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'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee (Part 2)/Council

Subject: Council Decision authorising the entering into negotiations on behalf of the European Union for a comprehensive international convention on countering the use of information and communications technologies for criminal purposes

Statement by the Commission

"The Commission welcomes the swift progress by the Council of the preparation and adoption of its decision to authorise the entering into negotiations on behalf of the European Union for a comprehensive international convention on countering the use of information and communications technologies for criminal purposes.

However, the Commission considers it legally incorrect that a Council Decision authorising the opening of negotiations indicates a substantive legal basis.

The Decision authorising the opening of negotiations is premised solely on the existence of conferred powers of the Union and not on a determination of a specific competence. Its effect is limited to authorising the Commission or the High Representative, as the case may be, to use its prerogatives under the EU Treaties in order to start negotiations. The scope of these negotiations is therefore determined by the scope of the powers of the Union. Besides, the freedom of the envisaged treaty partner of the Union as regards the determination of the scope of the negotiations cannot be limited by the Council Decision authorising the opening of the negotiations. Thus, the precise legal basis for the future agreement can only be determined after the content of the agreement is known.

The Commission also considers that the scope of the authorisation as set out in Article 1 of the Decision should extend to matters falling within all Union's competences, as defined by the Treaties. In this respect, the Commission considers it incorrect and contrary to case law of the Court to limit the authorisation to solely matters in respect of which 'the Union has adopted rules' and not to include matters covered by foreseeable future developments of Union law, such as the Commission's April 2018 e-evidence package (COM(2018) 225 and 226). Since the foreseeable developments of Union law fall within Union's exclusive competence, the Commission, as guardian of the Treaties, will monitor that there is no violation thereof.

The Commission also considers that the possible revision or further development of negotiating directives as set out in Article 2 of the Decision to be subject to the Commission's right of initiative for those matters.

The Commission will therefore pursue the negotiations in full respect of the above-mentioned provisions and principles.

The Commission reserves all its rights."