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NOTE

From:	Presidency
To:	Delegations
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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) - Conditions for access for law enforcement purposes

I. INTRODUCTION

On 4 May 2016, the Commission submitted the abovementioned proposal for a recast Eurodac Regulation[1]. At the Asylum Working Party, which examined the proposal, a broad support for its objectives was expressed by delegations. It has been, however, clear during examinations undertaken so far, including at the SCIFA meeting on 13 September, that **many delegations are in favour of a simplified and broader access of law enforcement authorities to Eurodac. The access according to the current rules is considered complicated and the list of authorities authorised to have access too restrictive.**

1 doc. 8765/1/16 REV 1

The issue of access of law enforcement authorities to Eurodac will be discussed by the Ministers during the JHA Council on 13 October 2016. However, for reasons stated further in this document, in particular in its part III, the Presidency would like to examine with the asylum and law enforcement experts at the meeting of the Friends of Presidency on 11 October 2016 possible approaches for extending and simplifying access for law enforcement purposes to Eurodac, as well as their consequences.

II. GENERAL ISSUES

The 2013 Eurodac Regulation introduced access to the database by law enforcement authorities for the prevention, detection and investigation of terrorism and other serious offences. The data in Eurodac is available, subject to the conditions set out in the Regulation, for comparison by the designated authorities of Member States and Europol.

While the provisions relating to the law enforcement access have not been amended in the proposal, recital 14 of the proposal refers to the work of the Expert Group on interoperability of information systems, set up on the basis of the Commission's Communication on Stronger and Smarter Information Systems for Borders and Security[2], which should, among its other tasks, examine if there is a need to revise the legal framework for law enforcement access to Eurodac. Attention has also been drawn to the Roadmap[3] which contains actions to enhance information management and information exchange in the JHA area.

According to Article 40 (8) of the Eurodac Regulation, "*On the basis of Member States and Europol annual reports …, the Commission shall compile an annual report on law enforcement access to Eurodac and shall transmit it to the European Parliament, the Council and the European Data Protection Supervisor.*" The 2013 Eurodac Regulation has only been applied since 20 July 2015, the Commission is currently working on first such report.

[2] doc. 7644/16

[3] Roadmap to enhance information exchange and information management including interoperability solutions in the Justice and Home Affairs area (9368/1/16 REV 1)

III. LEGAL ISSUES

At the SCIFA meeting on 13 September 2016, a large majority of delegations favoured simplifying and broadening the law enforcement access to the Eurodac. On that occasion, in view of the fact that the Commission has not proposed changes in the relevant provisions, the Council Legal Service drew the attention of delegations to the Interinstitutional agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts. According to its point 8, "*where, in the course of the legislative procedure, it appears necessary to introduce substantive amendments in the recasting act to those provisions which remain unchanged in the Commission's proposal, such amendments shall be made to that act in compliance with the procedure laid down by the Treaty according to the applicable legal basis*".

There is a need for a clear justification for broadening and simplifying access to the Eurodac for law enforcement purposes based on sufficient evidence that such change is necessary and proportionate. The acceptance by the Commission of such changes is also necessary. The Commission finally reserved its position pending the outcome of the discussions within the Council.

As established by the Court of Justice case law, it is necessary to lay down clear and precise rules governing the scope and application of the access for law enforcement purposes. Therefore, it is necessary to establish objective criteria respecting the principles of proportionality and necessity to determine which authorities would be authorised to have access to the data stored in the Eurodac and under which conditions. Rules should also be in place to limit to what is strictly necessary the use of the data retained in the light of the objective pursued.

According to the Court of Justice[4], certain provisions of EU law may interfere with fundamental rights, but this should be justified in accordance with the conditions set out in Article 52 (1) of the Charter. This Article allows limitations to fundamental rights, provided that such limitations, in addition to being provided for by law: respect the essence of the rights; genuinely meet objectives of general interest recognised by the Union; and subject to the principle of proportionality, are necessary.

[4] Judgment of the Court of Justice of 8 April 2014 in Joined Cases C-293/12 and C-594/12. The Council Legal Service has issued an Information Note on the judgment set out in doc. 9009/14 9009/14 JUR 249 DAPIX 58 TELECOM 106 COPEN + COR 1.

Given that the access to the biometric data stored in the Eurodac for the purpose of prevention, detection and investigation of terrorist offences or of other serious criminal offences constitutes a tool to fight terrorism and serious crime, it could constitute an objective of general interest to the EU. However, in the light of the case law of the Court of Justice, any access for law enforcement purposes to the Eurodac, as well its changes, should be made possible only in so far as is strictly necessary and with the necessary safeguards in relation to the protection of personal data. Thus, the draft Regulation should lay down clear and precise rules governing the scope and application of the measure in question and impose minimum safeguards so that the persons whose data have been retained have sufficient guarantees for the effective protection of their personal data against the risk of abuse and against any unlawful access and use of that data.

IV. QUESTIONS TO DELEGATIONS

In the light of the above and in order to make progress on this important issue, the Presidency invites delegations to express their views on the following questions:

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

In order to broaden the scope of access of law enforcement authorities to Eurodac, the MS underlined particularly the need to ensure that:

– a comparison of fingerprints with Eurodac data should also be possible for crimes other than serious crimes and terrorist offences[5];

– the list of authorities that are authorised to request comparison with Eurodac data should include national intelligence services; and

– the data of beneficiaries of international protection should not be blocked after three years.

[5] The list of offences covered by the definitions of 'terrorist offences' and 'serious criminal offences' as set out in Art. 2(1)(j) and (k) of the current Eurodac Regulation is in Annex.

Questions:

Member States are invited to provide a series of arguments justifying broadening the scope and reply to the following questions:

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?*

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

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?*

B) Simplifying of law enforcement access to Eurodac

According to the current Eurodac Regulation, reasoned request for comparison with Eurodac data submitted by the designated authority shall be checked by the verifying authority and, only then, the request is transmitted for comparison to the National Access Point. Moreover, the Regulation sets very strict conditions (compared to the conditions to access VIS[6] or future EES) for access to Eurodac by designated authorities. Member States argued that under the current rules it can take weeks to make a comparison with Eurodac data, and therefore called for its simplification. This might be also a reason for a low number of requests made by law enforcement designated authorities (95 in 2015, 147 in Q1 2016)[7] although some Member States are not yet connected for law enforcement purposes and cannot carry out searches.

[6] Council Decision 2008/633/JHA.
[7] http://www.eulisa.europa.eu/Publications/Reports/Eurodac%20-%202015%20Statistics.pdf

Questions:

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

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

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

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

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.*

V. CONCLUSION

The Presidency invites the Working Party to discuss the questions set out in point IV and to provide further written contribution by 21 October 2016.

ANNEX

List of "serious criminal offences"

The list of "serious criminal offences" is defined in Article 2(1)(k) of the current Eurodac Regulation as being those referred to in Article 2(2) of Framework Decision 2002/584/JHA - the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision. These are listed below:

– participation in a criminal organisation,
– terrorism,
– trafficking in human beings,
– sexual exploitation of children and child pornography,
– illicit trafficking in narcotic drugs and psychotropic substances,
– illicit trafficking in weapons, munitions and explosives,
– corruption,
– fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
– laundering of the proceeds of crime,
– counterfeiting currency, including of the euro,
– computer-related crime,
– environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
– facilitation of unauthorised entry and residence,
– murder, grievous bodily injury,
– illicit trade in human organs and tissue,
– kidnapping, illegal restraint and hostage-taking,
– racism and xenophobia,

- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

Terrorist Offences

The list of "terrorist offences" is defined in Article 2(1)(j) of the current Eurodac Regulation as being those offences under national law which correspond or are equivalent to the offences referred to in Articles 1 to 4 of Framework Decision 2002/475/JHA as amended by Council Framework Decision 2008/919/JHA. These Articles are reproduced below:

Article 1

Terrorist offences and fundamental rights and principles

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

   – seriously intimidating a population, or

   – unduly compelling a Government or international organisation to perform or abstain from performing any act, or

   – seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

   shall be deemed to be terrorist offences:

   (a) attacks upon a person's life which may cause death;

   (b) attacks upon the physical integrity of a person;

   (c) kidnapping or hostage taking;

   (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h).

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Offences relating to a terrorist group

1. For the purposes of this Framework Decision, "terrorist group" shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:

(a) directing a terrorist group;

(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

Article 3 [Amended version]

Offences linked to terrorist activities

1. For the purposes of this Framework Decision:

   (a) "public provocation to commit a terrorist offence" shall mean the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;

   (b) "recruitment for terrorism" shall mean soliciting another person to commit one of the offences listed in Article 1(1)(a) to (h), or in Article 2(2);

   (c) "training for terrorism" shall mean providing instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1(1)(a) to (h), knowing that the skills provided are intended to be used for this purpose.

2. Each Member State shall take the necessary measures to ensure that offences linked to terrorist activities include the following intentional acts:

   (a) public provocation to commit a terrorist offence;

   (b) recruitment for terrorism;

   (c) training for terrorism;

   (d) aggravated theft with a view to committing one of the offences listed in Article 1(1);

   (e) extortion with a view to the perpetration of one of the offences listed in Article 1(1);

   (f) drawing up false administrative documents with a view to committing one of the offences listed in Article 1(1)(a) to (h) and Article 2(2)(b).

3. For an act as set out in paragraph 2 to be punishable, it shall not be necessary that a terrorist offence be actually committed."

Article 4 [Amended version]

Aiding or abetting, inciting and attempting

1. Each Member State shall take the necessary measures to ensure that aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.

2. Each Member State shall take the necessary measures to ensure that inciting an offence referred to in Article 1(1), Article 2 or Article 3(2)(d) to (f) is made punishable.

3. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3(2)(d) to (f), with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.

4. Each Member State may decide to take the necessary measures to ensure that attempting to commit an offence referred to in Article 3(2)(b) and (c) is made punishable."