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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 way forward

The Presidency has continued its efforts to identify possible compromises with the European Parliament for the notification block of rules in the draft Regulation. Both legislators approach the matter in a very good atmosphere of cooperation, but there are clear differences in substance. Indeed, it is the impression of the Presidency that the European Parliament has a clear willingness to make concessions on issues it *a priori* considers important, such as on the scope of the notification obligations, the suspensive effect of orders and the character of the grounds for refusal. As regards the so-called residence criterion, however, the Parliament continues to strongly defend its view that the residence of a person should in principle not have any effect on the notification obligation, although there seems to be some room to discuss the modalities.

A few possible approaches in the sense of a compromise were analysed and discussed at the meeting of COPEN on 22 September. The Presidency has attempted to summarize these discussions in a new consolidated draft approach, which will be shared with delegations in view of the meeting of COPEN on 6 October. The Annex to the current note sets out to develop a couple of issues, with a view to include them in the consolidated draft approach, which could be the basis of a compromise package to agree with the Parliament. Delegations are invited to analyse these issues in detail and to reflect on the questions at the end of the Annex¹.

¹ The questions should be read in conjunction with WK 11217/2021 (to be issued).

1. Grounds for refusal (non-recognition)

The Working Group has previously declared its openness in principle to the inclusion of a list of grounds for refusal in the Regulation. A preliminary discussion on the substance of the list was conducted during the Portuguese Presidency. A substantial number of delegations noted that the list should be based on the corresponding lists in other instruments, such as the Directive on an European Investigation Order and the Regulation on Freezing and Confiscation. Some delegations suggested that the list in this case should be either more restricted or more extensive. The Parliament has preliminarily agreed that the grounds for refusal will be optional, that is, that there would be no obligation imposed by the Regulation itself to check orders, and has maintained its proposal as regards the concrete content of the list.

The Presidency is of the opinion that the provisions on grounds for refusal should be part of the compromise package on the notification block of rules and invites delegations to return to the issue in this light. The Presidency proposes to base the discussion on the to assumption that the same grounds for refusal as indicated in the European Investigation Order would apply. It should be noted that any addition of grounds to this list could influence the amount of information the notified authority will need.

2. Remedies

The question of remedies for a person affected by an Order is very important to the Parliament. In particular, the Parliament has underlined the role of the enforcing/executing state in this sense.

The Presidency notes that there is broad agreement in Council on the principle expressed in the General Approach that the right to remedies should apply in the issuing state. However, it has been argued that it is possible that exceptions to this rule could be considered, so that a right to certain remedies could apply also in the enforcing/executing state, in accordance with national law. This could, for example, possibly be the case when there are particular strong links between the circumstances of the case and the latter state, and in particular in relation to the exercise of grounds for refusals. If it would be considered that such a right should exist, other questions would arise regarding the exercise, impact and legal effect of such remedies. These questions would need to be examined at a later stage.

3. **Questions to delegations**

Delegations are invited to reflect on the following questions, in the light of the consolidated draft approach that will be shared in WK 11217/2021:

1. **In the context of a global compromise on the notification block of rules, what should be the content of the list of optional grounds for refusal?**
 2. **What legal remedies for a person affected by an Order could possibly be applicable in the enforcing state and under which circumstances?**
 3. **What are your views on the balance between the elements in the consolidated draft approach in general?**
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