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NOTE

From: General Secretariat of the Council
To: Delegations

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Subject: Proposal for a Regulation of the European Parliament and of the Council
on European production and preservation orders for electronic evidence in
criminal matters
- compilation of Member States comments

Delegations will find in the Annex German and Belgian comments added to the ones of Member States on doc. 9732/18 - discussion paper on selected provisions - of the proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters.

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BELGIUM

Delegations are invited to share

- their understanding of **cases** where the SP cannot provide the data due to *force majeure*, or *de facto impossibility*.
- their views on the possibility provided for the **SP to raise any issue** related to the execution of an EPOC with the issuing authority with the aim of correcting or reconsidering the EPOC early on, before the enforcement stage, or only a **limited number issues** that figure in a predefined list of specific ones that could be raised by the SP.

Belgium finds it essential to create a system that is efficient and transparent for both law enforcement authorities and providers. It is therefore deemed appropriate to clearly set out an exhaustive list of issues which would prevent the provider to comply with an EPOC or EPOC-PR. In our experience, providers have raised the following issues in specific cases:

- the requested data are not (or no longer) registered, for example due to limited data retention obligations or due to the acquisition of the provider by another company (data were deleted in the process);
- the requested data cannot be accessed due to a technical failure; or
- the requested data are encrypted and the providers does not hold a decryption key.

At this stage of the negotiations, it could be useful to make a clear distinction between the following two situations:

- (1) the provider cannot provide the requested data due to technical issues, such as the fact that the data are not registered; and
- (2) the provider objects handing over the requested information based on a legal issue.

Only the situations under item (1) should fall under the category of '*force majeure*', or '*de facto impossibility*'.

As a first instance, such issues should be dealt with directly by the issuing competent authority. The role of the enforcing State should be limited to the enforcing stage (see further information under article 14).

Procedure for enforcement (Article 14)

Delegations are invited to express their views on the **general operation** of the article and, more specifically, on how to ensure a **balance** between the **obligations** and the **grounds that the SP can invoke against the decision** of the enforcing and/or issuing authority to preserve the effectiveness of the procedure and avoid further unnecessary delays.

Belgium strongly supports the guiding principle of this instrument, i.e. the principle that a provider responds directly to an order of a judicial authority of another Member State, regardless of the location of the data and without the systematic involvement of a judicial authority in the Member State of its legal representative. It is therefore of great importance to provide a clear set of rules for the issuing of these judicial orders. It is preferable that any relevant issue (for example the EPOC has not been issued for an offence covered by the directive) should primarily be dealt with directly between the SP and the competent authorities of the issuing State, in accordance with the national legislation of that State.

We understand the benefits of the approach of the European Commission to foresee a procedure to enforce the decision in case of unjustified non-compliance of an addressee. Nonetheless, we are rather cautious about the idea to plainly attribute a systematic and/or large degree of control to the enforcing state.

We should not take a retrograde step in comparison what is already possible in accordance with article 18 of the Cybercrime convention. Furthermore, the concrete link with the enforcing state might be limited to merely hosting the legal representative of an international provider which is a rather artificial link with the case at hand. We are currently further scrutinising whether this State is actually the best placed to analyse if a judicial decision of the issuing authority is valid and in conformity with fundamental rights, or if other scenarios could be envisaged.

In our understanding, the issuing authority is in first place competent to issue and execute the EPOC, since the service is provided on its territory and the requested data are needed in the context of an ongoing criminal investigation and prosecution for which the issuing authority is competent. If needed, we would be ready to work further on the required connecting factors with the issuing state in view to strengthen the legitimacy of the issuing authority to intervene directly.

The assistance of the enforcing State is merely required in view to provide its help in case of non-compliance of the provider. Indeed being the hosting state of that provider or its legal representative, the enforcing state might be in a good position to compel the provider in case of non-compliance.

Review procedure in the case of conflicting obligations based on the fundamental rights or the fundamental interests of a third country (Article 15)

MS are asked their position on the option to incorporate in the text a high standard to encourage ‘*a level of similar protection*’ to ensure the protection of the fundamental rights of the individual concerned or the fundamental interests of the third country related to national security or defense (international comity): ‘*By setting a high standard, they aim to encourage third countries to provide for a similar level of protection*’

Belgium fully supports the idea to ensure a high degree of protection of fundamental rights and the fundamental interests of third countries. Although we advocate the principle, we have a number of significant concerns related to the approach chosen to fulfil this aim.

The proposed review mechanism in article 15 is not a common form of international comity, which allows national courts to balance competing public or private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns. The Commission’s proposal foresees that a third central authority will have the possibility to object the execution of an EPOC, resulting in the obligation for the court in the issuing State to lift the order.

The article therefore stipulates that the law of any third State aiming to protect fundamental rights of individuals or fundamental interests of that State always prevails the legislation of the European union and its Member States, regardless the interests at stake for EU citizens and Member States. EU law will only be applicable in case the third state doesn't formulate an objection.

We are furthermore sceptic about the proposed procedure. We do not expect a foreign administrative authority – especially by lack of an international agreement with this State – to be willing to take a decision on the compliance of a foreign judicial decision with its national legislation, in particular since it aims to protect fundamental interests or rights. It is therefore highly likely that the central authority will object the execution and will require an MLA-request. This results in a status quo of the current situation and this standstill could only be resolved by forthwith concluding bilateral agreements with important partner countries, if they see any reason or advantage thereto.

On the other hand, it is rather unlikely that third states will follow our example. The US have already legislated and opted for a common form of international comity. Some other third States have put in place other forms of mechanisms in view to protect their data (such as data localisation requirements).

A more interesting approach has been taken in article 16. A court in the issuing State is competent to balance the relevant interests in case with any conflicting legislation of a third State which is not covered by article 15. Belgium finds this approach a good starting point for further discussion on all conflicts of law. This approach would allow providers offering services within the EU to challenge an EPOC in case of conflicting laws and to voice their concerns, while attributing the final decision power to a judicial authority who has access to all relevant information in this individual case. The number of remaining conflicts of legislation could be furthermore reduced by concluding international agreements, which would include clear benefits and transparency for all parties involved.

CZECH REPUBLIC

Execution of the EPOC (Article 9)

In principle we welcome the possibility for a dialogue between the addressee and the issuing authority, because it could contribute to a fast correction of eventual obvious mistakes in the EPOC or help to complete the necessary information. It is however necessary to make sure that the provider can only demand the information that is needed to execute the EPOC (for example for technical reasons). He should not ask for further information concerning the criminal proceedings.

Concerning the second point we think that the service provider or his legal representative should not review the orders issued by a state authority in this way. It would also be very difficult for him and would imply a huge responsibility.

Paragraph 4 – aside from the already stated examples we think that it is only possible to include cases, when the data gets lost without any fault on the side of the provider.

In response to the last question we would like to state that we prefer the limitation of the number of issues.

Procedure for enforcement (Article 14)

The whole procedure of enforcement and review is in our opinion very complicated and unclear. As already stated above, we think that the service provider or his legal representative should not review orders issued by a state authority in this way. The current text of the proposal places too much of responsibility on the legal representatives and this responsibility should be left on the state authorities.

Review procedure (Article 15)

In general we consider it to be better to deal with this topic in international agreements (in that way it is possible to consider the differences between the legal systems of the third countries – we do not think that we should apply the same regime for example for the US and North Korea). We do not think that having this Article in the text is a necessary condition for the conclusion of an “executive agreement“ with the US.

However if this Article should stay in the text, it will have to be significantly amended. The proposed mechanism pursuant to Article 15 is too complicated. It will also be necessary to take account of the very important points raised by the Council Legal Service at the COPEN meeting on 29th and 30th May 2018 and to make sure that the text is in accordance with the EU Law.

GERMANY

The questions concern Articles 9, 14 and 15 of the EPOC Regulation and focus primarily on the balance to be achieved between the efficiency of the new instruments on the one hand, and the adequate consideration of the interests of all those involved on the other. This means that the questions also touch upon the proposed Regulation's underlying concept and should therefore be answered in that context. Germany is grateful for the opportunity to formulate its key concerns in this regard. These concerns do not rule out any further questions being examined and discussed at a later stage:

1) The structuring of the procedure between the investigating and the affected Member State

The Commission's proposal assigns an important and extensive role to the provider/legal representative while also taking into account – in a wide range of different contexts – the interests of the EPOC addressee's Member State. This creates a system which is not entirely coherent. The result is that a production and preservation procedure based on the Commission's proposals could become protracted and unclear. The negotiations to date have shown that – from the perspective of many Member States – the rules are overly complex and poorly suited to legal practice.

Germany shares the same concern as the Commission and the rest of the Member States – namely that the procedure for securing and gathering data must be accelerated and that there needs to be added value in comparison with the recently established procedure based on the Directive on the European Investigation Order. Especially in light of this simplification and acceleration aspect, Germany advocates breaking down the cross-border procedure into different segments and concentrating responsibilities at specific points. Overall, the procedure could be simplified as follows:

- Where the disclosure of transactional and content data is concerned, the investigating Member State sends the EPOC form – including the information pursuant to Article 5 (5) (i) of the EPOC Regulation – to the competent authority in the affected Member State no later than when this is sent to the provider. In order to clarify any problematic issues – e.g. the clarification of immunities and privileges (see Article 5 (7) of the EPOC Regulation) or questions of national security (see Article 14 (2) of the EPOC Regulation) – it is obviously possible and advisable to involve the other Member State at an earlier stage. This enables the investigating Member State to gain an overview of all the relevant legal issues. In order to swiftly process the case, specific time limits should be set for providing the desired information.
- This Member State’s competent authority has a short consideration period in which it can object to the EPOC.
- If no objection is raised, the investigating Member State can use the data as evidence in court proceedings, as long as this is not precluded by any other provision of the EPOC Regulation or national law.
- The procedure envisaged in Article 15 of the EPOC Regulation could be simplified by having potential conflicting obligations directly reviewed by the competent authority of the affected Member State.
- Overall, the investigating Member State and the affected Member State would work together as partners in order to quickly find a balance between efficiency and the adequate consideration of the interests of all those involved, thereby decisively simplifying the procedure.

2) The need for additional safeguards

Since the rights of affected persons must be protected regardless of whether these persons are located in the investigating Member State, in the Member State of the addressee or in another state, it is furthermore necessary to strengthen certain safeguards which are regulated in the EPOC Regulation itself. In Germany's view, the following aspects are particularly relevant here:

- By inserting a kind of “territoriality clause” into Article 5 of the EPOC Regulation, stipulating (for example) that the act of committing the offence or the results of the offence must occur in the investigating Member State, it should be ensured that a sufficient reason exists for the Member States to reach agreement on allowing the unilateral cross-border gathering and preservation of data.
- Raising the maximum penalty pursuant to Article 5 (4) (a) of the EPOC Regulation to at least five years; in addition, Germany could also imagine replacing the extremely unclear references to offences under existing EU legal acts as cited in Article 5 (4) (b) and (c) with a clear list. This would make the Regulation's scope of application much more transparent and would make it easier for practitioners to implement the Regulation.
- Inclusion of provisions to protect persons who are bound by professional secrecy.
- Protection of individual rights by providing affected persons with more precise information pursuant to Article 11 (3) of the EPOC Regulation; simple (e.g. form-based) remedies to be regulated within the framework of Article 17 of the EPOC Regulation.
- Deferral of notification of the affected person in accordance with Article 11 (2) of the EPOC Regulation should only be permitted following a judicial decision and under conditions which need to be stipulated more precisely.

LATVIA

Latvia would like to thank the Presidency for the commencement of the work on the proposal. Moreover, we would like to thank you for the possibility to provide some comments.

Regarding Article 9 and Article 14, Latvia would like to look into possibility of involving executing state at an earlier stage. This should be done at an expert level, so the MS can prepare their positions and offer possible proposals and solutions.

Latvia considers that SPs should only have possibility to object / demand clarifications for technical reasons and reasons that concern the practical execution of EPOC (not sufficient information etc.) and cannot raise any objections regarding the Charter of fundamental rights as SPs are not competent to evaluate adherence to fundamental rights. In addition, SPs could abuse this provision to prolong or stop the proceedings.

Therefore, the executing state should be involved in an earlier stage. Latvia thinks that this should be done without prejudice to direct transmission of EPOC to addressee, rather the information to the executing state should be sent in parallel. Then the executing state could react in set deadlines if there are any issues regarding fundamental rights, national security or immunities.

Regarding Article 15, Latvia shares the views of MS that stated during FoP on 13.06.2018. that Article 15 and Article 16 firstly should be viewed conceptually. Therefore, Latvia will not express any comments on details and the formulations of the provisions.

We hope that under incoming AT presidency there will be a possibility for the MS to discuss our idea in more detail.

FINLAND

General comments

We thank the Presidency for your speedy start on this file and for the opportunity to provide some written comments on the proposed Regulation COM(2018) 225 FINAL. We look forward to continuing constructive and thorough discussions on this important matter.

We'll need to start by stressing that our views expressed here are only preliminary as our parliament is still analyzing the proposals and it will be up to them to confirm our final position. All in all, these proposals are rather delicate in nature and therefore member states need enough time to first carefully form their national positions and then to react should there be any new formulations or questions on the table in the future.

Having said that, please find below some general remarks from the Finnish delegation. We look forward to addressing all of these issues carefully at the working party level in order to find a solution that is both effective and satisfactory in terms of different fundamental rights relating to the subject matter.

There should be a role for the authorities of the member state of the service provider

We do share the aim behind the proposals. This is a field where progress is needed in order to tackle today's forms of crime effectively. Direct cooperation between the law enforcement authorities and the service providers is, however, a very delicate issue related to fundamental rights, data protection and even sovereignty of states. Therefore, a well-considered balance has to be found between these and the needs of the law enforcement.

As a whole, the role the proposal foresees for the service providers seems unrealistic - even more so, when taken into account that service providers may also be SMEs (small or medium sized enterprises). These providers are not, in most cases to say the least, in the position to guarantee, for example, that the order is not against the Charter or that its disclosure would not harm the fundamental interests of the Member State of the provider. Moreover, in practice this role would mean an excessive administrative burden and remarkable costs for the providers.

Therefore, we believe that in the direct cooperation there has to be a role also for the authorities of the member state of the service provider. We are confident that this role can be guaranteed without giving up on the efficiency of the instrument. It would indeed seem reasonable that these authorities are notified of the order at the same time when the order is sent to the provider (addressee).

However, and quite the contrary, it seems that in the proposal these authorities are only notified once there already is a problem and the process is already delayed. It would seem a lot more efficient to notify these authorities already at the early stage so that the authorities could start assessing the order as early as possible.

Furthermore, the national authorities of the member state of the service provider should, after having carefully assessed the notification, be able to reject the order if, for example, the order concerns a measure that would not be available in a similar national case or if the execution of the order would be against the fundamental principles of that member state. The threshold for accessing certain data should not be different in cross-border situations than it is in national situations in the Member State of the service provider.

The distinction between different forms of data could be clearer

In addition, we believe that the distinction between different forms of data (subscriber, access, traffic and content) could be more visible in the regulation. Inter alia, and in relation to what has been stated above, the role of the authorities of the Member State of the service provider is important especially when talking about traffic data and content data, since subscriber data is less problematic in terms of data protection. Moreover, subscriber data is also information that in practice is most often needed in cross-border investigation today and therefore achieving an effective solution concerning subscriber data would be highly useful in the whole of the system.

Conclusion

All in all, it seems obvious that these proposals (i.e. also the directive, which has already raised a number of relevant questions) still need thorough discussions on a working party level in order to guarantee that the system would work in practice in an efficient manner that also takes into account the issues relating to fundamental rights involved.

SWEDEN

The Presidency has in a discussion paper on selected provisions (doc no 9732/18) invited all member states to share their views on certain issues in the Regulation. In reply to this invitation, Sweden would like to contribute to the discussions by sharing the following comments.

The law enforcement authorities need efficient tools for gathering e-evidence from service providers. But we have serious doubts about leaving the responsibility for checking orders against national law and for guaranteeing the protection of fundamental rights to the service providers. This is a task for judicial authorities.

In our view, these issues could be overcome by involving the enforcing authority in the procedure to a greater extent and in a much earlier stage than what is proposed. The enforcing authority could receive a copy of the order at the same time as it is issued and transmitted to the service provider. In this way the enforcing authority could – in parallel with the ordinary procedure – assess matters such as whether the order is in conflict with the Charter of Fundamental Rights of the European Union, rules regarding immunities or privileges, or whether the execution of the order would violate fundamental rights such as freedom of the press and expression in other media in the enforcing member state.

As this procedure would run alongside with the ordinary one, it would not affect the effectiveness of the instrument. On the contrary, we believe that it would generate efficiency gains for all stakeholders involved. Costly, time consuming and legally complex assessment responsibilities would be lifted from the service providers and allow the issuing authority to correct or reconsider the order with the help of the enforcing authority, long before the enforcement phase. In addition, this tandem – or parallel – procedure would simplify the work of the enforcement authorities if the same order is subject to the enforcement procedure at a later stage.