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**NOTE**

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From: Presidency  
To: Delegations

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Subject: Recommendation for a COUNCIL DECISION 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  
- final text

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Delegations will find in the Annex the final version of the above Recommendation for a Council Decision as agreed at the FOP COPEN (E-evidence) meeting held on 6 May 2019.

Recommendation for a

**COUNCIL DECISION**

**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**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 16 and 82(1) in conjunction with Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) On 17 April 2018, the Commission submitted legislative proposals for a Regulation on European Production and Preservation orders for electronic evidence in criminal matters and a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings ("e-evidence proposals")<sup>1</sup>. The Council agreed on a general approach on the Commission proposal for the regulation at its meeting on 7 December 2018<sup>2</sup> and on the Commission proposal for the Directive at the Council meeting on 8 March 2019<sup>3</sup>.
- (2) Negotiations should be opened with a view to concluding an agreement between the Union and the United States of America on cross-border access by judicial authorities in criminal proceedings to electronic evidence held by a service provider.

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, 17 April 2018, COM(2018) 225 final. Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, 17 April 2018, COM(2018) 226 final.

<sup>2</sup> Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters, Council General Approach, ST 15292 2018 INIT, 12 December 2018.

<sup>3</sup> Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, Council General Approach, ST 7348 2019 INIT.

- (3) The agreement should include the necessary safeguards for fundamental rights and freedoms and observe the principles recognised by the Charter of Fundamental rights of the European Union, in particular the right to private and family life, home and communications recognised in article 7 of the Charter, the right to protection of personal data recognised in Article 8 of the Charter, the principle of non-discrimination as recognised in Article 21 of the Charter, the right to effective remedy and fair trial recognised in Article 47 of the Charter, the presumption of innocence and right of defence recognised in Article 48 of the Charter, the principles of legality and proportionality of criminal offences and penalties recognised in Article 49 of the Charter, and the *ne bis in eadem* principle as recognised in Article 50 of the Charter. The agreement should be applied in accordance with those rights and principles.
- (4) In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (5) In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

- (6) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (7) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council<sup>1</sup> and delivered an opinion on 2 April 2019<sup>2</sup>.

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<sup>1</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L295, 21.11.2018, p. 39).

<sup>2</sup> OJ C ....

HAS ADOPTED THIS DECISION:

*Article 1*

1. The Commission is hereby authorised to open negotiations for an agreement between the Union and the United States of America on cross-border access by judicial authorities in criminal proceedings to electronic evidence held by a service provider.
2. The negotiations shall be conducted on the basis of the negotiating directives of the Council set out in the Addendum to this Decision.

*Article 2*

The Commission is hereby nominated as the Union negotiator.

*Article 3*

The negotiations should be conducted in consultation with the COPEN Working Party and in accordance with the directives contained in the Addendum, subject to any directives which the Council may subsequently issue to the Commission.

The Commission shall report to the Council on the conduct and the outcome of each negotiating session. Where appropriate or upon request of the Council the Commission will produce a written report.

*Article 4*

This decision is addressed to the Commission.

Done at Brussels,

*For the Council*

*The President*