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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	9732/18
Subject:	Proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters - compilation of Member States comments

Delegations will find in the Annex comments from Member States on doc. 9732/18 - discussion paper on selected provisions - of the proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters.

ANNEX

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CZECH REPUBLIC

Execution of the EPOC (Article 9)

In principle we welcome the possibility for a dialogue between the addressee and the issuing authority, because it could contribute to a fast correction of eventual obvious mistakes in the EPOC or help to complete the necessary information. It is however necessary to make sure that the provider can only demand the information that is needed to execute the EPOC (for example for technical reasons). He should not ask for further information concerning the criminal proceedings.

Concerning the second point we think that the service provider or his legal representative should not review the orders issued by a state authority in this way. It would also be very difficult for him and would imply a huge responsibility.

Paragraph 4 – aside from the already stated examples we think that it is only possible to include cases, when the data gets lost without any fault on the side of the provider.

In response to the last question we would like to state that we prefer the limitation of the number of issues.

Procedure for enforcement (Article 14)

The whole procedure of enforcement and review is in our opinion very complicated and unclear. As already stated above, we think that the service provider or his legal representative should not review orders issued by a state authority in this way. The current text of the proposal places too much of responsibility on the legal representatives and this responsibility should be left on the state authorities.

Review procedure (Article 15)

In general we consider it to be better to deal with this topic in international agreements (in that way it is possible to consider the differences between the legal systems of the third countries – we do not think that we should apply the same regime for example for the US and North Korea). We do not think that having this Article in the text is a necessary condition for the conclusion of an “executive agreement“ with the US.

However if this Article should stay in the text, it will have to be significantly amended. The proposed mechanism pursuant to Article 15 is too complicated. It will also be necessary to take account of the very important points raised by the Council Legal Service at the COPEN meeting on 29th and 30th May 2018 and to make sure that the text is in accordance with the EU Law.

LATVIA

Latvia would like to thank the Presidency for the commencement of the work on the proposal. Moreover, we would like to thank you for the possibility to provide some comments.

Regarding Article 9 and Article 14, Latvia would like to look into possibility of involving executing state at an earlier stage. This should be done at an expert level, so the MS can prepare their positions and offer possible proposals and solutions.

Latvia considers that SPs should only have possibility to object / demand clarifications for technical reasons and reasons that concern the practical execution of EPOC (not sufficient information etc.) and cannot rise any objections regarding the Charter of fundamental rights as SPs are not competent to evaluate adherence to fundamental rights. In addition, SPs could abuse this provision to prolong or stop the proceedings.

Therefore, the executing state should be involved in an earlier stage. Latvia thinks that this should be done without prejudice to direct transmission of EPOC to addressee, rather the information to the executing state should be sent in parallel. Then the executing state could react in set deadlines if there are any issues regarding fundamental rights, national security or immunities.

Regarding Article 15, Latvia shares the views of MS that stated during FoP on 13.06.2018. that Article 15 and Article 16 firstly should be viewed conceptually. Therefore, Latvia will not express any comments on details and the formulations of the provisions.

We hope that under incoming AT presidency there will be a possibility for the MS to discuss our idea in more detail.

FINLAND

General comments

We thank the Presidency for your speedy start on this file and for the opportunity to provide some written comments on the proposed Regulation COM(2018) 225 FINAL. We look forward to continuing constructive and thorough discussions on this important matter.

We´ll need to start by stressing that our views expressed here are only preliminary as our parliament is still analyzing the proposals and it will be up to them to confirm our final position. All in all, these proposals are rather delicate in nature and therefore member states need enough time to first carefully form their national positions and then to react should there be any new formulations or questions on the table in the future.

Having said that, please find below some general remarks from the Finnish delegation. We look forward to addressing all of these issues carefully at the working party level in order to find a solution that is both effective and satisfactory in terms of different fundamental rights relating to the subject matter.

There should be a role for the authorities of the member state of the service provider

We do share the aim behind the proposals. This is a field where progress is needed in order to tackle today´s forms of crime effectively. Direct cooperation between the law enforcement authorities and the service providers is, however, a very delicate issue related to fundamental rights, data protection and even sovereignty of states. Therefore, a well-considered balance has to be found between these and the needs of the law enforcement.

As a whole, the role the proposal foresees for the service providers seems unrealistic - even more so, when taken into account that service providers may also be SMEs (small or medium sized enterprises). These providers are not, in most cases to say the least, in the position to guarantee, for example, that the order is not against the Charter or that it´s disclosure would not harm the fundamental interests of the Member State of the provider. Moreover, in practice this role would mean an excessive administrative burden and remarkable costs for the providers.

Therefore, we believe that in the direct cooperation there has to be a role also for the authorities of the member state of the service provider. We are confident that this role can be guaranteed without giving up on the efficiency of the instrument. It would indeed seem reasonable that these authorities are notified of the order at the same time when the order is sent to the provider (addressee). However, and quite the contrary, it seems that in the proposal these authorities are only notified once there already is a problem and the process is already delayed. It would seem a lot more efficient to notify these authorities already at the early stage so that the authorities could start assessing the order as early as possible.

Furthermore, the national authorities of the member state of the service provider should, after having carefully assessed the notification, be able to reject the order if, for example, the order concerns a measure that would not be available in a similar national case or if the execution of the order would be against the fundamental principles of that member state. The threshold for accessing certain data should not be different in cross-border situations than it is in national situations in the Member State of the service provider.

The distinction between different forms of data could be clearer

In addition, we believe that the distinction between different forms of data (subscriber, access, traffic and content) could be more visible in the regulation. Inter alia, and in relation to what has been stated above, the role of the authorities of the Member State of the service provider is important especially when talking about traffic data and content data, since subscriber data is less problematic in terms of data protection. Moreover, subscriber data is also information that in practice is most often needed in cross-border investigation today and therefore achieving an effective solution concerning subscriber data would be highly useful in the whole of the system.

Conclusion

All in all, it seems obvious that these proposals (i.e. also the directive, which has already raised a number of relevant questions) still need thorough discussions on a working party level in order to guarantee that the system would work in practice in an efficient manner that also takes into account the issues relating to fundamental rights involved.

SWEDEN

The Presidency has in a discussion paper on selected provisions (doc no 9732/18) invited all member states to share their views on certain issues in the Regulation. In reply to this invitation, Sweden would like to contribute to the discussions by sharing the following comments.

The law enforcement authorities need efficient tools for gathering e-evidence from service providers. But we have serious doubts about leaving the responsibility for checking orders against national law and for guaranteeing the protection of fundamental rights to the service providers. This is a task for judicial authorities.

In our view, these issues could be overcome by involving the enforcing authority in the procedure to a greater extent and in a much earlier stage than what is proposed. The enforcing authority could receive a copy of the order at the same time as it is issued and transmitted to the service provider. In this way the enforcing authority could – in parallel with the ordinary procedure – assess matters such as whether the order is in conflict with the Charter of Fundamental Rights of the European Union, rules regarding immunities or privileges, or whether the execution of the order would violate fundamental rights such as freedom of the press and expression in other media in the enforcing member state.

As this procedure would run alongside with the ordinary one, it would not affect the effectiveness of the instrument. On the contrary, we believe that it would generate efficiency gains for all stakeholders involved. Costly, time consuming and legally complex assessment responsibilities would be lifted from the service providers and allow the issuing authority to correct or reconsider the order with the help of the enforcing authority, long before the enforcement phase. In addition, this tandem – or parallel – procedure would simplify the work of the enforcement authorities if the same order is subject to the enforcement procedure at a later stage.