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#### NOTE

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| From:           | Presidency  |
| To:             | Delegations   |
| No. prev. doc.: | 13035/1/16 REV 1 EURODAC 12 CODEC 1409 ENFOPOL 332 ASILE 46   |
| No. Cion doc.:  | 8765/16 REV 1 ASILE 13 EURODAC 3 ENFOPOL 132 CODEC 630  |
| Subject:        | 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)<br>- Conditions for access for law enforcement purposes - Summary of the Member States' replies |

#### I. INTRODUCTION

During the discussions of the above proposal on the recast of the Eurodac Regulation, many delegations spoke in favour of a simplified and broader access of law enforcement authorities to Eurodac. On that basis, the Presidency prepared a questionnaire<sup>1</sup> with the aim of identifying possible approaches for extending and simplifying that access. This questionnaire was examined at the Friends of Presidency meeting on 11 October attended by the asylum and law enforcement experts. The JHA Council on 13 October 2016<sup>2</sup> confirmed this approach and invited its preparatory bodies to accordingly examine possible changes to be introduced in the proposal.

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<sup>1</sup> doc. 13035/1/16 REV 1

<sup>2</sup> doc. 12726/16

Written contributions were received from 23 delegations. Based on the above, the Presidency has prepared the below summary.

## **II. SUMMARY OF REPLIES**

Most Member States support the idea of simplifying and broadening the possibilities for law enforcement authorities to have access to Eurodac. It is generally considered that the present Eurodac Regulation contains rather restrictive and complex conditions for access to its database for law enforcement purposes. The expansion of the scope of law enforcement access should help dealing with the increasingly complicated operational situations and cases involving cross-border crimes and terrorism with direct impact on the security situation in the EU. However, Member States also underlined that this approach must be balanced to limit access only to duly justified cases.

It is to be noted that a significant group of Member States (14 MS), which replied to the questionnaire, indicated they do not yet have experience with law enforcement access to the Eurodac database.

### **A) Broadening of the scope of law enforcement access to Eurodac**

#### ***1. For which crimes, other than terrorist offences or other serious criminal offences that carry a sentence of less than three years, do MS want to allow law enforcement authorities to access Eurodac and why is this necessary?***

Five Member States do not consider it necessary to extend the list of crimes to which their law enforcement authorities already have access.

The Member States which are in favour of extending the list suggest the addition of the following crimes:

- property crimes (theft, burglary, etc.) (9 MS)
- criminal offences that are punishable by a custodial sentence or a detention order for at least one year (5 MS)
- smuggling (2 MS)
- forgery of official documents in relation to illegal migration (3 MS)

- sexually motivated offenses, extending the currently covered 'sexual exploitation of children' and 'rape' (3 MS)
- crimes against peace and public order, such as riots, incitement to violence or hatred based on sexual orientation or gender identity (1 MS)
- illegal crossing of the border barrier (1 MS)
- offences, when the victims are children, such as: grooming, solicitation, sexual extortion, and all other sexual crimes in Article 3 to 6 as referred in the Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography (1 MS).

Certain Member States consider it useful to be able to use Eurodac for identification and location of missing persons/minors (5 MS), or victims of major disasters or unidentified victims in general (1 MS).

## ***2. Under which circumstances should intelligence services be permitted to make a law enforcement access request to Eurodac and why?***

A large number of Member States (14 MS) consider that intelligence services should be permitted to have access to Eurodac for the purposes of preventing, detecting and investigating terrorist offences and serious crimes, in particular to verify persons suspect of terrorist activities or activities connected to terrorism, for supporting specific investigations or providing support to victims. Fingerprints may constitute a useful tool, e.g. in locating and prosecuting foreign terrorist fighters. Some delegations specified that intelligence services should be permitted to make a request under the same circumstances as other law enforcement agencies. One delegation suggested that inspiration should be taken from the conditions for law enforcement access under the future Entry/Exit System (EES), which are less restrictive. Another delegation thought that intelligence services should be permitted to make a request for law enforcement access under the conditions set by the national legal system.

Three delegations were of the view that there is no need for extension of the access to intelligence services.

**3. *Can MS provide specific reasons why it is necessary for a law enforcement authority to access the data of beneficiaries of international protection in Eurodac more than three years following the granting of the protection?***

A large number of Member States is in favour of extending the time limit within which law enforcement authorities can request access to the data of beneficiaries of international protection beyond three years (16 MS). Two Member States suggest five or ten years depending on the category in which they were recorded in the database.

Delegations consider that:

- cases are often complex and investigation takes long time (5 MS);
- it is possible that certain circumstances were unknown at the time of the decision granting international protection (3 MS);
- the crime may have been reported to judicial or police authorities more than 3 years after it has taken place (2 MS);
- beneficiaries of international protection, following their stay in the EU for more than three years, may commit serious crimes, sometimes make use of forged and falsified official documents, which makes it impossible for later identification, detection and prosecution (1 MS);
- the extension will increase the probability of getting a hit because the system will contain more data (1 MS).

One delegation considered that the access should be granted in accordance with the deadline for the prescription of each specific crime. It was also reminded by one delegation that the extension should be governed by the principle of proportionality (not more than what is strictly necessary).

## **B) Simplifying of law enforcement access to Eurodac**

### **1. *What difficulties in acceding to Eurodac for the law enforcement purposes have Member States encountered?***

Even though a number of Member States' authorities are not yet connected to the system and therefore do not have practical experience with requesting access, many of them consider that the procedure is too complex, cumbersome, time- and human resources-consuming and therefore not attractive (14 MS). One delegation indicated it has not encountered difficulties in acceding Eurodac.

The main difficulties mentioned by many delegations included the need to consult other databases before submitting a request for access to Eurodac and a complicated three-layer search mechanism involving designated authorities, verifying authorities and the National Access Point. Two delegations were of the view that the condition requiring the existence of reasonable grounds to consider that the comparison will substantially contribute to the prevention, detection or investigation of any of the criminal offences in question is not appropriate since it is quite discretionary. One delegation also considered that the lengthy form to be filled in by the authorities is burdensome. Furthermore, not all police investigators have access to the VIS at their workplace, therefore it takes longer and becomes even more complicated to fulfil the conditions for requesting access to Eurodac.

### **2. *How can access to Eurodac be made easier whilst still respecting the principles of proportionality and necessity?***

The main suggestion made by a large number of delegations relates to the simplification of the procedure by eliminating the need to consult other databases (national databases, Prüm, and/or VIS). Inspiration could be taken from the VIS or the future EES.

Some delegations prefer to keep the requirement of consulting the national database. Two delegations suggested that, following a search in the national AFIS system and in case of a negative match, parallel searches could be carried out in the other databases (Prüm, Eurodac and VIS), without a rigid search order.

Other suggestions made by various delegations included in particular:

- amending the procedure along the lines of the procedure enabling access to the VIS or the future EES and ETIAS (4 MS), including e.g. parallel requests for consultation of the VIS and creating an exception for the mandatory consultation of Prüm as it is the case in the text of the EES (Art. 29 (2) §2 and 3);
- simplifying the structures at national level by creating a two-tier model, i.e. merge of the verifying authorities and National Access Point (6 MS);
- taking inspiration in the workflow used in Interpol cooperation or in the Prüm network (1 MS).

**3. *Have Member States experienced problems with the verifying authorities when making a law enforcement access request? Please give specific examples.***

No specific problems were reported by the delegations with regard to the verifying authorities.

**4. *Under Article 20, which pre-conditions have caused difficulties for Member States to access Eurodac and why? Please give specific examples.***

As outlined above, specific examples given by delegations included mainly the need to search different databases before accessing Eurodac. One delegation considered that the obligation to perform Prüm consultations before being able to query Eurodac could lead to problems with the Prüm quota.

**5. *Have Member States made use of the urgent procedure provided for under Article 20(4)? If not, please provide reasons. If so, please give details of the cases.***

It seems that no Member State has so far made use of the urgent procedure. It was, however, recalled that this procedure is to be used only in exceptional circumstances and should not be a way to circumvent the procedure to be applied in non-urgent investigations.

### **C) Other comments**

In addition to the replies to the questions outlined above, several Member States made other comments in relation to searches in Eurodac which can be summarised as follows:

- Five Member States suggested that it should be possible to search Eurodac not only based on biometric data but to extend the possibility to search also on the basis of personal data and, in general, alphanumeric data.
- According to two delegations, it would be appropriate, when searching Eurodac, to be able to perform data crosses with other biometric databases such as SIS II, Interpol SLTD database and/or VIS. This could be particularly useful in determining the identity and travel documents of suspected terrorists, as some documents may have been recorded in SLTD. The consultation of the SIS II could allow the detection of persons subject to an alert who have returned to the Schengen area under a false identity.
- One delegation noted that with a view to improving security in the Schengen area, it should be possible to check at the earliest opportunity the data of persons illegally entering the Schengen area against existing security intelligence of national authorities. A (consultation) procedure similar to the visa consultation procedure should be created whereby Member States would have the possibility of requesting a consultation immediately after persons arriving from certain third countries are registered in Eurodac for the first time.

### **III. CONCLUSIONS/WAY FORWARD**

It is evident from the summary of replies outlined above that Member States indeed confirmed their willingness to simplify and broaden the access of law enforcement authorities to Eurodac.

In order to broaden this access, delegations wish to maintain their autonomy in designating the competent authorities that will have access to Eurodac for law enforcement purposes, based on the criteria specified in the Regulation, which could include intelligence services, along the lines of similar frameworks (VIS and EES). Based on the view of the vast majority of delegations, the time limit within which law enforcement authorities can request access to the data of beneficiaries of international protection could be extended beyond three years. In view of the Presidency, the possible extension of the list of crimes for which access to Eurodac can be granted requires further consideration.

As regards the simplification of the access, it seems that the vast majority of delegations would be in favour of the procedures along the lines of similar models (such as VIS or EES), in particular as regards the conditions for prior consultation of other databases and the authorities involved.

Delegations are invited to examine the abovementioned summary of replies and the proposed conclusions.

Following the discussions at the JHA Counsellors meeting on 11 November 2016, the Presidency will further analyse the views expressed and will consider next steps which may include changes to the text of the proposal.

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