



EUROPEAN COMMISSION

*Brussels, 31.10.2018
C(2018) 7008 final*

Dear Chair,

The Commission would like to thank the Assembleia da República for its Opinion on the proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters {COM(2018)225 final} and on the proposal for a Directive of the European Parliament and of the Council 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 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 while 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 aims at creating a level playing field for all companies offering the same type of services in the Union, regardless of where they are established or act from, by laying down rules on the legal representation in the Union of certain service providers for the purposes of gathering evidence in criminal proceedings.

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

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The Commission welcomes the Assembleia da República's broad support for the aims of the proposals but notes its doubts on the legal nature of the proposal for a Regulation. The Commission is pleased to have this opportunity to offer the following clarifications regarding its choice of the instrument.

The reasoning for the choice of the Regulation is included in the Explanatory Memorandum, which concludes that the Regulation has the following advantages over the Directive: direct applicability, clarity, greater legal certainty and avoidance of divergent interpretation in the Member States. A Regulation allows for the same obligation to be fulfilled in a uniform manner in the Union.

This is particularly important because, subject to the conditions that will be laid out in the legislative text, the orders would be directly served on a private party, unlike European Investigation Orders, which are exchanged between public authorities. Service providers and their legal representatives as addressees of orders need to have clarity as to what precise rules are applicable to them. They will greatly benefit from a single cross-border regime, while varying national regimes would create additional burden for them. For the sake of clarity and practicability, a Regulation has been considered to be the best choice.

This is consistent with other related measures, such as the the Commission proposal of 2016 on the mutual recognition of freezing and confiscation orders, also presented as a Regulation to avoid the transposition problems to which the Framework Decisions on mutual recognition of freezing and confiscation orders were subject.

Also, 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 (e.g. the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹). Judges and other practitioners have applied 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 as this is just an additional instrument that can be used. Practitioners are able to use different instruments in cross-border situations.

The Commission hopes that these comments address the issues raised by the Assembleia da República and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Věra Jourová
Member of the Commission*

¹ Regulation (EU) No 1215/2012 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, p. 1–32.