



Brussels, 17 November 2014  
(OR. en)

15617/14

LIMITE

JAI 887  
CATS 187  
GENVAL 74  
ENFOPOL 368  
DROIPEN 138  
MI 894

**NOTE**

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From:	Presidency
To:	Delegations
No. prev. doc.:	DS 1326/14
Subject:	Exchange of police information for administrative use - outcome and possible follow-up

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1. On 24 July 2014, the Presidency submitted to delegations the meeting document DS1326/14 as part of a package of documents on preventing and combating illegal infiltration in the legal economy. The document (attached as Annex) concerned the exchange of police information for administrative use and contained three questions to delegations:
  - whether Member States face difficulties when requesting police information for administrative purposes?and, if so:
  - which legal basis and channel(s) they use or think could be used to obtain this information from other EU Member States?and finally
  - whether Member States perceived a need to establish a new legal basis and/or a new ad hoc channel to exchange this type of information.

2. DS 1326/14 was based on the observation that the EU Police Forces encounter limits in exchanging information when this is not requested in direct connection to a crime committed or being committed, but with the aim of, for instance, ascertaining the eligibility of administrative license applicants to an administrative procedure, in compliance with the national legislation.

The limitations are faced also when a national and EU legal framework is in place like the one on public tenders. The case presented by the Presidency concerning the public call for tenders is just an example, but the same limitations exist also for a wide range of administrative cases.

Delegations were invited to send written comments.

3. Only eight delegations answered providing very different views and/or solutions, see point 4 below. The Presidency considers the low number of answers to be a consequence of the fact that the current legal framework is difficult to understand rather than as a sign of indifference to the issue. This consideration is based also on the very different answers which have been given in spite of the fact that the EU legal framework of reference is the same for all Member States.

4. According to the eight delegations who replied:

A. The exchange of police information among Member States for administrative use is:

- i) legally possible for two Member States;
- ii) not legally possible for three Member States.
- iii) Three Member States did not express their position.

- B. The exchange of police information for administrative use was not deemed possible on the basis of:
- i) Council Framework Decision 2006/960/JHA ("The Swedish initiative") for one Member State;
  - ii) Article 46 of the Convention implementing the Schengen Agreement for one Member State.
- C. The exchange of police information for administrative use is actually possible using the following channel:
- i) Interpol for one Member State;
  - ii) SIENA (Secure Information Exchange Network Application) for two Member States;
  - iii) Not possible for five Member States.
- D. Police information for administrative use was effectively exchanged only by one Member State using the Interpol channel.
- E. The need to establish a new *ad hoc* channel:
- i) could be advisable for one Member State;
  - ii) is not advisable for six Member States.
5. Two Member States suggested to examine the results of an ISEC funded study on the administrative approach<sup>1</sup>, carried out by Tilburg University (NL) before taking a decision on this issue. Therefore, the Presidency decided also to address the three questions to the Members of the Informal EU Network on the Administrative Approach.
- Only three Member States replied:
- I. All three Member States answered that it is not possible to exchange police information for administrative use through police channels.

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<sup>1</sup> HOME/2011/ISEC/AG/4000002511.

- II. One Member State suggested to extend the mandate of Europol and create a platform similar to ARO (Asset Recovery Office) enabling the exchange of information via SIENA.
  - III. One Member State suggested the option of extending the scope of the Council Framework Decision 2006/960/JHA of 18.12.2006 of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union<sup>2</sup> in order to include administrative information or to create a new legal tool.
6. On the basis of the analysis of the answers received and for the purpose of avoiding misinterpretation, it is possible to draw up some definitions that can be useful for further discussions.
1. **Police information** is any piece of information useful to draw attention to a current or previous criminal act or activity and to a direct or indirect link between this criminal act or activity, the person(s) to whom the requested information refers and the person(s) involved in this criminal act or activity (*for example: a family or financial link between the person about whom the information is requested and a third person involved in a criminal activity or a member of a criminal organisation*).
  2. **Administrative use** is any use of the information with the aim of making a decision about the suitability of a natural or legal person to establish a relation with the public authorities where this relation implies that this person meets the prescribed requirements, as well as any use of the information in order to monitor public administration activity (*for example: the absence of specific police records for people applying for permission to buy a weapon*).
  3. **Information exchange** is the exchange of relevant personal information on the basis of a given legal framework through a suitable channel.

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<sup>2</sup> OJ L 386, 29.12.2006, p. 89.

7. The proposal of the Presidency is to evaluate the findings of the study on the administrative approach funded by the Commission (HOME/2011/ISEC/AG/400000251) together with the incoming Presidencies and with the support of the Delegations willing to seek a suitable solution.

Along with the options suggested by delegations, the Presidency supports the possibility of exploiting the Swedish Initiative for the exchange of police information for administrative use among Member States via the SIENA channel or, alternatively, to resort to the ARO platform.

8. Delegations are requested to take note of the outcome and the suggested follow-up.

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**DS 1326/14**

In view of the increasing opening of markets, free movement of goods and protection of competition, guaranteed by the EU legislation on public procurement, there is a growing need to access or verify information in possession of the authorities of Member States other than the one where the call for tender is published.

Along the same line as the previous Directive, the new Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014<sup>3</sup> on public procurement provides, under Article 57, that an economic operator that has been the subject of a conviction by final judgment for participation in a criminal organisation, corruption, fraud, terrorist offences, money laundering, child labour or other forms of trafficking in human beings must be excluded from participation in a procurement procedure. The same provisions are contained in Article 38 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014<sup>4</sup> on the award of concession contracts. Under Article 86 of Directive 2014/24/EU, Member States are required to provide mutual assistance to each other and to put in place measures for effective mutual cooperation in order to ensure the exchange of information. Under article 45.1 Par. 4 of Directive 2004/18/EC “*the contracting authorities [...] may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned*” with reference to “*any person having powers of representation, decision or control in respect of the candidate or tenderer*”.

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<sup>3</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0065.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG)

<sup>4</sup> [http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=uriserv%3AOJ.L\\_.2014.094.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=uriserv%3AOJ.L_.2014.094.01.0001.01.ENG)

Under the Italian system designed to prevent organised crime infiltration into the legal economy, verifications and checks are also entrusted with the police authorities. Such *modus operandi* provides a suitable response to the threat, but has a weakness when it comes to obtaining information or carrying out checks outside the national territory.

The information that is obtained, exchanged and handled is in essence police information and will hardly be exchangeable using the IMI channel (Internal Market Information System) provided for in Article 86 of the EU Directive. It should be borne in mind that the IMI Regulation only applies where the administrative cooperation requirement is covered by an EU act.

In Italy, information is gathered on a wide variety of individuals, including live-in family members of the owners, project managers and partners of companies participating in procurement procedures with a view also to preventing the use of front persons.

To date, there is no possibility to acquire such information when a company established in a Member State participates in a procurement procedure held in another Member State, since the information should be obtained from abroad and there is no legal instrument or cooperation channel providing for the exchange of such crucial and sensitive administrative information.

In addition to the IMI channel that the new EU Directive on public procurement intends to test, there are legal instruments at EU level that allow for the exchange of personal data that can be used for the application of administrative measures at the national level.

Such supranational rules allow for the exchange of information for purposes other than those covered by the specific legal instrument.

The information can be used at the national level only where domestic legislation exists that permits a different use such as, for example, for administrative purposes.

To date, these legal instruments which are useable in theory have not yet been used in fact.

Here are a few examples:

- pursuant to Article 126 of the Schengen Convention concerning the exchange of personal data, such data may be used for purposes other than those covered by the Convention (police and judicial cooperation) only with prior authorisation of the Contracting Party communicating the data and in accordance with the law of the recipient Contracting Party.
- Pursuant to Article 23 of the EU Convention on Mutual Legal Assistance, personal data communicated under the Convention may be used by the Member State to which they have been transferred for, inter alia, preventing an immediate and serious threat to public security and for any other purpose, only with the prior consent of the communicating Member State, unless the Member State concerned has obtained the consent of the data subject.
- Pursuant to Article 8.3 of Council Framework Decision 2006/960/JHA (*not transposed by Italy*) on simplifying the exchange of information and intelligence between law enforcement authorities, processing of data exchanged under the Decision for any purposes other than those specified in the Framework Decision is permitted solely with the prior authorisation of the communicating Member State.
- Under Article 26 of EU Council Decision 2008/615/JHA (Prüm Decision), processing for other purposes (other than those covered by the Decision) is permitted solely with the prior authorisation of the Member State administering the file and subject to the national law of the receiving Member State.
- Under Articles 6 and 9 of Council Framework Decision 2009/315/JHA on the exchange of information extracted from the criminal record, a possible alternative use (for any other purpose than that of criminal proceedings) of personal data is provided for.



Two more instruments are available for the exchange and use of information for administrative purposes, namely the two European Conventions on the Service Abroad of Documents relating to Administrative Matters and on the Obtaining Abroad of Information and Evidence in Administrative Matters, adopted in Strasbourg on 24 November 1977 and 15 March 1978, respectively. However, the limit to both Conventions is that they have been ratified only by few States, 8 and 7, respectively.

All the instruments mentioned above have proved unsuitable to obtain all the necessary information to make the checks required by the domestic procurement and antimafia legislation and have in fact never been used. In reality, in all mentioned cases, the rules do not define the authorities of the Member States responsible for obtaining, issuing and possibly authorising a different use of the information requested. Those rules do not even specify the notion of extended use on the procedural level.

Articles 3 (Objective) and 5 (Tasks) of Council Decision 371/2009/JHA establishing the European Police Office (Europol) ensure cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States.

Nevertheless, Europol is not used to obtain information for administrative purposes, as mandated areas are clearly identified by specifying the criminal offences which are the subject of investigations enabling the exchange of information (Art. 4 ECD). Basically, any request for information of an administrative nature (e.g. one aimed at excluding a front person from a public procurement procedure) would be an “Out of Mandate Request”, without prejudice to the provisions under Art.19.3 ECD which states: *"Use of the data for other purposes or by authorities other than the national competent authorities shall be possible only after consultation of the Member State which transmitted the data in so far as the national law of that Member State permits"*.

The possibility for Member States to exchange the information bilaterally between themselves through the SIENA system, pursuant to Article 9 of Council Decision 2009/371/JHA, and the use of so-called “Out of Mandate Requests” for that purpose do not appear to provide the legal basis required for such wide-ranging requests with a purely preventive and administrative purpose.

It should be noted that also the new draft Europol Regulation amending Council Decision 2009/371/JHA, which is still being discussed by EU institutions but is expected to be adopted by 2015, makes reference, under Article 3.1, to a list of offences that may trigger Europol's involvement; for other offences outside that list, the Agency has no competence.

The S.I.Re.N.E. Bureau does not deal with this kind of information either. Following the coming into operation of the SIS II on 9 April 2013, there is a further limitation to the use of that channel, as the Sisnet Mail communication tool is no longer available to S.I.Re.N.E. Bureaux; as a result, police cooperation under Article 39 of the Schengen Implementing Convention of 14 June 1985 is precluded in administrative cases.

The use of the Interpol channel has proved partly successful.

Art. 2 of the ICPO-Interpol Constitution<sup>5</sup> provides that the aim of the Organization is to ensure the widest possible mutual cooperation between all criminal police authorities. Art. 10 of Interpol's Rules on the Processing of Data<sup>6</sup> stipulates that information must be processed in the Interpol Information System for the purposes listed in the article.

Interpretation of the rules governing Interpol's activity has so far prevented an opportunity concretely and openly to exchange and obtain information of an administrative nature among the Organization's member countries. In any event, the use of the Interpol channel has also the limit of not being binding.

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<sup>5</sup> <http://www.interpol.int/About-INTERPOL/Legal-materials/The-Constitution>

<sup>6</sup> <http://www.interpol.int/About-INTERPOL/Legal-materials/Fundamental-texts>

In conclusion,

- a) in view of the fact that checks aimed at excluding from participation in procurement procedures those convicted of serious offences are in all respects of an investigative nature with prevention aims, which are the responsibility of police forces
- b) taking into account that the EU legal instruments which theoretically would allow a Member State to obtain investigative information from other Member States and use such information also for purposes other than those specified in the scope of such instruments have never been practically implemented,

delegations are kindly requested to consider the following:

- Which channel do you use to obtain investigative information from EU Member States for administrative use? On the basis of which legal instrument? Is it required by domestic legislation, as in Italy's case, to make such checks?
- Do you think there is a need to establish a new *ad hoc* channel, for example using the model adopted for Asset Recovery Offices?

Delegations are kindly invited to express their opinion on the issue by 15 September 2014.

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