EUROPEAN COMMISSION

Brussels, 19.10.2018
C(2018) 6849 final

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters {COM(2018) 225 final} and on the Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings {COM(2018) 226 final}.

The proposals presented in April 2018 contribute to the Commission's efforts to deliver on the commitment made under the Joint Declaration on the European Union legislative priorities for 2018-2019, to better protect European citizens and to equip law enforcement authorities with efficient tools to make it easier and faster to obtain electronic evidence.

The proposed Regulation seeks to give the judiciary and law enforcement tools to address the way criminals communicate today and to counter modern forms of criminality. It speeds up the process to secure and obtain electronic evidence that is stored and/or held by service providers established in another jurisdiction and at the same time improves legal certainty for authorities, service providers and persons affected and maintains a high standard for law enforcement requests, thus ensuring protection of fundamental rights, transparency and accountability. This instrument will co-exist with the current judicial cooperation instruments, such as the European Investigation Order, that can still be used as appropriate by the competent authorities.

The proposed Directive ensures a level-playing field for the designation of legal representatives for the purpose of gathering evidence in criminal proceedings for all service providers covered by this proposal and offering services in the Union.

Negotiations of both proposals in the competent Council working group have started in April, while substantial discussions in the European Parliament will start in September.

Mr Michael MÜLLER
President of the Bundesrat
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The Commission welcomes the Bundesrat's view that action at the Union level as envisaged in the proposal is required to adapt the applicable tools for law enforcement authorities to the challenges posed by new technologies. The Commission takes note of the comments expressed by the Bundesrat relating to specific parts of the proposals, such as the degree of involvement of the Member State where the legal representative or the service provider is located. The Commission is pleased to have this opportunity to provide detailed explanations regarding its proposals in response to the more technical comments in the Opinion in the annex attached.

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

Yours faithfully,

Frans Timmermans
First Vice-President

Věra Jourová
Member of the Commission

Annex

The Commission has carefully considered the issues raised by the Bundesrat in its Opinion and would like to make the following observations:

Point 6: The Commission has carefully analysed the choice of the legal nature of this instrument. It considers that a regulation is the most appropriate form to be used for this mutual recognition instrument for the following reasons:

A regulation is directly applicable and provides greater legal certainty. Whereas a directive would give Member States more margin for transposition, national legislation might vary between Member States. Although in the case of harmonisation measures, the necessity to leave this margin to Member States to adapt it to their national situation may well be justified, the situation is different with mutual recognition instruments, which concern only cross-border procedures and in this case will even be directly served on a third person. Service providers and their legal representatives who will be addressees of orders will benefit from a single cross-border regime, while varying national regimes would create additional burden for them. Reducing the burden for service providers as much as possible is also referred to by the Bundesrat in point 3 of its opinion. For the sake of clarity and practicability, a regulation seems to be the best choice.

In the area of civil law, several mutual recognition instruments have been adopted in the form of a regulation and have proven to be efficient[1]*. Judges and other practitioners have applied the regulations and national law in parallel without any particular problems. There is no specific reason why this could not be done in the area of criminal law, especially as the national instruments will not be affected because this is an additional instrument that can be used. Practitioners are accustomed to using different instruments in cross-border situations.*

Point 7: Having carefully assessed the issue, the Commission decided in its proposal not to systematically involve the "host Member State" at the issuing stage in every case. The proposed Regulation aims at bringing added value compared to existing cooperation tools, such as the European Investigation Order, by devising more efficient solutions, not by replicating existing mechanisms. The Commission considers that a notification system (as provided by the Directive on the European Investigation Order) would limit the efficiency of this instrument and its added value and would not take adequately into account the specific situation of cyberspace, where services can be provided from everywhere, with little link between the host country and the service provider or the data location.

Moreover, the Commission proposal does foresee the involvement of the Member State where the service provider or its legal representative is located (hereafter "host Member State") in four situations where the Commission's assessment has found this to be necessary:

[1] E.g. Regulation (EU) N°2015/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p1

1. *in cases where the issuing authority has reasons to believe that transactional or content data requested with the Order is protected by immunities and privileges granted under the law of the "host Member State", or where the disclosure may impact fundamental interests of that Member State;*

2. *in cases where the issuing Member State has indications that parallel criminal proceedings may be ongoing in another Member State: then it shall consult the authorities of this Member State in accordance with Council Framework Decision 2009/948/JHA;*

3. *in cases where the sole information contained in the Certificate seems to indicate that it manifestly violates the Charter of Fundamental Rights of the European Union or that it is manifestly abusive: the addressee shall also inform the competent enforcement authority in the "host Member State";*

4. *in cases where the addressee does not comply with the Order and the issuing State launches the enforcement procedure by sending all necessary information to the "host Member State" that will be the enforcing Member State.*

In terms of a possible non-respect for data protection rules, the harmonisation of the data protection framework through the General Data Protection Regulation and the Directive on Data Protection for the Police has put in place a coherent framework across the Union which ensures respect for high data protection standards in all Member States. The proposed e-evidence rules fully respect and build on this framework.

A systematic notification of the "host Member State" could lead to a considerable burden for that State, especially if a service provider would decide to designate only one legal representative in one Member State. This "host Member State" would receive notifications from all the other participating Member States and would need to check them within a short deadline. Most importantly, this "host Member State" would very often have no connection at all to the investigation, neither to the case, the victim nor the perpetrator. Its involvement would rely solely on the designation of a legal representative on its territory. In the light of this lack of connection to the investigation, it does not seem appropriate to give the legal order of that Member State a significant role in the procedure. This would also allow forum shopping for service providers.

The Commission is aware of the importance of privileges and immunities in the national legal orders of Member States. These immunities and privileges have not been harmonised so far. Therefore, the Commission included in the Regulation an obligation to assess and take into account applicable immunities and privileges at different stages of the procedure. For the evaluation of these immunities and privileges, the Commission relies on and trusts the existing networks and agencies who should be contacted in these situations to support authorities of the issuing State, and is prepared to assist practitioners with guidance.

<u>Points 8 and 9:</u> The Commission refers to the above explanations. In particular, the "host Member State" would very often have no connection at all to the investigation, neither to the case, the victim nor the perpetrator. In the light of this lack of connection

to the investigation, it does not seem appropriate to give the legal order of that Member State a significant role in the procedure, including on double criminality. Especially in cases where the legal representative is the addressee, the Commission considers it not appropriate to make this the basis for the applicable procedural law in light of the specific nature of electronic evidence.

Point 11: The Commission acknowledges that the current situation in national law may allow police authorities to request subscriber or comparable access data. On the other hand, the legal basis does not allow any provision that will define police as an issuing authority on a broad scale, as Article 82 of the Treaty on the Functioning of the European Union covers only judicial cooperation.

Point 12: With the distinction made in Article 4 of the Regulation, the Commission acknowledges the different levels of intrusiveness for the fundamental rights of the affected person depending on the requested data category and thus requires a higher level of protection. Therefore, the standard of protection in the issuing State has to be higher.

Additionally, the draft Regulation allows investigating authorities to obtain, for instance, transactional data from another Member State that has been retained under a national data retention scheme. In its rulings, the Court of Justice of the European Union set clear conditions for such situations and one of them was the involvement of a judge or court.[2]

Points 14-17: In its Opinion, the Bundesrat also expresses concerns regarding the United States Cloud Act and its interaction with the proposed instruments. There is currently no possibility to compel a United States of America service provider to disclose content data outside of a mutual legal assistance procedure, except for emergency cases. This will not be changed by the proposed instruments, which will provide a legal framework to obtain subscriber, access and transactional data from United States providers offering services in the Union.

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[2] Court of Justice of the European Union, judgment of 8 April 2014, Digital Rights Ireland and Seitlinger, joined cases C-293/12 et C-594/12, para. 62; EU:C:2014:238.