place. Until the necessary amendment is made we will not be in full compliance with our EU obligations.

Criminal Legislation
Department of Justice