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NOTE

From: Presidency
To: Permanent Representatives Committee/Council

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
- Progress report

Background

The legislative package consisting of the proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and the proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings was submitted by the Commission in 2018. After the adoption of the general approach in the Council and of the report of the Parliament, the negotiations in trilogues started in February 2021. From the outset, the negotiations have been challenging as the co-legislators had diverging views on quite a few key elements of the texts.

In particular, the issue of when and under which conditions a European Production Order addressed to a service provider in another state would need to be notified to the authority in the state of the service provider proved to be a major difficulty. The file was therefore progressing relatively slowly during the first year of negotiations.

The negotiations took up speed as from spring this year. Three political trilogues were held in a good atmosphere of cooperation in March and June 2022 and a global compromise deal on the legislative package appeared to be within reach at the end of the mandate of the French Presidency. However, the positions on a few important topics still diverged and therefore agreement on global compromise was not possible to achieve.

Progress under the Czech Presidency

The Czech Presidency continued the intensive work on the basis of the accomplishments of the French Presidency. A few open issues proved to be very challenging to solve. Several months of technical discussions between the institutions proved necessary to clarify those issues, about which the COPEN Working Party, JHA Counsellors or Coreper were regularly informed and consulted.

During the last steps of the negotiations, the most difficult discussions focused on three aspects.

The details of the regime for notification of orders to the authorities in the state in which the addressee (legal representative or designated establishment of the service provider) is located have constituted the major difficulties in the negotiations. In particular, the issue of the so called residence criterion, which would ensure that notifications are not needed in cases where the person concerned resides in the issuing state, proved challenging to solve. The Council thereby strived to ensure that purely and pre-dominantly national cases would not need to undergo the sometimes work-intensive process of notification.

The rules in the Regulation on whether the European Production Orders should be addressed to the service provider acting as data controller rather than to the service provider processing the data on behalf of the data controller raised several technical, but still very important issues, which the co-legislators found difficult to agree on. The Council continuously insisted on the fact that a too strict or simplistic rule could lead to situations that are detrimental to the investigation.

The wording and character of the rules on the grounds for refusal also raised several issues. Essentially, the Council insisted that judicial authorities must retain some margin of discretion.

On 29 November 2022, the 8th and probably final trilogue took place. The atmosphere during the trilogue was constructive with both co-legislators showing flexibility, but with difficult exchanges on the most controversial issues, as both parties strongly defended their positions.

As a global conclusion of the trilogue, a provisional agreement on the remaining substantive parts of the Regulation and the Directive was reached. The Presidency informed the Parliament that the provisional agreement is still subject to the technical details that are under finalisation at technical level. The rest of the remaining minor points in both texts will be finalised at the technical level.

The general assessment of the Presidency is that the provisional compromise agreement will prove acceptable to the Council. Even if certain aspects are not ideal from the Council's perspective, the provisional agreement is no doubt the best possible outcome the Council could reach.

Next steps

Following the provisional agreement reached with the Parliament, the Presidency has together with the Parliament and the Commission engaged in intensive efforts to finalise the last remaining technical issues in the Regulation and the Directive.

The Presidency aims to ensure that this work is concluded as soon as possible, so that the full political agreement can be submitted to Member States for endorsement. Provided that such endorsement will be received, the formal adoption of the new legislation would then follow some time in the beginning of 2023.