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OUTCOME OF THE COUNCIL MEETING

3661st Council meeting

Justice and Home Affairs

Brussels, 6 and 7 December 2018

Presidents **Herbert Kickl**
Federal Minister of the Interior of Austria
Josef Moser
Federal Minister of Constitutional Affairs, Reforms,
Deregulation and Justice of Austria

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¹ • Where declarations, conclusions or resolutions have been formally adopted by the Council, this is indicated in the heading for the item concerned and the text is placed between quotation marks.
• Documents for which references are given in the text are available on the Council's internet site (<http://www.consilium.europa.eu>).
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ITEMS DEBATED

HOME AFFAIRS

European Border and Coast Guard

The Council today agreed a partial general approach on a proposal on the European Border and Coast Guard, covering the provisions linked to return and cooperation with third countries. This agreement does not allow for the start of negotiations with the European Parliament, and is on the understanding that nothing is agreed until everything is agreed.

The proposed rules will allow Frontex to provide technical and operational support to member states in return operations. They will also contribute to strengthening cooperation with third countries, by giving the agency wider scope for action and not limiting its possibilities for cooperation to neighbouring countries.

The proposal was presented by the Commission on 12 September 2018. In addition to the provisions agreed today, it aims to strengthen the agency in terms of staff and equipment in order to provide further support to member states, including by setting up a European Border and Coast Guard standing corps of 10000 operational staff with executive powers. It also incorporates the European Border Surveillance System (EUROSUR) into the Frontex framework, to improve its functioning.

During the discussion, ministers also confirmed that further work is needed on the other aspects of the regulation, namely on the proposed establishment of an EBCG standing corps. This includes the size, composition, tasks and powers of the proposed EBCG standing corps, as well as the timeframe needed to establish the corps. Discussions on these aspects will continue at technical level.

[European Border and Coast Guard: Council reaches partial agreement on returns and cooperation with third countries \(press release\)](#)

[Proposal for a regulation on the European Border and Coast Guard - partial general approach](#)

[Strengthening the EU's external borders \(background information\)](#)

Return directive

The presidency reported on progress regarding the Commission proposal to reform the return directive, on which intensive discussions have been held in different Council bodies ([14859/18](#)).

The discussions held so far indicate by and large a consensus on the direction of the revised Return Directive towards having a more stringent approach to returns. Significant progress has been achieved in moving towards an agreement as regards the list of factors indicating the risk of absconding, the obligation for third country nationals to cooperate with national authorities as well as the consequences for non-cooperation, the adoption of the return decision, granting of voluntary departure, the possibility to issue the entry ban without issuing a return decision, design and modalities of the return management system as well as national voluntary return and reintegration programmes.

At the same time, a number of issues require a further in-depth discussion with a view of moving towards consensus. Debate should still take place on the possibility to return a third country national to any safe third country and not only the country of origin or transit. Another possibility not provided in the Commission proposal for a revised Return Directive, but which has also been addressed by some delegations is the principle of mutual recognition of return decisions issued by other Member States. Article 16 on remedies and Article 22 on border procedures also require further in-depth discussions.

Several member states welcomed the progress made on this file and reiterated the need to continue work both on the proposed directive and on cooperation with third countries on return and readmission.

[How the EU manages migration flows \(background information\)](#)

Terrorist content online

The Council agreed its negotiating position on the proposed regulation on preventing the dissemination of terrorist content online. On the basis of this mandate, the Council Presidency will start negotiations with the European Parliament once the latter has adopted its position.

The proposed rules apply to hosting service providers offering services in the EU, whether or not they have their main establishment in the member states. Voluntary cooperation will continue, but this legislation will provide an additional tool for member states to enforce the rapid removal of terrorist content where necessary. Hosting service providers will have to remove terrorist content or disable access to it within one hour from receiving a removal order from authorities.

Furthermore, service providers will have to apply certain duties of care to prevent the dissemination of terrorist content on their services, which may vary depending on the risk and level of exposure of the service to terrorist content. If exposed to terrorist content, they will also have to take effective and proportionate proactive measures to protect their services against the dissemination of terrorist content.

This proposal was submitted by the European Commission on 12 September 2018, following a call by EU leaders in June. It builds on the work of the EU Internet Forum, launched in December 2015 as a framework of voluntary cooperation between member states and representatives of major internet companies to detect and address online terrorist content. Cooperation through this forum, which includes also the Europol internet referral unit, has helped in addressing the problem. However, terrorist groups have adapted to the steps taken and the voluntary approach is no longer sufficient on its own due to, among other things, the ever increasing speed of dissemination of illegal terrorist content over an ever increasing range of platforms. Crucially, this includes many platforms that are not yet involved in the cooperation through the EU Internet Forum.

[Terrorist content online: Council adopts negotiating position on new rules to prevent dissemination \(press release\)](#)

[Proposal for a regulation on preventing the dissemination of terrorist content online - general approach](#)

[Response to the terrorist threat and recent terrorist attacks in Europe \(background information\)](#)

Reform of the Common European Asylum System and resettlement

The presidency presented a progress report on the reform of the Common European Asylum System (CEAS). ([14597/18](#))

On the Dublin regulation the Austrian presidency has continued to look for possible solutions to ensure an overall balance between solidarity and responsibility.

On the asylum procedure regulation, discussions are ongoing at the Council.

On the European fingerprinting system (Eurodac) inter-institutional negotiations with the European Parliament (trilogues) started on 6 September 2017 and significant progress has already been achieved.

On the EU asylum agency, a provisional agreement with the European Parliament was reached in 2017, excluding the parts of the text related to other legislative proposals in the package. In September 2018, the European Commission presented an amended proposal, which builds on the existing agreement and aims to reinforce the operational support provided by the agency and the cooperation with other relevant experts. Discussions on this amended proposal are ongoing at the Council.

On the qualification regulation, the reception conditions directive and the resettlement regulation, a provisional agreement was reached between the presidency and the rapporteur in June. However, this provisional agreement did not achieve the necessary support from member states. Discussions within the Council continued with a view to identifying the minimum amendments required to achieve the necessary support from both institutions.

[Reforming the Common European Asylum System \(background information\)](#)

Migrant smuggling

Ministers approved a comprehensive and operational set of measures with a law enforcement focus to step up the fight against migrant smuggling networks ([15250/18](#)). This follows a call by EU leaders at their meeting in October.

These measures build on ongoing efforts at EU and national level, for example as part of the EU action plan against migrant smuggling (2015-2020). The concrete actions draw on:

- enhanced inter-agency approach both at EU and national level
- making the best use of synergies between the operational tools available
- maximising the use of the external assets of the EU

The objective is to disrupt migrant smuggling networks both inside and outside the EU, taking into account their high level of adaptability and the increased interlinking of different criminal activities (including drug trafficking, money laundering).

[Migrant smuggling: Council approves a set of measures to fight smuggling networks \(press release\)](#)

Multiannual financial framework: justice and home affairs priorities

The Council discussed the justice and home affairs priorities for the next multiannual financial framework, including the accuracy of the programming of the budget with the future implementation of new legislative proposals.

Member states identified migration, returns, cooperation with third countries and the fight against migrant smuggling as priorities. Some member states emphasized the need for flexibility and sufficient funding.

The justice and home affairs agencies, participating in the discussions, presented their priorities and called for adequate funding throughout the next period. Besides specific priorities, several agencies are coping with the setting up of the recently agreed IT systems and adaptation to digital tools for the areas of justice and home affairs.

Discussions on the MFF proposals for the area of justice and home affairs will continue at technical level.

[Multiannual financial framework proposals \(European Commission\)](#)

[Multiannual financial framework \(background information\)](#)

Any other business

– ***Current legislative proposals***

The presidency updated the Council on the state of play of a number of legislative proposals.

– ***Regional ministerial forum on counteraction of internal corruption***

Bulgaria updated ministers on the results of the regional ministerial forum on counteraction of internal corruption, which was held in Sofia on 26-27 November 2018.

– ***EU-US Justice and Home Affairs ministerial meeting***

The Presidency updated ministers on the outcome of the EU-US Justice and Home Affairs ministerial meeting, which took place in Washington on 8-9 November 2018

For more information, see [joint press statement](#)

– ***High-Level Conference "European values, rule of law and security"***

The Presidency informed ministers about the high-level conference on European values, rule of law and security, which was held in Vienna on 19-20 November.

For more information, see [Austrian presidency website](#)

– ***Vienna process***

The Presidency updated the Council on the results and follow up on the Vienna process, which is a reflection process on current internal security challenges.

– *Work programme of the incoming Presidency*

The Romanian interior minister informed the Council of the priorities of the incoming Romanian Presidency in the area of home affairs.

For more information, see [Romanian presidency website](#)

Migration

Over lunch, ministers discussed the EU's comprehensive approach to migration, including the external and internal aspects and border protection. They focused in particular on the issues of solidarity and responsibility.

MIXED COMMITTEE

The Council in the Mixed Committee format (the EU plus Norway, Iceland, Liechtenstein and Switzerland) discussed the following items:

– ***European Border and Coast Guard***

See above

– ***Return directive***

See above

– ***Any other business***

The presidency updated the committee on the state of play of a number of legislative proposals.

JUSTICE

Contract law - Sales of goods directive

The Council adopted a general approach on the directive on contracts for the sales of goods (DSG).

For more information:

[Press release - More unified rules on contracts for the sales of goods: Council agrees its position](#)

Revision of Brussels IIa : Recognition and enforcement of decisions in matrimonial matters and parental responsibility

The Council agreed on a general approach ([14784/18](#)) on the revision of so called Brussels IIa Regulation (regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction).

For more information:

[Press release - Council agrees on more effective rules to solve cross border parental responsibility issues](#)

Regulation on the assignments of claims

The Council took note of the report summarising the progress made at technical level on the regulation on the assignments of claims ([14498/18](#)).

This proposal is part of the Capital Markets Union (CMU) launched in 2015 and its main objective is to ensure greater legal certainty for investors in cross-border transactions of claims.

In this respect, the new rules will clarify according to which law disputes are to be resolved. The Commission has proposed, as a general rule, that the law of the country where creditors ("assignors") have their habitual residence would apply, regardless of which member state's courts or authorities examine the case. However, in the Commission's proposal, two specific claims are exempted from the general rule and the law of the assigned claim applies:

- cash on the account of a credit institution (e.g. a bank, where the consumer is the creditor and the credit institution is the debtor); and
- claims derived from financial instruments, such as derivatives.

In addition, for securitisation transactions, the Commission proposes a choice between the law of the assignor and the law of the assigned claim.

The assignment of a claim refers to a situation where a creditor transfers the right to claim a debt to another person in exchange of a payment. This system is used by companies to obtain liquidity and access credit. At the moment, there is no legal certainty as to which national law applies when determining who owns a claim after it has been assigned in a cross-border case because no uniform Union conflict-of-law rules have been adopted on the law applicable to the third-party (or proprietary) effects of assignments of claims.

The European Parliament has adopted its position on the proposed regulation on 12 September 2018.

E-evidence package: regulation on European production and preservation orders

The Council adopted a general approach on the regulation on European production and preservation orders for e-evidence in criminal matters.

For more information:

[Press release - Regulation on cross border access to e-evidence : Council agrees its position](#)

Negotiating mandates for the 2nd additional protocol to the Budapest Convention and for an agreement between the EU and the US on facilitating access to e-evidence

The Commission updated the Council on the preparation on these mandates and the timeline for their submission to the Council. On the latter, it committed to finalise them as soon as possible.

The presidency took note and reminded the wish of the Council to receive those draft mandates swiftly.

– ***Second additional protocol to the Budapest Convention***

In September 2017, the Council of Europe undertook to prepare a second additional protocol to the Budapest Convention on Cybercrime. The objective of the protocol is to lay down provisions for direct cooperation with service providers in other jurisdictions and for a more effective and simplified mutual legal assistance (MLA) regime. The advantage of such an agreement is its potentially wide application across the globe. Currently, 61 countries are party to the convention, including 26 EU member states. The preparatory work on the protocol is expected to be finalised by December 2019.

– ***EU-US agreement on facilitating access to e-evidence***

The Clarifying Lawful Overseas Use of Data (CLOUD) Act was introduced in the US Congress on 6 February 2018. The CLOUD Act obliges US service providers to preserve and disclose data, including content, without the need for a mutual legal assistance (MLA) request, directly to the US government, even if the data are located outside the US. The Act also allows US service providers to deliver such data, also without the need for an MLA request and regardless of where the data are located, to a foreign government with whom the US has concluded an executive agreement. If a non-US person is concerned, the CLOUD Act allows the service providers under the 'comity clause' to challenge the order on the basis of strict conditions.

The conclusion of an executive agreement is subject to a positive determination by the US Attorney General, to be submitted to the US Congress, that the foreign government meets a number of criteria (such as adequate substantive and procedural laws on cybercrime and e-evidence, respect for the rule of law, non-discrimination and human rights, accountability and transparency mechanisms, etc.).

In June 2018, justice ministers reaffirmed that, given the EU competence on the matter, it is the EU, rather than individual member states, that should pursue the conclusion of an agreement with the US in order to facilitate access to e-evidence. At the EU-US ministerial meeting recently held in Washington DC (8-9 November 2018), both sides once again expressed their intention to explore the possibilities of such an agreement between the EU and the US.

European Public Prosecutor's Office (EPPO regulation)

Justice ministers were updated by the Commission on the state of play of the implementation of the EPPO regulation.

The latest developments concerning the setting-up of the EPPO include the appointment of an ad-interim administrative director and the publication of the vacancy notice for the chief prosecutor. The selection panel is expected to start mid-December its work on reviewing applications with a view to have the appointment of the successful candidate by the Council and the Parliament before the European elections.

The EPPO will have the authority, under certain conditions, to investigate and prosecute EU fraud and other crimes affecting the Union's financial interests. It will bring together European and national law enforcement efforts to counter EU fraud. 22 member states have so far formally decided to join the EPPO.

The EPPO central office will be based in Luxembourg. The date on which the EPPO will assume its investigative and prosecutorial tasks will be set by the Commission on the basis of a proposal from the European Chief Prosecutor once the EPPO has been set up. This date will not be earlier than three years after the entry into force of the regulation.

For more information:

[Council press release on the agreement of the EPPO regulation](#)

[Commission Q&A on the EPPO](#)

Data retention: retention of electronic communication data

Ministers were informed about the state of play of the expert discussions on data retention for the purpose of fighting crime. The presidency concluded that the Council supports a continuation of the work at experts level to explore avenues to develop a concept of data retention within the EU.

The expert group on this topic was created in 2017 to launch and conduct a common reflection process on data retention in the context of recent case-law from the European Court of Justice.

To fight crime effectively, it is important that service providers retain certain data, besides those collected strictly for their business purposes, that can be disclosed under certain strict conditions for the purpose of fighting crime. However, such retention of data could infringe upon individual fundamental rights, in particular the rights to privacy and protection of personal data as interpreted by the European Court of Justice (ECJ). For that reason, any legal framework providing for data retention for the purpose of fighting crime must meet strict proportionality and necessity criteria.

In the cases *Digital Rights vs Ireland* in 2014 and *TELE2* in 2016 the ECJ prohibited the EU and its Member States from laying down rules that entail a general and indiscriminate retention of data. The ECJ's interpretation at that time put limits on the retention of data which make it challenging to conduct effective criminal investigations.

All reflection on this topic is conducted keeping in mind the importance of providing effective tools to fight crime, on the one hand, and the need to respect privacy and data protection as interpreted by the Court of Justice, on the other hand.

For more information:

[Commission website - data retention](#)

Mutual recognition in criminal matters

The Council adopted conclusions on mutual recognition in criminal matters ([14540/18](#)). Judicial cooperation in criminal matters in the EU is based on the principle of mutual recognition of judgment and judicial decisions. The efficient application of this principle is largely based on mutual trust between judicial authorities.

The objective of these conclusions is therefore to support efforts to foster and enhance this trust. In this respect, the conclusions reaffirm that the effectiveness of EU mutual recognition instruments is, to a large extent, dependent on the relevant national legislation being drafted, adopted and implemented in line with those instruments. The Council also reaffirms that member states should continue to ensure the independence and impartiality of judges while also noting that a refusal to execute a judgment issued on the basis of a mutual recognition instrument can only be justified in exceptional circumstances following the approach of the Court of Justice.

The conclusions also foresee a number of practical actions to be taken to foster cooperation and mutual trust between authorities. Those include: fostering the use of alternative measures to detention, so as to reduce the population in detention facilities; promoting training of practitioners; encouraging exchange of best practices; encouraging to make full use of the possibilities offered by Eurojust and the European Judicial Network (EJN); further developing the handbook for practitioners on the European arrest warrant and creating handbooks on other instruments; ensuring better forms and certificates for mutual recognition procedures; etc.

These conclusions are the result of exchanges of views ministers held during the informal meeting of Justice ministers in Innsbruck in July 2018 and during the October Council meeting.

For more information:

[Press release following the Informal meeting of Justice ministers in Innsbruck](#)

[Press outcome of the JHA Council - October 2018](#)

[Commission website: mutual recognition of judgments](#)

EU accession to the European Convention of Human Rights (ECHR)

The Council took note of the state of play and next steps concerning the EU's accession to the ECHR.

The Treaty on European Union makes provision for the EU's accession to the ECHR. The objective is to reinforce the common values of the Union, improve the effectiveness of EU law and enhance the coherence of fundamental rights protection in Europe.

Negotiations on an agreement with the Council of Europe started in 2010. In 2013, a draft agreement was submitted by the Commission to the Court of Justice for an opinion on its compatibility with the EU treaties. At the end of 2014, the Court stated that the draft agreement was not compatible with the treaties on a number of points.

In October 2015, the Council reaffirmed the EU's commitment to accede to the ECHR and invited the Commission to work on an analysis of legal issues raised by the Court.

Any other business

– ***Current legislative proposals***

The Presidency updated the justice ministers on the state of play on a number of legislative proposals.

– ***EU-US Justice and Home affairs ministerial meeting***

The presidency updated justice ministers on the outcome of the EU-US Justice and Home affairs ministerial meeting which took place in Washington on 8-9 November 2018.

For more information, see [joint press statement](#)

– ***Work programme of the incoming Romanian presidency***

The Justice minister of Romania presented the priorities of the incoming presidency in the area of justice.

For more information, see [Romanian presidency website](#)

– ***Eurojust presentation on the topic "Towards digital criminal justice in the EU"***

The President of Eurojust, Ladislav Hamran, gave a presentation on its initiative concerning digital criminal justice ([14585/18](#)). The Council encouraged Eurojust to work further on this initiative, and to present a report to the Council with concrete proposals.

OTHER ITEMS APPROVED

JUSTICE AND HOME AFFAIRS

Council Declaration on the Fight against antisemitism

The Council adopted today a Declaration on the fight against antisemitism ([14966/18](#)).

For more information, see [press release](#)

Strategy and action plan on e-Justice 2019-2023

The Council adopted today the strategy and action plan on e-justice 2019-2023 ([12794/3/18](#) & [11724/4/18](#)).

For more information, see [press release](#)

Strategic direction on internal security - Council conclusions

The Council adopted conclusions on the future strategic direction in the field of internal security ([14578/18](#)).

Amended regulation on the electronic publication of the Official Journal of the EU

The Council adopted today an amendment to the regulation on the electronic publication of the Official Journal of the EU ([14463/18](#)). The amendment regards the introduction of an authentication by electronic seal as an alternative to qualified electronic signature. This should help accelerate the procedure for the publication of the Official Journal on the EUR-Lex website.

Council's conclusions on alternative development

The Council adopted today conclusions on alternative development: "Towards a new understanding of alternative development and related development centered drug policy interventions - Contributing to the implementation of UNGASS 2016 and the UN Sustainable Development Goals" ([14338/18](#)).

The conclusions aim at supporting the objectives of the European Union drugs strategy 2013-2020. In these Conclusions, alternative development is considered as an important strategy to address the underlying root causes of illicit drug economies through an integrated approach.

FOREIGN AFFAIRS

CTA - Members of the executive board

The Council approved a draft decision of the African, Caribbean and Pacific (ACP) - EU committee of ambassadors appointing members to the executive board of the Technical Centre for Agricultural and Rural Cooperation (CTA).

It decided to forward the draft decision to the ACP side for adoption by the ACP-EU committee of ambassadors by exchange of letters. ([13497/18](#))

[African, Caribbean and Pacific \(ACP\) region, European Commission](#)

CDE discharge procedure 2013-2016

The Council approved a draft decision of the African, Caribbean and Pacific (ACP) - EU committee of ambassadors giving a discharge to the director of the Centre for the Development of Enterprise (CDE) in respect of the implementation of the budgets of the centre for the financial years 2013-2016.

It decided to forward the draft decision to the ACP side for adoption by the ACP-EU committee of ambassadors by exchange of letters. ([14961/18](#))

[African, Caribbean and Pacific \(ACP\) region, European Commission](#)

ECONOMIC AND FINANCIAL AFFAIRS

SSM Chair appointment

The Council today adopted a decision appointing Andrea Enria as head of the supervisory board of the European Central Board. He will hold the position for a period of five years, starting from 1 January 2019.

See [press release](#)

TRANSPORT

Revision of Regulation on common rules for the operation of air services

The Council approved the European Parliament's position on the proposed amendments to regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community. The legislative act is therefore deemed to be adopted.

The proposed regulation eliminates time restrictions for wet-leases of aircraft registered in the United States of America. It does so to ensure legal consistency with an international agreement. ([PE-CONS 61/18](#))