Opinion of the European Economic and Social Committee on a) Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

(COM(2018) 378 final — 2018/203 (COD))

and on b) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)

(COM(2018) 379 final — 2018/204 (COD))

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Section responsible	Single Market, Production and Consumption
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Outcome of vote (for/against/abstentions)	184/0/9

1. **Conclusions and recommendations**

1.1. The EESC takes due note of the Commission's proposals to amend the Taking of Evidence Regulation and the Service of Documents Regulation.

1.2. The EESC calls on the Commission to take into account the observations in this document concerning their proposals, specifically those set out in points 5.2, 5.3, 5.4, 5.5, 5.9, 5.10, 6.3, 6.4. and 6.6, since without a genuine judicial area, the freedoms of the single market cannot be fully taken advantage of.

2. **Background**

2.1. With the objective of creating an area of freedom, security and justice in the European Union (EU), Article 81 of the Treaty on the Functioning of the European Union (TFEU) lays the groundwork for developing 'judicial cooperation in civil matters' having cross-border implications, by enabling the EU to adopt measures for the approximation of the laws and regulations of the Member States.

2.2. When necessary for the proper functioning of the internal market, a legal provision exists to adopt measures aimed at ensuring mutual recognition and enforcement — between Member States — of judgments and of decisions in extrajudicial cases and cooperation in the taking of evidence.

2.3. To regulate judicial assistance between Member States, the EU replaced the systems set out in the Hague Conventions by adopting the following legal instruments:

2.3.1. Council Regulation (EC) No 1206/2001 ([1]) on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, adopted on the initiative of the Federal Republic of Germany ('Taking of Evidence Regulation'), in force in all Member States except Denmark.

2.3.2. This Regulation establishes a direct and rapid EU-wide system to transmit and implement requests for the taking and execution of evidence between courts and lays down precise rules as to the form and content of such requests. It has put in place a system of direct dealings between courts, replacing the previous system, under which requests were sent from a court in one Member State to the central body of the other Member State.

2.3.3. Regulation (EC) No 1393/2007 ([2]) of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('Service of Documents Regulation'), in force in all Member States ([3]).

2.3.4. This Regulation applies in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. However, it does not extend to revenue, customs or administrative matters or to liability of the state for actions or omissions in the exercise of state authority (*acta iure imperii*).

2.4. The EESC has always been in favour of creating a common area of freedom, security and justice in the EU, which (among other things) involves adopting measures in the area of judicial cooperation and in civil matters — measures that are needed so that citizens and enterprises are not prevented or discouraged from exercising their rights due to the incompatibility or complexity of the Member States' judicial systems.

2.5. In any event, in order to create the European judicial area, it is imperative to improve cooperation between courts, thus simplifying and speeding up procedures so as to eliminate dysfunctions and delays.

3. **Commission proposals**

3.1. The Commission's proposals seek to amend the two existing regulations on the taking of evidence and the service of documents.

3.2. *The proposal to amend the Taking of Evidence Regulation*

3.2.1. The proposal aims to improve the smooth functioning of the area of freedom, security and justice, and of the internal market, improving and speeding up the cross-border taking of evidence.

3.2.2. It seeks to bring the Regulation into line with technical developments, exploiting the benefits of digitalisation; requiring that the communication and exchange of documents be carried out electronically by default; and respecting data protection and privacy, without any infringement upon parties' procedural rights. To this end, the system will have to incorporate a decentralised structure enabling direct communication between end-users.

3.2.3. The proposal encourages the use of modern methods of taking evidence, such as videoconferencing when there is a need to hear a person who is in another Member State. It seeks to ensure a more appropriate, more frequent and faster use of direct taking of evidence when hearing a person domiciled in another Member State as a witness, expert or party.

3.2.4. It removes legal barriers to the acceptance of electronic (digital) evidence. The proposal provides for the mutual recognition of digital evidence. This will reduce the burden for citizens and businesses in proceedings, and will also limit the instances where electronic evidence is rejected.

3.2.5. It seeks to solve the issue of the divergent interpretations of the term 'court', which is currently not defined in the Taking of Evidence Regulation. The proposal aims to dispel uncertainties in this regard.

([1]) Council Regulation (EC) No 1206/2001 of 28 May 2001 (OJ L 174, 27.6.2001, p. 1).

([2]) Regulation (EC) No 1393/2007 of 13 November 2007, repealing Council Regulation (EC) No 1348/2000 (OJ L 324, 10.12.2007, p. 79).

([3]) By virtue of the 'parallel agreement' with Denmark (OJ L 300, 17.11.2005, p. 55). The United Kingdom and Ireland, in accordance with Article 3 of Protocol No 21 to the Treaty, notified at that time that they wished to take part in the adoption and application of these two regulations.

3.2.6. The proposal is in line with other EU instruments in relation to civil judicial cooperation. It is also without prejudice to the possible exchange of information between authorities with regard to recognition and enforcement in matrimonial matters and matters of parental responsibility ([4]) or with regard to maintenance obligations ([5]), even where that information has evidentiary value, so the requesting authority is free to choose the most suitable method.

3.2.7. The proposal regulates the ability of one Member State's diplomatic officers or consular agents to take evidence in the territory of another Member State and in the area where they exercise their functions, without the need for a prior request to the central body or competent authority of that Member State.

3.2.8. To ensure mutual recognition of digital evidence, such evidence taken in a Member State in accordance with its law should not be denied recognition as evidence only because of its digital nature.

3.2.9. A delegation to the Commission, in accordance with Article 290 TFEU, is included, for the sake of making changes to or updating the standard forms in the Annexes.

3.3. *Service of Documents Regulation*

3.3.1. The main focus of its rules is in fact to lay down uniform channels for transmission of documents from one Member State to another for purposes of serving those documents in the other Member State. The experience of applying the current Regulation, and the relevant case law issued by the Court of Justice of the European Union (CJEU), have been particularly useful in this connection.

3.3.1.1. Its scope of application is being changed, but the current language of the provision on extrajudicial documents remains. Meanwhile, as regards judicial documents, the Regulation will apply in all situations where the domicile of the addressee is in another Member State.

3.3.1.2. This new standard, under which all instances of service of documents are obligatorily covered when the addressee is domiciled in another Member State, only applies to the service of the documents instituting the proceedings and the 'service of process'. As to the subsequent instances of service of judicial documents in the course of a judicial proceeding, the extra protection is less relevant.

3.4. The communication and exchange of documents between sending and receiving authorities is carried out electronically, through a decentralised IT system made up of national IT systems interconnected by a secure and reliable communication infrastructure; however, there is the option of using alternative (traditional) means of communication in cases of unforeseen and exceptional disruption of the IT system.

3.5. It is stipulated that Member States must provide assistance in locating the whereabouts of a recipient in another Member State; there are three alternative options:

— judicial assistance through authorities designated by the Member States;

— providing access to public domicile registers through the European e-justice Portal;

— providing detailed information via the European e-justice Portal on available tools for locating persons in their territories.

3.6. Foreign parties to proceedings may be required to appoint a representative in the Member State of the proceedings for the purposes of service of documents related to the proceedings.

3.7. There is an improvement to the procedure on the right of the addressee to refuse to accept the document if it is not drawn up or translated into an appropriate language.

3.8. The proposal obliges the postal service providers to use a specific return slip (acknowledgement of receipt) when serving documents by post under the Regulation. It also introduces a minimum rule concerning persons to be regarded as eligible 'substituting recipients' if the postal service provider cannot hand over the document to the addressee in person.

([4]) Council Regulation (EC) No 2201/2003 of 27 November 2003 (OJ L 338, 23.12.2003, p. 1).
([5]) Council Regulation (EC) No 4/2009 of 18 December 2008 (OJ L 7, 10.1.2009, p. 1).

3.9. The proposal introduces the electronic service of documents as an additional alternative method of service under the Regulation.

3.10. In the event of the defendant not entering an appearance, there are two substantial new elements:

a) the court seised with the proceedings is required to send an alert message about the initiation of the proceedings or about the default judgment to the available user account of the defendant;

b) a uniform period of two years is set, as of the issuance of the default judgment, for the availability of extraordinary relief from the effects of the expiry of the time for appeal in the context of challenging the recognition and enforcement of that judgment in another Member State.

4. **General comments**

4.1. The EESC welcomes the Commission's proposals to amend the Taking of Evidence Regulation and the Service of Documents Regulation, as they facilitate judicial integration in the Member States by establishing uniform channels in their respective fields of application.

4.2. Both proposals contribute to: improving judicial cooperation in the EU, based on the principle of mutual recognition of judgments (Article 81 TFEU); reinforcing the area of freedom, security and justice (Article 3(2) and Article 67 TFEU); and establishing the internal market (Article 26 TFEU).

4.3. In sum, the adoption and application of the regulatory framework proposed by the Commission should contribute objectively to the dismantling of several invisible barriers that directly affect the lives of all citizens — whether nationals of the Member States or people who are resident in the EU — and the commercial activities of companies that operate in the EU.

4.4. In order to guarantee access to justice and to a fair trial, it is essential that the provisions of these two proposals be applied in judicial cases that have cross-border implications, as well as being appropriately substantiated.

4.5. The proposals are also in line with the digital market strategy in relation to e-government, especially as regards the need to take steps to modernise public administration and achieve cross-border interoperability, which facilitates interaction with the general public.

4.6. The proposals increase legal certainty and thereby help to avoid delays and undue costs for citizens, companies and public administrations, as well as addressing shortcomings in the protection of parties' procedural rights, since they try to avoid legal defencelessness in accordance with the 'principle of equality of arms'.

4.7. It should be noted that the provision concerning delegated acts to update and amend the annex to the two proposed regulations is not in line with the position held by the EESC ([6]) in this regard, since the proposal provides that the delegation may be of indeterminate duration, despite the call for the adoption of delegated acts to be subject to a time limit.

4.8. In short, the EESC considers that without a genuine judicial area the freedoms of the single market cannot be fully taken advantage of.

5. **General comments on the Taking of Evidence Regulation**

5.1. The proposed amendment to the Taking of Evidence Regulation aims to enhance electronic communications between the relevant competent bodies as a replacement for the use of paper, which is slower and more expensive, as well as to use videoconferencing to take evidence in other Member States, without incurring any loss to the procedural rights of the parties.

5.2. Although this proposal presupposes that the courts concerned will behave in a diligent and effective way and that scrupulous respect will be shown for the principles of sincere cooperation and mutual recognition — the latter expressly invoked to prevent the evidential value of digital evidence from being rejected (fourth recital and Article 18(a) of the proposal) — it does not establish any provision in the case of a refusal on the part of the requested court due to:

([6]) OJ C 288, 31.8.2017, p. 29; OJ C 345, 13.10.2017, p. 67.

— undue delay;

— lack of motivation; or

— insufficient motivation.

These cases amount in practice to the impossibility of accessing effective judicial protection and a solution should be found to ensure that this does not happen.

5.2.1. This is relevant in relation to the current state of EU law, in which the mere refusal of a court required to refer a preliminary ruling to the CJEU in a case that is under its jurisdiction could be considered a serious breach of the obligations of the state under EU law ([7]).

5.2.2. There are many situations in which the requested court can severely impair defendants' rights if it does not cooperate with due diligence, especially with regard to interim judicial protection, by resorting to reservations about national sovereignty, national security, public order, etc. (see Article 4(2) TEU) or in the case of divergences arising from the different procedural practices in the Member States.

5.2.3. The latter situation occurs, for example, during pre-trial discovery, as Article 23 of the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters allows the Contracting States to introduce a sovereignty reservation to reject letters of request that originated in the preliminary phase of the proceedings (after the lawsuit has been filed but before the trial has begun).

5.2.4. The current Regulation (EC) No 1206/2001, although it does not explicitly address this issue, excludes it from its scope of application, as is clear from Council Declaration 54/01 of 4 July 2001 (doc. 10571/01, p. 1).

5.2.5. Occasionally, undue delays may be the result of insufficient technical skills on the part of the requested courts or of inadequate technological infrastructure. In order to prevent and eliminate these situations as much as possible, the proposal should lay down a provision requiring Member States to guarantee that their courts will be digitally up-to-date and to ensure that their technological infrastructure is adequate.

5.3. On the other hand, certain provisions of the proposal should be made specific. For example, Article 1(4) establishes a restrictive notion of 'court' by defining it as 'any judicial authority in a Member State which is competent for the performance of taking of evidence' according to the Regulation.

5.3.1. While this definition could include public officials (e.g. notaries public), it excludes private arbitration bodies, whether in the fields of investment, commercial or consumer arbitration, or arbitration bodies that resolve other issues.

5.3.2. The major significance of arbitration bodies for the commercial and economic activities of the Member States and of third countries is therefore not recognised.

5.3.3. With regard to the latter, situations of *lis pendens* may arise, as well as problems relating to the execution of their decisions by the Member States' requested courts (e.g. an anti-suit injunction), which could cause legal uncertainty.

5.3.4. Certainly, this restrictive definition of 'court' tallies with the case law of the CJEU, which usually denies the status of 'court' to private arbitration bodies ([8]).

5.3.5. In the EESC's opinion, automatically applying the case law of the CJEU to the field in question could lead to a situation in which the decisions of the arbitration tribunals are not recognised or the requested court refuses to cooperate, which — in some cases — could ultimately leave the parties in question defenceless.

([7]) See Advocate General Wathelet's opinion in case C-416/17, European Commission v French Republic, points 95-103.

([8]) For example, in the following cases: Nordsee case 102/81 (1982), paragraphs 10-13; Eco Swiss case C-126/97 (1999), paragraph 34; Denuit and Cordier case C-125/04 (2005), paragraph 13; Gazprom case C-536/13 (2015), paragraph 36; Achmea case C-284/16 (2018), paragraphs 45-49, etc.

5.3.6. However, arbitration clauses between the investor and the state referred to in bilateral investment treaties should be excluded from this assessment, as they are incompatible with EU law and have no legal effect inasmuch as they are illegal, overlapping with the rules of the single market and discriminating between investors in the EU, in line with the case law of the CJEU in the 'Achmea' judgment ([9]).

5.4. For its part, Article 17(b) recognises the right of diplomatic or consular representatives of a Member State to take evidence, without prior request, on the territory of another Member State in which they are accredited. This power is limited to hearing nationals of the Member State which they represent without compulsion, in the context of proceedings pending in the courts of that Member State.

5.5. It would be useful to extend the judicial assistance tasks that are set out in the proposal for these officials, in order to adapt them to the current situation in the EU, particularly as regards the free movement and residence of Member State nationals and freedom of establishment on the part of businesses. As a result, non-nationals would also be permitted to perform these officials' tasks without the need for prior authorisation, as would nationals of the receiving state, provided that the state in question gives its authorisation.

5.6. The EESC agrees with the need to establish an obligation to assist the serving Member State in its search for the address in the receiving Member State of the person to whom the judicial or extrajudicial document must be served, when that address is not known.

5.7. On the other hand, in the context of the present proposal, the EU Justice Agenda for 2020 seeks to reinforce fundamental rights, including civil procedural rights.

5.8. In this regard, the digitalisation measures set out in the proposal take into account the data protection and privacy requirements in the system for electronic exchanges between the courts concerned, such as the establishment of a predefined set of users of the system (which is limited to the courts and the judicial authorities of the Member States).

5.9. Yet despite the fact that attacks on this electronic infrastructure are expected to multiply in the future — a risk that may be exacerbated as a result of any interconnection between the computer systems concerned — no provision is made for ascertaining who is responsible in the event that cyber-attacks, or computer system failures and crashes, lead to the dissemination of sensitive information or even destroy the evidence of a proceeding.

5.10. Accordingly, serious injury to the rights of individuals may occur without there being any foreseeable way of insisting upon the liability of their perpetrators. It may even be the case that the individuals themselves must bear these injuries if those responsible claim that they are the result of *force majeure*.

6. **General comments on the proposed Service of Documents Regulation**

6.1. The EESC believes that the proposed Service of Documents Regulation will improve and speed up judicial proceedings, as it will simplify and streamline cooperation mechanisms for the service of documents. This will improve the administration of justice in cross-border cases, strengthen civil procedural rights and enhance mutual trust between Member States' justice systems.

6.2. This proposal seeks to do away with slowness and with the frequent breach of deadlines — situations that occur because the documents are served by the competent bodies — by insisting that the service of documents be carried out electronically. It also strengthens the rights of defence of the recipient by means of targeted interventions on the part of the competent bodies with regard to uncertainty arising from the non-acceptance of a document or in cases of default judgments.

6.3. The wide range of subjective and material applications of this proposal is worth noting, given that it includes all persons, both physical and legal. It therefore also applies to all retailers, including micro-enterprises, and only allows those exceptions that are specifically mentioned (Article 1(1) and (3)).

([9]) 'Achmea' judgment, case C-284/16 of 6 March 2018 (ECLI:EU:C:2018:158).

All the linguistic versions would need to be aligned in order to make clear that the proposed Regulation affects not only the document that triggers the procedure, but also all the judicial documents that relate to the proceedings.

6.4. The EESC agrees with the guarantees and safeguards laid down to deal with the 'refusal to accept a document' on the part of the recipient and the obligation of the receiving body to provide notification of this. On the other hand, in order to balance the rights of the parties to the proceedings, the defendant must have full knowledge of the document that gives rise to the proceedings, and so it seems appropriate for it to be drafted in a language understood by the recipient or one of the official languages of the place of service of the document.

6.5. The provision of additional means of serving documents by post, the possibility for service to be carried out directly by judicial agents, officials or other competent persons from the requested Member State, and the electronic service of documents, all appear to be appropriate.

6.6. In any case, it is important to safeguard and guarantee the integrity and purpose of the document, whether judicial or extrajudicial.

Brussels, 17 October 2018.

The President
of the European Economic and Social Committee
Luca JAHIER