



Council of the  
European Union

Brussels, 13 November 2015  
(OR. en)

12895/15  
ADD 1

PV/CONS 52  
JAI 737  
COMIX 481

## DRAFT MINUTES

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Subject: **3415th** meeting of the Council of the European Union (**JUSTICE AND HOME AFFAIRS**), held in Luxembourg, on 8 and 9 October 2015

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# PUBLIC DELIBERATION ITEMS<sup>1</sup>

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<sup>1</sup> Deliberations on Union legislative acts (Article 16(8) of the Treaty on European Union), other deliberations open to the public and public debates (Article 8 of the Council's Rules of Procedure).

## **LEGISLATIVE DELIBERATIONS**

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

### **"A" ITEMS**

**1. Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 as regards specific measures for Greece [First reading] (LA)**

PE-CONS 50/15 FSTR 51 FC 50 REGIO 65 SOC 473 EMPL 312 BUDGET 26

AGRISTR 59 PECHE 268 CADREFIN 46 CODEC 1083

+ COR 1

+ COR 2 (fr)

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 177 of the TFEU).

**2. Managing the refugee crisis: immediate budgetary measures under the European Agenda on Migration**

= Draft amending budget No 7 to the general budget for 2015

12506/1/15 REV 1 FIN 651 PE-L 56

approved by Coreper, Part 2, on 7.10.2015

The Council adopted its position on draft amending budget No 7 to the general budget for 2015 by unanimity, in accordance with Article 314 of the Treaty on the Functioning of the European Union.

### **"B" ITEMS**

#### **HOME AFFAIRS**

**3. Visa policy**

(a) **Proposal for a Regulation of the European Parliament and of the Council on the Union Code on visas (recast) [First reading]**

(b) **Proposal for a Regulation of the European Parliament and of the Council establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 562/2006 and (EC) No 767/2008 [First reading]**

= Policy debate/Progress report

12382/15 VISA 314 CODEC 1248 COMIX 435

The Council confirmed the conclusions drawn by the Presidency at the meeting of the Mixed Committee at Ministerial level (see doc. 12956/15).

4. **Follow-up on legislative proposals of 9 September 2015**<sup>1</sup>

- (a) **Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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**

[First reading]

11843/15 ASIM 79 CODEC 1167

+ ADD 1

- (b) **Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU** [First reading]

11845/15 ASIM 81 COWEB 86 CODEC 1171

+ ADD 1

= Progress report

12557/15 ASIM 101 COWEB 94 CODEC 1280

+ COR 1

The Council took note of the information provided by the Presidency on the state of play of the examination of the above mentioned Commission proposals. The Council invited its preparatory bodies to pursue the examination of the two legislative proposals in order to allow the Presidency to start negotiations with the European Parliament as soon as possible with a view to reaching an agreement.

5. **Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime** [First reading]

= Progress report

The Council was informed of the Presidency's plans regarding the ongoing trilogues with the European Parliament in this file.

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<sup>1</sup> Exceptionally, in the presence of Associated States.

**6. Any other business**

= Information from the Presidency on current legislative proposals

The Presidency informed the Council about the state of play of the negotiations of several legislative proposals.

JUSTICE

**15. Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data [First reading]**

= General approach (°)

12555/15 DATAPROTECT 154 JAI 707 DAPIX 163 FREMP 202 COMIX 456  
CODEC 1279

The Council adopted a general approach on the draft Data Protection Directive. Austria could not support the general approach. Slovenia and the Czech Republic as well as Austria made statements as set out hereafter.

**Statement by the Czech Republic and Slovenia**

"The Czech Republic and the Republic of Slovenia welcome the general approach and will be constructive in further negotiations.

However, the Czech Republic and the Republic of Slovenia are nevertheless of the opinion that regulating in the proposed Directive national processing of personal data, without a cross border element, by competent authorities in the area of law enforcement and criminal justice is not in full conformity with the principle of subsidiarity as defined in Article 5 of the Treaty on European Union and the Protocol (No. 2) on the application of the principles of subsidiarity and proportionality. More precisely, we are of the opinion that Member States are better placed to regulate national processing of personal data in the area of law enforcement and criminal justice taking into account national specificities and established national rules on law enforcement and criminal proceedings that are underlying the processing of personal data."

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(°) When adopting a general approach after the European Parliament has adopted its position at first reading, the Council is not acting within the meaning of Article 294(4) and (5) TFEU.

## **Statement by Austria**

### **on the Adoption of a General Approach on the Directive proposal in the version of Council doc. 12555/15.**

"From the very beginning of the discussions on the Commission Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, dated January 25, 2012, Austria has always played an active and constructive role in order to reach the goal of a swift and well-balanced agreement on the Directive.

Austria acknowledges the intensive work done by all the Presidencies in order to achieve this goal. In particular, we appreciate the fact that the Directive will establish a consistent data protection level within the law enforcement sector, in coherence with the General Data Protection Regulation but also taking account of the specific requirements of this sector.

Whilst we regret that in some points, the data protection level of the Directive lowers the current level of protection provided for by the Framework Decision 2008/977/JAI, the Directive leaves enough flexibility for national legislation to provide a higher or more specific data protection level.

For example, the changes recently made in Article 7a para 1 approach an important concern of Austria. We understand this provision to the effect that any transfer of personal data must be provided for by law, even if it falls under the scope of the Regulation. However, for systematic reasons we believe that such transmissions should fall under the scope of the Directive in order to ensure that member states can set out conditions for such transfers, in particular if data is transferred for purposes which do not fall under the Directive.

However, in our view some very important issues, which cannot be solved at national level, remain. These deficits have yet to be resolved during the trialogue with the European Parliament and European Commission:

1. With regard to the scope of the Directive, as already pointed out in the AT Declaration on the Proposal for General Data Protection Regulation <sup>1</sup>, we cannot accept that data processing activities for pure administrative purposes such as speed monitoring, food safety, assessment of individual grounds for asylum or registration of events and assemblies fall under the scope of the Directive. Austria holds the position that it must be clear that such processing activities are covered by the Regulation irrespective of which authority, agency or body is carrying out such processing. However, the current text lacks clarity on this issue.
2. Documentation and Logging must be obligatory to the extent that the legality of each processing activity can be verified by the supervisory authority (esp. purpose). However, in this respect, the Directive provides for restrictions of these obligations to the effect that the level of data protection is to some extent lower than the level of the Framework Decision 2008/977/JAI. For instance, logging is restricted to automated processing activities in the Directive whereas it covered also non-automated transnational processing activities within the scope of the Framework Decision.

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<sup>1</sup> Note from Austria to the 3396<sup>th</sup> COUNCIL of 15-16.6.15.

3. Art. 36aa, which allows for the transfer of personal data to private parties in third countries (irrespective of the data protection level) is not acceptable for Austria, in particular with regard to its current drafting. We have strong concerns that this provision may lead to the circumvention of official channels provided for by international agreements. Furthermore, such transmissions must be restricted to a strict minimum and may only take place under strict conditions, including the urgency of the case, which must be prescribed in the text. Furthermore, the relation of Art. 36aa to other provisions of Chapter V, in particular to the principles laid down in Art. 33, requires further clarification.
4. Art. 52 provides for a judicial remedy against infringements of provisions adopted pursuant to the Directive without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority. As Austria already pointed out with regard to Art. 75 of the Regulation<sup>4</sup>, such a possibility of parallel proceedings about the same subject matter is incompatible with the Austrian legal system."

## 16. **Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office**

= Partial general approach

12621/15 EPPO 37 EUROJUST 168 CATS 98 FIN 660 COPEN 256 GAF 39

After substantial progress in July and September, the Council expressed a very large support to the Articles 24-33 plus Article 35 of the EPPO Regulation, as set out in the Presidency document, regarding investigations, prosecutions and procedural safeguards. However, it was made clear that these Articles would be re-visited once the full text was examined in order to ensure coherence. On this basis, the experts were invited to continue examining Articles 17 to 23 related to competencies of EPPO and rules on investigations. Austria made a statement, as set out hereafter.

### **Statement by Austria**

#### **"Preamble**

First of all, the Austrian Delegation would like to state clearly that we fully support the idea of the establishment of the European Public Prosecutor's Office (EPPO).

However, it is of utmost importance for the Austrian Delegation that, on the one hand, the EPPO is enabled to conduct its investigations efficiently and that, on the other hand, investigations are in line with the Charter of the Fundamental Rights as well as national constitutional requirements. The latter is necessary since the Regulation, to a large extent, does not establish procedural rules for the investigations of the EPPO but relies on the national Criminal Procedure Codes of the Member States (MS).

With regard to cross border investigative measures we understand the aim of a majority of MS to have a system with only one judicial authorisation. However, we are afraid that the proposed system does not provide the EPPO with an efficient procedure in this regard. For us it seems that this system is taking two steps at once without creating the necessary prerequisites, i.e. common procedural rules for the investigations of the EPPO directly applicable throughout all participating MS.

## **Article 26**

It is proposed – and so far we agree – that the European Delegated Prosecutor handling the case shall assess conditions for the adoption and justification of a measures in cross border cases in accordance with the law of his/her MS (para 2).

However, judicial authorisation shall be sought in the MS of the assisting European Delegated Prosecutor (EDP) if the applicable law of that MS provides for such authorisation. Only where the law that MS does not require such an authorisation, but the law of the MS of the EDP handling the case requires it, the authorisation shall be obtained by the EDP handling the case (para 4). In our view the Regulation does not set out provision on how the court in the assisting MS will carry out its judicial review. This seems to be left to national law. If such judicial authorisation is not to be a simple rubber stamp but a procedure according to which the court is able to assess the conditions for the ordering of the measure (independently of the opinion of the prosecution service) it is inevitable that the court in the MS of the assisting EDP is provided with the file in order to assess the circumstances of the case (e.g. the degree of suspicion, the necessity, the proportionality of the measure etc.) on its own.

In most of the cases this will imply, of course, that the file is translated into the language of the MS of the assisting EDP. Since the judge in the assisting MS is not familiar with the case at hand he/she will need some time in order to study the file. Both steps (translation and time for study) will take time depending on the scope of the file – not to speak of the costs for the translation of the file which will have to be born either by the MS or the European Union.

If however the court in the assisting MS will only rubber stamp the order of the EPPO this would lead to a decrease of legal protection. To explain this, we would like to give the following example: Currently in mutual legal assistance if a prosecution service in Austria is investigating and wants a telephone interception to be carried out in another MS the prosecution service in Austria would have to apply for judicial authorisation for this measure at the competent court in Austria which will undertake a full review of the file (particularly regarding the degree of suspicion, the necessity and proportionality as well as other legal requirements). In the executing MS there would only be a formal review by the competent judicial authority. If in an EPPO investigation there would only be a rubber stamp procedure by the court in the assisting MS the level of legal protection by an independent court would be decreased in comparison to the current situation. Apart from that this would be in contradiction with the requirements of the Austrian Constitution.



Apart from the problem that the proceedings of the EPPO will not be time-efficient, which is in contradiction with the jurisprudence of the ECtHR, the Member State where judicial authorisation is to be sought will be determined in an arbitrary manner depending on the applicable Procedure Codes of the MS concerned and whether one of them or both require judicial authorisation. The result is not foreseeable for the accused or other persons concerned.

Finally, we would like to refer to our proposal no. DS 1237/15 which was submitted during negotiations of the working party and which was created on the basis of the European Investigation Order but would have provided the EPPO with a far simpler procedure for cross border investigations. In our view this proposal would have taken account of all the concerns stated above regarding the current regime.

### **Article 31**

When analysing Art. 31 one has to bear in mind the provisions set out by Art. 26 and 27. As stated above, the judicial authorisation shall in principle be sought in the assisting MS according to Art. 26. Furthermore, Art. 27 provides that the assigned measure shall be carried out in accordance with the Regulation and the law of the assisting MS; formalities and procedures expressly indicated by the handling EDP shall be complied with unless they are contrary to the fundamental principles of law of the assisting MS.

As a result, the law of the assisting MS again will have priority although the evidence will most likely be used in the main trial in the MS of the EDP handling the case.

Art. 31 states that the trial court shall ensure it is satisfied that evidence presented in the main trial would not be incompatible with MS' obligations in accordance with Art. 6 TEU, the fairness of the procedure, the rights of defence or other rights enshrined in the Charter. Hence national law, particularly the conditions regarding admissibility of evidence, will only be applicable if the said requirements are met.

Taking into account the provisions of Art. 26 and 27, this is not the best result since the Regulation mainly refers to national procedural rules of the MS for the investigations of the EPPO. This leads to an unforeseeable mixture of provisions of different legal traditions which is currently not the case in mutual legal assistance or mutual recognition. The Austrian delegation strongly believes that each national Criminal Procedure Codes is a closed and coherent system linking together the investigation phase and the trial phase – which should not be mixed together in the way described above.

The Austrian delegation is of the opinion that this could lead to particularly time-consuming proceedings before the trial court. Since the trial court will have to apply Art. 31 of the Regulation instead of national law it might happen that for each piece of evidence presented by the EPPO a request for preliminary ruling will be submitted to the ECJ.

### Article 35 paragraph 3

This provision concerns the rights of accused and other persons involved in the proceedings of the EPPO. It sets out that those rights shall be available in accordance with the applicable national law. The Austrian delegation is asking which law shall apply in cases of cross border investigative measures. Will it be the law of the European Delegated Prosecutor handling the case, according to which the measure will have to be assessed regarding justification and adoption or the law of the assisting MS where the judicial authorisation might be sought and according to which the measure will be executed or even both?

Of course it is possible to leave this for the ECJ to decide in every individual case for each measure. However, the European legislator hereby runs the risk that the proceedings of the EPPO will be cumbersome and inefficient which will be to the detriment of accused persons who will be facing overlong proceedings as well as to the detriment of the European Union and society since criminal organisations and their members will not be prosecuted and brought to justice within due time.

### Summary

In an overall assessment the Austrian delegation wants to express the opinion that the European legislator runs the risk of establishing an EPPO which will have no added value and will therefore not be able to contribute to the aim of the European Union of being an area of freedom, security and justice. The mixture of procedural rules could lead to an – for accused and other person concerned – unforeseeable application of law. Since important questions are either not regulated by the Regulation (e.g. rights of accused in case of cross border measures – Art. 35 para 3) or unnecessarily provided for in the Regulation instead of referring to national law (Art. 31), the ECJ will be overflowed with requests for preliminary rulings which will make the proceedings of the EPPO time-consuming to a very large extent. This is also true with regard to the judicial authorisation of measures which have to be carried out in another MS (Art. 26) as the file will have to be translated in most cases for the judge in the assisting MS."

## 17. Any other business

### (a) Information from the Presidency on current legislative proposals

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

### (b) Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime: transposition

= Information from the Commission

The Commission recalled the upcoming deadline of 16 November 2015 for the transposition of this Directive and briefly outlined the activities it would undertake to support its implementation.