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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee

Subject: Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings
- Analysis of the final compromise text

1. On 17 April 2018, the Commission submitted two proposals for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and a Directive laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.

2. The Council reached a general approach on the draft text of the Regulation at its meeting on 7 December 2018 and a general approach on the Annexes to the Regulation on 6 June 2019. The general approach to a draft text of the Directive was reached on 8 March 2019. The Portuguese, Slovenian, French, Czech and Swedish Presidencies of the Council have conducted negotiations with the European Parliament and the Commission with a view to a first reading agreement.
3. On 29 November 2022, a provisional agreement was reached, which after some complementary work at technical level resulted in the final compromise text set out in Annex to this note.
4. On 20 December 2022, the Permanent Representatives Committee performed a first analysis of the compromise text.
5. It is in this light that the Permanent Representatives Committee is invited to:
 - a) Analyse the final compromise texts regarding the Directive laying down harmonized rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings, as set out in the Annex to this note, and
 - b) confirm that the Presidency can indicate to the European Parliament that, should the European Parliament adopt its position at first reading as regards the Directive as set out in the Annex to this note, subject, if necessary, to revision of that text by the legal linguists of both institutions, the Council would approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.

DIRECTIVE (EU) 2023/...
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of ...

laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53 and 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure²,

¹ OJ C 367, 10.10.2018, p. 88.

² Position of the European Parliament of ... (not yet published in the Official Journal) and decision of the Council of

Whereas:

- (1) Network-based services can be provided from anywhere and do not require a physical infrastructure, premises or staff in the country where the relevant service is offered, nor in the internal market itself. As a consequence, it can be difficult to apply and enforce obligations laid down in national and Union law which apply to the service providers concerned, in particular the obligation to comply with an order or a decision by a judicial authority. This is the case in particular in criminal law, where Member States' authorities face difficulties with serving, ensuring compliance and enforcing their decisions, in particular where relevant services are provided from outside their territory.
- (2) Against that background, Member States have taken a variety of disparate measures to more effectively apply and enforce their legislation. This includes measures for addressing service providers to obtain electronic evidence that is of relevance to criminal proceedings.
- (3) To that end, some Member States have adopted, or are considering adopting, legislation imposing mandatory legal representation within their own territory, for a number of service providers offering services in that territory. Such requirements create obstacles to the free provision of services within the internal market.
- (4) There is a risk that, in the absence of a Union-wide approach, Member States will try to overcome existing shortcomings related to gathering electronic evidence in criminal proceedings by means of imposing disparate national obligations. This is bound to create further obstacles to the free provision of services within the internal market.

- (5) The absence of a Union-wide approach results in legal uncertainty affecting both service providers and national authorities. Disparate and possibly conflicting obligations are set out for service providers established or offering services in different Member States, which also subject them to different sanction regimes in case of violations. This divergence in the framework of criminal proceedings will likely further expand because of the growing importance of communication and information society services in our daily lives and societies. The foregoing not only represents an obstacle to the proper functioning of the internal market, but also entails problems for the establishment and correct functioning of the Union's area of freedom, security and justice.

- (6) To avoid such fragmentation and to ensure that undertakings active in the internal market are subject to the same or similar obligations, the Union has adopted a number of legal acts in related fields such as data protection³. To increase the level of protection for the data subjects, the rules of Regulation (EU) 2016/679 of the European Parliament and of the Council⁴ provide for the designation of a legal representative in the Union by controllers or processors not established in the Union but offering goods or services to individuals in the Union or monitoring their behaviour if their behaviour takes place within the Union, unless the processing is occasional, does not include processing, on a large scale, of special categories of personal data or the processing of personal data relating to criminal convictions and offences, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing or if the controller is a public authority or body.

³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31); Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

- (7) By setting out harmonised rules on the designation of establishments and the appointment of legal representatives of certain service providers in the Union for receipt of, compliance with and enforcement of decisions issued by competent authorities in the Member States for the purposes of gathering electronic evidence in criminal proceedings, the existing obstacles to the free provision of services should be removed, as well as the future imposition of divergent national approaches in that regard should be prevented. Level playing field for service providers should be established. This should not affect obligations on service providers deriving from other EU legislation. Moreover, more effective criminal law enforcement in the common area of freedom, security and justice should be facilitated.

- (8) The designated establishment and legal representative at issue should serve as an addressee for decisions and orders for the purpose of gathering electronic evidence on the basis of Regulation (EU) 2023/XXX of the European Parliament and of the Council⁵ [e-Evidence Regulation], Directive 2014/41/EU⁶, the Convention established by the Council in accordance with Article 34 of the Treaty on the European Union on mutual assistance in criminal matters between Member States of the Union⁷, including where those orders and decisions are transmitted in the form of a certificate. Recourse to the designated establishment or the legal representative should be in accordance with the procedures set out in the instruments and legislation applicable to the judicial proceedings, including whether the instrument permits the direct serving of orders in cross-border situations on the designated establishment or legal representative of the service provider, or is based on cooperation between competent judicial authorities. The competent authorities of the Member State where the designated establishment is established or the legal representative resides should act in accordance with the role set out for them in the respective instrument where an involvement is foreseen. Member States may also address decisions and orders for the purpose of gathering electronic evidence on the basis of national law to a natural or legal person acting as legal representative or designated establishment of a service provider on their territory.

⁵ Regulation (EU) 2023/XXX of the European Parliament and of the Council on European Production and preservation orders for electronic evidence in criminal matters.

⁶ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p.1.

⁷ Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, p. 1 and its Protocol, OJ C 326, 21.11.2001, p. 2.

- (9) Depending on whether service providers are established in the Union, are established in Member States not taking part in a legal instrument referred to in this Directive or are not established in the Union, Member States should ensure that service providers have the obligation to designate at least one establishment or legal representative by 6 months from the transposition deadline of this Directive or from the moment service providers start offering services in the Union for those service providers that will start offering services after 6 months from the transposition deadline of this Directive. Without prejudice to data protection safeguards, such designated establishment or legal representative could be shared between several service providers, in particular by small and medium-sized enterprises.
- (10) The obligation to designate an establishment or a legal representative should apply to service providers that offer services in the Union, meaning in one or more Member States. Situations where a service provider is established on the territory of a Member State and offers services exclusively on the territory of that Member State, should not be covered by this Directive.
- (11) For the purpose of gathering electronic evidence in criminal proceedings, Member States should be able to continue addressing service providers established on their territory for purely domestic situations in accordance with Union law and their respective national laws. Notwithstanding the possibilities currently provided for by domestic law to address service providers on their own territory, Member States should not circumvent the principles set out in this Directive and in Regulation (EU) 2023/XXX [e-Evidence Regulation].

- (12) Determining whether a service provider offers services in the Union requires an assessment whether the service provider enables either natural or legal persons, in one or more Member States, to use its services. However, the mere accessibility of an online interface in the Union, such as for instance the accessibility of the website or an e-mail address or other contact details of a service provider or an intermediary, taken in isolation, should be considered insufficient to determine that a service provider offers services in the Union within the meaning of this Directive.

(13) A substantial connection to the Union should also be relevant to determine the ambit of application of this Directive. Such a substantial connection to the Union should be considered to exist where the service provider has an establishment in the Union. In the absence of such an establishment, the criterion of a substantial connection should be based on specific factual criteria such as the existence of a significant number of users in one or more Member States, or the targeting of activities towards one or more Member States. The targeting of activities towards one or more Member States should be determined on the basis of all relevant circumstances, including factors such as the use of a language or a currency generally used in that Member State, or the possibility of ordering goods or services. The targeting of activities towards a Member State could also be derived from the availability of an application ('app') in the relevant national app store, from providing local advertising or advertising in the language generally used in that Member State, or from the handling of customer relations such as by providing a customer service in the language generally used in that Member State. A substantial connection is also to be assumed where a service provider directs its activities towards one or more Member States as set out in Regulation (EU) No 1215/2012 of the European Parliament and of the Council⁸. On the other hand, provision of the service in view of mere compliance with the prohibition to discriminate laid down in Regulation (EU) 2018/302 of the European Parliament and of the Council⁹ cannot, on that ground alone, be considered as directing or targeting activities towards a given territory within the Union. The same considerations should apply to determine whether a service provider offers services in a Member State.

⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

⁹ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60I, 2.3.2018, p. 1).

- (14) Different instruments falling within the scope of Title V, Chapter 4, of the Treaty on the Functioning of the European Union apply in the relationships between Member States when gathering evidence in criminal proceedings. As a consequence of this ‘variable geometry’ that exists in the common area of criminal law, there is a need to ensure that this Directive does not facilitate the creation of further disparities or obstacles to the provision of services in the internal market by allowing service providers offering services on their territory to designate designated establishments or legal representatives within Member States that do not take part in relevant legal instruments, which would fall short of addressing the problem. Therefore, at least one designated establishment or legal representative should be designated in a Member State that participates in the relevant Union legal instruments to avoid the risk of weakening the effectiveness of the designation provided for in this Directive and to make use of the synergies of having a designated establishment or legal representative for the receipt of, compliance with and enforcement of decisions and orders issued in the context of gathering electronic evidence in criminal proceedings, including under Regulation (EU) 2023/XXX [e-Evidence Regulation], Directive 2014/41/EU, the Convention established by the Council in accordance with Article 34 of the Treaty on the European Union on mutual assistance in criminal matters between Member States of the Union. In addition, designating a designated establishment or legal representative, which could also be utilised to ensure compliance with national legal obligations, makes use of the synergies of having a clear point of access to address the service providers for the purpose of gathering evidence in criminal matters.

- (15) Service providers should be free to choose in which Member State they designate their designated establishment or, where applicable, legal representative, and Member States may not restrict this free choice, e.g. by imposing an obligation to designate the designated establishment or legal representative on their territory. However, this Directive also contains certain restrictions with regard to this free choice of service providers, notably that the designated establishment should be established in, or where applicable, the legal representative should reside in a Member State where the service provider provides services or is established, as well as the obligation to designate a designated establishment or a legal representative in one of the Member States participating in a legal instrument referred to in this Directive. The sole designation of a legal representative should not be considered to constitute an establishment of the service provider.

(16) The service providers most relevant for gathering evidence in criminal proceedings are providers of electronic communications services and specific providers of information society services that facilitate interaction between users. Thus, both groups should be covered by this Directive. Providers of electronic communication services are defined in Directive (EU) 2018/1972 of the European Parliament and of the Council¹⁰. They include inter-personal communications such as voice-over-IP, instant messaging and e-mail services. This Directive should also be applicable to other information society service providers within the meaning of Directive (EU) 2015/1535 of the European Parliament and of the Council¹¹ that do not qualify as electronic communications service providers, but offer their users the ability to communicate with each other or offer their users services that can be used to process or store data on their behalf. This should be in line with the terms used in the Budapest Convention on Cybercrime. Processing of data should be understood in a technical sense, meaning the creation or manipulation of data, i.e. technical operations to produce or alter data by means of computer processing power. The categories of service providers included here are, for example online marketplaces providing consumers and businesses the ability to communicate with each other and other hosting services, including where the service is provided via cloud computing, as well as online gaming platforms and online gambling platforms. Where an information society service provider does not provide its users the ability to communicate with each other, but only with the service provider, or does not provide the ability to process or to store data, or where the ability to store/process data is not an essential part of the service provided to users, such as legal, architectural engineering and accounting services provided online at a distance, it would not fall within the scope of the definition, even if within the definition of information society services pursuant to Directive (EU) 2015/1535.

¹⁰ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

¹¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

- (17) Providers of internet infrastructure services related to the assignment of names and numbers, such as domain name registrars and registries and privacy and proxy service providers or regional internet registries for internet protocol ('IP') addresses, are of particular relevance when it comes to the identification of actors behind malicious or compromised web sites. They hold data that could allow for the identification of an individual or entity behind a web site used in a criminal activity, or the victim of a criminal activity.

- (18) Member States should ensure that service providers established or offering services on their territory provide their designated establishments and legal representatives with the necessary powers and resources to comply with those decisions and orders received from any Member State. Member States should also verify that the designated establishments or legal representatives residing on their territory have received from the service providers the necessary powers and resources to comply with decisions and orders received from any Member State and that they cooperate with the competent authorities when receiving those decisions and orders, in accordance with the applicable legal framework. The absence of such measures or their shortcomings should not serve as grounds to justify non-compliance with decisions or orders falling into the ambit of application of this Directive. Neither should service providers be able to exculpate themselves due to missing or ineffective internal procedures, as they are responsible for providing the necessary resources and powers to guarantee compliance with orders and national decisions. Nor should designated establishments or legal representatives be able to exculpate themselves by claiming, for example, that they are not empowered to deliver data. To this end, Member States should ensure that both the designated establishment or the legal representative and the service provider can be held jointly and severally liable for non-compliance with obligations deriving from the applicable legal framework when receiving decisions and orders falling within the scope of this Directive, with the effect that each of the designated establishment or the legal representative and the service provider may be sanctioned for non-compliance by either of them. In particular, the lack of appropriate internal procedures between the service provider and the designated establishment or the legal representative cannot be used by either side as a justification for non-compliance with those obligations. Joint and several liability should not apply for actions or omissions of either the service provider or the legal representative or the designated establishment which constitute a criminal offence in the Member State applying the sanction.

(19) Member States should ensure that each service provider established or offering services in their territory notifies in writing the central authority of the Member State where its designated establishment is established or where its legal representative resides, the respective contact details and any changes thereof. The notification should also provide information about the languages in which the designated establishment or the legal representative can be addressed, which should include one or more of the official languages in accordance with the national law of the Member State where the designated establishment is established or the legal representative resides, but may include other official languages of the Union, such as the language of its headquarters. Where a service provider designates several designated establishments or legal representatives in accordance with this Directive, Member States should ensure that such service provider indicates, for each designated establishment or legal representative, the precise territorial scope of its designation. The territory of all the Member States taking part in the instruments within the scope of this Directive should be covered. Member States should ensure that their respective competent authorities address all their decisions and orders in application of this Directive to the indicated designated establishment or legal representative of this service provider. Member States should ensure that the information notified to them in accordance with this Directive is publicly available on a dedicated internet page of the European Judicial Network in criminal matters to facilitate coordination between Member States and use of the designated establishments or legal representative by authorities from another Member State. Member States should ensure that this information is regularly updated. The information may also be further disseminated to facilitate access to this information by competent authorities, such as via dedicated intranet sites or forums and platforms.

- (20) Service providers should be subject to effective, proportionate and dissuasive sanctions for the infringement of its obligations deriving from this Directive. Member States should, by the date set out in this Directive, notify the Commission of their rules and of measures regarding such sanctions and should notify it, without delay, of any subsequent amendment affecting them. Member States should also inform the Commission on an annual basis about non-compliant service providers, relevant enforcement action taken against them and the sanctions imposed. Under no circumstances should the sanctions determine a ban, permanent or temporary, of service provision. Member States should coordinate their enforcement action where a service provider offers services in several Member States. Central authorities should coordinate to ensure a coherent and proportionate approach. The Commission should facilitate such coordination if necessary, but needs to be informed of cases of infringement. This Directive does not govern the contractual arrangements for transfer or shifting of financial consequences between service providers, designated establishments and legal representatives of sanctions imposed upon them.
- (20a) When determining the appropriate sanction applicable to infringements by service providers, the competent authorities should take into account all relevant circumstances, such as the financial capacity of the service provider, the nature, gravity and duration of the breach, whether it was committed intentionally or through negligence and whether the service provider was held responsible for similar previous breaches. Particular attention should, in this respect, be given to micro enterprises.
- (21) This Directive is without prejudice to the powers of national authorities in civil or administrative proceedings, including where such proceedings can lead to sanctions.

(22) In order to ensure the application of this Directive in a consistent manner, additional mechanisms for the coordination between Member States should be put in place. For that purpose, Member States should designate one or more central authorities that can provide central authorities in other Member States with information and assistance in the application of this Directive, in particular where enforcement actions under this Directive are considered. This coordination mechanism should ensure that relevant Member States are informed of the intent of a Member State to undertake an enforcement action. In addition, Member States should ensure that central authorities can provide each other any relevant information and with assistance in those circumstances, and cooperate with each other where relevant. Cooperation amongst central authorities in the case of an enforcement action may entail the coordination of an enforcement action between competent authorities in different Member States. It should aim to avoid positive or negative conflicts of competence. For the coordination of an enforcement action, central authorities should also involve the Commission where relevant. The obligation of these authorities to cooperate does not prejudice the right of an individual Member State to impose sanctions on service providers that fail to comply with their obligations under this Directive. The designation and publication of information about central authorities will facilitate the notification by service providers of the designation and contact details of their designated establishment or legal representative to the Member State where their designated establishment is established or legal representative resides. To this end, Member States should inform the Commission of their designated central authority, or central authorities and the Commission should forward a list of designated central authorities to the Member States and make it publicly available.

- (23) Since the objective of this Directive, namely to remove obstacles to the free provision of services in the framework of gathering electronic evidence in criminal proceedings, cannot be sufficiently achieved by the Member States, but can rather, by reason of the borderless nature of such services, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (24) The European Data Protection Supervisor was consulted in accordance with Article 42(2) of Regulation (EU) 2018/1725 of the European Parliament and of the Council¹² and delivered an opinion on 6 November 2019¹³,

¹² Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

¹³ OJ C 32, 31.1.2020, p.11.

- (25) The Commission should carry out an evaluation of this Directive that should be based on the five criteria of efficiency, effectiveness, relevance, coherence and EU value added and should provide the basis for impact assessments of possible further measures. The evaluation should be completed 3 years and 6 months after entry into application, to allow for the gathering of sufficient data on its practical implementation. Information should be collected regularly and in order to inform the evaluation of this Directive.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. This Directive lays down the rules on the designation of establishments and the appointment of legal representatives of certain service providers offering services in the Union for the receipt of, compliance with and enforcement of decisions and orders issued by competent authorities of the Member States, for the purposes of gathering electronic evidence in criminal proceedings.

2. This Directive applies to decisions and orders for the purpose of gathering electronic evidence on the basis of Regulation (EU) 2023/XXX [e-Evidence Regulation], Directive 2014/41/EU and the Convention established by the Council in accordance with Article 34 of the Treaty on the European Union on mutual assistance in criminal matters between Member States of the Union. This Directive equally applies to decisions and orders for the purpose of gathering electronic evidence on the basis of national law addressed by a Member State to a natural or legal person acting as legal representative or designated establishment of a service provider on the territory of that Member State.

3. This Directive is without prejudice to the powers of national authorities in accordance with Union and national law to address directly service providers established on their territory, for the purposes of gathering electronic evidence in criminal proceedings.
4. Member States shall not impose additional obligations to those deriving from this Directive on service providers in particular with regard to the designation of establishments or the appointment of legal representatives for the purposes set out in paragraph 1.
5. This Directive shall apply to the service providers defined in Article 2(2) offering their services in the Union. It shall not apply where those service providers are established on the territory of a single Member State and offer services exclusively on the territory of that Member State.

Article 2
Definitions

For the purpose of this Directive, the following definitions apply:

- (1) ‘legal representative’ means a natural or legal person, designated in writing by a service provider not established in a Member State taking part in a legal instrument referred to in Article 1(2) of this Directive, for the purpose of Articles 1(1) and 3(1);
- (2) ‘service provider’ means any natural or legal person that provides one or more of the following categories of services, with the exception of financial services referred to in Article 2(2)(b) of Directive 2006/123/EC of the European Parliament and of the Council¹⁴:
 - (a) electronic communications service as defined in Article 2(4) of Directive (EU) 2018/1972 of the European Parliament and of the Council¹⁵;
 - (b) internet domain name and IP numbering services such as IP address providers, domain name registries, domain name registrars and domain name related privacy and proxy services;

¹⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

¹⁵ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

(c) other information society services as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council¹⁶ that provide:

- the ability to its users to communicate with each other; or
- the ability to process or store data on behalf of the users to whom the service is provided, where the storage of data is a defining component of the service provided to the user;

(3) ‘offering services in a Member State’ means:

(a) enabling natural or legal persons in a Member State to use the services referred to in point (2); and

(b) having a substantial connection based on specific factual criteria to the Member State(s) referred to in point (a); such a substantial connection to the Union shall be considered to exist where the service provider has an establishment in the Union, or, in the absence of such an establishment, based on the existence of a significant number of users in one or more Member States, or the targeting of activities towards one or more Member States;

(4) ‘establishment’ means an entity actually pursuing an economic activity for an indefinite period through a stable infrastructure from where the business of providing services is carried out or the business is managed;

(4a) ‘designated establishment’ means an establishment with a legal personality designated in writing by a service provider established in a Member State taking part in a legal instrument referred to in Article 1(2) of this Directive, for the purpose of Articles 1(1) and 3(1);

¹⁶ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

Article 3

Designated establishment and legal representative

1. Member States shall ensure that service providers offering services in the Union designate at least one addressee for the receipt of, compliance with and enforcement of decisions and orders falling within the scope of Article 1(2) of this Directive issued by competent authorities of Member States for the purpose of gathering evidence in criminal proceedings:
 - (a) For service providers established in the Union with legal personality, the Member States where the service providers are established shall ensure that such service providers designate the establishment(s) responsible for the activities described in this paragraph in accordance with Article 2(4a);
 - (b) For service providers that are not established in the Union with legal personality/ Member States shall ensure that service providers offering services on their territory designate the legal representative(s), responsible for the activities described in this paragraph, in Member States taking part in the instruments referred to in Article 1(2) of this Directive;
 - (c) For service providers established in Member States not taking part in the instruments referred to in Article 1(2), the Member States taking part in those instruments shall ensure that such service providers offering services on their territory designate the legal representatives, responsible for the activities described in this paragraph, in Member States taking part in such instruments.

2. Member States shall ensure that the addressees defined in paragraph 1:
 - (a) reside in a Member State where the service providers offer their services; and
 - (b) can be subject to enforcement procedures.
3. Member States shall ensure that the decisions and orders issued by the competent authorities for evidence gathering in criminal proceedings are addressed to the designated establishment or legal representative designated by the service provider in accordance with paragraph (1) to that effect.
4. Member States shall ensure that service providers established or offering services on their territory provide their designated establishments and legal representatives with the necessary powers and resources to comply with those decisions and orders received from any Member State. Member States shall also verify that the designated establishments or legal representatives residing on their territory have received from the service providers the necessary powers and resources to comply with decisions and orders received from any Member State and that they cooperate with the competent authorities when receiving those decisions and orders, in accordance with the applicable legal framework.

5. Member States shall ensure that both the designated establishment or the legal representative and the service provider can be held jointly and severally liable for non-compliance with obligations deriving from the applicable legal framework when receiving decisions and orders falling within the scope of Article 1(2) of this Directive, with the effect that each of the designated establishment or the legal representative and the service provider may be sanctioned for non-compliance. In particular, the lack of appropriate internal procedures between the service provider and the designated establishment or the legal representative cannot be used by either side as a justification for non-compliance with those obligations. Joint and several-liability shall not apply for actions or omissions of either the service provider or the legal representative or the designated establishment which constitute a criminal offence in the Member State applying the sanction.
6. Member States shall ensure that the obligation to designate designated establishments or legal representatives is fulfilled by 6 months from the date of transposition set out in Article 7 for service providers that offer services in the Union at that date, or from the moment service providers start offering services in the Union for those service providers that will start offering services after that date.

Article 4
Notifications and languages

1. Member States shall ensure that each service provider established or offering services in their territory notifies in writing the central authority of the Member State where its designated establishment is established or where its legal representative resides, the respective contact details and any changes thereof.
2. The notification shall specify the official language(s) of the Union, as referred to in Council Regulation No 1¹⁷, in which the legal representative or designated establishment can be addressed. This shall include one or more of the official languages in accordance with the national law of the Member State where the legal representative resides or designated establishment is established.
3. When a service provider designates several designated establishments or legal representatives in accordance with Article 3(1), Member States shall ensure that such service provider indicates the precise territorial scope of the designation for the designated establishment or legal representatives. The notification shall specify the official language(s) of the Union or Member States covered by each of them.
4. Member States shall ensure that the information notified to them in accordance with this Article is publicly available on a dedicated page of the European Judicial Network in criminal matters. Member States shall ensure that this information is regularly updated. This information may be further disseminated to facilitate access by competent authorities.

¹⁷ Council Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

Article 5

Sanctions

1. Member States shall lay down rules on sanctions applicable to infringements of national provisions adopted pursuant to Article 3 and 4 and shall take all measures necessary to ensure that they are implemented. The sanctions provided for shall be effective, proportionate and dissuasive.
2. Member States shall, by the date set out in Article 7, notify the Commission of those rules and of those measures and shall notify it, without delay, of any subsequent amendment affecting them. Member States shall also inform the Commission on an annual basis about non-compliant service providers, relevant enforcement action taken against them and the sanctions imposed.

Article 6

Central authorities

1. In accordance with their legal systems, Member States shall designate one or more central authorities to ensure the application of this Directive in a consistent and proportionate manner.
2. Member States shall inform the Commission of their designated central authority, or central authorities, referred to in paragraph 1. The Commission shall forward a list of designated central authorities to the Member States and make it publicly available.

3. Member States shall ensure that their central authorities coordinate and cooperate with each other and, where relevant, with the Commission, and provide any appropriate information and assistance to each other in order to apply this Directive in a consistent and proportionate manner. The coordination, cooperation and provisioning of information and assistance shall cover, in particular, enforcement actions.

Article 7

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 months after entry into force. They shall immediately inform the Commission thereof.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
3. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

Article 8

Evaluation

By [3 years and 6 months from the date of application of this Directive] at the latest, the Commission shall carry out an evaluation of this Directive. The Commission shall transmit this report to the European Parliament and the Council. The evaluation shall be conducted according to the Commission's better regulation guidelines. Member States shall provide the Commission with the information necessary for the preparation of that Report.

Article 9

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 10

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
