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NOTE

From: Presidency
To: Delegations

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Subject: Recommendation for a Council Decision authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185)
- final text

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 participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185)

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 9 June 2017, the Committee of Parties to the Council of Europe Convention on Cybercrime (CETS No. 185) (T-CY) adopted a decision adopting the Terms of Reference for the preparation of a Second Additional Protocol to the Convention.
- (2) The Terms of Reference for the Second Additional Protocol include the following elements for reflection: provisions for more effective mutual legal assistance (a simplified regime for mutual legal assistance requests for subscriber information; international production orders; direct cooperation between judicial authorities in mutual legal assistance requests; joint investigations and joint investigation teams; requests in English language; audio/video hearing of witnesses, victims and experts; emergency Mutual Legal Assistance procedures); provisions allowing for direct cooperation with service providers in other jurisdictions with regard to requests for subscriber information, preservation requests, and emergency requests; clearer framework and stronger safeguards for existing practices of transborder access to data; safeguards, including data protection requirements.

- (3) The Union has adopted common rules that overlap to a large extent with the envisaged elements being considered for the Second Additional Protocol. This includes in particular a comprehensive set of instruments in order to facilitate judicial cooperation in criminal matters,¹ to ensure minimum standards of procedural rights², as well as data protection and privacy safeguards³.

¹¹ Council Act of 29.5.2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C197, 12.7.2000, p.1; Regulation (EU) 2018/1727 of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018; Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53; Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ L 162, 20.6.2002, p. 1; Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L328, 15.12.2009, p.42; Directive 2014/41/EU regarding the European Investigation Order in criminal matters, OJ L130, 1.5.2014, p.1.

² Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, p. 1, Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89.

- (4) The Commission also submitted legislative proposals for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, and for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings introducing, binding cross-border European Production and Preservation Orders to be addressed directly to a representative of a service provider in another Member State⁴.
- (5) Therefore, the Second Additional Protocol may affect common Union rules or alter their scope.
- (6) Articles 82(1) and 16 of the Treaty on the Functioning of the Union specify Union competencies in the area of judicial cooperation in criminal matters as well as in data protection and privacy. In order to protect the integrity of Union law and to ensure that the rules of international law and Union law remain consistent, it is necessary that the Union participates in the negotiations on the Second Additional Protocol.
- (7) The Second Additional Protocol should include the necessary safeguards for fundamental rights and freedoms, including the right in protection of personal data and privacy, 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 and principles of legality and proportionality of criminal offences and penalties recognised in Article 49 of the Charter. The Second Additional Protocol should be applied by the Member States in accordance with those rights and principles.

⁴ COM (2018) 225 final and COM (2018) 226 final.

- (8) 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 Council⁵ and delivered an opinion on 2 April 2019⁶,
- (9) 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.
- (10) 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.
- (11) 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.

⁵ 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).

⁶ OJ C ...

HAS ADOPTED THIS DECISION:

Article 1

1. The Commission is hereby authorised to negotiate, on behalf of the Union, the Second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185).
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 shall 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