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From:	Presidency
To:	Delegations
Subject:	Digital files - state of play

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The Presidency wishes to underline the importance to internal security of several on-going discussions and legislative negotiations on digital files, and to outline how certain law enforcement capabilities will evolve in the future.

Technological development and digitalisation are game changers for our societies across all sectors. Retaining and accessing relevant information, analysing it and acting upon it within legally prescribed powers is the very essence of law enforcement work. It is central to ensuring the capacity of criminal justice systems and law enforcement agencies to access data in a digital environment, including encrypted communications data and electronic evidence. The situation is exacerbated by the limitless exploitation of technological development in the criminal underworld. Whilst there is a general tendency for more and more legislative proposals to be addressed horizontally and thus viewed in terms of their overall impact, the direct effects of each proposal will be felt - though not negotiated - in our sector. General digital policy developments need also to benefit the JHA sector while addressing and minimising the associated risks. This, in turn, requires a high degree of coordination across a wide range of policies, including the internal market, telecoms and data protection.

The JHA community needs to be able to understand and steer the debate on all the issues at stake, including where legislative proposals will have a direct effect on the sector but are handled in other sectors, such as the AI Act or the ePrivacy Regulation. COSI should continue to monitor and discuss relevant concepts and updates on the different initiatives. These efforts should focus on creating a positive narrative and consolidating views on the justice and internal security needs related to technological development and digitalisation. National coordination processes, and the consolidation of national positions between sometimes differing views, play a key role and should ensure that internal security sector considerations are channelled into the working fora leading the negotiations on the various legislative proposals.

The following provides an overview on the current status of certain digital files relevant to internal security/law enforcement interests.

AI Act

Following the first consolidated compromise text submitted by the French Presidency in June 2022 (10069/22), the Czech Presidency picked up the work on the AI Act in the Telecom Working Party. The Czech Presidency - which had made reaching a general approach on this file a political priority - submitted several compromise texts, which generally received positive feedback from Member States. The final compromise text for the General Approach (13955/22) was distributed on 3 November and discussed in WP TELECOM on 8 November 2022. On 18 November, Coreper endorsed the final compromise text, which will be submitted for formal adoption by the TTE Council on 6 December 2022. Trilogues are expected to start in the first quarter of 2023 once the Parliament has finalised its position.

Though the JHA communities have been involved, to some extent, in the negotiations on the AI Act due to the significant consequences for the JHA sector (especially for law enforcement authorities), it remains crucial to closely follow this file, especially during the trilogue phase. It is likely that the European Parliament's position will diverge significantly from the Council mandate on a range of issues, including crucial ones (e.g. Article 5 on the ban of real-time remote biometric identification).

Regulation to prevent and combat child sexual abuse (CSA)

The Commission presented its proposal for a Regulation on laying down rules to prevent and combat CSA (9068/22) in May 2022. The Czech Presidency organised eight meetings of the LEWP-Police to examine the proposal in its entirety and to table compromise texts on three chapters. To ease discussions on this highly technical proposal, the Czech Presidency hosted two workshops together with the Commission. The first was held on 29 September 2022 and concerned '*Detection of New and Known Child Sexual Abuse Material and Grooming in Unencrypted and Encrypted Communications*'. The second, on '*Age verification techniques and detection of child sexual abuse material in encrypted environments*', took place on 16 November. Two discussion papers were prepared to streamline exchanges during these workshops. The Czech Presidency will issue reports outlining the main outcomes of these workshops. The Council Legal Service is preparing a written opinion on the proportionality of detection orders to be issued shortly.

Work in the European Parliament has not formally started yet but the lead committee (LIBE) and the rapporteur (Zarzalejos, EPP/ES) have been appointed. Time is of the essence, given the expiry of the Interim Regulation in August 2024, which would prevent the continuation of voluntary detection of child sexual abuse online in the most relevant services (interpersonal communications).

E-evidence

The e-evidence package, consisting of a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, has been negotiated in trilogues since the beginning of 2021.

Negotiations have been slow and challenging; more specifically the Parliament has insisted on rules guaranteeing that at least sensitive cross-border production orders to a service provider are notified to the authorities in the state of the said provider.

Under the French Presidency, a breakthrough in the negotiations took place. The legislators were close to agreeing on a global balanced compromise package in June this year that would have taken the interests of both parties into account. However, a few important issues remained unsolved. The Czech Presidency has worked intensively to solve these issues, so an agreement seems very close and may still be confirmed by the end of 2022. Finalising these discussions is crucial to enable law enforcement and judicial authorities to fight crime more effectively.

ePrivacy and lawful access to electronic evidence, including data retention

Since the annulment of the **Data Retention** Directive by the European Court of Justice (ECJ) in 2014, Member States have been seeking a solution, possibly through the adoption of a new legal instrument at EU level. The need to advance work on the matter was expressed at the highest political level by the European Council (11 December 2020 and 25 March 2021) and the Justice and Home Affairs Ministers (11 March 2021).

In addition to the COPEN (Data Retention) Working Party, which has followed the developments of the ECJ case law and has been consulted by the Commission on possible ways forward (16 June 2021), the topic has been discussed in the Telecom Working Party in the context of the ePrivacy Regulation negotiations. On 10 February 2021, Coreper adopted a general approach on this legislative proposal, which includes important access to electronic evidence and data retention aspects (Article 2(2)(d) - Scope: Article 6(1)(d) - Opening for data processing for law enforcement and public security purposes; Article 7(4) -An explicit provision on data retention; Article 11 - Exceptions to the obligations and rights provided for in the instrument).

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