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'I/A' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
Subject:	Draft REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (first reading) - Adoption of the legislative act = Statements

Statement by Germany

1. The German Federal Government approves the final version of the Regulation on European production and preservation orders for electronic evidence in criminal proceedings (hereinafter 'the Regulation'), as it provides an urgently needed set of tools to more effectively combat crimes using digital media.

2. At the same time, the Federal Government finds it regrettable that the recitals lack the necessary clarity with regard to the handling of the grounds for refusal. The rule of law imposes two obligations upon the notified authority: it must, on the one hand, examine the production orders transmitted to it and, on the other hand, it must invoke the grounds for refusal relating to the protection of the rights of individuals as set out in Article 12, if the relevant conditions are met. In particular, if the conditions of the still very narrow ground for refusal on the basis of fundamental rights are met, there should be no scope for a discretionary decision. Clearer wording on this in recitals 62 et seq. would have been useful.

3. Furthermore, from a rule of law perspective, it is essential that legal protection exists not only against production orders and in the issuing state, but also against preservation orders and in the enforcing state. The Federal Government regrets that Article 18 explicitly provides for only the first two aspects of legal protection, but considers the possibility of comprehensive legal protection to be covered by the wording.

4. Lastly, we regard the wording used in recital 53 (interpretation of the residence criterion) on the intention to settle in a particular Member State as too vague. A mere undefined ‘manifestation’ of an intention to settle leaves too much room for interpretation, thereby unduly broadening the scope of the residency criterion. In practice, this could result in fewer notifications than would be appropriate in light of the rationale behind the Regulation.

Statement by Croatia

The Republic of Croatia expresses its full support for the adoption of the Regulation on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (“Regulation”).

The Republic of Croatia has been continuously expressing its discontent with the Croatian linguistic version of the legislative proposals using a particular equivalent of the English term “cyber” and its derivatives into the Croatian language versions of the legal acts¹. Following intensive consultations, in May 2023 an understanding on the issue was reached with the Secretariat General of the Council that would apply in all new Council legal acts that DQL receives for legal-linguistic revision, as from 1 June 2023, regarding legal acts to be adopted by the Council.

Croatia has expected that this understanding would have been reflected in the Croatian linguistic version of this Regulation taking into consideration the importance of this Regulation as a basic legal act in the field of e-evidence in criminal proceedings, and therefore as a step forward towards harmonising the respective terminology. Unfortunately, this seems not to be the case and that opportunity is missed.

The Republic of Croatia welcomes the adoption of this legislative instrument, in order to adapt the cooperation mechanisms regarding the collection of evidence to the digital age, especially when the relevant data is stored in third countries.

Statement by Hungary

Hungary is fully committed to the fight against crime and would welcome an effective instrument that promotes criminal justice and observes the protection of fundamental rights at the same time. However, we hold any reference in the Regulation to Article 7 TEU unacceptable, even in the recital. The reference to Article 7 TEU was not part of the general approach adopted by the Council, it has only been introduced on the request of the EP and we find its inclusion detrimental to the effectiveness of the new measure and also to the principles of mutual trust and mutual recognition, upon which it is based. Accordingly, Hungary is not in a position to support the adoption of the Regulation.

¹ The equivalent used in the Croatian legislation is “kibernetički” whereas the term used in the Regulation is “kiber-“.

Statement by Poland

From the beginning of the negotiations, Poland has fully supported the objectives of the e-evidence package, which were fully incorporated into the general approach adopted by the Council. However, the amendments adopted at the initiative of the European Parliament completely undermine the effectiveness of the measures introduced. For this reason, Poland needs to express its objection to the adoption of the e-evidence Regulation and the e-evidence Directive.

The proposed ground for refusing orders, based on the political procedures referred to in Article 7(1) TEU, introduces a significant liberalisation of the grounds for refusal, which will have the effect of obstructing cooperation in criminal matters between Member States. Such a procedure dictates, that practitioners applying the law are involved in assessing circumstances, that are far beyond the scope and purpose of criminal proceedings. The development of a mechanism to enable Member State authorities to assess a potential serious breach of a fundamental right unjustifiably interferes with the competences of the Council of the European Union as set out in the Treaties.

In view of the final negotiated structure of the provisions of the Regulation on European Production and Preservation Orders for e-evidence and the close link with the Directive on the appointment of legal representatives for the purpose of gathering evidence, Poland objects to the adoption of both instruments of the e-evidence package.

Statement by Finland

Finland recognizes the changing nature of criminality and the growing importance of cross-border cooperation to obtain electronic evidence in criminal proceedings swiftly and effectively.

During the negotiations, Finland has consistently underlined the necessity to find the right balance between effective law enforcement and criminal investigation and the protection of fundamental rights. From this perspective, the notification mechanism and its scope as well as the grounds for refusal are of particular importance. While the text has improved during the negotiations, we consider the mechanism still inadequate. We believe that in relation to production orders for the most sensitive data, judicial assessment should also be done by the competent authorities in the enforcing State.

Furthermore, Finland regrets that the grounds for refusal do not include a ground that would allow the enforcing authority to refuse a production order for traffic and content data in cases where the use of such measure is restricted under the law of the enforcing State to certain offences or to offences punishable by a certain minimum threshold.
