Council of the European Union

Brussels, 2 December 2021
(OR. en)

14612/21
ADD 1

Interinstitutional File:
2021/0382(NLE)

JAI 1332
COPEN 432
CYBER 320
ENFOPOL 482
TELECOM 452
EJUSTICE 105
MI 912
DATAPROTECT 276

PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	25 November 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 718 final
Subject:	ANNEX to the Proposal for a Council Decision authorising Member States to sign, in the interest of the European Union, the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence

Delegations will find attached document COM(2021) 718 final.

Encl.: COM(2021) 718 final

EUROPEAN
COMMISSION

Brussels, 25.11.2021
COM(2021) 718 final

ANNEX

ANNEX

to the

Proposal for a Council Decision

authorising Member States to sign, in the interest of the European Union, the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence

ANNEX

Member States shall, when signing the Protocol, in the interest of the Union, make the following reservations, declarations, notifications or communications, and other considerations.

1. RESERVATIONS

The Second Additional Protocol on enhanced co-operation and disclosure of electronic evidence to the Council of Europe 'Budapest' Convention on Cybercrime ('the Protocol') allows a Party, in accordance with Article 19, paragraph 1, to declare that it avails itself of a reservation provided in relation to a number of articles of the Protocol.

Member States shall refrain from reserving the right not to apply Article 7 (disclosure of subscriber data) pursuant to Article 7, paragraphs 9, point a.

Member States shall refrain from reserving the right not to apply Article 7 (disclosure of subscriber data) in relation to certain types of access numbers pursuant to Article 7, paragraphs 9, point b.

Member States are encouraged to refrain from reserving the right not to apply Article 8 (giving effect to orders from another Party) in relation to traffic data pursuant to Article 8, paragraph 13.

Where Article 19, paragraph 1, provides a basis for other reservations, Member States are authorised to consider and make their own reservations.

2. DECLARATIONS

The Protocol also allows a Party, in accordance with Article 19, paragraph 2, to make a declaration in relation to a number of articles of the Protocol.

Member States shall make the declaration pursuant to Article 7, paragraph 2, point b, indicating that orders issued to service providers in their territory must be issued by, or under the supervision of, a prosecutor or other judicial authority, or otherwise be issued under independent supervision. Accordingly, Member States shall make the following declaration when depositing the instrument of ratification, acceptance or approval:

> *'The order under Article 7, paragraph 1, must be issued by, or under the supervision of, a prosecutor or other judicial authority, or otherwise be issued under independent supervision.'*

Member States are encouraged to refrain from declaring, under Article 9, paragraph 1, point b, that they will not execute requests under Article 9, paragraph 1, point a, (expedited disclosure of computer data in an emergency) seeking only the disclosure of subscriber data.

Where Article 19, paragraph 2, provides a basis for other declarations, Member States are authorised to consider and make their own declarations.

3. DECLARATIONS, NOTIFICATIONS OR COMMUNICATIONS

The Protocol also requires a Party, in accordance with Article 19, paragraph 3, to make declarations, notifications or communications in relation to a number of articles of the Protocol.

Member States shall notify that when an order is issued under Article 7, paragraph 1, to a service provider in its territory, it requires simultaneous notification of the order, supplemental information and a summary of the facts related to the investigation or proceeding, pursuant to Article 7, paragraph 5, point a. Accordingly, Member States shall, at the time of signature or when depositing their instrument of ratification, acceptance or approval, make the following notification to the Secretary General of the Council of Europe:

> *'When an order is issued under Article 7, paragraph 1, to a service provider in the territory of [Member State], we require in every case simultaneous notification of the order, the supplemental information and a summary of facts related to the investigation or proceeding'.*

Pursuant to Article 7, paragraph 5, point e, Member States shall designate a single authority to receive notification under Article 7, paragraph 5, point a, and perform the actions described in paragraphs 5, point b, point c and point d, and communicate the contact information of that authority.

Member States shall declare, under Article 8, paragraph 4, that additional supporting information is required to give effect to orders under Article 8, paragraph 1. Accordingly, Member States shall, at the time of signature or when depositing their instrument of ratification, acceptance or approval, make the following declaration:

> *'Additional supporting information is required to give effect to orders under Article 8, paragraph 1. The additional supporting information required will depend on the circumstances of the order and the related investigation or proceeding'.*

Member States shall communicate and keep up to date the contact information of those authorities designated under Article 8, paragraph 10, point a, to submit an order under Article 8, and of those authorities designated, under Article 8, paragraph 10, point b, to receive an order under Article 8. The Member States that participate in the enhanced cooperation established by Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') shall include the EPPO, in the exercise of its competences as provided for by Articles 22, 23 and 25 of Regulation (EU) 2017/1939, among the authorities communicated under Article 8, paragraph 10, point a and point b.

Member States shall communicate the authority or authorities to be notified under Article 14, paragraph 7, point c, in relation to a security incident.

Member States shall communicate the authority or authorities to provide authorisation for the purpose of Article 14, paragraph 10, point b, in relation to the onward transfer to another State or international organisation of data received under the Protocol.

Where Article 19, paragraph 3, provides a basis for other declarations, notifications or communications, Member States are authorised to consider and make their own declarations, notifications or communications.

4. OTHER CONSIDERATIONS

Member States that participate in the enhanced cooperation established by Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') shall ensure that the EPPO can, in the exercise of its competences as provided for by Articles 22, 23 and 25 of Regulation (EU) 2017/1939, seek cooperation under the Protocol in the same way as national prosecutors of those Member States.

Member States shall ensure that, when transferring data for the purposes of the Protocol, the receiving Party is informed that their domestic legal framework requires giving personal notice to the individual whose data is provided, pursuant to Article 14, paragraph 11, point c, of the Protocol.

With regard to international transfers on the basis of the EU-U.S. Umbrella Agreement, Member States shall communicate to the competent authorities of the United States, for the purposes of Article 14, paragraph 1, point b, of the Protocol, that the Agreement applies to the reciprocal transfers of personal data under the Protocol between competent authorities. However, Member States shall take into account that the Agreement should be complemented with additional safeguards that take into account the unique requirements of the transfer of electronic evidence directly by service providers rather than between authorities as provided under the Protocol. Accordingly, Member States shall, at the time of signature or when depositing their instrument of ratification, acceptance or approval, make the following communication to the competent authorities of the United States:

> *'For the purposes of Article 14, paragraph 1, point b, of the Second Additional Protocol to the Council of Europe Convention on Cybercrime, we consider that the EU-U.S. Umbrella Agreement applies to the reciprocal transfers of personal data under the Protocol between competent authorities. For transfers between service providers in our territory and authorities in the United States under the Protocol, the Agreement applies only in combination with a further, specific transfer arrangement that addresses the unique requirements of the transfer of electronic evidence directly by service providers rather than between authorities'.*

Member States shall ensure that, for the purpose of Article 14, paragraph 1, point c, of the Protocol, they only rely on other agreements or arrangements if either the European Commission has adopted an adequacy decision pursuant to Article 45 of the General Data Protection Regulation (EU) 2016/679 or Article 36 of the Law Enforcement Directive (EU) 2016/680 for the third country concerned that covers the respective data transfers, or if such other agreement or arrangement ensures appropriate data protection safeguards pursuant to Article 46 of the General Data Protection Regulation or Article 37, paragraph 1, point a, of the Law Enforcement Directive.