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NOTE

From:	Presidency
To:	Delegations
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Subject:	Draft Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (e-evidence) - State of play and possible ways forward

I. STATE OF PLAY

Since the latest COPEN meeting on 1 September, the Presidency has continued its efforts to identify possible compromises with the European Parliament with regard to the notification block of rules in the draft Regulation.

In detail, the Presidency has engaged in informal and close consultations with the EP negotiation team, aiming at exploring the respective positions in detail and possibly identifying some common ground. Throughout these consultations, the Presidency has defended the system and logic behind the General approach and in particular underlined the need to ensure that the new instrument will add value to practititioners and be efficient, both for what regards the interest of law enforcement and the protection of fundamental rights. Also the Parliament has defended its position, highlighting broadly the same interests as the Presidency but using different arguments. It is in this light that the Presidency considers the only way forward consists in a package compromise where both parties give up on some of their positions. The assessment of the Presidency is that such a compromise will need to contain the following elements:

1. The legislators have reached a preliminary understanding that there will be **no notification obligation for preservation orders,** and that notifications will in general not have any **suspensive effect**.

2. The parties also seem close to an understanding that the notification obligation will encompass content data and "real" traffic data (that is not other identification data).

3. The so-called residence criterion, which would limit the notification obligation by excluding domestic cases from the regime, remains a contentious point. The EP continues to insist on the deletion of this criterion from the Regulation. Simplified, the EP considers that the authorities in the enforcing/executing State must in principle have access to information that renders it possible for them to protect the law and fundamental rights in their own state, i.e. including data on orders addressed to service providers on their territory. The Presidency has opposed this request, not the least with the argument that a notification system without such an exclusion of residence would mean that the authorities in the enforcing/executing state would encounter a very high amount of notifications, possibly so many that they cannot be handled in a reasonable way. The Presidency has also repeated the argument that the issuing autority is often in a better position to protect the fundamental rights of an affected person that is resident in that state. The Presidency has however also proposed to explore the possibilities to find a formula that would cater for the interests expressed by both legislators, i.e. a formula that would ensure that the numbers of notifications are limited while ensuring a fully fledged protection of the fundamental rights of all concerned as well as of the states concerned. Some preliminary concrete ideas in this sense have been mentioned, for example:

- Article 5(6) and 5(6a) should be maintained as in the GA

- An efficient digital communication system (exchange system) will be used for the transmission of the Certificates to the service provider/legal represenentative as well as for notifications, which would permit an automatisation of large parts of the administration

- Notifications of subscriber and other identification data would only be done once a year, in the form of compiled information, without any personal data being shared (see below)

- When certain grounds for refusal could be raised by the notified authority, there would be no formal requirement for the issuing authority to check the same circumstances regarding the law of the enforcing/executing state as those covered by the grounds for refusal, before issuing the order.

4. As regards **subscriber and identification data**, the Presidency has requested that the notification obligation requested by the EP would be replaced by an obligation to transfer certain data to the enforcing authorities once a year through the envisaged digital exchange system. Such a mechanism would allow the authorities in the enforcing state to follow developments and examine any possible malfunctions. The EP remains cautious and has underlined that the main interest to protect with a notification obligation of such data is to ensure that a person whose data is sought can defend his or her rights in an appropriate way, in particular by having recourse to remedies.

5. As regards ex-post safeguards, the EP has requested a stronger regime than provided for in the general approach as a matter of priority, especially considering that notifications would *a priori* not have any suspensive effect. The Presidency has declared itself ready to analyse this in the light of a global compromise, but a detailed discussion with the EP counterparts has not yet started. In particular the following seems to be important for the EP:

- The person directly concerned by an order should in principle be informed without undue delay about the order, and that to withhold this information should only be possible on specific and duly motivated request from the authorities.

- The person whose data is sought by an order must have access to effective remedies in both the issuing and the enforcing state.

- When the data is gathered in breach of the Regulation or a ground for refusal is raised, this data shall not be used in the proceedings and shall be deleted.

6. Further, in return for the provisional agreement on the introduction of an optional list of grounds of non-recognition (new Article 10a), the Presidency has requested that Articles 9(2a)-(2c) in the EP position, which are related to the **procedures under Article 7(1) and 7(2) TEU**, will not be included in the Regulation and that such procedures will not affect the way the data is obtained from service providers.

7. Both legislators consider that the provision with the **list of grounds of non-recognition** must most probably be included in the compromise package described in this note. The details of such a compromise remain to be disscussed. The Presidency will thereby consider how the list could be based on existing instruments as well as the case law of the Court of Justice.

8. As regards **service providers**, the Presidency has requested that the Regulation will not include any rules that give service providers the right to conduct necessity/proportionality tests or similar. The EP seems ready to agree to this in principle.

The Presidency wishes to underline that it considers that the most important factor of any global compromise on the notification system will be how the elements of the compromise relate to each other, so than an efficient instrument can be achieved. This must be kept in mind throughout the analysis of the individual elements.

II. NEXT STEPS

Delegations are invited to consider the elements of a possible compromise as described above. In order to facilitate an exhange in COPEN on 22 September, the Presidency will distribute separetly tentative drafts that would illustrate how possible compromises could be expressed in concrete legal drafting. Further analysis and consultations are needed before the Presidency will be in a position to propose a balanced compromise including all these elements.

III. QUESTIONS TO DELEGATIONS

Delegations are invited to reflect on the different aspects mentioned above in I. points 1-8, especially:

1. Do you see any possibility to replace the residence criterion with a different element or a system that would serve the same main purposes, i.e. to limit the number of notifications while ensuring the protection of the rights of the affected person? Alternatively, do you see ways to modulate the residence criterion?

2. Do you consider that there is scope to consider, as an element in a global compromise, a rule that would imply that a person whose data is sought by an Order should as a rule be informed about it (without undue delay, but with a possibility to delay on basis of a detailed justified judicial Order)? Who should by default inform the user, the issuing authority or the service provider?

3. Do you see it problematic if the person whose data is sought by an Order would have access to legal remedies in the enforcing state, including a right to request that the authorities shall assess whether a ground for refusal should be applied?

4. What safeguards should be put in place to ensure protection of fundamental rights of the persons whose data is sought when the data is gathered in breach of the Regulation or a refusal ground is raised, following that notifications would not have a suspensive effect?

5. Do you consider some additional elements to the ones mentioned in section I.1-8 above (particularly I.3) should be included in a global compromise covering the notification issue?