



Brussels, 30 November 2004

BACKGROUND ¹
JUSTICE AND HOME AFFAIRS COUNCIL
Brussels, 2 December 2004

*The JHA Council will start its work at 10h00. The main items on the agenda are: **European evidence warrant** (progress report), exchange of information extracted from the **criminal records, data retention, terrorism** (preparation of the European Council on 17 December), exchange of information on **terrorist offences**, exchange of data with Interpol concerning **lost or stolen passports** and measures against **ship source pollution**.*

A Ministerial meeting on Western Balkans will be held at 16.00.

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A press conference will be held at the end of the Council meeting.

¹ This note has been drawn up under the sole responsibility of the Press Service.

EUROPEAN EVIDENCE WARRANT: PROGRESS REPORT

The Council will take note of a progress report concerning negotiations on the proposal for a Council Framework Decision on the European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters.

The proposal is based on a step by step approach and covers as a first step in principle evidence which exists and is readily available. At a later stage other types of evidence will be included.

The first discussions in the Council preparatory bodies showed that delegations agreed on the importance of the implementation of the principle of mutual recognition of decisions in criminal matters in accordance with the conclusions of the meeting of the European Council in Tampere on 15 and 16 October 1999 and the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters adopted by the Council on 30 November 2000. The proposal is a first step towards a single mutual recognition instrument that would in due course replace all of the existing mutual assistance regime.

EXCHANGE OF INFORMATION EXTRACTED FROM THE CRIMINAL RECORDS

The Council is expected to agree on the main body (Articles 1-8) of a Decision on exchange of information extracted from criminal records.

The preamble and the Forms to be annexed to the draft Decision should be discussed at a later stage by the Council.

The proposal aims to ensure that the criminal record in the Member States of the person's nationality is as complete as possible at the earliest opportunity.

According to the draft text, each central authority shall without delay inform the central authorities of the other Member States of criminal convictions and subsequent measures in respect of nationals of those Member States entered in the criminal record.

Furthermore, a central authority may request information from the criminal records of another Member State.

The reply shall be sent immediately and in any event within a period not exceeding ten working days from the receipt of the request, under certain conditions.

Requests, replies and other relevant information may be transmitted by any means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity.

In all Member States criminal convictions are recorded by a variety of procedures in specific registers. There are exchange mechanisms to facilitate the transmission of this information between Member States, in particular under the European Convention on Mutual Assistance in Criminal Matters of 1959. But an analysis of their operation reveals that they contain gaps and function randomly and slowly, no longer meeting the needs for judicial cooperation in a frontier-free area such as the European Union. Recent tragic paedophilia cases have also highlighted the serious malfunctioning of systems for the exchange of information on convictions between Member States. Likewise, the demands of the fight against terrorism are such that the quality of these exchanges must be improved quickly.

DATA RETENTION BY TELECOMMUNICATION SERVICE PROVIDERS

The Council will examine the scope of the draft Framework Decision on data retention.

The proposal has been made in the light of in particular the Declaration by the European Council of 25 March 2004 on combating terrorism. The text strongly highlight in particular the use of telecommunications for the purpose of the commission of terrorist acts.

The Council will consider the obligation for service providers to retain data to apply to all relevant data defined in a common list in the instrument, provided that the data is processed/generated by the service provider in the process of supplying the telecommunications service concerned.

This approach may lead to a higher degree of certainty for the retention of the data concerned, and is less sensitive to the commercial behaviour of the service provider and technical developments. The service provider would be under an obligation to retain the data concerned to the extent that the data is processed/generated by the service provider, even if the data has no interest for the service provider. The level of harmonisation of Member States' legislation would be relatively high.

Judicial authorities and law enforcement authorities have during the last years increasingly expressed concerns regarding the use of the technical innovations, brought about by the continuous development of electronic telecommunications services, for the purpose of committing crimes, and the difficulties which this may cause regarding detection of crimes and investigation into crimes. These concerns relate not only to communications by fixed phones, mobile phones, short message services (SMS), electronic media services (EMS) and multi media services (MMS). Increasingly, they also relate to internet Protocols including Email, voice over the internet, world wide web, file transfer protocols, network transfer protocols, voice over broadband etc.

TERRORISM : PREPARATION OF THE EUROPEAN COUNCIL (17 DECEMBER 2004)

In June, the European Council identified four priority areas on which the EU should focus its work in the fight against terrorism: information sharing, combating terrorism financing, mainstreaming counter-terrorism in the EU external relations and improving civil protection and the protection of critical infrastructure.

On 17 December, the European Council will be presented with proposals in each of these areas. Additional recommendations will focus on national arrangements of Member States in the field of counter-terrorism.

The Council (JHA) will discuss some of these measures with a view to preparing the work of the next European Council on 17 December.

a) Revised Action Plan on Terrorism

At its meeting in June, the European Council decided that it would review the Action Plan twice a year, beginning at its December 2004 meeting.

The Presidency, in close cooperation with the EU Counter-terrorism Coordinator, Gijs de Vries, and the Commission, has drafted a revised Action Plan which will be discussed by the (JHA) Council.

The Action Plan contains well over 100 initiatives to be taken during the Dutch, Luxembourg and British Presidencies.

Significant progress have been achieved these last six months. However, the document shows that the EU is still faced with some gaps in implementation of legal provision. Member States still have to implement one or more of the twelve legislative instruments highlighted in successive European Council conclusions. These include the three protocols to improve Europol's powers to combat terrorism, and several other instruments which would make the EU more effective in the fight against terrorism financing, such as the convention and the protocol on mutual legal assistance. Several Member States have yet to implement the mutual legal assistance and extradition agreements with the United States, which are important instruments to reinforce transatlantic cooperation. Two framework decisions (on confiscation of crime-related proceeds and on protection against cyber attacks) have been the subject of a political agreement in the Council - in December 2002 and February 2003, respectively. However, adoption has so far not been possible due to the maintenance of parliamentary scrutiny reserves in two Member States. Most Member States have signed, ratified and implemented the twelve main United Nations Conventions in the fight against terrorism, but fewer than six conventions have been ratified by all 25 EU Member States. In the field of improving mechanisms for operational cooperation, however, some progress has been reached. The Task Force Chiefs of Police will play a more important operational role, the cooperation between security services using SitCen and Europol has been improved.

b) Peer review of national arrangements

As individual Member States - not the European Union - continue to be responsible for most operational aspects in the fight against terrorism, the quality of national anti-terrorist arrangements is of crucial importance. This is why the Ministers of Justice and Home Affairs decided to evaluate these national arrangements. In particular, they resolved to assess how information is being exchanged between law enforcement services, intelligence services and other domestic agencies. It was decided to proceed in two stages and to start with an assessment of the situation in the 'old' 15 Member States. A final report, covering also the 10 states which joined in May, will be prepared in 2005.

For each Member State national good practices have been identified and recommendations issued. National good practices with a significance for all or most other Member States were identified as best practices; an interim report, containing recommendations based on these best practices, will be presented to the JHA Council. The recommendations range from cooperation between the relevant services, information gathering and information sharing to the capacity to respond to a terrorist attack with chemical, biological, radiological or nuclear means. The purpose of the exercise is to provide national actors - Governments as well as Parliaments - with ways to learn from the experience of other Member states.

c) Terrorism financing

The Council is expected to reach agreement on a document containing a comprehensive strategy with respect to the fight against terrorist financing and subsequent endorsement by the European Council at its meeting of 17 December.

Terrorists need money to prepare and carry out attacks. Identifying and disrupting the mechanisms through which terrorism is financed are therefore key elements of the Union's counter-terrorism strategy. As well as reducing the financial flows to terrorists and disrupting their activities, action to counter terrorist financing can provide vital information on terrorists and their networks. In accordance with resolutions adopted by the UN Security Council the Union has established lists of individuals and groups designated as being involved in terrorist acts whose assets must be frozen. In part as a result of increased attention by governments and the financial sector the methods involved in terrorism financing appear to have changed since 9/11; intelligence indicates that there is now

less use of the regular banking system. This implies that terrorists may be seeking alternative means of moving funds, for example cash couriers and alternative remittance systems. The adoption of a regulation on cash movements and a new directive on money-laundering are a priority for the Council. The Commission is preparing legislation to improve the supervision of money remitters. The Council will examine additional proposals from the SG/HR Javier Solana and the Commission. Their aim is to provide the Union with a coordinated, cross-pillar strategy, based on an intelligence-led approach including input from the SitCen and Europol, and in close cooperation with international bodies such as the UN and the Financial Action Task Force.

d) Emergency response

The Council is expected to adopt conclusions on prevention, preparedness and response to terrorist attacks.

The main objective of the EU's counter-terrorism strategy is to help the Member States prevent terrorist attacks. However, should prevention fail, Member States need to ensure that essential public services are maintained or restored as soon as possible and that emergency relief is provided to citizens and businesses. Civil protection and emergency response management for the most part fall under the national competence of Member States. Nevertheless, in March the Union's Heads of State and Government declared their firm intention to "act jointly in a spirit of solidarity if one of them is the victim of a terrorist attack" and pledged to mobilise all the instruments at their disposal, including military resources, to assist a Member State affected by such an attack. The June European Council invited the Commission "to assess the capabilities of the Member States both in preventing and coping with the consequences of any type of terrorist attack, to identify best practices and to propose the necessary measures". The Commission has also been invited to make proposals to protect the Union's critical infrastructure, such as transport, energy, and communications. At their June Summit meeting the EU committed itself, together with the US, to "take concrete steps to expand and improve our capabilities to prevent and respond to bioterrorism".

The Commission has announced its intention to propose, in 2005, a European programme for the protection of critical infrastructure with a transboundary dimension. It has also proposed to create a critical infrastructure warning information network of national experts. Based on the information provided by Member States the Commission is drawing up an assessment of the national assets and capabilities that can be made available through the Community Civil Protection Mechanism in the event of a major terrorist attack. The Dutch Presidency has drawn up an EU Solidarity Programme on the consequences of terrorist threats and attacks which will be discussed by the Council in the next few weeks. This programme will cover, among other items, the interoperability of equipment, the holding of joint exercises and the sharing of information on vaccines and other medical resources that might be made available in case of a major terrorist attack. From this programme it is clear that a great deal of important work remains to be done. The Council is expected to discuss these various contributions at its 2 December meeting.

EXCHANGE OF INFORMATION ON TERRORIST OFFENCES

The Council is expected to agree on a general approach on Decision on the exchange of information and cooperation concerning terrorist offences.

According to the draft text, each Member State shall designate a specialised service within its police services or other law enforcement authorities which will have access to and collect all relevant information concerning and resulting from criminal investigations conducted by its law enforcement authorities with respect to terrorist offences, and send it to Europol.

Each Member State shall designate a Eurojust national correspondent for terrorism matters or an appropriate judicial or other competent authority which shall have access to and can collect all relevant information concerning prosecutions and convictions for terrorist offences, and send it to Eurojust.

The information to be transmitted to Europol is the following:

- a) data which identify the person, group or entity;
- b) acts under investigation and their specific circumstances;
- c) the offence concerned;
- d) links with other relevant cases;
- e) the use of communication technologies;
- f) the threat posed by the possession of weapons of mass destruction.

The information to be transmitted to Eurojust is the following:

- a) data which identify the person, group or entity that is the object of a criminal investigation or prosecution ;
- b) the offence concerned and its specific circumstances;
- c) information about final convictions for terrorist offences and the specific circumstances surrounding these offences;
- d) links with other relevant cases;
- e) requests for judicial assistance, including letters rogatory, addressed to or by another Member State and the response.

Each Member State shall take the necessary measures to ensure that requests from other Member States for mutual legal assistance and recognition and enforcement of judgments in connection with terrorist offences are dealt with as a matter of urgency and shall be given priority.

EXCHANGE OF DATA WITH INTERPOL CONCERNING LOST OR STOLEN PASSPORTS

The Council is expected to agree on a Common Position on exchanging certain data with Interpol.

All Member States are affiliated to the International Criminal Police Organization – Interpol; to fulfil its mission, Interpol receives, stores, and circulates data to assist competent law enforcement authorities to prevent and combat international crime. The Interpol database on Stolen Travel Documents permits Interpol's members to share between themselves the data on lost and stolen passports.

The European Council of 25 March 2004 in its Declaration on combating terrorism instructed the Council to take forward work on the creation by end 2005 of an integrated system for the exchange

of information on stolen and lost passports having recourse to the Schengen Information System and the Interpol database; the present Common Position is a first response to that request that could be followed-up by the setting up of the technical functionality in the second generation of the Schengen Information System (SIS II) to achieve that aim.

The exchange of Member States' data about stolen, lost and misappropriated passports with the Interpol database on Stolen Travel Documents as well as the processing of these data, shall respect applicable data protection rules both of the individual Member States and of Interpol.

Article 100 of the Convention Implementing the Schengen Agreement provides for the integration in the Schengen Information System of data on stolen, lost and misappropriated passports by the Member States that are bound by the Convention Implementing the Schengen Agreement.

The Common Position will oblige Member States to ensure that their competent authorities will exchange the aforementioned data with the Interpol database on Stolen Travel Documents in parallel to entering them in the relevant national database, and the Schengen Information System as regards the Member States participating in it. The obligation will arise from the moment the national authorities become aware of the theft, loss or misappropriation. A further requirement to set up the necessary infrastructure to facilitate the consultation of the Interpol database acknowledges the law enforcement relevance of the latter.

The conditions of the exchange shall be agreed with Interpol in order to ensure that the data exchanged will respect the data protection principles that lie at the heart of data exchange within the Union, in particular with regard to the exchange and automatic processing of such data.

The Common Position respects the fundamental rights and observes the principles recognised in particular by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union.

MEASURES AGAINST SHIP SOURCE POLLUTION

The Council will debate the draft Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.

It should be noted that the JHA Council of 19 November 2004 discussed the text of this Framework Decision and that the Presidency noted that three Member States (Greece, Malta and Cyprus) could not agree to the text proposed.

The fight against intentional or negligent ship-source pollution is one of the European Union's priorities. The conclusions of the Copenhagen European Council of 12 and 13 December 2002 (points 32 to 34) and the statement of the JHA Council of 19 December 2002 following the shipwreck of the tanker Prestige, in particular, express the Union's determination to adopt all the measures needed to prevent recurrences of such damage.

To that end, the Council reached a common position in June on a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences with the aim of approximating national legislation with regard to the definition of the relevant offences and commission, participation and incitement, on the one hand, and the nature, possibly criminal, of the penalties that can be imposed. It also includes technical and operational supporting measures.

With a view to supplementing those provisions, there should be approximation of, among other

things, the level of penalties corresponding to the seriousness of offences in relation to the natural or legal persons who commit them or are liable for them.

The purpose of the Framework Decision that will be discussed by the JHA Council is therefore to supplement the Directive agreed by the Council in June with detailed rules on criminal matters.

At the same time, provisions will be laid down to facilitate criminal investigations. Member States will be able to set up joint investigation teams with which Europol could be associated.

In addition, rules on cooperation will be laid down to ensure that offences will be prosecuted effectively. To that end, the European Union will supplement the results obtained in regional or international organisations. The 1982 United Nations Convention on the Law of the Sea, signed by all the Member States of the Union, of which the European Community as a party, is particularly important in this context.

Each Member State will take the measures necessary to ensure that the offences referred to in the Framework Decision are punishable by effective, proportionate and dissuasive criminal penalties.

The criminal penalties may be accompanied by other penalties or measures, in particular fines, or the disqualification of a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his or her conviction show an obvious risk that the same kind of criminal activity may be pursued again.

As regards sanctions against legal persons, each Member State will take the measures necessary to ensure that a legal person held liable is punishable by effective, proportionate and dissuasive sanctions such as criminal or non-criminal fines, or exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from engaging in commercial activities; being placed under judicial supervision; a judicial winding-up order; or the obligation to adopt specific measures in order to eliminate the consequences of the offence which led to that legal person's liability.

EU-WESTERN BALKANS FORUM

The Ministers responsible for Justice and Home Affairs of the European Union, the Candidate Countries, Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Serbia and Montenegro, the Romanian chairmanship of the South Eastern Europe Cooperative Process (SEEC) and the European Commission will meet in Brussels on 2 December 2004 at 16h00 in the presence of the Special Representative of the UN Secretary General in Kosovo, the High Representative for Bosnia and Herzegovina, the Special Co-ordinator of the Stability Pact for South-Eastern Europe, and the EU Special Representative in the former Yugoslav Republic of Macedonia, to discuss JHA issues, in particular the situation and latest developments related to organised crime in the Western Balkans and its impact on the European Union, as well as co-operation on border management and the development of judicial and law enforcement cooperation.

At the end of the meeting, the Presidency will issue a statement.
