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PROPOSAL

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY
OF THE IMPACT ASSESSMENT Accompanying the document Proposal
for a Regulation of the European Parliament and of the Council on
European Production and Preservation Orders for electronic evidence in
criminal matters and 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

Delegations will find attached document **SWD(2018) 119 final**.

Encl.: **SWD(2018) 119 final**



Brussels, 17.4.2018
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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

**Proposal for a Regulation of the European Parliament and of the Council on European
Production and Preservation Orders for electronic evidence in criminal matters
and**

**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) 225 final} - {COM(2018) 226 final} - {SWD(2018) 118 final}

Executive Summary Sheet

Impact assessment for a proposal on improving cross-border access to electronic evidence in criminal matters

A. Need for action

What is the problem and why is it a problem at EU level?

Difficulties in cross-border access to electronic evidence currently hinder the effective investigation and prosecution of crime in the EU. There is a lack of efficiency in judicial cooperation between public authorities, direct cooperation between public authorities and service providers, and public authorities' direct access to electronic evidence. As a result, investigations come to a halt, crimes go unpunished, victims are less well protected, and EU citizens feel less safe.

The impact assessment identifies three problems:

1. It takes **too long** to access e-evidence across borders under existing **judicial cooperation** procedures, rendering investigations and prosecutions less effective.
2. Inefficiencies in **public-private cooperation** between service providers and public authorities hamper effective investigations and prosecutions.
3. Shortcomings in defining **jurisdiction** can hinder effective cross-border investigations and prosecutions.

What needs to be achieved?

The **general** objective is to ensure effective investigation and prosecution of crimes in the EU by improving cross-border access to electronic evidence through enhanced judicial cooperation in criminal matters and an approximation of rules and procedures.

There are three **specific** objectives:

1. **Reduce delays** in cross-border access to electronic evidence;
2. **Ensure** cross-border **access** to electronic evidence where it is **currently lacking**;
3. Improve **legal certainty, protection of fundamental rights, transparency** and **accountability**.

What is the value added of EU-level action (subsidiarity)?

Since this initiative involves **cross-border** issues, the problems concerned cannot be solved by individual EU countries. Moreover, given the diversity of legal approaches, the number of policy areas concerned (security, criminal law, fundamental rights including data protection, economic issues) and the wide range of stakeholders, the EU is the most appropriate level at which to address the problems identified.

EU-level action also facilitates cooperation with non-EU countries, especially the US; this is important, as the need to access e-evidence internationally frequently goes beyond EU borders.

B. Solutions

What are the various options for achieving the objectives? Is there a preferred option? If not, why not?

Option A: non-legislative action (i.e. practical measures to improve judicial cooperation among public authorities and step up direct cooperation between public authorities and service providers)

Option B: option A + **international agreements**

Option C: option B + direct cooperation **legislation (European Production Order + access to databases)**

Option D: option C + direct access legislation

Option D is the preferred option, both qualitatively and in terms of costs and benefits.

What are the views of the various stakeholders concerned? Who supports which option?

Extensive stakeholder consultations were held over more than 18 months. Public authorities in EU countries highlighted the following key issues: the length of time it takes to process a request, lack of reliable cooperation with service providers, lack of transparency and, for investigative measures, legal uncertainty about jurisdiction.

Service providers and some civil society organisations said that legal certainty was essential to enable direct cooperation with public authorities and that conflicts of law must be avoided.

Some civil society organisations opposed EU-level legislation on direct cooperation; instead, they had a preference for improving mutual legal assistance procedures.

C. Impacts of the preferred option
What are the benefits of the preferred option (if any apart from the main ones)?
The initiative is expected to make investigations and prosecutions more effective and efficient, improve transparency and accountability, guarantee respect for fundamental rights, and foster trust in the digital single market by improving security and reducing the perception of impunity for crimes committed on or through networked devices.
What are the costs of the preferred option (if any apart from the main ones)?
The costs are administrative , arising from EU countries' transposition and enforcement of the preferred option and service providers' compliance : <ul style="list-style-type: none"> • One-off costs are estimated at EUR 3.3m for EU countries and EUR 1.7m for service providers. • The preferred option will not introduce any recurrent costs. Rather, it will generate recurrent savings estimated at over EUR 7.1m annually for Member States and over EUR 4.3m annually for service providers.
What are the impacts on SMEs and competitiveness?
Legal certainty and standardisation of procedures, which would alleviate administrative burden and favour competitiveness, should have a positive impact on SMEs.
Will there be any significant impacts on national budgets and administrations?
The preferred option is expected to have initial implementation costs, which would be offset in the long term by savings on recurrent costs. National authorities would have to adapt to new procedures and undergo training. However, in the long term authorities should benefit from streamlining and centralisation , additional training and the clear legal framework governing requests for access to data, which should generate efficiency gains. Similarly, as the preferred option would take strain off judicial cooperation channels, there should be a drop in the number of requests countries are required to process.
Will there be any other significant impacts?
Service providers would need to adapt to a new legislative framework by introducing new procedures, training staff, and, possibly, appointing a legal representative. The implementation of practical measures, while not compulsory, would generate certain costs . Service providers might face more requests, pushing up compliance costs. Conversely, a harmonised framework could reduce the burden on those providers currently responding to requests for non-content data which have to assess them under the different laws of all Member States. More effective investigations involving cross-border access to electronic evidence would have positive social impacts , including a possible reduction in crime through increased deterrence. The preferred option contains sufficient safeguards to ensure that the measures it includes are fully compatible with fundamental rights . No significant environmental impact was detected.
Proportionality?
The preferred option would introduce rules and procedures to improve cross-border access to electronic evidence for national judicial authorities, with explicit safeguards based on necessity and proportionality . It would not impose disproportionate obligations on the private sector (including SMEs) or individuals. Rather, it would introduce a set of measures expected to produce substantial material and intangible benefits . The preferred option does not go beyond what is necessary to solve the original problem and meet the defined objectives of EU action.
D. Follow-up
When will the policy be reviewed?
The Commission should review the initiative's implementation to assess whether policy objectives have been met. This evaluation should take place 5 years after the deadline for implementing the legislative act, thus allowing enough time to elapse for a meaningful assessment of law and practice across all participating Member States.