



Brussels, 21 May 2021  
(OR. en)

8969/21

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**Interinstitutional File:  
2020/0365 (COD)**

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**LIMITE**

<b>PROCIV 62</b>	<b>ECOFIN 466</b>
<b>JAI 580</b>	<b>ENV 330</b>
<b>COSI 102</b>	<b>SAN 314</b>
<b>ENFOPOL 198</b>	<b>CHIMIE 58</b>
<b>CT 70</b>	<b>RECH 235</b>
<b>COTER 62</b>	<b>DENLEG 39</b>
<b>ENER 197</b>	<b>RELEX 461</b>
<b>TRANS 317</b>	<b>HYBRID 28</b>
<b>TELECOM 220</b>	<b>CYBER 155</b>
<b>ATO 36</b>	<b>ESPACE 59</b>

**NOTE**

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From:	Presidency
To:	Delegations
No. Cion doc.:	14262/20 + ADD 1
Subject:	Presidency progress report on the proposal for a Directive on the resilience of critical entities

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The present report sets out the work done so far in the Council's preparatory bodies and gives an account on 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 7-8 June 2021. The Council will be invited to take note of the report.

**I. INTRODUCTION**

1. On 16 December 2020, the Commission adopted the proposal for a Directive on the resilience of critical entities (the “CER Directive”)<sup>1</sup> with the aim to replace the current Directive on the identification and designation of European Critical Infrastructure (the “ECI Directive”)<sup>2</sup>. Together with the CER Directive, the European Commission also tabled the proposal for a Directive on measures for a high common level of cybersecurity across the Union (the “NIS2 Directive”)<sup>3</sup>, focusing on the resilience against cyber threats whereas the CER Directive concentrates on the non-cyber, physical threats.
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. When adopted, the CER Directive will repeal the current ECI Directive, adopted in 2008, which needs updates in view of the new challenges the Union and its Member States are facing.
3. In fact, the 2019 evaluation of the implementation of the ECI Directive concluded that current European and national practices do not sufficiently cater for the evolving threats (including terrorist and hybrid threats and increased natural disasters linked to climate change) and interdependencies across a range of sectors. It was also perceived that mechanisms in place were not sufficient to provide adequate conditions for critical infrastructure operators to meet the increasingly complex operational challenges they face. It was therefore considered important to ensure that entities providing vital services to society can prevent, resist, absorb and recover from disruptions to their operations, regardless of the type of risks that may affect them.

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

<sup>2</sup> 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.

<sup>3</sup> 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.

4. 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 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, covered 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.
5. 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). The Portuguese Presidency held an informal exchange of views with representatives of the rapporteur and with administrators from the LIBE committee on 20 April 2021. An informal exchange of views with administrators from the IMCO Committee and representatives of the IMCO rapporteur for opinion also took place on 8 March 2021.
6. The European Economic and Social Committee adopted its opinion on 27 April 2021<sup>4</sup>.
7. On February 2021, the Permanent Representatives Committee decided to consult the European Committee of Regions on the proposal. Thus far, the European Committee of the Regions has not given its opinion yet.

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<sup>4</sup> ST 8416/21

8. The CER Directive proposal was discussed in the Informal VTC of the Ministers of Home Affairs, which took place on 12 March 2021. Based on a framing document issued by the Portuguese Presidency<sup>5</sup>, Ministers had an exchange of views, in public session, about the proposal and welcomed its main objectives and scope, and the overall objective of enhancing resilience in a coherent fashion. Ministers also have highlighted the need for flexibility and a balanced approach taking into account Member States' primary responsibility for national security.

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<sup>5</sup> ST 6630/21

## II. WORK WITHIN THE COUNCIL PREPARATORY BODIES

9. 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 cross-cutting nature of the file.
10. After the translations of the proposal were published on 9 February 2021, the examination of the proposal in the informal videoconference of the members of PROCIV-CER started on 18 February. Since then, 5 other informal videoconferences took place (on 3 March, 31 March, 23 April, 7 May and 27 May 2021), representing almost 40 hours of discussions.
11. During the first two informal meetings, the Commission presented the proposal and its impact assessment and gave a comprehensive explanation to general questions asked by the Member-States. Delegations welcomed the shift from the protection of infrastructures to an approach focused on resilience, the extension of the scope, as well as the focus on preparedness and risk assessments. At the same time, several delegations raised questions and expressed concerns regarding, *inter alia*, the choice of the internal market-related legal basis, the terminology (shift from "critical infrastructure" to "critical entities"), the need for recognising Member States' prerogatives in the area of national security in the proposal, the sectoral coverage (rationale and scope of the additional sectors covered) and the interplay with other Union legislation, in particular the proposal on the NIS2 Directive.

12. Starting from the meeting on 31 March 2021, the Presidency led a careful read-through of the proposal, taking into account the important innovations included in the CER Directive (by comparison with the previous ECI Directive) and allowing for delegations to comment and present questions in writing followed by clarifications by the Commission and, when needed, the Council Legal Service. Member States have asked more than seven hundred written questions to the Commission in total, which reflects the multi-sector and multi-stakeholder ambition of the proposal. Discussions focused *inter alia* on the content of strategies and risk assessments to be developed by Member-States, the process for identification of critical entities, the resilience measures to be adopted by critical entities, the ways of handling and communicating classified and sensitive information, the role of the competent authorities, the concept of entities equivalent to critical entities, the background checks and the specific oversight over critical entities of particular European significance.
13. Additionally, the informal videoconference of the members of PROCIV-CER WP discussed the interaction of the CER Directive with sectoral legislation, notably the above-mentioned proposal on the NIS2 Directive and the proposal on the Regulation on digital operational resilience for the financial sector (the "DORA Regulation"). The Commission (DG CONNECT and DG FISMA) presented these proposals, underlining the main elements of interaction with the CER Directive. The Chair of the Horizontal Working Party on Cyber Issues (HWPCI) also attended a meeting of the informal videoconference of the members of PROCIV-CER WP to present the state of play of the discussions on the NIS2 Directive. The Presidency regularly kept the PROCIV-CER WP 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).

14. As part of the coordination efforts, the PROCIV-CER Chair kept a 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). The state of play of the CER Directive negotiations were also presented by the PROCIV-CER Chair at the meeting of the Horizontal Working Party on Enhancing Resilience and Countering Hybrid Threats (29 March 2021) and by the Co-chair at the Presidency Workshop on Protection of Public Spaces and Critical Infrastructures (18 March 2021).

### III. CONCLUSIONS

15. The Presidency expresses its sincere appreciation for the commitment of the Commission and the Member States during the thorough read-through process and related discussions. Furthermore, the Presidency acknowledges the important efforts made by Member States in terms of inter-ministerial coordination at national level on the file.
16. It is the Presidency's conviction that the work done so far, though demanding, has allowed delegations to receive further explanations from the Commission on the fundamental elements of the CER Directive proposal and, simultaneously, to highlight their main issues regarding the proposal, which should be further reflected upon during the discussion of the proposal, thus facilitating the future work with a view to reaching a general approach in due time.
17. The read-through of the articles of the proposal is expected to be concluded at the last informal videoconference of the members of PROCIV-CER WP during the Portuguese Presidency, to be held on 21-22 June 2021.
18. The Portuguese Presidency is working closely with the incoming Slovenian Presidency in order to facilitate the continuation of the discussions in the PROCIV-CER WP and to ensure the smooth progress on the file in the Council. As part of this cooperation with the incoming Slovenian Presidency, the timeline for drafting suggestions was already announced in May 2021. Drafting suggestions are invited with three different deadlines, the first of it (referring to Chapters I ("Subject matter, scope and definitions") and II ("National frameworks on the resilience of critical entities") and the Annex ("Sectors, subsectors and types of entities") of the proposal) being 3 June 2021. The 2<sup>nd</sup> and the 3<sup>rd</sup> calls for drafting suggestions will be in place until 30 June and 3 September 2021, respectively.
19. 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.