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NOTE

From:	Presidency
To:	Council
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters - Policy debate

1. In June 2016 the Council called for a common EU approach to improve criminal justice in cyberspace. In particular, it called for measures that streamline the cooperation with non-EU based service providers and supply law enforcement and judicial authorities with expeditious tools to obtain e-evidence. After an extensive expert process and consultations with Member States and relevant stakeholders, the Commission presented in April 2018 a proposal for a Regulation on European production and preservation orders for electronic evidence in criminal proceedings ("the proposal")¹.

¹ doc. 8110/18.

The proposal seeks to introduce an alternative mechanism to the existing tools of international cooperation and mutual legal assistance. It addresses specifically the problems stemming from the volatile nature of e-evidence and the "loss of location" aspect by setting new procedures for quick, efficient and effective cross-border access.

2. The proposal builds upon and further develops the principle of mutual recognition as set out in Article 82 (1) TFEU while ensuring legal certainty for the authorities, service providers and affected persons. It provides for the possibility that, subject to certain rules, a judicial authority in the issuing state can directly address an order to a service provider or its legal representative in another Member State. The judicial authority in the Member State where the service provider or its representative is located at this stage does not need to be involved. That authority will only intervene in order to recognise and enforce the order in the event that the service provider does not comply with it.
3. Given the specific operational needs and technical aspects related to the access to e-evidence, many Member States welcomed the proposed development, underlining the need for an efficient and expeditious practical solution that is based on mutual trust.
4. Other delegations voiced various concerns and suggested introducing an obligation to provide an opportunity for another Member State to get involved in the procedure via a notification to the judicial authorities of that Member State which would allow an assessment of the legality of the order and of any obstacles to its execution. Following the outcome of that assessment the judicial authorities would have the possibility to object to the execution of the order.

5. Two different solutions for such a notification procedure were extensively discussed among experts:
 - notification to the Member State of the service provider or its legal representative, or
 - notification to the Member State of the person whose data were sought.
6. The debates showed support, but also misgivings regarding both the solution set out in the draft Regulation and the different proposals for notification.

As this issue underpins the essence of the proposal, it should be clarified for the smooth progress of the negotiations. The Presidency therefore wishes to hear from Ministers:

- whether they confirm the approach as set out in the draft Regulation; or
- whether they wish to modify that approach by introducing a notification system.

In the latter case, which state should be notified (the enforcing Member State or the Member State of the affected person).

Given the progress made so far and with a view to ensure a timely conclusion of the negotiations by December, the Presidency invites Ministers to consider as a compromise a solution where a notification is provided *for information* to the authorities of the enforcing Member State or the Member State of the affected person. On that basis the notified authority may engage in consultation with the issuing Member State without having the right to object to the execution of the order.