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General Secretariat

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Subject:	Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities -4-column table resulting from the technical meeting of 8 February 2022

Delegations will find in Annex the four-column table concerning the above legislative proposal. The annotations on the 4th column are the result of the technical meeting of 8 February 2022. Only the rows discussed in that technical meeting were included in this document.

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the resilience of critical entities

2020/0365(COD)

Outcome of technical trilogue of 8 February 2022

	Commission Proposal	EP Mandate	Council Mandate	Draft Agreement
Article 2				
55	Article 2 Definitions	Article 2 Definitions	Article 2 Definitions	Article 2 Provisionally agreed on technical trilogue of 8/02.
Article 2, first paragraph, introductory part				
56	For the purposes of this Directive, the following definitions apply:	For the purposes of this Directive, the following definitions apply:	For the purposes of this Directive, the following definitions apply:	Provisionally agreed on technical trilogue of 8/02.
Article 2, first paragraph, point (1)				
57	(1) “critical entity” means a public or private entity of a type referred to in the Annex, which has been identified as such by a Member State in accordance with Article 5;	(1) “critical entity” means a public or private entity of a type referred to in the Annex, which has been identified as such by a Member State in accordance with Article 5;	(1) "critical entity" means a public or private entity belonging to the categories of a type referred to in the third column of the table in the Annex, which and has been identified as such by a Member State in accordance with Article 5;	(1) Discussed on technical trilogue of 8/02: Provisional agreement on Council text with the term of "categories" in square brackets to be checked later for coherence with NIS2. “critical entity” means a public or private entity belonging to the [categories] referred to in the third column of the table in the Annex, and has been identified as such by a Member State in accordance with Article 5; Text Origin: Council Mandate

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Article 2, first paragraph, point (2)				
58	(2) “resilience” means the ability to prevent, resist, mitigate, absorb, accommodate to and recover from an incident that disrupts or has the potential to disrupt the operations of a critical entity;	(2) “resilience” means the ability to prevent, resist, mitigate, absorb, accommodate to and recover from an incident that disrupts or has the potential to disrupt the operations of a critical entity;	(2) "resilience" means the a critical entity's ability to prevent, protect against, respond to , resist, mitigate, absorb, accommodate to and recover from an incident that disrupts or has the potential to disrupt the operations of a critical entity;	(2) Discussed in technical trilogue on 8/02: -Provisional agreement on the insertion "critical entity's" - Provisional agreement on the insertion "protect against, respond to" -Possibility to reintegrate the definition of incident (fully in line with what would be agreed on article 2.3). This issue may be discussed with the respective Legal Services. We will then revert to the issue. “resilience” means a critical entity’s ability to prevent, protect against, respond to, resist, mitigate, absorb, accommodate and recover from an incident [that disrupts or has the potential to disrupt the operations of a critical entity];
Article 2, first paragraph, point (3)				
59	(3) “incident” means any event having the potential to disrupt, or that disrupts, the operations of the critical entity;	(3) "incident" means any event having the potential to disrupt, or that disrupts, the operations of the <u>the provision of an essential service by a</u> critical entity;	(3) "incident" means any event having the potential to significantly disrupt, or that disrupts, the operations of the critical entity provision of an essential service;	(3) Discussed on the technical trilogue of 8/02: -provisional agreement on "the provision of the essential service by a critical entity" (instead of "operations") -EP shows concerns over the insertion of the word "significantly" because they perceive it as a

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			PUBLIC	limitation of the scope. Council explained that they added significantly to be more concrete; Council does not think that all incidents, including minor ones, need to be covered. EP shares that not all minor problems need to be reported. Need to be seen together with the implications for risk assessments, identification and reporting. Possibility to explore new language. To be reverted to this wording later. "incident" means any event having the potential to [significantly] disrupt, or that disrupts, the provision of an essential service;
Article 2, first paragraph, point (4)				
60	(4) “infrastructure” means an asset, system or part thereof, which is necessary for the delivery of an essential service;	(4) "infrastructure" means an asset, system or part <u>assets, including facilities, systems and equipment, or parts</u> thereof, which is <u>are</u> necessary for the delivery of an essential service;	(4) " critical infrastructure" means an asset, facility, equipment, network , system or part thereof, which is necessary for the delivery provision of an essential service;	(4) Discussed on the technical trilogue of 8/02: -Provisional agreement on using "provision" (instead of delivery) but EP highlights that it needs to be in line with the use of this term in the rest of the Directive. -Provisional agreement to include "network" -Regarding singular vs plural: To be checked with respective Legal Services and then we will revert to this issue. To be kept in mind a single asset needs to be covered in the definition. -Regarding the insertion of "critical

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			PUBLIC	infrastructure", the EP proposes to keep it in square brackets for now and will further reflect on the issue. EP is concerned with the impact on the overall proposal if the term critical infrastructure is kept. Need to revert to the issue later. -Provisional agreement on: "[critical] infrastructure means an asset, facility, equipment, network, system or part thereof, which is necessary for the provision of an essential service;" (With the issue of plural vs singular to be checked)
Article 2, first paragraph, point (5)				
61	(5) "essential service" means a service which is essential for the maintenance of vital societal functions or economic activities;	(5) "essential service" means a service which is essential for the maintenance of vital societal functions, <u>economic activities, public health and safety, the environment or the rule of law</u> or <u>economic activities</u>;	(5) "essential service" means a service which is essential indispensable for the maintenance of vital societal functions or economic activities;	(5) Discussed on the technical trilogue of 8/02: -Council explained that "essential" is replaced by "indispensable" to avoid the repetition of essential. EP thinks that essential and indispensable are not fully synonymies and perceives that this may limit the scope. Provisional agreement to replace essential by "crucial". -The issue of the insertion of "rule of law" or "public health and safety, the environment" needs to be further discussed. The Council has important concerns (including legal ones) against these inclusions particularly the inclusion of "rule of law". The Commission highlighted the this paragraph is in their view

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				related to the sectorial coverage (particularly regarding the status of public administration in the Annex) as well as the potential connection of this paragraph with article 6.1.c. Council suggested to identify a new place in the text for a reference to rule of law.
Article 2, first paragraph, point (6)				
62	(6) “risk” means any circumstance or event having a potential adverse effect on the resilience of critical entities;	(6) “risk” means any circumstance or event having a potential adverse effect on the resilience of <u>ability of a critical entity to provide an essential service</u> ;	(6) “risk” means any circumstance or event having a potential adverse effect on the resilience of critical entities;	(6) Discussed on the technical trilogue on 8/02: -To revert to this issue later, particularly after discussion of article 2.7. EP highlighted that there is a definition of risk on NIS2 and raised the need for coordination. Council highlighted that NIS2 does not seem to have definition of risk assessment.
Article 2, first paragraph, point (7)				
63	(7) “risk assessment” means a methodology to determine the nature and extent of a risk by analysing potential threats and hazards and evaluating existing conditions of vulnerability that could disrupt the operations of the critical entity.	(7) "risk assessment" means a methodology to determine the nature and extent of a risk by analysing <u>assessing</u> potential threats and hazards and evaluating against the resilience of a critical entity, <u>analysing</u> existing conditions of vulnerability that could disrupt <u>lead to the disruption of</u> the operations of the <u>a</u> critical entity- <u>and evaluating the potential adverse effect the disruption of operations could have</u>	(7) "risk assessment" means the overall process undertaken by the national competent authorities pursuant to Article 4, or by the critical entities pursuant to Article 10, in order to determine the nature and extent of relevant threats, vulnerabilities and risks that could lead to an incident-a methodology to determine the nature and extent of a risk by analysing potential threats and hazards and	(7) Discussed on the technical trilogue on 8/02: -To revert to this issue later as it needs further assessment. Council has a problem with the word methodology and EP is open to the idea of replacing it. EP would in principle prefer not to mention cross references to other articles. Commission will provide drafting proposals for both the definitions of risk and risk assessment.

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		<u>on the provision of essential services;</u>	evaluating existing conditions of vulnerability that could disrupt the operations of the critical entity.	
Article 2, first paragraph, point (7)(a)				
63a		<u>(a) 'standard' means standard as defined in Article 2, point (1), of Regulation (EU) No 1025/2012 of the European Parliament and of the Council¹;</u> <u>1. Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ L 316, 14.11.2012, p. 12)</u>		(a) Discussed on the technical trilogue of 8/02: -Need to revert to this issue later. Council raised concerns on this addition (including legal ones). EP explained that they wanted to promote the use of the existing standards and recalled the need to see this paragraph together with article 13a. The Commission highlighted that the purpose of standard is to help to a more coherent implementation and that this supports convergence.
Article 2, first paragraph, point (7)(b)				
63b		<u>(b) 'technical specification' means technical specification as defined in Article 2 point (4), of Regulation (EU) No 1025/2012;</u>		(b) Discussed on the technical trilogue of 8/02: -Need to revert to this issue later. Council raised concerns on this addition (including legal ones). EP explained that they wanted to promote the use of the existing standards and recalled the need to see this paragraph together with article 13a. The Commission

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				highlighted that the purpose of standard is to help to a more coherent implementation and that this supports convergence.
Article 2a				
63c			Article 2a Minimum harmonisation	
Article 2a, first paragraph				
63d			Without prejudice to their obligations under Union law, Member States may adopt or maintain provisions of national law with a view to achieving a higher level of resilience of critical entities.	Discussed on the technical trilogue on 8/02: -Need to revert to the issue later. Council included this to provide clarity. Council highlighted that article 114 (legal basis) may call for full or minimal harmonisation and it felt the need to be concrete (for MS and for critical entities which will read the Directive). EP felt that this article is not needed given the legal basis but it does not fundamentally oppose to it, however, it requires further reflection. EP felt that this new article may promote incoherence on the implementation.
Chapter II				
64	Chapter II National Frameworks on the Resilience of Critical Entities	Chapter II National Frameworks on the Resilience of Critical Entities	Chapter II National Frameworks on the Resilience of Critical Entities	Chapter II Provisionally agreed on the technical trilogue on 8/02

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Article 3				
65	Article 3 Strategy on the resilience of critical entities	Article 3 Strategy on the resilience of critical entities	Article 3 Strategy on the resilience of critical entities	Article 3 Provisionally agreed on the technical trilogue on 8/02
Article 3(1)				
66	1. Each Member State shall adopt by [three years after entry into force of this Directive] a strategy for reinforcing the resilience of critical entities. This strategy shall set out strategic objectives and policy measures with a view to achieving and maintaining a high level of resilience on the part of those critical entities and covering at least the sectors referred to in the Annex.	1. <u>Following a consultation open to all affected stakeholders</u> , each Member State shall adopt by [three years after entry into force of this Directive] a strategy for reinforcing the resilience of critical entities. This strategy shall <u>take into account the Union strategy on resilience prepared by the Critical Entities Resilience Group, referred to in Article 16, and</u> set out strategic objectives and policy measures with a view to achieving and maintaining a high level of resilience on the part of those critical entities and covering at least the sectors referred to in the Annex.	1. Each Member State shall adopt by [three years after entry into force of this Directive] a strategy for reinforcing enhancing the resilience of critical entities. This strategy shall set out strategic objectives and policy measures, building upon relevant existing national and sectoral strategies or documents , with a view to achieving and maintaining a high level of resilience on the part of those critical entities and covering at least the sectors referred to in the Annex.	1. Discussed on the technical trilogue on 8/02: Only the addition of "Following a consultation open to all affected stakeholders," was discussed. - Need to revert to this issue later. For the Council, the consultation is important but, given the difficulties on organising open consultations (including regarding information security), Council suggested to add "if possible" at the beginning. The reference to "all" is particularly problematic for the Council and causes legal problems. For the EP, the consultation is also important. Council also proposed to add "as adequate". EP would consider particularly problematic if any future language will put in question the happening of the consultation itself.