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NOTE

From:	Presidency
To:	Delegations
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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 - discussion paper on selected provisions

On the basis of the comments and observations made during the COPEN WP meetings of 7-8 May and 29-30 May 2018 on the above proposed Regulation, the Presidency has selected a number of provisions for a detailed examination:

- firstly the procedures for execution and enforcement of a European production order, set out in Articles 9 and 14 respectively,

- secondly, following Member States' requests in view of the relationship of the proposal to the US CLOUD Act - the review clause provided for in Article 15.

To steer the discussion, the Presidency has provided some brief explanations set out in the Annex.

Delegations are kindly invited to send their views on the issues raised by the Presidency at the meeting or in writing by **22 June 2018** to the following email address: cyber@consilium.europa.eu.

1. Execution of a European Production Order Certificate (EPOC)(Article 9)

The Commission presented a flowchart illustrating the practical operation of Article 9 at the last meeting of the COPEN WP of 29-30 May 2018.

In that context, the Presidency would like to draw the attention of delegations in particular to following elements:

- the possibility for a dialogue between the addressee and the issuing authority when the addressee considers the EPOC incomplete, containing manifest errors or not containing sufficient information to execute it and the respective obligation of the addressee to inform the issuing authority referred to in the EPOC without undue delay and ask for clarifications using the form set out in Annex III;
- the possibility for a dialogue between the addressee and the competent enforcing authority in the case where the addressee considers that the EPOC cannot be executed as it manifestly violates the charter of fundamental rights or is manifestly abusive (competent enforcement authority may seek clarifications from the issuing authority).

Delegations are kindly invited to share their understanding of cases where the SP cannot provide the data due to *force majeure*, or *de facto impossibility* (i.e. - the person whose data is sought was neither a customer of this service or — for example under other privacy obligations — the data has lawfully been deleted by the service provider before it or its legal representative received the Order).

Finally, the Presidency would be interested to hear delegations' views on the possibility provided for the SP to raise any issue related to the execution of an EPOC with the issuing authority with the aim of correcting or reconsidering the EPOC early on, before the enforcement stage, or only a limited number issues that figure in a predefined list of specific ones that could be raised by the SP.

2. Procedure for enforcement (Article 14)

Following the Commission's presentation of the flowchart illustrating the practical operation of Article 14 at the last meeting of the COPEN WP of 29-30 May 2018, the Presidency deemed it necessary to look into the details and issues raised by delegations in relation to this provision.

The Presidency sees this article as being applicable in the case of non-compliance with the help of the Member State where the addressee of the transmitted EPOC or European Preservation Order is located. The addressee could be either the Member State of the SP or the Member State of the SP's legal representative. Enforcement will be done in accordance with the national law of the enforcing Member State.

In that regard delegations are invited to express their views on the general operation of the article and, more specifically, on how to ensure a balance between the obligations and the grounds that the SP can invoke against the decision of the enforcing and/or issuing authority to preserve the effectiveness of the procedure and avoid further unnecessary delays.

3. Review procedure in the case of conflicting obligations based on the fundamental rights or the fundamental interests of a third country (Article 15)

In the light of the conclusions of the (JHA) Council held on 4 June in Luxembourg, the Presidency would like to invite delegations' views on the effectiveness of this provision.

In particular, they are asked to express their positions on the option to incorporate in the text a high standard to encourage '*a level of similar protection*¹' to ensure the protection of the fundamental rights of the individual concerned or the fundamental interests of the third country related to national security or defence (international comity).

¹ See the Explanatory Memorandum (doc. 8110/18), p. 21 which states that '*By setting a high standard, they aim to encourage third countries to provide for a similar level of protection.*'