



Briefing

Eurodac: Member States want wider police access to biometric database despite most having never made use of it

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A European Commission proposal to expand the Eurodac biometric database has provided the perfect opportunity for national interior ministries to demand that police forces be able to obtain asylum-seekers' and irregular migrants' data more easily, despite the fact that half of all Member States do "not yet have experience with law enforcement access" to the system, according to an official document obtained by *Statewatch*. [1] Proposed amendments simplifying and broadening law enforcement access now form part of the Council's mandate for negotiations with the European Parliament on the proposed new Eurodac Regulation.

From fingerprints to faces

Since 2003 the Eurodac system has held fingerprints and biographical data that are gathered by national authorities to see whether asylum-seekers' or irregular migrants "previously claimed asylum in another EU country or... entered the Union territory unlawfully," and by the end of 2014 the central database held over 2.7 million records. [2] More recent statistics are yet to be published but, given the number of people that have sought asylum in Europe in the last two years, that figure has presumably increased substantially.

National law enforcement authorities and Europol have had access to the system since July 2015, following changes agreed in June 2013 that were strongly opposed by the European Data Protection Supervisor ("not convinced" it was proportionate or necessary), the Meijers Committee of experts in international law ("the proposal... breaches fundamental rights"), the Joint Supervisory Body of Europol ("no evidence... to prove such access is necessary") and

[1] NOTE from: Presidency to: Delegations, 'Conditions for access to law enforcement purposes – Summary of the Member States' replies', Council document number 14099/16, 9 November 2016, <http://statewatch.org/news/2016/dec/eu-council-lea-access-to-eurodac-14099-16.pdf>

[2] eu-LiSA, 'Annual report on the 2014 activities of the Central System of Eurodac pursuant to Article 24(1) of Regulation (EC) No 2725/2000', June 2015, p.11, <http://statewatch.org/news/2016/dec/eu-lisa-eurodac-report-2014.pdf>

the UNHCR (it risks “putting persons seeking international protection at risk of stigmatisation”). [3]

Law enforcement access has so far been minimal – statistics covering July to December 2015 show that that authorities from just five states (Austria, Denmark, Finland, France and the Netherlands) made a total of 95 requests for data. [4]

However, following a proposal from the Commission in May this year that seeks to expand the amount of data held in the system (to include facial images as well as fingerprints, amongst other things) and to extend the number of people on whom data will be collected (irregular migrants who have not requested international protection, as well as those who have), [5] Member States have shown significant interest in extending and simplifying access to the system for law enforcement agencies.

In October Member States were sent a questionnaire by the Slovakian Presidency of the Council asking for their opinions on the issue, after EU justice and interior ministers “confirmed their support for a broader and simplified access by law enforcement authorities to Eurodac” at their meeting on 18 October. [6]

The official summary of responses, obtained by *Statewatch*, [7] shows that a majority of Member States are in favour of both widening the reasons for which the authorities can have access, and making the procedure for doing so easier.

Wider scope for access

23 Member States responded to the questionnaire and, although “a significant group of Member States (14MS)... do not yet have experience with law enforcement access,” the general view is that “the present Eurodac Regulation contains rather restrictive and complex conditions for access to its database for law enforcement purposes.”

18 Member States are in favour of extending the list of crimes for which law enforcement agencies (LEAs) can access the data held in Eurodac, which is currently restricted to the offences contained in the soon-to-be-broadened Directive on combating terrorism and the

[3] ‘Opinion of the European Data Protection Supervisor on the amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘EURODAC’ for the comparison of fingerprints’, <http://www.statewatch.org/news/2012/sep/eu-edps-eurodac-opinion.pdf>; Meijers Committee, ‘Note on the proposal for a Regulation on the establishment of Eurodac (COM(2012)254)’, <http://www.statewatch.org/news/2012/oct/eu-meijers-committee-eurodac-proposal.pdf>; ‘Opinion of the Joint Supervisory Body of Europol (Opinion 12/52)’, <http://www.statewatch.org/news/2012/oct/europol-jsb-opinion-eurodac.pdf>; UNHCR, ‘An efficient and protective Eurodac’, <http://www.unhcr.org/50adf9749.pdf>

[4] eu-LiSA, ‘Eurodac – 2015 statistics’, p.14,

<http://www.eulisa.europa.eu/Publications/Reports/Eurodac%20-%202015%20Statistics.pdf>

[5] European Commission press release, ‘Towards a sustainable and fair Common European Asylum System’, 4 May 2016, http://europa.eu/rapid/press-release_IP-16-1620_en.htm; European

Commission, ‘Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of ‘Eurodac’, COM(2016) 272 final, 4 May 2016, <http://statewatch.org/news/2016/may/eu-com-eyurodac-data-comp-272-16.pdf>

[6] ‘Outcome of the Council meeting – 3490th Council meeting, Justice and Home Affairs’, 13 October 2016, 13118/16, <http://statewatch.org/news/2016/oct/eu-jha-council-13-10-16-prel.pdf>

[7] NOTE from: Presidency to: Delegations, ‘Conditions for access to law enforcement purposes – Summary of the Member States’ replies’, Council document number 14099/16, 9 November 2016, <http://statewatch.org/news/2016/dec/eu-council-lea-access-to-eurodac-14099-16.pdf>

'Eurocrimes' covered by the European Arrest Warrant, if they are punishable with a custodial sentence of three years or more in the Member State in question.

Member States proposed adding a whole host of crimes to the list, including theft and burglary (favoured by nine delegations); any criminal offence "punishable by a custodial sentence or detention order of at least one year (favoured by five); smuggling (two); "crimes against peace and public order, such as riots, incitement to violence or hatred based on sexual orientation and gender identity (one); and "illegal crossing of the border barrier" (one).

Official permission for security agencies

14 Member States want to give their security agencies access "for the purposes of preventing, detecting and investigating terrorist offences and serious crimes".

Of particular interest is the need "to verify persons suspected of terrorist activities or activities connected to terrorism," to support investigations and "providing support to victims" – not a role for which the intelligence agencies are particularly-well known.

Three Member States (which ones in particular is currently unknown) "were of the view that there is no need for extension of the access to intelligence services," assuming of course that they do not already have more informal ways of accessing the data held in Eurodac.

Data retention

Member States were also asked if they could "provide specific reasons" why law enforcement agencies might need access to "the data of beneficiaries of international protection... more than three years following the granting of the protection".

16 Member States want to extend the current limit of three years with two suggesting "five or ten years depending on the category in which they were recorded in the database."

The reasons offered for why this extension is necessary range from the banal to the laughable: five Member States argued that "cases are often complex and investigation takes long time," while one noted: "the extension will increase the probably of getting a hit because the system will contain more data."

Only one delegation took the time to recall a basic data protection principle: "the extension should be governed by the principle of proportionality (not more than what is strictly necessary)."

Access issues

Member States were asked what difficulties they have had with accessing law enforcement data, and it seems that many want to put the cart before the horse:

"Even though a number of Member States' authorities are not yet connected to the system [14 of the 23 that responded to the questionnaire] 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)."

Meanwhile: "One delegation indicated that it has not encountered difficulties in acceding [sic] Eurodac."

Broader and simpler

The findings of the questionnaire were sent to a secretive Council working party, the JHA Counsellors, so that they could “consider next steps which may include changes to the text of the proposal.”

Unfortunately for the public, the JHA Counsellors do not make a habit of publishing minutes of their meetings. *Statewatch* filed a request for the record of the 11 November meeting (for which law enforcement access to Eurodac was on the agenda [8]) and all other meetings of the group since September, only to be informed by the Council’s access to documents department that “no minutes/outcome of proceedings of the JHA Counsellors meetings have been issued during the requested period.”

Numerous specialists have already argued that the proposal to expand Eurodac in order to address the return of irregular migrants is unjustified: the Meijers Committee said in October that it was “not convinced by the reason submitted for this new extension of purpose,” [9] the European Council on Refugees and Exiles expressed “deep concern as to the unduly expansive agenda of the Commission proposal to recast the Eurodac Regulation,” [10] and the European Data Protection Supervisor:

“[H]as concerns about the extension of the scope of Eurodac... regrets that the recast does not refer to any impact assessment of the new provisions as to the proportionality of the measure...”

The mere statements contained in the Explanatory Memorandum referring to the principle of privacy by design or to the fundamental rights do not explain in substance how the approach followed by the proposal could not have been better addressed by less intrusive measures, or how the proposal could reduce its impact on privacy and data protection rights.”[11]

The Justice and Home Affairs Council on 9 December adopted its negotiating mandate, [12] which includes provisions on “simpler and broader” law enforcement access to the system (see Articles 6, 7 and 8, Chapter VII, Article 35 and Article 42); negotiations on the final text will begin once the Parliament adopts its position A “first reading” dealing is being sought,

[8] ‘JHA Counsellors meeting (Asylum)’, 7 November 2016, CM 4675/16, <http://data.consilium.europa.eu/doc/document/CM-4675-2016-INIT/en/pdf>

[9] Meijers Committee, ‘Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final)’, <http://statewatch.org/news/2016/oct/eu-meijers-cttee-dublin-recast-eurodac.pdf>

[10] ECRE, ‘ECRE Comments on the Commission Proposal to recast the Eurodac Regulation’, <http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-Eurodac-proposal.pdf>

[11] ‘EDPS Opinion on the First reform package on the Common European Asylum System (Eurodac, EASO and Dublin regulations)’, <http://statewatch.org/news/2016/sep/eu-edps-ceas-opinion.pdf>

[12] NOTE from: Presidency to: Council, ‘Partial general approach’, 15119/16, 7 December 2016, <http://statewatch.org/news/2016/dec/eu-council-eurodac-partial-general-approach-15119-16.pdf>. The text was approved at the JHA Council on 9 December. For previous versions of the Council’s position, see: 14710/16 (28 November), <http://statewatch.org/news/2016/dec/eu-council-eurodac-partial-general-approach-14710-16.pdf>; 14858/16 (6 December), <http://statewatch.org/news/2016/dec/eu-council-eurodac-partial-general-approach-14858-16.pdf>; 15166/16 (2 December), <http://statewatch.org/news/2016/dec/eu-council-eurodac-proposed-amendments-15166-16.pdf>; 15166/1/16 REV 1 (2 December), <http://statewatch.org/news/2016/dec/eu-council-eurodac-proposed-amendments-15166-16.pdf>.

which means approval of the relevant parliamentary committee (LIBE) and then the start of secret “trilogue” meetings with the Council (and the Commission) before the agreed text is sent back to the Parliament for rubber-stamping.

Proposals to simplify law enforcement access to an expanded database – less than two years after such access was first provided, while only half of all Member States have any experience with it, and before any independent evaluation – merely add to the reasons to oppose an expanded Eurodac. As the European Council on Refugees and Exiles has pointed out, adding new purposes to the system and easing law enforcement access to it:

“[W]ill come not only with substantial financial costs but, crucially, tremendous human costs...

In ECRE’s view, a faithful reading of the Charter not only tests the permissibility of several obligations on Member States and individuals set out in the proposal, but questions the overall legality of the proposed new purpose of Eurodac and the means to achieve it...

...So long as people seeking refuge from oppressive regimes and dire conflicts are welcomed under suspicion and undignified conditions, more coercion will only generate greater resistance.” [13]

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[13] ECRE, ‘ECRE Comments on the Commission Proposal to recast the Eurodac Regulation’, <http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-Eurodac-proposal.pdf>



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