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**NOTE**

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From: Presidency  
To: CATS

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Subject: Proposal for a Regulation on European production and preservation orders for electronic evidence in criminal matters  
- selected issues for discussion

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The review procedure stipulated in Articles 15 and 16 of the draft Regulation on European Production and Preservation Orders for electronic evidence in criminal matters has been subject to extensive discussions during the COPEN Working Party meetings held in the May. Whereas Article 15 provides for a review procedure in case of conflicting obligations based on fundamental rights or fundamental interests of a third country related to national security and defence, Article 16 provides for such a procedure in case of conflicting obligations based on other grounds. The concept has been also touched upon during the informal meeting of the Justice ministers on 13 July in relation to the discussions held on comity clause provided for in the US CLOUD Act.

Given the number of comments received questioning the efficiency of the proceeding provided for in particular in Article 15(3) and (4) and the legal concerns raised so far the Presidency considers it necessary to separate this issue from the examination of the rest of the proposal and have an in-depth debate. To facilitate the debate the Presidency would like to propose a number of possible options to deal with the conflicting obligations for service providers.

Therefore delegations are invited

- to express their preference for one of the options proposed and/or elements of the options, and/or
- to present alternative solutions.

## Option 1

In option 1, Article 15 is retained, but with the following changes:

- explicitly referring to Directive 2016/680 regarding submission of personal data to a third country (Article 15(5) and Article 16(1));
- taking into account the needs of the investigation of the issuing Member State, in particular the danger of obstructing the investigation (Article 15(5));
- reducing the influence of the administrative authority of the third country on the decision of the court in the issuing Member State, thereby ensuring the division of powers (Article 15(6)).

Article 16 would remain as proposed by the Commission in the draft Regulation.

### *Article 15*

#### *Review procedure in case of conflicting obligations based on fundamental rights or fundamental interests of a third country*

1. If the addressee considers that compliance with the European Production Order would conflict with applicable laws of a third country prohibiting disclosure of the data concerned on the grounds that this is necessary to either protect the fundamental rights of the individuals concerned or the fundamental interests of the third country related to national security or defence, it shall inform the issuing authority of its reasons for not executing the European Production Order in accordance with the procedure referred to in Article 9(5).
2. The reasoned objection shall include all relevant details on the law of the third country, its applicability to the case at hand and the nature of the conflicting obligation. It cannot be based on the fact that similar provisions concerning the conditions, formalities and procedures of issuing a production order do not exist in the applicable law of the third country, nor on the only circumstance that the data is stored in a third country.
3. The issuing authority shall review the European Production Order on the basis of the reasoned objection. If the issuing authority intends to uphold the European Production Order, it shall request a review by the competent court in its Member State. The execution of the Order shall be suspended pending completion of the review procedure.

The competent court shall first assess whether a conflict exists, based on an examination of whether

- (a) the third country law applies based on the specific circumstances of the case in question and if so,
  - (b) the third country law, when applied to the specific circumstances of the case in question, prohibits disclosure of the data concerned.
4. In carrying out this assessment, the court should take into account whether the third country law, rather than being intended to protect fundamental rights or fundamental interests of the third country related to national security or defence, manifestly seeks to protect other interests or is being aimed to shield illegal activities from law enforcement requests in the context of criminal investigations.
5. If the competent court finds that no relevant conflict within the meaning of paragraphs 1 and 4 exists, it shall uphold the Order. If the competent court establishes that a relevant conflict within the meaning of paragraphs 1 and 4 exists, the competent court, **subject to compliance with Directive 2016/680, in particular its Chapter V**, shall transmit all relevant factual and legal information as regards the case, including its assessment, to the central authorities in the third country concerned, via its national central authority, **and to the extent that such transmission does not obstruct the relevant criminal proceedings and informing it of the consequences of not providing a response. The competent court shall inform the central authority that a response will be taken into account if submitted**, ~~within~~ a 15 day deadline ~~to respond~~. Upon reasoned request from the third country central authority, the deadline may be extended by 30 days.
6. If the third country central authority, within the deadline, informs the competent court that it objects to the execution of the European Production Order in this case, the competent court shall **duly take into account the opinion expressed by the central authority of the third country concerned when determining whether to uphold or** lift the Order and inform the issuing authority and the addressee. ~~If no objection is received within the (extended) deadline, the competent court shall send a reminder giving the third country central authority 5 more days to respond and informing it of the consequences of not providing a response. If no objection is received within this additional deadline, the competent court shall uphold the Order.~~
7. If the competent court determines that the Order is to be upheld, it shall inform the issuing authority and the addressee, who shall proceed with the execution of the Order.

## Option 2

In option 2 it is proposed to merge Articles 15 and 16. There would only be one single article regulating the procedure applicable to conflicting situations. However given the slightly different ways in which the merge can be done, the Presidency would like to differentiate between two sub-options provided below.

### Sub-option 2a

From procedural point of view the main difference of this sub-option to option 1 is that there would be no obligation for the competent court to “hear” the third country’s opinion (see Article 15(5) of option 1). In addition, it is proposed to introduce a time limit for objections to be raised by providers (see paragraph 2 of this option).

#### *Article 16*

##### *Review procedure in case of conflicting obligations ~~based on other grounds~~*

1. If the addressee considers that compliance with the European Production Order would conflict with applicable laws of a third country ~~prohibiting disclosure of the data concerned on other grounds than those referred to in Article 15~~, it shall inform the issuing authority of its reasons for not executing the European Production Order in accordance with the procedure referred to in Article 9(5).
2. The reasoned objection must include all relevant details on the law of the third country, its applicability to the case at hand and the nature of the conflicting obligation. It cannot be based on the fact that similar provisions concerning the conditions, formalities and procedures of issuing a production order do not exist in the applicable law of the third country, nor on the only circumstance that the data is stored in a third country. **It shall be filed not later than 10 days after the date on which the addressee was served with the EPOC. Time limits shall be calculated in accordance with the national law of the issuing authority.**
3. The issuing authority shall review the European Production Order on the basis of the reasoned objection. If the issuing authority intends to uphold the European Production Order, it shall request a review by the competent court in its Member State. The execution of the Order shall be suspended pending completion of the review procedure.

4. The competent court shall first assess whether a conflict exists, based on an examination of whether
  - (a) the third country law applies based on the specific circumstances of the case in question and if so,
  - (b) the third country law, when applied to the specific circumstances of the case in question, prohibits disclosure of the data concerned.
  
5. If the competent court finds that no relevant conflict within the meaning of paragraphs 1 and 4 exists, it shall uphold the Order. If the competent court establishes that the third country law, when applied to the specific circumstances of the case under examination, prohibits disclosure of the data concerned, the competent court shall determine whether to uphold or withdraw the Order in particular on the basis of the following factors:
  - (a) the interest protected by the relevant law of the third country, including **fundamental rights as well as other interests preventing disclosure of the data of the third country's interest in preventing disclosure of the data, in particular national security interests**;
  - (b) the degree of connection of the criminal case for which the Order was issued to either of the two jurisdictions, as indicated *inter alia* by:
    - the location, nationality and residence of the person whose data is being sought and/or of the victim(s),
    - the place where the criminal offence in question was committed;
  - (c) the degree of connection between the service provider and the third country in question; in this context, the data storage location by itself does not suffice in establishing a substantial degree of connection;
  - (d) the interests of the investigating State in obtaining the evidence concerned, based on the seriousness of the offence and the importance of obtaining evidence in an expeditious manner;
  - (e) the possible consequences for the addressee or the service provider of complying with the European Production Order, including the sanctions that may be incurred.
  
6. If the competent court decides to lift the Order, it shall inform the issuing authority and the addressee. If the competent court determines that the Order is to be upheld, it shall inform the issuing authority and the addressee, who shall proceed with the execution of the Order.

## Sub-option 2b

This sub-option introduces further amendments which concern:

- the weighing of the factors, mentioned in paragraph 5, and
- the need of introducing a completely new paragraph 5b which provides for an explicit possibility of the competent court to contact a competent authority in the third country in case further information on the applicable national law, jurisprudence or its interpretation is needed. It would be envisaged to add a corresponding recital providing some examples in that regard.

### *Article 16*

#### *Review procedure in case of conflicting obligations ~~based on other grounds~~*

1. If the addressee considers that compliance with the European Production Order would conflict with applicable laws of a third country ~~prohibiting disclosure of the data concerned on other grounds than those referred to in Article 15~~, it shall inform the issuing authority of its reasons for not executing the European Production Order in accordance with the procedure referred to in Article 9(5).
2. The reasoned objection must include all relevant details on the law of the third country, its applicability to the case at hand and the nature of the conflicting obligation. It cannot be based on the fact that similar provisions concerning the conditions, formalities and procedures of issuing a production order do not exist in the applicable law of the third country, nor on the only circumstance that the data is stored in a third country. **It shall be filed no later than 10 days after the date on which the addressee was served with the EPOC. Time limits shall be calculated in accordance with the national law of the issuing authority.**
3. The issuing authority shall review the European Production Order on the basis of the reasoned objection. If the issuing authority intends to uphold the European Production Order, it shall request a review by the competent court in its Member State. The execution of the Order shall be suspended pending completion of the review procedure.
4. The competent court shall first assess whether a conflict exists, based on an examination of whether
  - (a) the third country law applies based on the specific circumstances of the case in question and if so,
  - (b) the third country law, when applied to the specific circumstances of the case in question, prohibits disclosure of the data concerned.

5. If the competent court finds that no relevant conflict within the meaning of paragraphs 1 and 4 exists, it shall uphold the Order. If the competent court establishes that the third country law, when applied to the specific circumstances of the case under examination, prohibits disclosure of the data concerned, the competent court shall determine whether to uphold or lift the Order. **That assessment shall in particular be based on the following factors while giving particular weight to the factors referred to in points (a) and (b):**
- (a) the interest protected by the relevant law of the third country, including **fundamental rights as well as other interests preventing disclosure of the data of the third country's interest in preventing disclosure of the data, in particular national security interests;**
  - (b) the degree of connection of the criminal case for which the Order was issued to either of the two jurisdictions, as indicated *inter alia* by:
    - the location, nationality and residence of the person whose data is being sought and/or of the victim(s),
    - the place where the criminal offence in question was committed;
  - (c) degree of connection between the service provider and the third country in question; in this context, the data storage location by itself does not suffice in establishing a substantial degree of connection;
  - (d) the interests of the investigating State in obtaining the evidence concerned, based on the seriousness of the offence and the importance of obtaining evidence in an expeditious manner;
  - (e) the possible consequences for the addressee or the service provider of complying with the European Production Order, including the sanctions that may be incurred.

**5b. The court may seek information from the competent authority of the third country taking into account Directive 2016/680, in particular its Chapter V and to the extent that such the transmission does not obstruct the relevant criminal proceedings.**

6. If the competent court decides to lift the Order, it shall inform the issuing authority and the addressee. If the competent court determines that the Order is to be upheld, it shall inform the issuing authority and the addressee, who shall proceed with the execution of the Order.