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**WORKING PAPER**

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**REPORT**

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From:	General Secretariat of the Council
To:	Delegations
Subject:	Informal Outcome of Proceedings of the informal VTC of the members of CATS on 8 February 2021

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On behalf of the Presidency, delegations will find in Annex an informal Outcome of Proceedings from CATS on 8 February 2021.



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**Informal Outcomes of Proceedings**

**CATS - 8 February 2021**

## 1. Adoption of the agenda

The agenda was adopted unchanged.

## 2. e-Evidence – state of play as regards ongoing legislative work and international negotiations (CoE, US)

The Presidency provided an update on progress on the development of EU e-evidence instruments, noting that interinstitutional negotiations with the European Parliament would start on 10 February 2021.

With regard to the external aspects of the matter, the Commission informed delegations that there had been some delays in the work of the Council of Europe on the 2nd second Additional Protocol. The discussions were progressing, however, with the aim of finalising the text of the protocol by May 2021. The Commission was preparing for the continuation of the EU-US negotiations following the taking of office of the new US administration. During the short discussion that followed, delegations underlined the importance of adopting the e-evidence rules now under negotiation and the need to find working compromise solutions.

## 3. EPPO – state of play

Referring to its non-paper (5521/21), the Commission provided information on the budget (EUR 45 million for 2021, an increase of EUR 7 million compared to the amount previously planned), the Delegated Regulation on data protection (which entered into force on 10 January 2021) and on external relations (notification of the EPPO as competent authority for UNTOC and Council of Europe instruments and for existing EU cooperation agreements in the field of justice; identification of non-EU states with which new cooperation agreements could be concluded). The Commission urged Member States to move forward quickly with the necessary adaptations of their national legislation and with the procedures for appointing European Delegated Prosecutors (EDPs).

The EPPO reported that 22 EDPs had already been appointed or were in the process of being appointed, and that 80 members of staff had been recruited (with a further 50 posts expected to be filled in 2021). The EPPO also stated that the central management system was ready to start operating, that connections had already been established with the majority of participating Member States and that the tests carried out with the other participating Member States were successful.

As in previous meetings, CY and FI again raised concerns about the European Chief Prosecutor's practice of not accepting half-time EDPs, despite this being allowed under the EPPO Regulation, and about their remuneration.

CY also questioned why, at the joint CONT-LIBE meeting on 26 January, the European Chief Prosecutor had provided an estimation according to which 10 % of the expected cases to be considered by the EPPO will concern Cyprus, while the Cypriot authorities arrive at much lower figures. With respect to a request for a legal opinion, the Council Legal Service noted that, as the EPPO Regulation is already under

implementation was already in force, the Commission would be better placed to check the conformity of the conditions of employment with the Regulation.

Concluding the discussion, the Presidency emphasised that it was willing to make all necessary efforts to support CY and FI, including by liaising with the Commission and the EPPO, in order to find the most satisfactory solution.

Finally, the Presidency presented the results of a questionnaire submitted in January, which showed that, whilst there had been some positive developments with respect to adaptations of national law, selection of EDPs and notifications, rapid progress would need to be made to ensure that the EPPO would become operational in March.

#### **4. Tenth round of mutual evaluations**

The Presidency briefly presented its document showing four options for the topic of the upcoming 10th round of mutual evaluations. Delegations were invited to reflect on these options. CATS will come back to the choice of topic at its next meeting in May.

#### **5. EU's UNCAC implementation review – state of play**

The Presidency briefly presented the state of play and emphasised that it would do what it could to finalise the preparations for the implementation review as quickly as possible. It explained that it expected it to be possible to adopt a statement of preparedness, addressed to the UNCAC secretariat, shortly thereafter. The Commission and FR took the floor to support the Presidency.

#### **6. Data retention – discussion on the latest developments**

The discussion generated a high level of interest and 20 delegations took the floor, with most declaring data retention a matter of high priority and essential for safeguarding public security and ensuring effective criminal investigations. There was consensus on the need to achieve a comprehensive approach at EU level, with a number of delegations (EE, ES, NL, FR, LU, ES, SK) speaking in favour of new legislation on the subject, a position supported by the EU Counter-Terrorism Coordinator (CTC). It was argued that new EU legislation on data retention was needed urgently due to the legal vacuum existing at that time and that it should: (1) include measures, criteria and safeguards for the protection of fundamental rights; (2) be combined with changes in secondary legislation such as the GDPR; and (3) be coordinated with the provisions of other instruments that affect the data retention regime (the ePrivacy Directive and the Digital Services Act), in particular with a view to ensuring that the latter would not limit the scope of the future data retention regime.

Both the CTC and delegations encouraged the Presidency to take up this matter at the highest political level (JHA Council), in addition to examining it further at technical level (CATS for strategy and COPEN data retention for in-depth analysis).

In relation to targeted retention, there was wide consensus on the difficulties of implementing the regime set out by the Court (i.e. geographical and/or user criteria). It was considered that this type of regime could lead to discrimination and could be ineffective and insufficient given the needs of law enforcement authorities. It was felt that a coherent regime based on limitations of use/access rather than on limited retention would be preferable, both for authorities and for service providers. Most delegations emphasised the need to better define the concepts related to IP addresses and civil identity data and noted that the reference to source IP addresses was insufficient to reliably identify an individual.

The Council Legal Service suggested further exploring the options, taking into account the case-law of the Court, such as the possibility of using traffic and content data that have been retained for other/commercial purposes for combating serious crime, once a warrant has been issued (*La Quadrature du Net*, Joined Cases C 511/18 and C 512/18, 6 October 2020, paragraph 167). To allow for this, Articles 6a and 6b of the text of the ePrivacy Regulation (5840/21) due to be submitted to Coreper I for adoption as a mandate for negotiations could be modified, by replacing the permission provided for in the wording under consideration at that time with a general obligation to retain data, and combining this obligation with the provisions on the retention period and the time limits for complaints (set out in Article 7).

The Commission pointed out that the Court's interpretation is rooted in the Charter, meaning that changes in secondary legislation could only lead to a reinforcement of the ECJ position in future case-law. It also encouraged delegations to be aware of the political reality, i.e. that the Parliament was keen to limit mass surveillance rather than to allow more intervention on the part of Member State authorities. On the substance, the Commission expressed concern about the limitations of the use of IP addresses as defined by the Court and emphasised the need to base the provisions on wider concepts, such as access data rather than civil identity data.

## **7. Justice aspects of the proposal for a Digital Services Act**

The Presidency presented its paper (5522/21) and then invited delegations to comment. A total of 15 delegations took the floor. All of them welcomed the opportunity to discuss the proposal in CATS and requested that CATS (as well as COSI and possibly certain working groups) be regularly informed of and/or consulted on developments with regard to the negotiations. A small number of delegations (FR, DE, IT, NL) explicitly encouraged the Presidency to put the Digital Services Act on the agenda for an upcoming JHA Council meeting. Many of the other delegations noted, however, that another Council formation is *chef de file* and that the JHA formations should contribute to their work, not duplicate it. Most delegations made clear that they still needed time to analyse the text of the draft Act in detail. The following issues – in order of frequency of mention – were highlighted as meriting particular attention from a JHA perspective.

- Territoriality, jurisdiction and cross-border effects: quite a few delegations noted that the proposal appeared unclear in this regard.
- Definition of illegal content: a number of delegations felt that there should be a common understanding – or even a common definition – of the types of illegal content that would be covered by the draft Regulation.
- Fundamental rights and freedom of expression.
- The exact scope of responsibility and liability of service providers, including for 'harmful content'.

- The relation and interaction between the Digital Services Act and JHA instruments (the terrorist content Regulation and the draft e-evidence instruments and the Child Abuse Directive).
- The system of representation of service providers in Member States.

The EU Counter-Terrorism Coordinator was critical of the proposal and noted that the Act would de facto maintain immunity for the platforms. He called for platforms to bear greater liability and for the introduction of a duty of care as regards harmful content. He also questioned the rationale behind the rule banning compulsory monitoring (Article 6 of the draft Regulation).

At the end of the discussion, the Commission gave a short presentation of the key aspects of the proposal.

The Presidency concluded the point by stating that CATS would continue to follow the issue, but that duplication of work being carried out by the competent working group would be avoided.

## 9. AOB

The Presidency announced that:

- a draft document on judicial training was under preparation and would be issued shortly;
- the next CATS meeting would take place on 10 May.

The meeting was then closed.

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