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NOTE

From: Presidency
To: Delegations

Subject: Draft Regulation on European Production and Preservation Orders for
electronic evidence in criminal matters (e-evidence)
- Certain issues: state of play and discussion

In view of the upcoming informal COPEN meeting on 1 September, the Presidency would invite delegations to consider the text below and to reflect on the questions it contains. The discussion, which will mainly cover general issues regarding the notification regime and the role of service providers, should serve to prepare the first technical discussions with the EP delegations following the summer break.

I. Introduction

As has previously been reported, the trilogues held so far have produced agreements on a few issues, but the main issues of disagreement remain open. Nevertheless, the latest trilogue on 9 July made it possible to identify a number of openings that could be used to elaborate future compromises in the areas described below. The Presidency would ask delegations to note that parts of the text below build on estimations, and that the possible compromises outlined do not express any position from the side of the Presidency.

A. NOTIFICATION REGIME

a) State of play

- EPOC-PR (preservation orders)
 - There seems to be agreement between the legislators that no notification will be required for preservation orders.
- EPOC (production orders)
 - The Presidency has underlined that no notification should be required for **subscriber and other identification data**, whereas the EP continues to strongly advocate such a required notification. However, the EP appears to be open to discuss the notification conditions for the said categories further; in particular, the idea that notifications for these categories should be for information purposes only (meaning, for example, that no grounds of refusal would apply) is on the table.
 - As regards **traffic and content data**, the EP insists on a notification obligation in line with its original proposal. Nonetheless, the discussions seem to indicate a certain openness to discuss different aspects and consequences of such notifications. The following aspects have been discussed:
 - The Presidency has defended the view that notification should not have any suspensive effect (a view that EP has not confirmed);

- A list of optional grounds for refusal will be included in the Regulation (this has in principle been agreed between the legislators, although the list of those grounds and their definitions remain to be discussed);
- It has in principle been agreed that an obligation to consult the issuing state before raising a ground for refusal should be provided for, and
- The legislators have in principle agreed that there will not be any prior consultation or clarification obligation for those orders.

The main difficulty between the institutions in this context appears to concern the **so-called residence criterion** (i.e. notification is only required when there are reasonable grounds to believe that the person whose data are sought is not residing on the territory of the issuing State). The Presidency has firmly insisted on the importance of this criterion, which the EP seems to equally firmly oppose. The EP has thereby strongly underlined the primordial interest to ensure that a state (i.e. the enforcing state) is in a position to exercise control over legal actions within its jurisdiction, not the least as regards fundamental right implications of such actions. In response to the argument of the Presidency that the principle of mutual trust should be maintained also in this instrument, the EP side has, in substance, agreed that the principle is important, but underlined that it cannot always be relied on as long as criminal law is not harmonized within the EU.

b) Considerations

Although there are several important substantive and technical issues that remain to be discussed, the Presidency believes that the legislators are slowly moving towards a compromise on the notification regime. Whereas both legislators maintain parts of their initial positions for now, it appears that such a compromise would build on the general idea that certain notifications would be made “for information only”. However, the exact meaning of “information only” in this sense, and what the consequences of such a notification would be, remains to be discussed. One particular question of considerable importance in this sense would be whether these notifications would need to be made for each individual order, or whether a mechanism of periodical notifications in block could be considered instead. One could, for instance, provide for an obligation to notify certain orders once every six months (or according to another appropriate periodicity).

So far, the discussions seem to indicate that the following aspects will be of importance when formulating a compromise:

- Efficiency/complexity/added value of the proposal compared to current instruments
- The interest of the issuing state
- The interests of the state of residence of the person concerned
- The interests of the enforcing state
- The protection of the rights of the person concerned
- If the residence criterion is agreed upon: the burden of proof – “reasonable grounds to believe that the person whose data are sought **is not residing** on the territory of the issuing State”

The EP appear to in particular underline the importance of the fourth and fifth points above. The impression of the Presidency is that the EP is not ready to move on its requirement that all traffic and content data must be notified, regardless of the residence of the person concerned. The application of the residence criterion thus appears to be a particularly hard nut to crack.

In the light of what has been said above, the Presidency would invite delegations to consider¹ what room there would be for a compromise that takes the positions of both legislators into account. One possible starting point for the elaboration of a compromise solution taking into account the residence criterion could be to enlarge the scope of the double layered mechanism of notification already considered for subscriber and identification orders, on the one hand (information only), and orders on content and traffic data, on the other, so that all orders concerning a person residing on the territory of the issuing state² would be covered by the lighter (information only) regime. Under this hypothesis, there would be two regimes:

¹ The Presidency would again underline that the purpose of a discussion in the WP would at this point be to assist the Presidency to prepare the discussions with EP and not to define a firm position of the Council. The Presidency has not in any way committed itself to any of the strands of possible compromise described here.

² Or a person for which the issuing authority has reasonable grounds to believe lives in the issuing state.

- A lighter regime for subscriber data, other identification data, and also all other data when the person is residing in the issuing state, with
 - ✓ no notifications;
 - ✓ notification for information purposes only – a form to be sent, with limited or no consequences; and/or
 - ✓ a mechanism through which SPs are required, possibly through national law, to inform the competent authority when data is provided to the issuing state (with a copy of the EPOC and the data that was provided);
 - ✓ information according to the latter two categories could possibly be sent periodically, in blocks.

- A stronger regime for traffic data and content data, except when the person is residing in the issuing state
 - ✓ Full notification regime (grounds for refusal would apply).

It should be underlined that there are currently no signs that the EP would be prepared to agree to such a compromise. Nonetheless, the Presidency wishes to explore what room there is in Council to move towards a compromise, and would therefore invite delegations to reflect on the following questions:

- a) **In general terms, do you consider it necessary to ensure that certain interests of the enforcing state can be protected on its territory, even if the person whose data are sought does not reside there but in the issuing state (e.g. fundamental interests of that state but also other circumstances mentioned in Art. 5(7)/6a/12a)?**

- b) **How would you, as a matter of principle, assess the introduction of two different regimes (subscriber + identification data: “lighter” regime; traffic + content data: “stronger” regime) in which the “lighter”³ regime would also apply to traffic and content data in cases in which the person whose data are sought is residing on its territory?**

³ The concrete terms of such a lighter regime would need to be developed further at a later stage.

- c) **How would you assess the idea of a periodical notification for the lighter regime (at least subscriber + identification data), as tentatively described above?**
- d) **Do you see any other strand that could be explored with a view to elaborating a compromise as regards the notification regime and the interests underlying the so-called “residence criterion”?**

B. ROLE OF SERVICE PROVIDERS (SP)

a) State of play

The issue regarding the right of SP to refuse or to postpone (by consulting or raising objections with competent authorities) the execution of an EPOC/EPOC-PR and the role of service providers in general in this sense has already been discussed in COPEN as well as between the Presidency and the EP⁴. Both legislators agree that there are situations where a SP cannot execute an EPOC or an EPOC-PR when the orders:

- are incomplete
- contain manifest errors
- do not contain sufficient information to execute.

In addition, and contrary to the General Approach, the EP proposes to give the SP a right to refuse the execution of an order, where it considers the order manifestly abusive or exceeding the purpose of the Production or Preservation Order.

⁴ See Articles 9(3), 9(4), 9(5), 10(4), 10(5), 14(4), 14(5) and 14(6), as well as Articles 8a(5), 8a(6) and 10(6)(2) of the EP’s proposal.

For cases where the SP is not capable of executing the order due to incorrect or lacking information, there is also agreement that:

- a SP should ask the issuing authority for clarification or correction (EP considers that a production order shall be null and void if such clarification/correction is not provided); and
- an order will not be executed when the SP cannot comply with it because a de facto impossibility not attributable to the SP (the order does not concern a user or the data has already been deleted). The text has already been preliminarily agreed with EP for Article 9(4) and 10(5). In these situations, a SP has to inform the authority of the reasons for the impossibility to execute.

However, the **EP** also suggests to provide for a possibility for the SP to reject the execution of an order if the SP considers it manifestly abusive or the EPOC exceeds the purpose of the order. In such cases, according to the EP, the SP shall inform both the issuing and the executing state. The executing authority may contact the issuing authority to seek clarifications. Without any clarification within 5 days, the order will be considered null and void.

The **Council** has not provided for any such role for the SP.

Consequently, EP and Council have different approaches with regard to the content of a Certificate. This will be relevant for the following topics:

- the possible grounds for refusal for the notified authority
- possible reasons for the SP to refuse/postpone the execution

The content of the respective Order is listed in Art. 5(5) for the EPOC and in Art. 6(3) for the EPOC-PR. With regard to the Certificate, the **General Approach**, as well as the original proposal, refers in Art. 8(3) and (4) to Articles 5(5) (a)–(h) (EPOC) and 6(3) (a)–(f) (EPOC-PR). To this, the EP has added additional information that need to be provided by also referring:

- to Art. 5(5)(i) – grounds for necessity and proportionality (for EPOC);
- to Art. 6(3)(g) – grounds for necessity and proportionality (for EPOC-PR)⁵.

b) Considerations

The Presidency considers that the content of the rules discussed in this section will surely be affected by the rules on the notification system and on grounds for refusal. It is however important to clarify the role of a SP – and in particular the limits of its role – already at this stage. The following question is therefore submitted to delegations:

Do you consider that a service provider should have the right or be required to assess (prima facie) whether an order is abusive or excessive? If the SP concludes that is the case, should it be allowed to refuse its execution, regardless of whether the competent authorities in the enforcing state were notified?

⁵ Additionally, the EP changed/deleted parts of Article 5(5) (a)-(i) and Article 6(3) (a)-(g).