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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: COUNCIL DECISION authorising Member States to ratify, 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

This Annex sets out the reservations, declarations, notifications, communications and indications referred to in Article 2.

1. Reservations

Pursuant to Article 19, paragraph 1, of the Protocol, a Party may declare that it avails itself of one or more of the reservations provided for in certain articles of the Protocol.

Pursuant to Article 7, paragraph 9.a, of the Protocol, a Party may reserve the right not to apply Article 7 (Disclosure of subscriber information). Member States shall refrain from making such a reservation.

Pursuant to Article 7, paragraph 9.b, of the Protocol, a Party may, subject to the conditions therein, reserve the right not to apply Article 7 to certain types of access numbers.

Member States may make such a reservation, but only in relation to access numbers other than those necessary for the sole purpose of identifying the user.

Pursuant to Article 8, paragraph 13, of the Protocol, a Party may reserve the right not to apply Article 8 (Giving effect to orders from another Party for expedited production of subscriber information and traffic data) to traffic data. Member States are encouraged to refrain from making such a reservation.

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

2. Declarations

Pursuant to Article 19, paragraph 2, of the Protocol, a Party may make the declarations identified in certain articles of the Protocol.

Pursuant to Article 7, paragraph 2.b, of the Protocol, a Party may, with respect to orders issued to service providers in its territory, make the following declaration:

‘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 shall, with respect to orders issued to service providers in its territory, make the declaration set out in the second paragraph of this point.

Pursuant to Article 9 (Expedited disclosure of stored computer data in an emergency), paragraph 1.b, of the Protocol, a Party may declare that it will not execute requests under paragraph 1.a of that Article, seeking only the disclosure of subscriber information.

Member States are encouraged to refrain from making such a declaration.

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

3. Declarations, notifications or communications

Pursuant to Article 19, paragraph 3, of the Protocol, a Party is to make any declarations, notifications or communications identified in certain articles of the Protocol according to the terms specified therein.

Pursuant to Article 7, paragraph 5.a, of the Protocol, a Party may notify the Secretary General of the Council of Europe that when an order is issued under paragraph 1 of that Article to a service provider in its territory, that Party requires, in every case or in identified circumstances, simultaneous notification of the order, the supplemental information and a summary of the facts related to the investigation or proceeding. Accordingly, Member States shall 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], [Member State] requires in every case simultaneous notification of the order, the supplemental information and a summary of the facts related to the investigation or proceeding.’.

In accordance with Article 7, paragraph 5.e, of the Protocol, Member States shall designate a single competent authority to receive the notification under Article 7, paragraph 5.a, of the Protocol, and perform the actions described in Article 7, paragraphs 5.b, 5.c and 5.d, of the Protocol, and shall, when the notification to the Secretary General of the Council of Europe under Article 7, paragraph 5.a, of the Protocol is first given, communicate to the Secretary General of the Council of Europe the contact information of that authority.

Pursuant to Article 8, paragraph 4, of the Protocol, a Party may declare that additional supporting information is required to give effect to orders under paragraph 1 of that Article. Accordingly, Member States shall 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.’

In accordance with Article 8, paragraphs 10.a and 10.b, of the Protocol, Member States shall communicate and keep up to date the contact information of the authorities designated to submit an order under Article 8, and of the authorities designated to receive an order under Article 8, respectively. The Member States that participate in the enhanced cooperation established by Council Regulation (EU) 2017/1939¹, implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), shall include the EPPO, within the limits of the exercise of its competences as provided for in Articles 22, 23 and 25 of that Regulation, among the authorities communicated under Article 8, paragraphs 10.a and 10.b, of the Protocol, and do so in a coordinated manner.

¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’) (OJ L 283, 31.10.2017, p. 1).

Accordingly, Member States shall make the following declaration:

‘In accordance with Article 8, paragraph 10, [Member State], as a Member State of the European Union participating in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office (“the EPPO”), designates the EPPO, in the exercise of its competences, as provided for in Articles 22, 23 and 25 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (“the EPPO”), as a competent authority.’.

In accordance with Article 14, paragraph 7.c, of the Protocol, Member States shall communicate to the Secretary General of the Council of Europe the authority or authorities to be notified under Article 14, paragraph 7.b, of the Protocol, for the purposes of Chapter II, Section 2, of the Protocol, in relation to a security incident.

In accordance with Article 14, paragraph 10.b, of the Protocol, Member States shall communicate to the Secretary General of the Council of Europe the authority or authorities to provide authorisation for the purposes of Chapter II, Section 2, of the Protocol, in relation to the onward transfer to another State or international organisation of data received under the Protocol.

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

4. Other indications

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

With regard to the application of Article 7, in particular in relation to certain types of access numbers, Member States may subject an order under that Article to the scrutiny of a prosecutor or other judicial authority when their competent authority receives a simultaneous notification of the order prior to the disclosure of the requested information by the provider.

In accordance with Article 14, paragraph 11.c, of the Protocol, Member States shall ensure that, when they transfer 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.

With regard to international transfers on the basis of the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences¹ (‘the Umbrella Agreement’), Member States shall, for the purposes of Article 14, paragraph 1.b, of the Protocol, communicate to the competent authorities of the United States that the Umbrella Agreement applies to the reciprocal transfers of personal data under the Protocol between competent authorities. However, Member States shall take into account that the Umbrella 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 for under the Protocol. Accordingly, Member States shall make the following communication to the competent authorities of the United States:

‘For the purposes of Article 14, paragraph 1.b, of the Second Additional Protocol to the Council of Europe Convention on Cybercrime (“the Protocol”), [Member State] considers that the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences (“the Umbrella Agreement”) applies to the reciprocal transfers of personal data under the Protocol between competent authorities. For transfers between service providers and authorities under the Protocol, the Umbrella Agreement applies only in combination with a further, specific agreement within the meaning of Article 3, paragraph 1, of the Umbrella Agreement that addresses the unique requirements of the transfer of electronic evidence directly by service providers rather than between authorities. In the absence of such a specific transfer agreement, such transfers may take place under the Protocol, in which case, Article 14, paragraph 1.a, in conjunction with Article 14, paragraphs 2 to 15, of the Protocol apply.’.

¹ OJ L 336, 10.12.2016, p. 3.

Member States shall ensure that they apply Article 14, paragraph 1.c, of the Protocol, only if the European Commission has adopted an adequacy decision pursuant to Article 45 of Regulation (EU) 2016/679 of the European Parliament and of the Council¹ or Article 36 of Directive (EU) 2016/680 of the European Parliament and of the Council² for the third country concerned that covers the respective data transfers, or on the basis of another agreement that ensures appropriate data protection safeguards pursuant to Article 46(2), point a, of Regulation (EU) 2016/679 or Article 37(1), point a, of Directive (EU) 2016/680.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

² Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).