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From: Commission services
To: Delegations

Subject: Report of the Commission services on the second round 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, 6 November 2019

Delegations will find in the Annex an information note from the Commission on the above mentioned subject.

Report of the Commission services on the second round 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, 6 November 2019

The purpose of this information note is to report on the second negotiating round on an EU-US Agreement on cross-border access to electronic evidence that took place in Washington on 6 November 2019.

The European Parliament and Council were informed of the discussions that took place in the first round of negotiations on 25 September (12318/19 EU RESTRICTED) and a written report outlining the main agenda points was provided in advance of the second round (13369/19 EU RESTRICTED).

The second negotiating round enabled the EU and U.S. delegations to deepen their understanding of the respective provisions in the EU's electronic evidence package and the U.S. CLOUD Act and related legislation.

The Commission provided an update on the state of play on the internal EU rules and informed that a report from the European Parliament is still pending. The Commission underlined that the texts may evolve on a number of points during trilogue negotiations. The Commission stressed that an EU-US Agreement can only be concluded following agreement on the internal EU rules.

The United States presented the main elements of the UK-US Agreement on access to electronic data for the purposes of countering serious crime signed on 3 October 2019. The United States stated that they hope to shortly begin the 180 day certification process with Congress. The Commission raised a series of questions and concerns on the agreement and informed the U.S. Department of Justice that a letter had been sent to the UK authorities on 5 November 2019 with similar points. The discussions clarified that the first part of the CLOUD Act continues to apply outside the UK-US Agreement and the concluded agreement lifts barriers and does not take precedence over domestic legislation or create new obligations.

An exchange of views took place on categories of data that should be considered in the negotiations for the agreement, based on the existing definitions used in the EU, U.S. and the Council of Europe 'Budapest' Convention on Cybercrime. The Commission stressed that while the respective definitions are similar, it will be important that transactional data is treated in the same way as content data in terms of safeguards.

On types of offences that should be considered in the negotiations for the agreement, the Commission presented a possible approach based on a threshold and in addition, a list of offences covered by the EU-US Agreement. This could ensure that offences such as the sharing of child sexual abuse images or some terrorist offences are included. The United States committed to examining how the list covered by the e-evidence Regulation would correlate with existing US law.

The United States provided further information on administrative subpoenas and how subscriber information can be obtained. The Commission stressed the importance of an independent assessment and the involvement of a judicial authority in cross-border orders for e-evidence, in line with the EU's e-evidence proposals. The Commission also requested further information on the role and involvement of tribunals in the U.S. criminal law system.

An exchange of views took place on which service providers are covered by the respective EU and US legislation. The Commission stressed the importance of clarity on this point in the EU-US Agreement and that these discussions will need to be developed, subject to the wider questions of scope and application of the EU-US Agreement. A discussion took place on both the definitions of service providers and the types of service providers to be covered by the Agreement.

A significant part of the discussions focussed on the need for strong privacy, data protection and procedural rights safeguards.

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The Commission set out the privacy and data protection safeguards that will need to be included in the EU-US Agreement, given the unique circumstances of direct cooperation with service providers. The Commission, presented the need of a lawful basis for the processing of personal data by service providers, as set out in Article 6(1) of the General Data Protection Regulation, and indicated that the need for the controller to comply with a ‘legal obligation’ represents the most stable legal basis. Both sides agreed that the Umbrella Agreement should be applicable to the agreement. The Commission also outlined the additional safeguards required as set out in the EU mandate. The United States committed to explore the possible inclusion of these additional safeguards. The United States underlined that the future agreement should ensure that EU and domestic legislation in EU Member States does not block service providers from responding to orders.

The Commission raised the issue of data protection safeguards being applied at both Federal and State level in the United States.

The United States highlighted its concerns on the rule of law situation in a number of EU Member States.

The Commission outlined the non-discrimination requirements under EU law. In line with the EU’s negotiating mandate, the Commission stressed that the EU-US Agreement should have a broad personal scope of persons that could be relevant in a criminal investigation. At the same time, any exclusions of categories of persons, whether legal or natural, should be fully reciprocal.

The United States provided further information on life imprisonment in the United States. The Commission highlighted the requirements under the Charter of Fundamental rights.

On the death penalty and freedom of speech, the United States presented the arrangements agreed with the United Kingdom and the requirements under U.S. constitutional law. The Commission stated that it will assess the conformity of these provisions with the Charter of Fundamental Rights.

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The Commission provided further clarifications of the meaning of the reference in the EU mandate to “the specific safeguards for data whose disclosure would be contrary to the essential interests of a Member State”. The Commission stressed that while this provision is rarely used, a range of different provisions exist in the respective jurisdictions and Mutual Legal Assistance Agreements. The United States will provide further details on the relevant U.S. legislation.

A brief discussions took place on other safeguards to be considered as part of the negotiations for the agreement. While non-exhaustive, the Commission highlighted procedural rights in general, judicial review, targeting restrictions and minimisation and notification of the authorities and the data target as important topics.

The second negotiating round concluded with a discussion on the next steps. It was agreed that the third negotiating round will take place in Washington on 10 December, the day before the EU-US JHA Ministerial.
