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**NOTE**

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From: Presidency

To: Permanent Representatives Committee/Council

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Subject: Regulation on European Production and Preservation Orders for electronic evidence  
- Progress report

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Delegations will find in Annex a progress report on the negotiations on the proposal for a Regulation on European Production and Preservation Orders for electronic evidence.

***Introduction***

Building on the achievements of the Portuguese Presidency, the Slovenian Presidency has undertaken substantial efforts to make progress on this file since the start of its mandate. Given the increasing relevance of cyberspace, the establishment of an effective and reliable mechanism that provides for clear structures and safeguards for obtaining electronic evidence is of major importance for all stakeholders, including law enforcement, judicial authorities, service providers and persons affected by such transfers. It will also be essential for effective cooperation with third-country partners of the Union.

In this sense, a fourth political trilogue on this file was held on 9 July. The legislators took note of the progress made and discussed a few of the main outstanding issues in substance, without reaching any agreement. They agreed to focus their exchanges on the notification regime provided for in the draft Regulation, due to its pivotal role in ensuring both the effectiveness of the instrument itself and the protection of fundamental rights. The legislators also agreed that a compromise on an appropriate notification regime could only be achieved as part of a broader package including other important issues linked to the notification regime, such as the rules on the application of grounds for refusal to execute a production order and their consequences, as well as the rules on user information and the remedies available to the person whose data is sought through a production order.

### *Frame of negotiations with the European Parliament*

Given the agreed need to find a compromise package on the notification regime, and the circumstance that the legislators have had substantially diverging positions on the relevant issues, the Presidency has throughout its mandate focused, based on input from Member States, on technical discussions with the Parliament's negotiation team. The COPEN Working Party has been informed regularly on the state of play and on issues discussed with the Parliament. The discussions in COPEN have made it possible to reach a consensus within the Council on negotiation possibilities and the red lines within the broader package on the notification regime. The continuous efforts of the Presidency has thus strengthened the negotiating position of the Council considerably. The discussions with the Parliament have taken place in a very good atmosphere of mutual respect and trust and have enabled the negotiation teams to make substantial progress in terms of understanding each other's positions and defining the main structures of a possible compromise package. However, it has not been possible to reach agreement on the main aspects of the envisaged compromise package.

### *In substance*

The main challenge in the negotiations is linked to the necessity to strike a balance between ensuring an effective mechanism for the obtaining of electronic evidence in criminal matters on the one hand and safeguarding the fundamental rights of persons whose data is sought on the other hand, with full consideration of the principle of mutual trust. Both legislators agree on this necessity in principle. In performing such a balancing exercise, the debate regarding the appropriate notification regime for different data categories, and the thereto closely connected issue of grounds for refusal, has been of central importance.

The main difference between the legislators as regards the notification obligations concerns the respective role of the states involved in the preservation or production order procedures.

The Council builds its position on the principle of mutual trust and rules that apply in cyberspace, and considers that the issuing state should have the main responsibility for ensuring a due process and safeguarding the fundamental rights of any person whose data was sought by an order.

The general approach includes detailed rules in this sense. The Parliament, however, wishes to endow the enforcing or executing state with substantial powers to supervise all the orders directed to a service provider who is, or whose legal representative is located on its territory.

For a great majority of Member States, such a system is unacceptable. Firstly, a global notification obligation would create an unmanageable administrative burden for the enforcing or executing state, as this state would in practice probably need to assess each order addressed to a service provider or its legal representative located in its territory. Secondly, such a system would not take into account the characteristics of digital communication and cyberspace, which are very different to the environment surrounding traditional instruments of mutual legal assistance. Thirdly, the rules proposed by the Parliament could mean that the Regulation would in some cases be less effective than existing instruments and measures, such as the currently existing systems of voluntary cooperation with service providers from third states. The added value of the Regulation would then be extremely limited.

Nonetheless, the Council has acknowledged the Parliament's requests and has offered to make certain concessions, which would in substance mean that the enforcing or executing state would have greater possibilities to protect – in addition to the protection already ensured in the issuing state – the fundamental rights of the persons concerned in certain circumstances. However, the Parliament has deemed these concessions to be insufficient.

Other outstanding issues included in the tentative compromise package, for which the Presidency is confident that solutions could ultimately be found as part of a general compromise, include:

- the list of grounds for refusal, to which the Parliament wishes to add elements to those proposed by the Council;
- the substance of the right to remedies in the issuing and the enforcing or executing state;
- the substance of the right of a person to be informed that an order requesting his or her data has been issued and the data obtained, notably regarding at what stage of the proceedings such a right would arise.

## ***Conclusion***

The Presidency notes that the Council has offered to make substantial concessions to the Parliament with a view to reaching an agreement, while insisting on some main features of the General Approach, in particular the so-called residence criterion which would ensure that in those cases where the person whose data is sought resides on the territory of the issuing state, the notification of enforcing or executing state is not necessary. These concessions have so far not been considered sufficient by the Parliament.

Notwithstanding the concessions offered by the Parliament, the Presidency considers that both parties must make additional efforts to reach a compromise on this very important file. However, a compromise must not come at the price of achieving an unbalanced and inefficient instrument, which would considerably limit the practical application of the principle of mutual trust between Member States in this area. The assessment of the Presidency is that this would be the case if certain of the Parliament's proposals were to be included in the final text of the Regulation. It is essential that the Regulation is adopted and implemented in the foreseeable future. The Presidency is confident that this will still be possible if the legislators pursue their efforts to find effective solutions to all outstanding issues in the cooperative atmosphere that has been built up throughout the negotiations so far.

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