

## **JUSTICE and HOME AFFAIRS COUNCIL**

### **Thursday 6 and Friday 7 December in Brussels**

The Council will be chaired by Herbert Kickl, Minister for the Interior of Austria, on Thursday and by Josef Moser, Minister for Justice of Austria, on Friday.

On Thursday, ministers will aim to reach a partial general approach on the **European Border and Coast Guard (EBCG)** proposal and a general approach on the proposed regulation on preventing the **dissemination of terrorist content online**. The Council is expected to approve a comprehensive and operational set of measures to **fight against people smuggling networks**.

Ministers will also discuss the justice and home affairs (JHA) priorities for the next **multiannual financial framework**. They will be briefed by the presidency on progress regarding the **reform of the Common European Asylum System** and the **return directive**.

Under any other business, ministers will be informed by the presidency of the state of play on current legislative proposals; the outcomes of the EU-US JHA ministerial meeting and of the high level conference 'European values, rule of law, security'; and the results and follow-up of the Vienna Process. The incoming Romanian presidency will present its work programme.

Over lunch, ministers are expected to cover the EU's comprehensive approach to **migration**.

In the margins of the Council, the **Mixed Committee** (the EU plus Iceland, Liechtenstein, Norway and Switzerland) will discuss the EBCG proposal and will be informed by the presidency of progress on the return directive and the state of play on other current legislative proposals.

On Friday, justice ministers will aim to reach a general approach on the **e-evidence regulation**. They will also be updated on the preparation of the **negotiating mandates for international agreements in the field of e-evidence** (second additional protocol to the Budapest Convention and EU-US agreement on facilitating access to e-evidence).

The Council is also expected to hold a debate with a view to reaching a position on the **Brussels IIa regulation** and on the **directive on contracts for the sales of goods**. It will also take note of a progress report on the work at technical level on the regulation on **assignments of claims**.

Ministers will also be briefed on the implementation of the European Public Prosecutor's Office (EPPO) regulation, on the work at technical level on the **retention of electronic communication data** and on the issue of the EU's accession to the European Convention on Human Rights.

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<sup>1</sup> This note has been drawn up under the responsibility of the press office.

Finally, under any other business, ministers will hear about the outcome of the EU-US JHA ministerial meeting and the work programme of the incoming Romanian presidency. The European Judicial Cooperation Unit (Eurojust) will also give a presentation entitled 'Towards digital criminal justice in the EU'.

Over lunch, ministers will discuss the fight against antisemitism by means of criminal law.

**Press conferences:**

- **Home Affairs** Council (**Thursday** +/-17.30)
- **Justice** Council (**Friday** +/-18.30)

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# HOME AFFAIRS

## European Border and Coast Guard

Home affairs ministers will discuss the Commission proposal on the European Border and Coast Guard Agency (EBCG). They are expected to focus in particular on the provisions regarding return and cooperation with third countries, with the aim of reaching a partial general approach on them.

On 12 September 2018, the Commission proposed an updated mandate for the EBCG, with the aim of further improving control of the EU's external borders. The proposal contains the following key elements:

- **reinforcing the agency in terms of staff and equipment** to further support member states, including by setting up a European Border and Coast Guard standing corps of 10 000 operational staff with executive powers
- **strengthening cooperation with third countries** by giving the agency a wider scope for action, not limiting its possibilities for cooperation to neighbouring countries
- **supporting member states with return operations** on a technical and operational level, including by allowing EBCG staff to communicate directly with third countries
- **incorporating the European Border Surveillance System (Eurosur)** into the EBCG framework, to improve its functioning

Effective control of the EU's external borders is an essential part of the EU's comprehensive approach to migration. Since 2015, the European Union has taken several measures to improve external border management. These include the creation of the Entry/Exit System (EES) and the European Travel Information and Authorisation System (ETIAS), the reinforcement of checks against relevant databases and the establishment of the EBCG. In its June 2018 conclusions, the European Council called for the EBCG's supportive role, including in the cooperation with third countries, to be further strengthened, through increased resources and an enhanced mandate.

For more information:

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

## Terrorist content online

Ministers will discuss a proposed regulation on preventing the dissemination of terrorist content online, with the aim of agreeing on a general approach.

This proposal was submitted by the European Commission on 12 September 2018, following a request by EU leaders in June. It includes the following elements:

- **removal of terrorist content:** service providers will have to remove terrorist content within one hour of receiving a removal order from authorities
- **proactive measures:** hosting services 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 to terrorist content
- **improved cooperation** between law enforcement authorities and service providers, through the establishment of points of contact to facilitate the handling of removal orders and referrals
- **protection of the rights** of ordinary users and businesses, including freedom of expression and information and freedom to conduct a business
- **effective safeguards and complaint mechanisms** to ensure users' rights are being protected
- **penalties:** member states must lay down the rules on penalties applicable in case of non-compliance

Terrorists use the internet to radicalise, recruit and incite to violence. Online terrorist content has played a role in many of the recent terrorist attacks in Europe. In December 2015, the European Union launched the EU Internet Forum, a framework for voluntary cooperation between member

states and representatives of major internet companies to detect and address online terrorist content. However, this has not been sufficient to tackle the problem. In June 2018, EU leaders welcomed the Commission's intention to present a legislative proposal to improve the detection and removal of content that incites hatred and the commission of terrorist acts.

For more information:

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

### **Migrant smuggling**

The Council is expected to approve a comprehensive and operational set of measures to fight against people smuggling networks.

At its meeting on 18 October 2018, the European Council tasked the Council with developing by December a set of measures to fight smuggling networks. These measures build on ongoing efforts at EU and national level, with an operational, law enforcement focus. They include both new measures and a strengthened implementation of existing activities, and cover the following areas:

- enhancing the flows of relevant information
- strengthening operational tools
- disrupting smuggling networks' online communications
- maximising synergies with external action in priority third countries and regions

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

For more information:

[Saving lives at sea and targeting criminal networks \(background information\)](#)

### **Multiannual financial framework: justice and home affairs priorities**

Ministers will discuss the justice and home affairs priorities for the next multiannual financial framework. They will focus in particular on which priorities they envision for the activities of the justice and home affairs agencies, as well as in which areas a reprioritisation or an adjustment of the funds might be necessary to adapt to ongoing legislative processes.

As part of the next multiannual financial framework (MFF) package, the Commission issued its proposals for the area of justice and home affairs. Under these proposals, decentralised JHA agencies and JHA funds are assigned to three different headings: cohesion and values; migration and border management; and security and defence.

The Commission's MFF proposal also provides for flexibility mechanisms similar to those in the current MFF, including establishing margins for each heading and allowing transfers between programmes and the mobilisation of special instruments. However, transfers of funds between agencies or towards funds under different headings are not provided for, while JHA agencies are spread between three headings under the new proposed MFF. It is therefore important to ensure the budgetary priorities within the JHA field are clearly set before the adoption of the next MFF.

For more information:

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

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

### **Return directive**

The presidency will present a progress report regarding the Commission proposal to reform the return directive, on which intensive discussions have been held in different Council bodies.

[\(14859/18\)](#)

On 12 September 2018, the Commission presented a proposal for a revised return directive. This proposal aims to speed up return procedures, prevent absconding and secondary movements and improve the rate of returns, in full compliance with international human rights standards. To achieve this, it proposes:

- **accelerated border procedures:** those whose asylum applications have been rejected during asylum border procedures will be subject to a simplified return procedure, ensuring decisions can be quickly adopted and enforced at the border
- **clearer and faster procedures** for issuing return decisions and for appeal, as well as an obligation to cooperate for persons subject to a return procedure
- **a stricter approach to voluntary returns**, including setting up dedicated programmes in member states and granting a shorter period for voluntary returns
- **clear rules on detention**, including a common, non-exhaustive list of objective criteria to determine the risk of absconding and an initial detention period of no less than three months

Effective returns are crucial for an efficient and comprehensive migration management policy. Currently returns are regulated at the European level under the return directive adopted in 2008. That directive sets common standards and procedures in member states for returning illegally staying third-country nationals. However, since the adoption of the directive the challenges in return policy have changed considerably. The European Council has, on several occasions, emphasised the need to significantly improve the effective return of irregular migrants in the EU. While the EU and member states have already undertaken significant endeavours in this regard, the overall number of returns still needs to be increased.

For more information:

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

### **Reform of the Common European Asylum System and resettlement**

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

The reform of the Common European Asylum System is composed of seven legislative files, presented by the European Commission in May and July 2016. An amended proposal on the EU Asylum Agency was presented by the Commission on 12 September 2018.

A proposal on the recast of the **Dublin regulation** aims to:

- enhance the system's capacity to determine efficiently and effectively a single member state responsible for examining the application for international protection
- ensure a fair sharing of responsibilities between member states by complementing the current system with a corrective allocation mechanism
- discourage abuse and prevent secondary movements of applicants within the EU

The Austrian presidency has continued to look for possible solutions to ensure an overall balance between solidarity and responsibility.

A proposal on the European fingerprinting system (**Eurodac**) includes the necessary changes to adapt the system to the proposed Dublin rules, in line with its primary objective of serving the implementation of the Dublin regulation. Eurodac will also become a database for wider immigration purposes, facilitating return and the fight against irregular migration. Inter-institutional negotiations with the European Parliament (trilogues) started on 6 September 2017 and significant progress has already been achieved on this file.

A proposal for a **European Union Agency for Asylum** aims to improve the implementation and functioning of the CEAS by building on the work of the European Asylum Support Office and further developing its responsibilities. On 6 December 2017, the Permanent Representatives Committee (Coreper) took note of the agreement reached between the representatives of the Council and of the European Parliament on the text of the proposal, 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, including from the European Border and Coast Guard Agency or Europol. Discussions on this amended proposal are ongoing at the Council.

A proposed regulation on the **qualification** of third-country nationals or stateless persons as beneficiaries of international protection (replacing the qualification directive), aims to set uniform standards for the recognition of persons in need of protection and the rights granted to beneficiaries of international protection. A provisional agreement was reached between the Council presidency and the European Parliament's 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.

An **asylum procedure** regulation proposal (replacing the asylum procedure directive) aims to create a genuine common procedure, thereby removing incentives for asylum shopping and secondary movements between member states. Discussions on this proposal are ongoing at the Council.

A proposed recast of the directive for the **reception conditions** of applicants for international protection further harmonises reception conditions in the EU to ensure that the treatment of applicants is dignified across the EU, in accordance with fundamental rights and the rights of the child, and to decrease secondary movements. 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.

A proposal for a regulation establishing an EU **resettlement framework** aims to create a common set of standard procedures for the selection of resettlement candidates and a common protection status for persons resettled to the EU, to streamline and better focus European resettlement efforts in the future. 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.

For more information:

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

# JUSTICE

## **Contract law - sales of goods directive**

The Council is expected to reach its position on the directive on contracts for sales of goods (DSG).

The main objective of this directive is to provide a coherent legal framework across the EU and so contribute to the proper functioning of the internal market while providing for a high level of consumer protection across the EU. The directive covers both distance (including online) and face-to-face sales to avoid fragmentation and provide more clarity for consumers.

This directive is closely linked to the digital content directive (DCD) on which the Council adopted its [general approach in June 2017](#) and for which negotiations with the Parliament are ongoing.

Both directives are part of the 'Digital Single Market Strategy for Europe' presented by the Commission in December 2015. The proposed sales of goods directive was initially limited to online and other distance sales but was modified by the Commission in 2017 to also include face-to-face sales.

## **Revision of Brussels IIa: recognition and enforcement of decisions in matrimonial matters and parental responsibility**

The presidency will present a general approach ([14416/18](#)) on the revision of the 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).

This regulation aims to improve the EU's current legal rules to protect children in the context of cross-border parental responsibility disputes related to custody, access rights and child abduction. A key objective of the new rules is to ensure quicker overall procedures given that time is of the essence in order to protect the best interests of the child in such cross-border parental responsibility disputes.

The proposal was presented by the Commission on 30 June 2016. The Council discussed it a number of times. In [June 2018](#), ministers discussed topics including the circulation of provisional, including protective, measures in urgent cases as well as the issue of the placement of a child in another member state. In [March 2018](#), the Council discussed the role and tasks of central authorities. In [June 2017](#), the Council exchanged views on the hearing of the child during proceedings while in [December 2017](#) ministers touched on the issue of the abolition of *exequatur*.

This regulation is subject to the special legislative procedure, which requires unanimity of the Council after consultation of the European Parliament. The [opinion of the Parliament](#) was delivered on 18 January 2018.

All member states, except Denmark, are participating in this legislation.

For more information:

[Commission website: new rules to better protect children in cross-border family proceedings](#)

## **Regulation on assignments of claims**

The Council will take note of the report summarising the progress made at technical level on the regulation on 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, in the following two specific cases 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)
- 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.

Assignment of a claim refers to a situation where a creditor transfers the right to claim a debt to another person in exchange for 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 EU 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 adopted its position on the proposed regulation on 12 September 2018.

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

The Council is expected to reach its position on the regulation on European production and preservation orders for e-evidence in criminal matters ([14351/18](#)).

The proposed regulation seeks to introduce an alternative mechanism to the existing tools of international cooperation and mutual legal assistance. It specifically addresses the problems stemming from the volatile nature of e-evidence and the 'loss of location' aspect by setting new procedures for quick, efficient and effective cross-border access.

The regulation on European production and preservation orders for e-evidence in criminal matters is part of a package tabled by the Commission in April 2018, which also includes a directive laying down harmonised rules on the appointment of legal representatives for the purposes of gathering evidence in criminal proceedings. The objective of the package is to improve cross-border access to e-evidence by creating a legal framework for judicial orders addressed directly to service providers in another member state.

For more information:

[Council - outcome of the October 2018 justice and home affairs meeting](#)

[Council - outcome of the June 2018 justice and home affairs meeting](#)

[Council website - policy page on better access to e-evidence](#)

[Commission - factsheet: facilitating access to electronic evidence](#)

[Press release on the fight against criminal activities in cyberspace, June 2016](#)

[Council of Europe - towards a protocol to the Budapest Convention](#)

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

The Commission will be invited to update the Council on the preparation on these mandates and the timeline for their submission to the Council.

Justice ministers asked the Commission in June 2018 and again in October 2018 to submit negotiating mandates as soon as possible, to allow the EU to take an active role in the negotiations currently ongoing at the Council of Europe and to respond to solicitations from the US authorities.

#### *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 will be briefed by the Commission on the state of play of the implementation of the EPPO regulation.

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 will be informed about the state of play of the expert discussions on data retention for the purpose of fighting crime. They will also be asked to share their views about the way forward.

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. Given 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, the Council will continue its reflections on an appropriate data retention framework.

For more information:

[Commission website - data retention](#)

### **Mutual recognition in criminal matters - Council conclusions**

The Council is expected to adopt 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 judgments 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 draft 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 is expected to also reaffirm that member states should continue to ensure the independence and impartiality of judges while noting that a refusal to execute a judgment issued on the basis of a mutual recognition instrument can only be justified in exceptional circumstances in line with the approach of the Court of Justice.

The draft conclusions also set out a number of practical steps to be taken to foster cooperation and mutual trust between authorities. These include: fostering the use of alternative measures to detention, so as to reduce the population in detention facilities; promoting training of practitioners; encouraging the exchange of best practice; encouraging practitioners 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 the exchanges of views held by ministers 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 on Human Rights (ECHR)**

Ministers will be updated on the state of play 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. After the Commission presented, at technical level, different parts of their analysis, it is now expected to inform the Council of the next steps in the accession process.