



EUROPEAN COMMISSION

*Brussels, 10.4.2018
C(2018) 1711 final*

Dear President,

The Commission would like to thank the Senát for its Opinion on the proposal for a Directive on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA {COM(2017) 489 final}.

This proposal was adopted as a part of the package of measures designed to enhance cybersecurity in the European Union, presented on 13 September 2017.

In proposing this initiative, the Commission is following up on the commitment it undertook in the European Agenda on Security {COM(2015) 185 final} to review the existing EU legal framework, which dates back to 2001, and remedy identified shortcomings.

The Commission agrees with the Senát that EU criminal law should be proportional and should not go beyond what is necessary for the accomplishment of the objectives of the legislation. The extent to which the proposal fits the principle of proportionality was carefully analysed in the impact assessment in preparation of the proposal and throughout the drafting process.

The Commission agrees with the Senát that the penalties have to be effective, proportionate and dissuasive. Given the cross-border nature of non-cash payment fraud, and as the impact assessment revealed, the disparities in the level of penalties across Member States can prevent effective cross-border investigations and judicial cooperation. A minimum harmonisation of the level of penalties was therefore proposed

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in coherence with relevant EU criminal law instruments, such as Directive 2013/40¹ and EU cooperation mechanisms in criminal matters such as the European Arrest Warrant².

In response to the other comments in the Opinion the Commission would like to refer to the attached annex.

The opinion of the Senát has been made available to the Commission's representatives in the ongoing negotiations with the European Parliament and the Council and will inform these discussions.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Senát and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Dimitris Avramopoulos
Member of the Commission*

¹ [Directive 2013/40/EU](#) of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.

² [2002/584/JHA Council Framework Decision](#) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

Annex

The Commission has carefully considered each of the issues raised by the Sénat in its Opinion and is pleased to offer the following clarifications.

- 1. The Commission's impact assessment, which included various stakeholder consultations, underlines how differences in the level of penalties among Member States may result in a different prioritisation of investigations against non-cash payment fraud, which in turn hampers cross-border cooperation. If a Member State has lower penalties in its criminal code than another Member State asking for assistance, this could lead law enforcement and judicial authorities to give lower priority to investigating these crimes.*

Those who benefit most from such disparities in sanction levels are likely to be the most serious offenders, i.e. transnational organised crime groups with operating bases in several Member States which could for example decide to host their phishing or carding website in a Member State with lower penalties.

- 2. The impact assessment also shows that fraud and counterfeiting of non-cash means of payment can result in serious economic and non-economic consequences for its victims and identifies specific needs of these victims not addressed by the minimum standards established by Directive 2012/29/EU³:*

- Specific needs arising from the consequences relating to identity theft.*
- Directive 2012/29/EU only covers natural persons, whereas legal persons can also become victims of non-cash payment fraud. In particular, it leaves out small and medium businesses, which, by lacking the resources of larger companies, are more vulnerable to fraud and its negative consequences.*

With regard to prevention, the impact assessment identified prevention gaps as a problem driver for non-cash payment fraud. In line with other EU criminal law instruments, such as Directive 2011/93/EU⁴, the proposal includes an article on prevention to address the need to raise awareness and thus reduce the risk of becoming a victim of fraud by means of information and awareness-raising campaigns, and research and education programmes.

- 3. The impact assessment showed an acute lack of data concerning these crimes which makes it difficult to effectively combat them. Without a minimum of statistical data it is difficult to evaluate the effectiveness of the tools used to combat these crimes, including this proposed Directive. The Commission is aware that data collection may represent an additional burden on national administrations. This burden was*

³ [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

⁴ [Directive 2011/92/EU](#) of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

estimated in the impact assessment, based on the proportionate need to collect a minimum number of indicators and statistical data.

4. *The purpose of the Commission proposal is to provide an encompassing definition of 'payment instrument', ensuring that this is technologically neutral and future-proof. Hence, the Commission has proposed to modify the corresponding definition in the existing legal instrument⁵ to remove references to specific examples, while avoiding that certain non-cash means of payment (in particular digital, such as virtual currencies) fall outside its scope.*

⁵ Article 1(a) of [Council Framework Decision 2001/413/JHA](#) of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment.