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European Union

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DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject: Position of the Council at first reading with a view to the adoption of a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL on cooperation between the courts of the Member States in the
taking of evidence in civil or commercial matters (taking of evidence)
(recast)
– Draft Statement of the Council's reasons

I. INTRODUCTION

1. The Commission adopted the abovementioned revision proposal¹ on 31 May 2018, and submitted it to the Council and Parliament. The legal basis is Article 81 (2) (Judicial cooperation in civil matters) of the Treaty on the Functioning of the European Union, and the proposal is subject to the ordinary legislative procedure.
2. Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the Taking of Evidence in civil or commercial matters is an important instrument for European judicial cooperation. The instrument provides a framework for cross-border judicial assistance between Member States in the collection of evidence across borders and for direct taking of evidence cross-border. The revision proposal aims to adapt the cooperation mechanisms and transmission workflows in the existing Regulation to the technical developments provided by digitalisation and the use of information technology (IT). In particular, the Commission proposal calls for the establishment of a decentralised IT system and its mandatory use for the exchange of requests and documents between the Member States' authorities. The revision proposal also aims at broadening and strengthening the direct taking of evidence cross-border.

¹ 9620/18.

3. The European Economic and Social Committee (EESC) adopted its opinion² on this proposal and the proposal for a Regulation amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (proposal on the Service of Documents) on 17 October 2018. The EESC found both proposals to be in line with the digital single market strategy in relation to e-government, especially as regards the need to take steps to modernise public administration and achieve cross-border interoperability.
4. On 13 February 2019, the European Parliament adopted its first-reading position on the Taking of Evidence proposal, with 37 amendments to the Commission proposal by 554 votes to 26, with 9 abstentions.
5. On 13 September 2019, the European Data Protection Supervisor submitted Opinion 5/2019 on this proposal and the proposal on the Service of Documents³.
6. At the JHA Council in June 2019, Ministers agreed that the judicial cooperation between the authorities in the context of this proposal and the Service of Documents proposal should be based on a secure decentralised IT system comprising interconnected national IT systems.

² 14013/18.

³ 12245/19.

7. The new proposed Regulation text provides that the Commission will be responsible for the creation, maintenance and future development of the reference implementation software. Because the original Commission proposal did not contain any financial statement on the potential impact on the budget of the EU, the Presidency has, in cooperation with the Commission and in line with Article 35 (1) subparagraph 2 of the Financial Regulation of the EU⁴, prepared an indicative financial statement⁵ setting out the estimated financial impact of the amendments on the budget.
8. On 2-3 December 2019, the Justice and Home Affairs Council reached a general approach on the normative part of the proposed Regulation and called for work on the Annexes to be finalised at technical level as soon as possible⁶. On February 2020, the Council reached a supplementary general approach⁷.
9. Pursuant to Article 3 of Protocol (No 21) to the Treaties on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, Ireland has decided to opt-in to this proposal.⁸ In application of Protocol (No 22) to the Treaties on the Position of Denmark, Denmark does not take part in the adoption of the proposed measures.
10. On the basis of the December 2019 and February 2020 general approach, the Presidency has been in contact with the European Parliament, with a view to reaching an early second reading agreement.

⁴ OJ L 193, 30.7.2018, p.1.

⁵ 14427/19.

⁶ 14601/19 + ADD1.

⁷ 5719/20.

⁸ Ireland opted-in on 17 October 2018 (see ST 13305/18). The UK did not made use of the possibility set out in Article 3 of Protocol (No 21) to take part in the adoption and application of this proposal.

11. Two trilogues were held, on 29 January 2020 and 30 June 2020, during which the representatives of the Presidency for the Member States and of the European Parliament had the opportunity to set out the cardinal points of their positions and explore the possibilities for finding compromise. The discussions resulted in a considerable convergence of views between the European Parliament and the Council on a draft compromise package⁹.
12. During the second trilogue, it was also agreed, with the support of the Commission, that the proposed Taking of Evidence Regulation should be presented and adopted as a recast of the current Taking of Evidence Regulation.
13. On 22 July 2020, COREPER II confirmed the final compromise text of a recast with view to the agreement reached with the European Parliament¹⁰.
14. On 10 September 2020, the compromise package of a recast was endorsed by the European Parliament's Committee on Legal Affairs. On 30 September, the Chair of the JURI Committee addressed a letter¹¹ to the Chair of COREPER II to inform him that, should the Council transmit formally to the European Parliament its position in the form presented in the Annex to that letter, he would recommend to the Plenary that the Council's position be accepted without amendment, subject to legal-linguistic verification, at the European Parliament's second reading.

⁹ 9248/20.

¹⁰ 9678/20 + ADD 1.

¹¹ 11357/20.

II. OBJECTIVE

15. This Regulation (recast) seeks to improve the efficiency and speed of the cross-border taking of evidence in the Union by exploiting the advantages of digitalisation for simplifying and streamlining the procedures for transmission of requests and ensuring that more use is made of direct taking of evidence by videoconferencing. It will for instance become easier for persons to be heard without requiring them to travel to another country. It will provide greater legal certainty and should thereby help to avoid delays and undue costs for individuals, businesses and public administrations, and encourage individuals and businesses to engage even more in cross-border transactions.
16. The proposal aims to digitise the transmission of requests for taking of evidence between competent authorities in different Member States. For this purpose, this Regulation calls for the establishment of a decentralised IT system. The Commission should be responsible for the creation, maintenance and future development of the reference implementation software in accordance with the principles of data protection by design and by default, which Member States should be able to apply instead of a national IT system.

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

A. PROCEDURAL CONTEXT

17. The European Parliament and the Council conducted negotiations with a view to concluding an agreement at the stage of the Council's position at first reading ("early second-reading agreement"). The text of the Council's position at first reading reflects the compromise package agreed between the two co-legislators, with the support of the Commission.

B. SUMMARY OF THE MAIN ISSUES

18. The main modifications are focusing on the following aspects:

- The concept of 'court' was defined in line with other Regulations in the field of judicial cooperation in civil and commercial matters in order to eliminate uncertainties and diverging interpretations among Member States.
- All communications and exchange of documents should be carried out through a secure and reliable decentralised IT system comprising national IT systems that are interconnected and technically interoperable, for example, based on e-CODEX. It also foresees that this communication and exchanges are to be carried out with due respect for fundamental rights and freedoms. The use of traditional means of communications should only take place in cases of disruption of the IT system or other exceptional circumstances. In order to simplify and accelerate the taking of evidence, videoconferencing or other distance communications technologies should be used more widely for direct taking of evidence by courts.
- The taking of evidence by diplomatic agents or consular officers within the area they are accredited, will be possible without the need for a prior request. Every Member State determines whether its diplomatic agents or consular officers have the power to take evidence as part of their functions.

IV. CONCLUSION

19. The Council's position at first reading reflects the compromise package agreed between the Council and the European Parliament, with the support of the Commission.

20. As indicated in paragraph 14 above, this compromise package was confirmed by a letter from the Chair of the European Parliament's Committee on Legal Affairs addressed to the Chair of COREPER II, on 30 September 2020¹².
21. The Council believes that its position at first reading represents a balanced package and that, once adopted, the new Regulation will significantly contribute to increasing the efficiency and speed of the cross-border taking of evidence by exploiting the advantages of digitalisation.
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¹² See doc. 11357/20.