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NOTE

From: General Secretariat of the Council

To: Delegations

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

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

– Note from the Presidency

NOTE FROM THE PRESIDENCY – JHA COUNSELLORS 17 JUNE 2022

Following the sixth political trilogue on 14 June 2022, the Presidency consults Member States in order to prepare the next steps of the negotiations.

1. Report on the substance of the exchanges on 14 June.

a) Provisional agreements.

As discussed in COREPER on 15 June 2022, the political trilogue held on 14 June has been a turning point in these negotiations. Both legislators have confirmed their willingness to finalise soon.

Following the bilateral contacts organised by the Presidency with Member States on 7 and 10 June 2022, the Presidency was able to **provisionally agree with the Parliament on 48 lines in the texts** (24 in the Regulation, 24 in the Directive). The updated four-column-tables have been sent to the Member States (WK8661/22 and WK 8662/22). These provisionally agreed lines are:

- In the Regulation :
 - Article 2 (“Definitions”): Lines 131, 132, 138, 140, 141, 145
 - Article 3 (“Scope”): Line 159
 - Article 4 (“Issuing authority”): Lines 164, 167, 170, 175
 - Article 5 (“Conditions for issuing a European Production Order”): Lines 53, 178, 180, 181, 182, 183, 184, 185, 186
 - Article 6 (“Conditions for issuing a European Preservation Order”): Lines 70, 213
 - Article 7a (“Platform”) : Line 247
 - Article 9 (“Execution of an EPOC”): Line 279

- In the Directive :
 - Article 2 (“Definitions”): Lines 43, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56
 - Article 4 (“Notifications and languages”): Lines 68, 69, 71
 - Article 5 (“Sanctions”): Lines 73, 74
 - Article 6 (“Central authorities”): Lines 76, 77, 78
 - Article 7 (“Transposition”): Lines 82, 83
 - Article 9 (“Entry into force”): Line 87
 - Article 10 (“Addressees”): Line 89

These agreements are provisional, nothing being agreed until everything is agreed.

b) Political discussions.

Aside from this endorsement of the progress made at technical level, this trilogue was the occasion to discuss political issues.

i) Scope of the Regulation.

On request of the Presidency, the Parliament has confirmed that national situations are excluded from the scope of the Regulation. As concerns have been voiced by several Member States on this issue, the Presidency is working on a possible drafting to submit to Parliament to clarify this in the text.

ii) Issuing conditions.

The Parliament has referred to its proposals on Recital 30 (line 54) and Recital 30a (line 55) on the issuing authorities. The Presidency has referred to the case law of the European Court of Justice (in particular C-584/19) to express its reservation but has shown its openness to clarify the exact situations aimed at by this proposal of the Parliament. Further technical exchanges are needed.

iii) Scope of the notification.

As regards the scope of the notification for productions orders on traffic data not requested for identifying the user and content data, after in-depth discussions, the Parliament has proposed the following system built on the last proposal from the Presidency:

- if there are reasonable grounds to believe that the commission of the offence and the residency of the person whose data is sought are in the issuing State, there should be a notification to the executing authority, solely for information with no possibility for the notified authority to oppose the execution of the order ;
- if there are no such grounds, there should be a notification to the executing authority with grounds for refusal and suspensive effect.

The Parliament has stressed the particular importance of the suspensive effect of the notification in the latter case.

The Presidency has reserved its position pending the consultation of Member States.

iv) Grounds for refusal.

Three particular grounds were on the agenda:

- *the ground for refusal on fundamental rights* : The Parliament has praised for a duplication of the drafting of such a ground in Directive 2014/41 of 3 April 2014 regarding the European Investigation Order in criminal matters (“EIO Directive”). The Presidency has reiterated its openness to insert such ground, provided it reflects the latest stage of the case law of the European Court of Justice. Referring to the drafting of such a ground in Regulation 2018/1805 of 14 November on the mutual recognition of freezing and confiscation orders, the Presidency has indicated that it could consider adding to this formulation a mention of “Article 6 TEU” ;

- *the ground on double criminality* : The Parliament has advocated for the insertion of such a ground as in the EIO Directive. The Presidency has underlined the fact that the e-Evidence Regulation already provides for a limitation of offences for which orders can be issued, which is not the case in the EIO Directive. The Presidency has highlighted the disadvantages of a general and transversal ground which could lead to a *de facto* harmonisation on offences not covered by EU law. The Presidency has indicated that it needed to be discussed further with Member States. Consideration could be given to the fact that the very specific situations which the Parliament wants to cover with this ground could be addressed with a different method;
- *the ground on the restriction of the use of the order, under the law of the executing State, to a list of offences which does not include the offence for which the order was issued* : The Parliament could consider not adding this ground to the list if the ground on fundamental rights include a reference to Article 6 TEU and if its concern on the ground on double criminality could be addressed.

v) Special regime linked to Article 7 TEU

The Parliament has presented its idea of a specific regime in which orders issued by judicial authorities in a Member State subject to a procedure under Article 7 TEU should only be executed after an explicit written approval of the executing authority. Stressing the fact that this derogatory regime has not been recently debated with Member States, the Presidency has underlined the specific nature of the Article 7 TEU procedure and, in light of the case law of the European Court of Justice, has shown some strong reservations on the idea of inserting a systematic and derogatory regime. In order to find a compromise, a reference to this procedure in a recital, linked to the ground for refusal on fundamental rights, and only reflecting the case-law of the European Court of Justice, could be foreseen.

vi) Platform.

Colegislators have acknowledged their common objective of a platform to authenticate the orders and secure the transfers. The entry into force of this Regulation will not be subject to the setting up of this platform. The drafting of this provision needs to be specified at technical level, with the support of the Commission.

2. Next steps.

This trilogue has taken stock of the progress made at technical level, of the numerous convergences and of the political willingness to move forward on this file. In this context, there seem to be an opportunity to finalise the negotiations in the next weeks, if the conditions are met. The Presidency will make every possible effort in that perspective. Two technical meetings will take place next week and informal meetings will be organised in parallel. If sufficient progress is confirmed, the Presidency will reiterate its proposal to hold another political trilogue before the end of June with the view of taking decisive steps.

This perspective requires a constructive approach from both legislators. In order to identify solutions, the Presidency is organising a JHA Counsellors meeting on Friday 17 June 2022. The mentioned items in Part 1 will be discussed to confirm the way forward and the position the Presidency can defend on behalf of the Council.