

RESTREINT UE/EU RESTRICTED



**Council of the
European Union**

**Brussels, 28 October 2019
(OR. en)**

13369/19

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COPEN 404
CYBER 289
DROIPEN 168
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ENFOPOL 453
DAPIX 304
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NOTE

From: Commission services
To: Delegations

Subject: Note ahead of the second negotiating round for an EU-US Agreement on cross-border access to electronic evidence, 6 November 2019

Delegations will find in the Annex an information note from the Commission on the above mentioned subject.

Note from the European Commission services ahead of the second negotiating round for an EU-US Agreement on cross-border access to electronic evidence, 6 November 2019

The purpose of this information note is to inform the Council and European Parliament on the negotiations of an EU-US Agreement on cross-border access to electronic evidence. The second negotiating round of negotiations will take place in Washington on 6 November 2019.

The purpose of the second round of negotiations is to deepen the discussions on the topics discussed on the 25th September. The aim is to further explore the starting positions of both sides based respectively on the European Union's e-evidence proposals and data protection legislation, and the U.S. CLOUD Act and related legislation. The European Commission's position fully reflects the negotiating directives included in the addendum to the 6 June 2019 Council Decision. A first review of discussions will take place at the EU-US JHA Ministerial in Washington on 11 December 2019.

During the second round the following issues will be discussed:

An exchange of views will be held on the **categories of data** based on the existing EU, US and Council of Europe definitions. In line with the EU mandate, the Commission will propose that the agreement sets out the definitions and types of data to be covered, including both content and non-content data. The Commission will explain its proposed definitions (subscriber, access, transactional, content).

In line with the EU mandate, the Commission will also propose clarifying the **types of offences and criminal proceedings**, including both pre-trial and trial stage, to be covered. For this the Commission will present a detailed overview of the offences covered under Article 5 (4) of the proposed Regulation on European Production and Preservation Orders for electronic evidence in criminal matters.

An exchange of views will be also held on the **service providers to be covered** in the EU-US Agreement. This will include an explanation of the current coverage under the respective EU and U.S jurisdictions. Regarding the **competent issuing authorities** the Commission will underline that orders addressed to service providers in another Party should be issued or reviewed by a judicial authority, i.e. judge or prosecutor. For transactional and content data, a judge or court should be involved.

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Strong privacy, data protection and procedural **safeguards** are a central feature of the EU mandate for the EU-US Agreement. During the first round of negotiations, both sides asked for clarifications on specific points and it was agreed to deepen the initial discussions on the following:

- Non-discrimination: in line with point III. 2, the Commission will provide further details on the existing non-discrimination requirements under EU law;
- Life imprisonment without review: in line with point III.5(a bis) of the EU mandate, the Commission has raised concerns that data may be requested for criminal proceedings that could lead to life imprisonment without the possibility of review and the prospect of release;
- Exclusion of data covered by essential interests: the Commission will have to clarify the reference under procedural rights in Point III. 5(d) of the EU mandate that “*The specific safeguards for data whose disclosure would be contrary to the essential interests of a Member State*”. The Commission has requested further information on the existing practice in each Member State;
- Death penalty and freedom of speech: in line with point III.5 (a) of the EU mandate, the Commission has raised concerns that data may be requested for criminal proceedings that could lead to the death penalty. The United States have been asked to clarify its approach on this issue and further explain its constitutional requirements related to exclusion of requests on the grounds of freedom of speech;
- Data protection: in line with point III.6 of the EU mandate, the Commission will provide further information on the privacy and data protection safeguards that will need to be included in the EU-US Agreement, given the unique circumstances of direct cooperation with service providers;
- Other safeguards: An initial exchange of views is likely to take place on other safeguards, including notification requirements, judicial review, targeting restrictions and minimisation. The Commission will underline that on a number of points the EU’s position is still subject to agreement by the co-legislators.

Updates

The United States has asked to provide a brief update on the status of the UK-US bilateral Agreement signed on 3rd October and published on the 7th October 2019.

The Commission will provide an update on the EU's internal e-evidence discussions.
