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NOTE

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

Delegations are provided with an updated overview on the state of play of certain digital files relevant to internal security/law enforcement interest.

Artificial Intelligence Act

On 6 December 2022, the Council adopted its general approach on the Artificial Intelligence (AI) Act (14954/22). The Council is waiting for the European Parliament's position to start the trilogues. The IMCO/LIBE vote on the AI Act is expected at a joint committee meeting on 11 May, and the plenary vote in June 2023 (tbc).

The JHA communities have been involved, to some extent, in the work of the TELECOM Working Party leading on the AI Act. Given that there are significant consequences for the JHA sector (especially for law enforcement authorities), e.g. Article 5 on the ban of real-time remote biometric identification, it remains crucial to closely follow this file, including during the trilogue phase.

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. A progress report was adopted in December 2022 under the Czech Presidency. The Swedish Presidency has organised eight meetings of the LEWP-Police so far to examine compromise proposals on the subject matter and definitions, on the removal, blocking and delisting orders, on victims' rights, on preservation of information, on the tasks and independence criteria of Coordinating Authorities and competent authorities, on the EU Centre, on the data collection and transparency reporting, and on the entry into force of the draft Regulation. The articles on detection obligations are the only texts that have not been examined at technical level, pending the written opinion of the Council Legal Service, and political guidance from Coreper. The Council Legal Service opinion was issued at the end of April (8787/23). It considers that the draft Regulation presents particularly serious legal risks, notably in relation to detection obligations in private communications. In the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) is the lead committee for the negotiations on the proposal. It appointed MEP Javier Zarzalejos (EPP, ES) as rapporteur in October 2022. Following a request by the EP coordinators, the European Parliament Research Service issued a complementary impact assessment in April 2023 covering *inter alia* the impact of the proposal on fundamental rights, the respect of the prohibition of general monitoring obligations and the necessity and proportionality of the obligations for providers to detect, report and remove CSA material. The Rapporteur presented his report to LIBE on 26 April. The deadline for tabling amendments is 17 May. The European Parliament report might be scheduled for adoption at the October plenary.

Data Act

The Commission adopted the proposal for a Regulation on harmonised rules on fair access to and use of data (Data Act) on 23 February 2022. The Council's mandate for negotiations with the European Parliament was confirmed in Coreper on 22 March 2023 and a first trilogue took place on 29 March 2023. The concerns pertaining to the JHA community are mostly addressed in Article 1(4) of the Council's mandate: While the Commission proposal states that the Regulation shall not affect legal acts in the area of prevention, investigation, detection or prosecution of criminal offences, as well as in the area of defence and national and public security, the Council's mandate adds that voluntary arrangements for the exchange of data between private and public entities are also unaffected by the Regulation. Article 27 provides for rules on the prevention of unlawful intergovernmental access and sets out a framework for the provision of data to countries with which there are specific arrangements in place.

European Digital Identity (revision of the eIDAS Regulation)

On 6 December 2022, the Council adopted its general approach regarding the framework for a European Digital Identity. The revised Regulation aims to ensure universal access for people and businesses to secure trustworthy electronic identification and authentication by means of a digital wallet.

At the European Parliament, the file has been assigned to the Industry, Research and Energy Committee (ITRE), with the Rapporteur being Romana Jerković (S&D, Croatia). The Parliament adopted its position on 16 March 2023, and the negotiations started thereafter.

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, is planned to be formally adopted during the summer 2023.

Negotiations were complex but the final result should give law enforcement and judicial authorities an important tool to fight crime more effectively.

ePrivacy and lawful access to electronic evidence, including data retention

The proposal for a Regulation on the respect for private life and the protection of personal data in electronic communications (proposal for e-Privacy Regulation) was published on 10 January 2017.

It will replace Directive 2002/58/EC (e-Privacy Directive) and specify the General Data Protection Regulation (GDPR). The objective is to reinforce trust, security and confidentiality of the communications in the Digital Single Market (including content and metadata, e.g. sender, time, location of a communication), while providing flexible regulatory tools to enable innovation, defining clearer rules on tracking technologies such as cookies (including more friendly ways for users to express consent) as well as on spam. It applies both to natural and legal persons and includes in its scope also market-players using the internet (e.g. 'Over-the-Top communication services', as instant messaging apps and web-based e-mail services), with the aim of ensuring a level playing field for companies.

The file is negotiated in the Telecom Working Party. On 10 February 2021, Coreper adopted a negotiating mandate on this legislative proposal. As far as JHA is concerned, the Council mandate 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).

Trilogues started in May 2021, with one trilogue having taken place under each of the Portuguese, Slovenian and French Presidencies. Since May 2021, the Parliament and the Council have been discussing the proposal at technical level. No compromise between the Parliament and the Council has been found so far. The Swedish Presidency has discussed the file at technical level with the European Parliament.

Media Freedom Act

On 16 September 2022, the Commission presented a proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act, EMFA). The proposal aims at improving the internal media market. From a law enforcement perspective, the proposal provides for a list of criminal offences covered by the notion of “serious crimes”, with reference to some of the criminal offences listed in Article 2 (2) of the Council Framework Decision 2002/584/JHA. In addition, Article 4(2)(c) also provides for a prohibition to deploy spyware on device used by media service providers, unless certain conditions are met (e.g. justified on grounds of national security or in the case of serious crimes investigations).

The Council Legal Service Opinion on the legal basis was issued on 4 April 2023. In essence, the CLS considers that the EMFA proposal as it stands can be based on art. 114 TFEU, but some adjustments are required in certain provisions in order to make it legally sound as an internal market act.

In the Council, the negotiations take place in the Audiovisual and Media Working Party (AVMWP) where amendments, including on Art 4, have been tabled by the Presidency following oral and written exchanges of views with delegations. The aim is to reach a General Approach (or a Council negotiation mandate) by June 2023. At the EYCS Council on 16 May there will be a progress report and a policy debate on EMFA. Further compromise proposals are expected for the working party meetings planned for the two last weeks of May.

The Parliament confirmed the Committee on Culture and Education (CULT) as lead committee with LIBE and IMCO asked for opinions. The CULT Committee Chair, Sabine Verheyen (EPP, DE) was appointed Rapporteur. The vote at CULT Committee is scheduled in September, and the plenary vote in October 2023 (tbc). Both co-legislators aim at reaching a first reading agreement before the next EP elections (May 2024).
