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NOTE

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Subject:	Presidency progress report on the proposal for a Directive on the resilience of critical entities

The present report sets out the work done so far in the Council's preparatory bodies and gives an account of the state of play in the examination of the above mentioned proposal.

The report has been drawn up under the responsibility of the Presidency and it is prepared in view of the JHA Council of the 9-10 December 2021. The Council will be invited to take note of the report.

**Presidency progress report on the proposal for a
Directive on the resilience of critical entities**

The present report sets out the work done so far in the relevant Council's preparatory body and gives an account of the state of play in the examination of the above-mentioned proposal. The report has been drawn up under the responsibility of the Presidency and is prepared in view of the Council of Home Affairs Ministers of 9 December 2021.

The Council will be invited to take note of the report.

The progress report of the Slovenian Presidency builds on that of the preceding Portuguese Presidency of the Council of the European Union. As such, the present report focuses on developments that have devolved within the current semester. The Slovenian Presidency expresses its sincere gratitude for the excellent cooperation with the preceding Portuguese Presidency on this file.

I. INTRODUCTION

1. On 16 December 2020, the Commission adopted the proposal for a Directive on the resilience of critical entities (the "CER Directive")¹ to replace the current Directive on the identification and designation of European Critical Infrastructure (the "ECI Directive")², in need of overhaul in view of the current challenges faced by the Union and its Member States. Concurrently, the European Commission tabled the proposal for a Directive on measures for a high common level of cybersecurity across the Union (the "NIS2 Directive")³, focusing on the resilience against cyber threats, whereas the CER Directive concentrates on the non-cyber, physical threats.

¹ Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities. Doc. ST 14262/20 + ADD 1

² Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.

³ Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148. Doc. ST 14150/20 +ADD1.

2. The aim of the CER Directive, based on Article 114 TFEU, is to contribute to strengthening the level of protection and resilience of critical entities that operate infrastructures and provide services essential for vital societal functions or economic activities, thereby ensuring the good functioning of the internal market.
3. In this context, the proposal on the CER Directive represents an expansion of the scope and the level of involvement of the EU on the matter. On the one side, the CER proposal covers 10 sectors (energy, transport, banking, financial market infrastructures, health, drinking water, waste water, digital infrastructure, public administration and space) while the ECI Directive, currently still in force, covers only two sectors (transport and energy). On the other hand, in line with policy trends, the proposal emphasises cross-sectoral and cross-border interdependencies and focuses on resilience thinking, in which the physical protection of infrastructure is but one element alongside risk prevention and mitigation, business continuity and recovery. The new proposal also moves away from the focus of the 2008 ECI Directive on terrorism towards an all-hazard approach, covering both natural and man-made disasters that the infrastructures may suffer, with the exception of cyber threats, which are covered by the NIS2 Directive proposal.
4. The Directive is negotiated under the Ordinary Legislative Procedure. In the European Parliament, the committee responsible for the proposal is the Committee on Civil Liberties, Justice and Home Affairs (LIBE), while the committees for opinion are the Foreign Affairs (AFET), the Industry, Research and Energy (ITRE), Internal Market and Consumer Protection (IMCO) and Transport and Tourism (TRAN). The rapporteur for the file is Michal Šimečka (Renew, Slovakia).
5. The Slovenian Presidency participated in the first, informal technical meeting with the LIBE Committee together with the Portuguese Presidency on 23 June 2021. On 6 October 2021, the Slovenian Presidency together with the French Presidency met with the team of the rapporteur of the LIBE committee to discuss respective progress attained on the file. The European Parliament adopted its Report on the Proposal on 18 October.

6. In conformity with better regulation Rules, Feedback received by the Commission on the Proposal between 16 December and 8 April 2021 from 23 responding stakeholders was also published on 1 July 2021. Most respondents welcomed the Proposal and its objective to strengthen the resilience of critical entities in the European Union.
7. The European Data Protection Supervisor was consulted according to Article 42(1) of Regulation 2018/17251 on the Proposal and published its formal comments on 13 August 2021, specifically welcoming the requirement in Article 8 of the Proposal for competent authorities and other national authorities to cooperate and consult each other. This cooperation with data protection supervisory authorities ideally would occur in a given case, for example a data breach or a controversial processing of personal data, but also strategically, shaping each supervisory authority's understanding and knowledge by a regular exchange on problem patterns and developments. However, it seems sufficient that the Proposal has left the details of such cooperation to the actors at national level.

II. WORK WITHIN THE COUNCIL PREPARATORY BODIES

8. In the Council, the examination of the proposal is carried out in a specific formation of the Working Party on Civil Protection, dedicated to the Critical Entities Resilience Directive (hereinafter PROCIV-CER). This formation includes delegates designated by the Member States to follow the discussions on the CER Directive proposal and to deliver consolidated national positions in this lead Working Party, while taking into consideration the crosscutting nature of the file.
9. Under the Slovenian Presidency, the proposal has been examined in seven informal videoconferences of the members of PROCIV-CER (19 July, 15 September, 19-20 October, 16-17 November, 1 December), representing over 60 hours of discussions.
10. The Portuguese Presidency worked closely with the Slovenian Presidency in order to facilitate the continuation of the discussions in the PROCIV-CER Working Party and to ensure smooth progression on the file in the Council. In the spirit of said cooperation, the timeline for prospective drafting suggestions on the proposal was already announced in May 2021.

11. In this complex multi-sector file, the Presidency attaches great importance to coordination with other ongoing negotiations of relevant Union legislation. The Presidency regularly kept the PROCIV-CER Working Party informed of the evolution of the relevant discussions on the NIS2 Directive and DORA Regulation proposals, reiterating the need for close coordination by the Presidency as well as by the Member States (amongst different lead ministries for these files). As part of the coordination efforts, the PROCIV-CER Chair kept close contact with his counterparts responsible for the HWPCI (in charge of NIS2 Directive negotiations) and the Working Party on Financial Services (leading body for DORA Regulation discussions). In view of a more coordinated future implementation, the Presidency also further developed (in Presidency compromises) various references in the CER text to foster better cooperation between CER national authorities and those under NIS2 and DORA.
12. Based on the comments received from Member States, the Slovenian Presidency has produced five Presidency compromises on the CER Directive. The intention of the compromises was finding common ground among the majority of the Member States, at the same time as producing a balanced and sound compromise that would allow for the increase the level of resilience of critical entities across the Union.
13. It was important for the Presidency to establish clear set of rules in the CER Directive to define the relation between CER and other sectorial relevant Union and national legislation. Regarding NIS2 and DORA, the Presidency followed the line of the Commission proposal that establishes that many articles of CER shall not apply to the sectors of banking, financial market infrastructures and digital infrastructure as they are covered by NIS2 and DORA. Beyond NIS2 and DORA, the Presidency extensively reflected on the issue of equivalence starting from the premise that Member States need to retain a certain degree of flexibility when establishing equivalence, within set parameters.
14. The Presidency considers vital that this Directive should not be an obstacle for the Member States to safeguard national security and defence. At the same time, references to security issues should be shaped in a way so as to not undermine the harmonisation effect of the Directive. The Presidency proposed a balanced way forward on this matter.

15. The Presidency welcomed the concept of Critical Entities of particular importance. Regarding the related advisory missions, the Presidency found important to further emphasise the role of the Member State where the critical entity is located as well as of those Member States to which the critical entity provides an essential service. The Presidency also proposed the addition of formalised channels for discussions between two or more Member States which host connected critical entities.

III. CONCLUSIONS

16. The Presidency expresses its sincere appreciation for the commitment of the Member States and the Commission during the negotiation process. Furthermore, the Presidency acknowledges the important efforts made by Member States in terms of inter-ministerial coordination at national level on the file.
17. The Presidency is convinced that the concerns expressed by Member States can be addressed while still preserving the ambitious goal of approximation of national laws, improving the resilience of critical entities and strengthening supervision and enforcement. The Presidency hopes that a compromise supported by a broad majority of delegations can be found soon and is working hard so that a General Approach is adopted before the end of the year.
18. In the light of the above, the Permanent Representatives Committee and Council are invited to take note of the progress made on the examination of the proposed Directive.
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