



Council of the European Union
General Secretariat

Brussels, 2 October 2019
(OR. en)

12318/19

RESTREINT UE/EU RESTRICTED

JAI 953
COPEN 358
CYBER 259
DROIPEN 138
JAIEX 137
ENFOPOL 401
TELECOM 301
DATAPROTECT 212
DAPIX 264
EJUSTICE 119
MI 654

NOTE

From: Commission Services
To: Permanent Representatives Committee/Council

Subject: E-evidence

- Negotiations for EU-U.S. Agreement on cross-border access to e-evidence
- Negotiations on a Second Additional Protocol to the Budapest Convention
= report on the state-of-play

Delegations will find in Annexes to this Note the reports prepared by the European Commission on the state-of-play of the negotiations for an EU - U.S. agreement on cross-border access to e-evidence (Annex I) and for a Second Additional Protocol to the Budapest Convention (Annex II).

These reports will be presented and serve as basis for the discussion on this matter at the Council (Justice and Home Affairs) meeting which will be held on 7-8 October 2019 in Luxembourg.

Report on the state-of-play of the negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters

On 6 June 2019¹, the Council of the European Union authorised the Commission to open negotiations on behalf of the Union with the United States of America for an agreement on cross-border access to electronic evidence for judicial cooperation in criminal matters.

The Commission's and US's negotiating teams met on 25 September 2019 for the first negotiation round on an EU-US Agreement on e-evidence. The US Delegation included Deputy Assistant Attorney Generals from the Department of Justice, as well as other colleagues from the US Department of Justice's Office for International Affairs, the State Department and the US Mission to the EU. The Commission was represented by Chief Negotiator Alexandra Jour-Schroeder, Deputy Chief Negotiator Peter Csonka and other members of the negotiating team from DG JUST and DG HOME. Representatives from the European External Action Service and European Union Delegation in Washington were also present.

This first formal negotiation meeting was an opportunity for each side to set out its opening positions. The Commission made clear that its negotiating stance is defined in the Council mandate, which is public, taking into account the April 2018 e-evidence proposals² and considering that they will still evolve during the legislative procedure. The European Union confirmed that it had a mandate to conclude an EU-wide agreement.

¹ Council Decision of 6 June 2019 authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters, available at www.consilium.europa.eu

² COM(2018) 225 final, COM(2018) 226 final

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The United States confirmed that they had obtained the Circular 175 formal mandate to negotiate with the European Union. The US stressed that their objective was to negotiate a framework agreement supplemented by bilateral agreements with individual EU Member States.

In line with the agreement between Commissioner Jourova and US Attorney General Barr, the first negotiating session concentrated on areas of substance rather than the legal form of the agreement. Discussions took place, amongst other things, on the types of electronic evidence and criminal proceedings that could be covered by the Agreement. The European Commission underlined that the agreement should include both content and non-content data. An initial discussion took place on workflows that should be followed by each of the parties, including which authorities should be involved. On safeguards, parties exchanged information about aspects that they find important to be covered by the agreement. The Commission explained the need to supplement the EU-US data protection Umbrella Agreement with additional safeguards to reflect the specificities of direct cooperation, as set out in the mandate, and stressed the need to align the scope of the future agreement with that of the Umbrella Agreement in terms of the US authorities covered.

It was concluded to work further on each of the topics discussed, with the objective of making swift progress.

A second negotiating round in Washington is planned to take place in the first weeks of November. Further contacts could also be envisaged before the next EU-US JHA Ministerial on 10-11 December.

Report on the state-of-play of Commission's participation, on behalf of the Union, in the negotiations for the Second Additional Protocol to the Council of Europe Convention on Cybercrime

The negotiations for the Second Additional Protocol to the Council of Europe Convention on Cybercrime are taking place in the framework of the terms of reference as adopted by the Committee of State Parties to the Convention on 8 June 2017.³ On 6 June 2019⁴, the Council of the European Union authorised the Commission to participate in the negotiations on behalf of the Union.

Since the adoption of the 6 June 2019 Council Decision, two negotiation sessions have taken place. On 9-11 July 2019, the fourth meeting of the Protocol Drafting Plenary (PDP) for the negotiations was organised in Strasbourg. The meeting brought together 56 State Parties (including representatives from AT, BE, BG, HR, CZ, DE, EE, FI, FR, DE, HU, IT, LV, LT, LU, NL, PL, PT, RO, SK, SI, ES, UK) and 7 Observer States (including a representative from IE) to the Convention, as well as representatives of international organisations and Council of Europe committees. At the PDP meeting, State Parties finalised the work on draft provisions to give effect to orders from another Party for the expedited production of data. Parties also made significant progress with the work on the provisions on the direct disclosure of subscriber information.

On 16-18 September 2019, the eighth meeting of the Protocol Drafting Group (PDG) for the negotiations was organised in Paris. The meeting brought together 24 State Parties (including representative from AT, BE, CY, CZ, DE, FI, FR, HR, IT, NL, PT, RO, SK, UK). The meeting was used to finalise the provisions on the direct disclosure of subscriber information.

³ Terms of Reference for the Preparation of a draft 2nd Additional Protocol to the Budapest Convention on Cybercrime, approved by the 17th Plenary of the Cybercrime Convention Committee (T-CY) on 8 June 2017, available at www.coe.int

⁴ Council Decision of 6 June 2019 authorising the European Commission to participate, on behalf of the European Union, in negotiations on a Second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185), available at www.consilium.europa.eu

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This should allow for the publication of the provisions to give effect to orders from another Party for the expedited production of data, and for the provisions on the direct disclosure of subscriber information to allow for stakeholder consultations to take place. The meeting was also used to discuss data protection safeguards for the Second Additional Protocol. Finally, the meeting was also used to have an initial discussion on measures for the extension of searches.

In view of the 6 June 2019 Council Decision, the Commission participated in the negotiation sessions on behalf of the Union. The Commission's negotiating stance for the sessions was based on the Council mandate, which is public. The Commission conducted the negotiations in consultation with the Council's Special Committee for the negotiations, for which the Council has designated the COPEN working party. The Commission also organised on-the-spot coordination meetings for EU Member States during the 9-11 July 2019 PDP meeting and the 16-18 September 2019 PDG meeting.

On 15-18 October 2019, the ninth meeting of the PDG will be organised in Strasbourg. The fifth PDP meeting will be organised on 19-20 November 2019 in Strasbourg. On 20-22 November 2019, the Council of Europe Octopus conference will be organised in Strasbourg.
