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European Union

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PV/CONS 33
JAI 586
COMIX 427

DRAFT MINUTES

Subject: **3546th** meeting of the Council of the European Union
(Justice and Home Affairs), held in Luxembourg on 8 and 9 June 2017

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JUSTICE

LEGISLATIVE DELIBERATIONS

(Public deliberation in accordance with Article 16(8) of the Treaty on European Union)

"A" ITEMS

1. Draft amending budget No 2 to the general budget for 2017: Entering the surplus of the financial year 2016

9436/17 FIN 315 PE-L 20

approved by Coreper, Part 2, on 31.05.2017

The Council adopted its position on the draft amending budget No 2/2017, with the United Kingdom abstaining, as set out in 9436/17.

2. Regulation of the European Parliament and of the Council on cross-border portability of online content services in the internal market [First reading]

= Adoption of the legislative act

PE-CONS 9/17 PI 19 RECH 47 EDUC 57 COMPET 107 SAN 68 AUDIO 16

CULT 17 DIGIT 29 CODEC 237

The Council approved the European Parliament's position at first reading and the proposed act has been adopted, pursuant to Article 294(4) of the Treaty on the Functioning of the European Union. (Legal basis: Article 114 TFEU).

"B" ITEMS (9814/17 OJ CONS 33 JAI 556 COMIX 405)

3. EPPO: Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office

= General approach

9545/2/17 REV 2 EPPO 18 EUROJUST 77 CATS 54 FIN 321 COPEN 169

GAF 21 CSC 109

9896/17 EPPO 20 EUROJUST 82 CATS 61 FIN 343 COPEN 185 GAF 24

CSC 119

The Council reached a General approach on the text of the draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, as set out in 9545/2/17 REV 2.

Statements to this item are set out below.

Statement by the Council and the Commission on article 49(6) - budget

"The Council and the Commission declare that the application of the financing mechanism provided for in Article 11 of the Making Available Regulation 609/2014 does not set a precedent for future possible measures undertaken within the procedure of enhanced cooperation."

Statement by the Council on article 59a - relations with Member States which do not participate in the enhanced cooperation on the establishment of the EPPO

"The Council invites the Commission to reflect on submitting appropriate proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and all Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO.

This should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, fully respecting the Union acquis in this field as well as the duty of sincere cooperation (Article 4(3) TEU).

The date on which the EPPO should exercise its competence should not be affected by the submission of any proposals from the Commission."

Statement by the Commission

"The Commission welcomes the Council's general approach on the proposal for a Regulation for the establishment of a European Public Prosecutor's Office. The European Public Prosecutor's Office should become a key actor and hence a milestone in the protection of the Union's financial interests. It will be also a significant step towards the creation of a genuine area of criminal justice in the European Union.

Although the Commission considers the draft Regulation to be a good basis for the establishment of the European Public Prosecutor's Office, it would like to make the following declaration regarding its outstanding concerns on Articles 31, and 65, as well as Chapter VI of the draft Regulation.

On Article 31:

The Commission considers that the principle of free admissibility of evidence must be preserved in the investigations and prosecutions carried out by the European Public Prosecutor's Office, i.e. evidence lawfully gathered in one Member State should be admissible before the trial court in another Member State. The review by the trial court of the admissibility of evidence presented by the EPPO should thereby be limited to checking compliance with the rights enshrined in the Charter of Fundamental Rights of the EU, in particular those contained in Title VI ("Justice") and not be based on any other criteria stemming from national law. The Commission is of the view that the draft Regulation, in particular recital 70, lacks the necessary clarity and as a result thereof could be interpreted in a way that the trial courts may deny admission of evidence presented by the European Public Prosecutor's Office on any ground stemming from national law. This interpretation would undermine the mutual trust required for the operation of the European Public Prosecutor's Office as a single office and ultimately impair the effectiveness of its cross-border investigations. The Commission wishes to stress that this does not prejudice the right of the trial court to freely assess the evidence presented to it.

On Article 65:

Given the rights foreseen in Article 15 TFEU and Article 42 of the European Charter of Fundamental Rights, which provide for a right of access to documents of all Union institutions, bodies, offices and agencies, the Commission considers that Regulation 1049/2001 should be fully applicable to all documents held by the European Public Prosecutor's Office. The full application of Regulation 1049/2001 would not endanger European Public Prosecutor's Office operations in any way, as it foresees specific exceptions for investigations and court proceedings and allows for the establishment of general presumptions of non-accessibility. These features adequately address confidentiality requirements whilst balancing them with the public interest.

On Chapter VI – Data Protection regime:

The Commission considers the stand-alone data protection regime for the European Public Prosecutor's Office as only a temporary solution. In accordance with Article 73a of the draft Regulation, and in the light of the position the European Court of Justice may take in its Opinion 1/15 as regards the legal basis for data protection rules, the Commission will consider submitting a legislative proposal with a view to amending or repealing the provisions relating to the protection of natural persons with regard to the processing of personal data by the European Public Prosecutor's Office. In addition to the legal basis, the Commission has specific concerns in particular with regard to Article 36e(2)(c), which makes the processing of data by the European Public Prosecutor's Office for purposes other than those for which they were collected subject to national procedural law."

Statement by Germany

"Germany would like to point out that maintaining the compromise on a 'static reference' related to VAT offences, as proposed by the Presidency, is a *conditio sine qua non* for Germany. We are willing to support the General Approach on that basis. Germany will only be able to agree to the eventual formal adoption of the legal act, however, if Article 17 paragraph (1) of the draft regulation remains unchanged in that respect. It is of essential importance for Germany that the competence of the European Public Prosecutor's Office in regard to the prosecution of value added tax offences remain limited to serious cases that are connected with the territory of two or more Member States and involve a total damage of at least EUR 10,000,000."

4. Digital Agenda

Supply of digital content: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content [First reading]

= General approach

9901/17 JUSTCIV 137 CONSUM 246 DIGIT 157 AUDIO 84 DAPIX 224
DATAPROTECT 111 CULT 83 CODEC 968

+ ADD 1

The Council approved as a compromise package a general approach on the text of the Articles and a number of important recitals of the proposed Directive as set out in ADD 1 of 9901/17 and took note of written statements of delegations (9833/17 and 10080/1/17 REV 1) and of the Commission (10080/17 ADD 1), set out below.

Joint statement by Portugal, France, Italy, Romania and Cyprus

"Portugal, France, Italy, Romania and Cyprus reserve the right to seek improvements in the text in the future interinstitutional negotiations with the European Parliament and expect that trilogue will lead to a more ambitious directive in favour of consumer protection within the European Union, notably in the provisions concerning the reversal of burden of proof on the supplier.

The compromise proposed by the Presidency, with one-year maximum harmonisation, is not in line with the two-year minimum harmonisation set out for the time-limit on the supplier's liability (legal guarantee), which will unjustifiably hinder the protection of our consumers in relation to typically very complex digital content or digital services.

It is not reasonable to expect that consumers will be able to fully understand such digital content or services, still less that they will be able to prove non-conformity when it occurs just after one year from a one-off supply.

In the case of Portugal, France, Italy, Romania and Cyprus, the maximum harmonisation of one year for the time-limit on the reversal of the burden of proof and the lack of alignment with the proposed two-year time limit for the supplier's liability (legal guarantee) will represent a major setback for consumer protection."

Statement by the Republic of Austria

"Despite its concerns regarding the requirement for a specific warranty regime for contracts for the supply of digital content, Austria has always taken part actively and constructively in the negotiations in the Council working party. It is all the more regrettable that many of Austria's proposals, whether concerning issues of content or of legal drafting, are not reflected in the current compromise text although they have been supported by other Member States. Although progress has been made in the course of the negotiations, there are still elements in the compromise text which are unclear and will give rise to considerable legal uncertainty. This applies particularly to the provisions concerning digital content integrated into products. In the interests of transparent regulation, rules on these products needed to be established which would be straightforward for consumers, suppliers and legal practitioners to follow, in order to avoid problems of differentiation. Unfortunately, the current text fundamentally fails to fulfil this requirement. Unclear legal drafting also affects the provisions on the start of the time-limit for the warranty (Article 9a(3)(ii) and on the termination of contracts (Article 13a(1) in conjunction with Article 13b(3).

The right balance between the interests of suppliers and consumers also has not always been struck. As regards the issue of the reversal of the burden of proof in Article 10(1a), Austria has always advocated a six-month time-limit for the reversal of the burden of proof. The provisions on the one-year time-limit for the reversal of the burden of proof and on warranty under contracts without payment where personal data are processed will give rise to a heavy burden on suppliers. On the other hand, the supplier's virtually unlimited unilateral right to modify content represents a deterioration in the consumer's position. Here - as Austria has repeatedly proposed - a criterion which takes adequate account of the consumer's interests need to be incorporated, such as whether the modification is such as the consumer can reasonably be expected to accept.

Ultimately, the provisions contained in the proposal are closely connected with those of the parallel proposal on certain aspects concerning contracts for the online and other distance sales of goods, so that the warranty in contracts for the supply of digital content should really not be treated separately."

Joint statement by Latvia, Lithuania and Luxembourg

"Fast developing digital products such as digital content are one of the main drivers for the growth of the digital economy. Therefore, Latvia, Lithuania and Luxembourg (hereinafter – *the Member States*) welcome that the Directive aims at enhancing the smooth functioning of the Digital Single Market by setting uniform rules for consumer protection with regard to contracts for the supply of digital content. In overall, *the Member States* believe that the General Approach is a delicate balance between the different interests of the Member States, as well as between the high level of consumer protection and business-friendly environment. Therefore, *the Member States* support the General Approach.

Nevertheless, *the Member States* would like to express the concerns on some aspects of the text endorsed today.

Considering already existing problems in practice, mainly, related to the different national regulations, the full harmonisation principle is a key to complete the well-functioning Single Market for both consumers and businesses. Therefore, *the Member States* regret that the European Commission's original proposal was watered down by allowing Member States to keep different national provisions on some elements of the Directive, notably on the legal guarantees periods, the termination of unlimited period contracts and the consequences of the termination of bundle contracts. This way the regulatory barriers to cross-border trade and, hence, the fragmentation of the Single Market will remain, which holds back the consumers and businesses from the benefits of the truly integrated Digital Single Market. Any further, even minor deviation from the level of harmonisation would jeopardise the aim of the whole Directive.

The Member States reserve the rights to stand behind the concerns expressed above in future interinstitutional negotiations."

Statement by the Czech Republic

"The Czech Republic welcomes and supports the objective of this Directive to contribute to faster growth of the Digital Single Market, for the benefit of both consumers and businesses. We also believe that with a targeted full harmonisation approach we could eliminate the key contract law-related obstacles to cross-border supply of digital content. The Czech Republic has participated in the negotiations on the proposal in an active and constructive manner and we are pleased that some problems have been resolved to reach a balanced compromise.

Nevertheless, we consider that some key elements of the proposal are unclear and only lead to legal uncertainty. Moreover, by accepting these provisions we would lower the level of consumer protection guaranteed by national law. In particular, we express our disappointment with regard to the ambiguous interpretation of the definition of "embedded digital content" (Article 2(12)) as it is not clear what rules should apply to what digital content. We also regret that the wording of Article 5 has changed at the last stage of negotiation and the text was watered down.

Moreover, the Czech Republic is not satisfied that the principle of full harmonization, which we have supported in the long term, could not be maintained in Article 9a. Nevertheless, to compensate the minimum harmonization in Article 9a, we were of the opinion that at least the time limit for reversal burden of proof should be 2 years, i.e. the same length as the time limit for the supplier's liability for non-conformity.

Finally, as we were pleading to maintain the level of protection for the Czech consumers we regret that our proposal for the recital concerning Article 12(2) was not accepted to ensure for the consumer legal certainty when establishing for us so problematic “reasonable time” for bringing the digital content and service into conformity by the supplier.”

Statement by the Commission

“The Commission attaches great importance to ensuring interoperability of digital content. To this end, the Commission follows the situation on the market while considering possible ways forward. In this context, the Commission is taking into account existing Union laws. It will also consider the impact of market developments on the application of the proposed Directive on contracts for the supply of digital content.”

5. Revision of Brussels II a: Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)

= Policy debate

9317/17 JUSTCIV 113

+ COR 1

The Council broadly supported the policy approaches as set out in 9317/17 + COR 1 that will serve as a basis for the future work in the working party of the Council.

6. Insolvency: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [First reading]

= Policy debate

9316/17 JUSTCIV 112 EJUSTICE 65 ECOFIN 418 COMPET 415

EMPL 312 SOC 398 CODEC 833

The Council endorsed the principles set out in 9316/17 for the future work on this draft Directive in the working party of the Council.

7. Money Laundering: Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law [First reading]

= General approach

9718/17 JAI 551 DROIPEN 76 COPEN 181 CT 55 CODEC 930

+ COR 1

The Council reached a General approach on the draft Directive of countering money laundering by criminal law with reservations from Austria and Greece, and the Commission reserving its position until the negotiations with the European Parliament.

8. Data protection by Union institutions and bodies: Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the union institutions, bodies, offices and agencies and of the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [First reading]

= = General approach

9091/17 DATAPROTECT 94 JAI 412 DAPIX 180 FREMP 59 DIGIT 133

CODEC 791 RELEX 390

+ REV 1 (it, da, cs, sk, bg, ro, hr, ga)

The Council approved the general approach on the above-mentioned draft Regulation as set out in 9091/17.

9. Any other business

= Information from the Presidency on current legislative proposals

The Presidency informed delegations on the state of play of the different on-going legislative files.

LEGISLATIVE DELIBERATIONS

(Public deliberation in accordance with Article 16(8) of the Treaty on European Union)

14. Reform of the Common European Asylum System and Resettlement

- a) **Dublin: Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [First reading]**
- b) **Reception conditions: Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) [First reading]**
- c) **Qualification: Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [First reading]**
- d) **Procedure: Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [First reading]**
- e) **Eurodac: Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) [First reading]**
- f) **EASO: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [First reading]**

g) Resettlement Framework: Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council [First reading]

= Progress report

9781/17 ASILE 38 ASIM 64 CSC 115 EURODAC 17 ENFOPOL 277
RELEX 467 CODEC 936

The Council took note of information provided by the Maltese Presidency on the state of play of the examination of the seven legislative proposals on the reform of the Common European Asylum System (CEAS) on the basis of a Presidency progress report (9781/17).

15. ETIAS: Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel and Information Authorisation System (ETIAS) [First reading]

= General approach

9763/17 FRONT 248 VISA 203 DAPIX 213 DATAPROTECT 108 CODEC 935
COMIX 399
+ ADD 1

The Council confirmed the outcome of discussions in the Mixed Committee at Ministerial level (10253/17) and adopted the texts set out in the Annex and the Addendum 1 to 9763/17 as a general approach.

Bulgaria abstained and made the statement set out in below.

Statement by Bulgaria

"Bulgaria welcomes the Presidency efforts to reach a common approach and to move the discussion on the next level in order to fulfil the political guidance given by the European Council in its conclusions adopted on 15 December 2016, namely to have an agreement between the co-legislators on ETIAS by the end of 2017.

We are deeply convinced that ETIAS will contribute to the prevention of threats to the security in general.

However, pending the final agreement on Smart Borders package and in particular the calculation of the duration of the stay of third country nationals, it is difficult for us to fully assess the overall functioning of ETIAS and the impact of the system for Bulgaria.

We highlight the importance of the single calculation of the duration of the stay of third country nationals as agreed by the Council under EES Regulation. We once again raise our concerns that any separation of the calculation of the duration of the stay will have negative impact on the functioning of ETIAS and on the internal security."

16. Schengen Information System (SIS)

- a) **Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1987/2006 [First reading]**
 - b) **Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU [First reading]**
 - c) **Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) for the return of illegally staying third-country nationals [First reading]**
- = Policy debate
9595/17 JAI 536 SIRIS 96 SCHENGEN 32 ENFOPOL 265 COPEN 175
FRONT 243 MIGR 85 COMIX 384 CODEC 908
+ COR 1

The Council took note of the discussions held in the Mixed Committee at Ministerial level (10253/17) and instructed the competent bodies of the Council to continue work on the proposals.

17. Any other business

- = Information from the Presidency on current legislative proposals

The Presidency informed delegations of the state of play of the different on-going legislative files.