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From: General Secretariat of the Council

To: Delegations

Subject: Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], 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 and amending Regulations (EU) 2018/1240 and (EU) 2019/818.

- Comments from the delegations

Following the Informal videoconference of the members of the JHA Counsellors (Asylum) on 25 November 2021, delegations will find attached a compilation of replies received from Member States on the abovementioned subject - Document 14084/21.

Written comments submitted by the Member States

Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], 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 and amending Regulations (EU) 2018/1240 and (EU) 2019/818 - Document ST 14084/21

and following informal videoconferences of the members of Asylum Working Party on 25 November 2021

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HUNGARY

General comments

Hungary would like to thank for the work done on the dossier. We maintain our scrutiny and political reservation on the proposal. Hungary indicates that the Hungarian Parliament, in its Decision No 40/2020 (XII. 16.) OGY, laid down that the principle of subsidiarity had been infringed in relation to the five draft regulations of the new Pact on Migration and Asylum.

Hungary underlines the importance of Eurodac and the added value of its technical update, including its inclusion in the interoperability framework and by this preventing the misuses of the asylum systems. In addition, Hungary points out that the draft regulation cannot ignore the political implications. Therefore, the dossier cannot be dissociated from other elements of the asylum package. In view of this, Hungary confirms its position on the package approach. Furthermore Hungary maintains its strong position made in respect of any article that refers to provisions relating to persons disembarked following a search and rescue operation as a separate category from those who illegally crossed the external borders.

Recital 4aa, Articles 9(1)(ba) and 13(2)(m)

In our view, the Presidency's proposal goes in the wrong direction, as it reintroduces a separate data collection of illegal migrants disembarked after SAR operations, even if only for statistical purposes. Hungary emphasizes that persons disembarked after such operations cannot be treated separately (even for statistical purposes) from migrants crossing the external borders illegally by other means. Furthermore, separate rules for SAR cases should be avoided.

In the light of the above, Hungary proposes to delete Recital (4aa). Furthermore, we do not support Article 9(1)(ba) and Article 13(2)(m) as it provides for the separate collection of data on disembarked persons.

Recital (35a)

Keeping the word *interpreted* instead of *clarified* is acceptable.

Article 1(1)(d)

We support the modification that indicates the official name of Europol.

Article 10(4d)

We support the change of *shall* clause to *may*, as we understand that in some Member States different authorities handle the data before they are transmitted to the national access point, and if the shall clause were to remain, this would lead to technical and procedural challenges.

Article 21(1a)

We welcome the amendment proposed by France. The wording is also acceptable, however, as many Member States entered a scrutiny reservation, in that sense there is the possibility that the wording of the text may change, therefore we reserve the right to make further comments.

EES amendments

The proposal for access of asylum authorities to the EES for consultation can be acceptable to us.

MED5 (CY,EL,ES,IT,MT)

The delegations of Cyprus, Greece, Italy, Malta and Spain wish to reiterate their proposal to amend few relevant provisions consistently with their respective positions on the New Pact on Asylum and Migration.

The following amendment proposals relate exclusively to the changes made by the Presidency in the document 14084/21, do not imply the agreement of the Med5 delegations on other provisions of the text and do not prejudice their positions on the global approach to the New Pact on Asylum and Migration.

*Furthermore, the aforementioned delegations agree on the amendment to **article 21**.*

PCY EURODAC COMPROMISE TEXT No. 14084/21

(1) the following recitals are inserted after recital 4:

'(4a) Moreover, for the purposes of effectively applying Regulation (EU) 604/2013 [...] and in accordance with the rules thereof, it is necessary to clearly mark in Eurodac which Member State is responsible once responsibility has been determined or, as applicable, if the fact that there has been a shift of responsibility between Member States, including in the cases of relocation, in which a Member State has relocated applicants from another Member State by applying a discretionary clause, providing voluntary solidarity to another Member State. Such marking should consequently be indicated in all cases where responsibility may be established based on the provisions set out in Article 3(2), the criteria set out in Chapter III, the clauses set out in Chapter IV, the issuance of a residence document as set out in Article 19(1), or after the expiry of any time limit governing responsibility set out in Chapter VI of that Regulation.

(4aa) Furthermore, in order to reflect accurately the obligations Member States have to conduct search and rescue operations, to support the possible connected relocation, as referred to in recital 4a, and to provide help these Member States with the specific challenges they face as they cannot apply to persons disembarked following such operations the same tools as for irregular crossings by land, sea or air, as well as to support creating a more accurate picture of the composition of migratory flows in the EU by enabling the production of statistical data for this category of persons, it is also necessary to mark in Eurodac the register third-country nationals or stateless persons disembarked following search and rescue operations as a separate category in Eurodac.

...

(4c) Registration of persons for the purpose of conducting in the framework of national resettlement schemes and humanitarian admission is likely to have a positive indirect effect on the smooth functioning of Regulation 604/2013, as it may help identify the Member States secondary movements and facilitate the determination of the Member State responsible having granted access into their territory to for a person a third-country national as a result of a concluded resettlement scheme or humanitarian admission. It is therefore appropriate that Eurodac may be used for such schemes and humanitarian admission.

(13) Article 9 is replaced by the following:

Article 9

Statistics

1. eu-LISA shall draw up statistics on the work of the CIR and Central System every month indicating in particular:

...

(ba) the number of persons relocated in connection with SAR related disembarkations and on the basis of solidarity arrangements;

...

Furthermore the references to the art. 14a (SAR category) should be reinstated in 9.1(d)(vi), (e)(vi), (f)(vi), (g)(vi), (h)(vi), (i)(vi).

(14) Article 10 is replaced by the following:

'Article 10

Collection and transmission of biometric data

New 4c. The fact that the application for international protection follows the disembarkation of the third-country national or stateless person following a search and rescue operation, does not exempt Member States to register those persons first in accordance with Article 14a of this Regulation.

4d. In the cases foreseen in paragraphs 4a, 4b and 4c [...], the Member State shall reuse the biometric data previously taken in accordance with Articles 13, 14 and 14a [...] of this Regulation for the recording in the Central System and in the CIR made pursuant to paragraph 1.

(15) Article 11 is replaced by the following:

'Article 11

Information on the status of the data subject

...

3. Where responsibility shifts to another Member State, pursuant to ~~{Articles 17, 19(1) and 29(2) of [...]~~ Regulation (EU) No 604/2013 [...], **including in connection with SAR related disembarkations and solidarity arrangements**, the **benefitting** Member State that establishes that responsibility has shifted [...] shall indicate the Member State responsible.

...

(16) Article 12 is replaced by the following:

'Article 12

Recording of data

1. Only the following data shall be recorded in the Central System and in the CIR as appropriate in accordance with Article 4(2):

...

(m) where applicable, the fact that a person was relocated in connection with SAR related disembarkations or on the basis of solidarity arrangements.

...

(17) Article 13 is replaced by the following:

'Article 13

Collection and transmission of biometric data

...

1. Each Member State shall promptly take the [...] biometric data of every third-country national or stateless person of at least six years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back or who remains physically on the territory of the Member States and who is not kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn him or her back.

2. The Member State concerned shall, as soon as possible and no later than ~~72 hours~~ **five days** after the date of apprehension, transmit to the Central System **and to the CIR as appropriate in accordance with Article 4(2)** the following data in relation to any third-country national or stateless person, as referred to in paragraph 1, who is not turned back:

...

(m) where applicable, the fact that a person was relocated on the basis of solidarity arrangements.

Comment:

The replacement of 72 hours with 5 days is accordingly to be done in articles 10.1, 13.4, 14.2, 14.3, 14a.2 and 14a.4. As a consequence, the second subparagraph of articles 10.2, 13.5, 14.4 and 14a.5 needs to be deleted. These amendments are aimed to simplify deadlines for collecting and transmitting data to Eurodac, avoiding derogations set out at current text and providing a clear deadline to be observed.

The following article should be reinstated with reference to third country nationals or stateless persons disembarked following a search and rescue operation:

Article 14a

Collection and transmission of biometric data

1. Each Member State shall promptly take the biometric data of every third-country national or stateless person of at least six years of age who is disembarked following a search and rescue operation **as defined in ~~[Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management]]~~.**

2. The Member State concerned shall, as soon as possible and no later than ~~72 hours~~ **5 days** after the date of disembarkation, transmit to the Central System and to the CIR, as appropriate in accordance with Article 4(2), the following data in relation to any third-country national or stateless person, as referred to in paragraph 1:

- (a) **fingerprint data;**
- (b) **a facial image;**
- (c) **surname(s) and forename(s), name(s) at birth and previously used names and any aliases, which may be entered separately;**
- (d) **nationality(ies);**
- (e) **date of birth;**
- (f) **place of birth;**
- (g) **Member State of origin, place and date of disembarkation;**
- (h) **sex;**

(ha) where available, the type and number of identity or travel document, the three letter code of the issuing country and [...] expiry date;

(hb) where available, a scanned colour copy of an identity or travel document along with an indication of its authenticity or, where unavailable, another document which facilitates the identification of the third-country national or stateless person along with an indication of its authenticity;

[...]

(i) reference number used by the Member State of origin;

(j) date on which the biometric data were taken;

(k) date on which the data were transmitted to the Central System and to the CIR as appropriate;

(l) operator user ID;

(m) where applicable, the fact that a person was relocated in connection with their SAR disembarkation.

2a. Additionally, where applicable and available, the following data shall be promptly transmitted to the Central System and the CIR, as appropriate in accordance with Article 4(2) as soon as available:

~~**(a) type and number of identity or travel document; three letter code of the issuing country and expiry date;**~~

~~**(b) a scanned colour copy of an identity or travel document along with an indication of its authenticity or, where unavailable, another document which facilitates the identification of the third-country national or stateless person along with an indication of its authenticity;**~~

(c) [...] in accordance with paragraph 6, the date when the person concerned left or was removed from the territory of the Member States;

~~**(d) the Member State of relocation in accordance with Article 14b(1);**~~

- (e) [...] the fact that assistance for voluntary return and reintegration (AVRR) has been granted,
- (f) [the fact that the person could pose a threat to internal security following any security checks ~~the screening referred to in Regulation (EU) XXX/XXX [Screening Regulation]]].~~

4. Non-compliance with the ~~72-hour~~ **5 days** time-limit referred to in paragraph 2 of this Article shall not relieve Member States of the obligation to take and transmit the biometric data to the to the CIR. Where the condition of the fingertips does not allow the taking of fingerprints of a quality ensuring appropriate comparison under Article 26, the Member State of origin shall retake the fingerprints of persons disembarked as described in paragraph 1 of this Article, and resend them as soon as possible and no later than 48 hours after they have been successfully retaken.

5. By way of derogation from paragraph 1, where it is not possible to take the biometric data of the disembarked person on account of measures taken to ensure his or her health or the protection of public health, the Member State concerned shall take and send such biometric data as soon as possible and no later than 48 hours after those health grounds no longer prevail.

~~In the event of serious technical problems, Member States may extend the 72-hour time-limit in paragraph 2 by a maximum of a further 48 hours in order to carry out their national continuity plans.~~

6. As soon as the Member State of origin ensures that the person concerned whose data was recorded in Eurodac in accordance with paragraph 1 has left the territory of the Member States in compliance with a return decision or removal order, it shall update its data set recorded in conformity with paragraph 2 relating to the person concerned by adding the date of his or her removal or when he or she left the territory.

7. Where requested by the Member State concerned, the biometric data may also be taken and transmitted on behalf of that Member State by members of the European Border and Coast Guard Teams or experts of the asylum support teams when exercising powers and performing their tasks in accordance with Regulation (EU) 2019/1896 and [Regulation (EU) XXX/XXX [EU Agency for Asylum Regulation]].

8. Each data set collected and transmitted in accordance with paragraph 1 shall be linked with other sets of data corresponding to the same third country national or stateless person in a sequence as set out in Article 4(6).

9. A data set pursuant to paragraph 2 [...] is considered created within the meaning [...] of Article 27(1) of Regulation (EU) 818/2019 when all the data in points (a) to (f) and (h) are recorded.';