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From:	Presidency
To:	Delegations
Subject:	E-evidence: internal rules - examination of the EP's position - Presidency note

Delegations will find in Annex the Presidency Note for the COPEN (E-evidence) WP meeting on 15 January 2021.

ANNEX

Following the adoption of the European Parliament's position on 14 December 2020, both co-legislators are ready to engage and start the final part of the negotiations on the e-evidence package. In order to prepare the strategy for those negotiations, the Presidency has drafted the present note in which it outlines the context, but also poses several questions which would help define the approach towards the European Parliament. Delegations are kindly requested to consider these questions and share their respective positions during the meeting. Furthermore, they are invited to present any other consideration they see relevant in defining the strategy for the upcoming negotiations with the European Parliament.

A. CONTEXT

The increasing role of technology in our daily lives imposes an urgent adaptation on the ways available to investigate and combat crime. Accordingly, obtaining and preserving e-evidence is of unsurmountable importance to enable criminal investigations and prosecutions across the Union. Therefore, establishing effective mechanisms to gather e-evidence, as proposed by the Commission e-evidence package[1], is of essence to succeeding in the fight against crime.

Taking into consideration that digital services can be provided from anywhere and do not require a physical infrastructure, premises or staff in the country where the providers offer their services, the Regulation proposes the creation of European Production and Preservation Orders, which can be issued and served to service providers established or represented in another Member State to disclose or preserve electronic evidence without the involvement of the competent authorities of that Member State, thereby departing from current mutual recognition instruments. The orders specifically address the challenges stemming from the international dimension of the access to e-evidence. The Directive complements this mechanism by providing that service providers should appoint legal representatives in the Union when they offer their services here.

[1] The e-evidence package of 17 April 2018 consists of a proposal for a Directive laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings and a proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters.

The e-evidence package was examined by the COPEN (e-evidence) Working Party under the Bulgarian, Austrian and Romanian Presidencies. A General Approach on a revised text of the Regulation was adopted by the JHA Council on 7 December 2018, under the Austrian Presidency, complemented on 6 June 2019 by the revised text of the Annexes, under the Romanian Presidency. A General Approach on the revised text of the draft Directive was adopted by the JHA Council on 8 March 2019, under the Romanian Presidency.

More recently, on 7 December 2020, the LIBE Committee adopted its position, confirmed by the European Parliament's Plenary on the 14 December 2020.

B. ISSUES FOR DISCUSSION

The German Presidency organised a COPEN (e-evidence) WP meeting on the 14 December 2020 where it presented the European Parliament's position and invited the Member States to exchange of views on the basis of a comparison between the compromise texts of both co-legislators.

Building upon this preliminary exchange, we would like to focus the present discussion on some aspects of the European Parliament position, starting with the consequences of rejecting the draft Directive.

B.1. REJECTION OF THE DRAFT DIRECTIVE

Whereas the negotiations in the Council took place on the basis of two separate and complementary legal acts - the draft Regulation and the draft Directive - composing the e-Evidence package as proposed by the Commission, the position adopted by the European Parliament merges the provisions aimed at regulating the appointment of a legal representative in the proposal for a Regulation itself, and completely rejects the proposed Directive, incorporating in the draft Regulation a new Article 6a relating to the legal representatives. As a consequence, the legal representative's tasks are limited to the receipt and compliance with European Production and Preservation Orders, thus cannot serve wider purposes as originally envisaged by the Commission proposal.

The draft Directive was discussed in the Council as a necessary complement to the draft Regulation. Given the fact that service providers offering services in the Union may not have any establishment in the Union, but also to ensure a level playing field with clear rules for all service providers offering services in the Union and at the same time avoid any loopholes, the appointment of legal representatives was deemed essential to ensure the applicability of the Regulation to the service providers. The Directive harmonises the requirements that can be imposed on service providers and their legal representatives, and aims at establishing a clear legal framework for access to evidence held by such providers by ensuring that service providers that are providing services within the EU, but are established elsewhere, can be contacted by the competent authorities of the Member States and served with production/preservation orders through their legal representatives.

As reflected by the General Approach on the draft Directive, Member States sustained the structure and purpose of the e-evidence package, i.e. agreed with having two different instruments with two different legal bases. The draft Regulation was proposed with the legal basis of Article 82 (1) TFEU which allows to establish rules to facilitate judicial cooperation among Member States. The legal bases of the draft Directive, however, are Articles 53 and 62 TFEU, which allow to adopt measures to harmonise rules on establishing and providing services in the Union. As proposed by the Commission, establishing an obligation for all service providers offering services in the Union to nominate a legal representative in the Union would contribute to ensure a level playing field between service providers and remove obstacles to the freedom to provide service as established in Article 56 TFEU.

Therefore, we would like to ask Member States' views on the following questions:

a) Do Member States consider beneficial/essential preserving the current structure of the package and having a separate instrument regulating the legal representative, considering also the legal implications of placing such rules in an instrument having Article 82(1) as a legal basis ?

b) Would Member States see as beneficial if the legal representatives once established for the purpose of the E-evidence Regulation could be addressed also for the purpose of other EU instruments that regulate the gathering of evidence (e.g. EIO, meaning that the authorities of the Member State where the legal representative is established would receive the EIO and act as executing Member State) ?

B.2. OTHER CHANGES TO THE LEGAL REPRESENTATIVE

In addition to the question of one versus two instruments and its possible implications for the validity and scope of the instrument, the Council General Approach and the European Parliament's position also differ with regard to the rules applicable to the legal representatives of service providers in the Union and their scope of application. In the European Parliament's position, the requirement of appointing a legal representative is limited to situations where the service provider is not established in the Union at all. The European Parliament also proposes to remove the possibility for Member States to address legal representatives on their territory with a national order for the production or preservation of data.

Against this background we consider it relevant to hear Member States' views on the following issues:

a) Should the obligation to nominate a legal representative concern only service providers not established in a Member State bound by the Regulation but offering services in one or more Member State, or should all service providers providing services in one or more Member State, even if established in a State not bound by the Regulation, nominate a legal representative ?

b) Do Member States consider the European Parliament's proposal to remove the possibility for Member States to address legal representatives on their territory with a national order as problematic ?

c) Do Member States identify other essential elements of the Directive not included in the European Parliament's position that should be taken into consideration ?

B.3. REIMBURSEMENT OF COSTS

Article 12 of the European Parliament position establishes an obligation for the issuing State to reimburse the justified costs borne by the service provider related to the execution of the European Production Order or the European Preservation Order, if claimed by the service provider. Moreover, the service provider can also claim his costs from the executing State, but the issuing State shall then reimburse these costs.

a) Does a similar obligation to reimburse the costs of service providers exist in your Member State? If so, which costs are reimbursed ?

b) Do you see any legal or practical obstacles for the European Parliament's proposal to work ?

B.4. DATA CATEGORIES

Another noteworthy difference between the General Approach of the Council and the position of the European Parliament concerns the different categories of data. On this matter, while the General Approach follows the proposal of the Commission describing 4 different categories of data (subscriber data, access data, transactional data and content data) in Article 2 (7, 8, 9 and 10) the European Parliament groups the data only in three categories (subscriber data, traffic data and content data). A comparative analysis of both positions allows for the conclusion that the General Approach sustains the Commission proposal to create a specific category for data concerning the "commencement and termination of a user access session to a service" labelled "access data", whereas the European Parliament includes these elements in the "traffic data" category.

As explained by the Commission in its proposal, the main purpose of creating a separate category of "access data" aims at ensuring that data such as "the data related to the commencement and termination of a user access session to a service" as well as "the IP address allocated by the internet access service provider to the user of a service" and other "data identifying the interface used and the user ID" is subjected to the same conditions and safeguards than subscriber data when used for the same objective, i.e. for the purposes of user identification.

Moreover, according to Article 2(7)(b) of the Council's General Approach the definition of subscriber data encompasses “any data pertaining to the type of service and its duration including technical data and data identifying related technical measures or interfaces used by or provided to the subscriber or customer, and data related to the validation of the use of service, excluding passwords or other authentication means used in lieu of a password that are provided by a user, or created at the request of a user”. This provision however corresponds to Article 2(8)(a) of the European Parliament’s position, which means that this data will now be categorised as "traffic data" and its production or preservation will, therefore, be subject to greater restrictions from the outset.

Considering these differences, it would be of relevance to know the position of Member States on the following questions:

a) Do Member States assess the Parliament’s proposal to remove the separate category of ‘access data’ ?

b) How do Member States consider the European Parliament’s proposal to treat as traffic data certain elements that are considered as subscriber data in the General Approach (‘any data pertaining to the type of service and its duration (...)’) ? Would Member States consider the approach taken for the definition of subscriber data in Article 18(3) of the Council of Europe Budapest Convention ?

c) Would Member States oppose the European Parliament’s proposal for a conventional classification of types of data (subscriber data, traffic data and content data) provided that the data related to the commencement and termination of a user access session to a service as well as the IP address allocated by the internet access service provider to the user of a service and other data identifying the interface used and the user ID is subjected to the same conditions and safeguards as subscriber data when used for the same objective, i.e. for the purposes of user identification? Do you think such an approach is sufficiently future proof ?

d) Do Member States think that the European Parliament's proposal for the treatment of IP addresses under the same conditions and safeguards as subscriber data when used for the purposes of user identification will cover sufficient ground in order to compensate for the inclusion of the definition provided for in Article 2(7)(b) of the Commission's proposal in the category of traffic data? If not, what additional information would have to be covered in addition to the notion of "IP addresses" to receive all the related data that is necessary to identify a user ?

B.5. SERVICE PROVIDERS COVERED

The position of the European Parliament regarding the definition of service providers covered differs only on a few points from the Council General Approach:

i) the European Parliament proposes **not to exclude financial services** from the scope of the Regulation;

ii) the definition of **information society services** is also more aligned with the Commission's definition although a number of deviations occur in the wording;

iii) the European Parliament also proposes a change in the definition of **internet infrastructure service providers** (maintaining internet domain name related providers of proxy services, but not covering providers of internet domain name related privacy services).[2]

iv) On the criterion of "offering services in the Union" the European Parliament's position differs in the way it defines the substantial connection.

a) How do Member States assess the four above-mentioned differences ?

b) Do they see any other essential differences not mentioned above ?

[2] Another difference in approach, where the Parliament proposes to cover only providers acting as data controllers is proposed to be discussed at a later stage.

B.6. COMMON EUROPEAN EXCHANGE SYSTEM

In a new Article 7a, the European Parliament requires the Commission to establish a common European (digital) exchange system with secure channels for the handling of authorised cross-border communication by the date of application (18 months after entry into force). It also obliges Member States and service providers to use this system for the purpose of the Regulation. Although the European Parliament recognises that Member States or providers may already have established dedicated systems or secure channels, it requires those systems or channels to 'interconnect' with the common European exchange system.

a) How do Member States see the inclusion of such a provision in the Regulation ?

b) Do you see any legal or practical obstacles for the Parliament's proposal to work ?

c) Do you see the need to amend some elements of the proposed provision ?

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On the basis of the discussion on these questions the Presidency will establish its initial strategy for starting the discussion with the European Parliament. However, delegations are invited to raise any additional elements to be considered in the approach to be taken in the upcoming negotiations.