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NOTE

From: Presidency

To: Permanent Representatives Committee

Subject: 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) 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, and amending Regulation (EU) 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)

– Preparation for the trilogue

1. On 4 May 2016, in the framework of the reform of the Common European Asylum System (CEAS), the Commission submitted a proposal for a recast of the Eurodac Regulation. The proposal includes the necessary changes to adapt and reinforce the Eurodac system in accordance with the new Dublin rules and to expand its purpose to help tackle irregular migration and facilitate returns. Detailed examination of the proposal by Member States started at the Asylum Working Party meeting on 26 May 2016. On 9 December 2016, the Council adopted a partial general approach¹ on the proposal.

¹ 15119/16

2. The inter-institutional negotiations on the recast of the Eurodac Regulation started in September 2017, based on the extended mandate agreed at COREPER on 15 June 2017² and the vote in the LIBE committee on 30 May 2017. On 14 February 2018, COREPER extended the Council's negotiating mandate for the Eurodac Regulation to also cover issues related to resettlement³.
3. Four trilogues took place during the Estonian Presidency and the fifth one was held during the Bulgarian Presidency on 25 April 2018. A number of meetings of JHA Counsellors have taken place as well as technical meetings with the European Parliament. During these discussions, it has been possible to find common ground between the co-legislators on most provisions of the recast Regulation. This excludes resettlement related provisions which have not been discussed with the European Parliament yet.
4. However, some outstanding issues still remain. The discussions at the latest meeting of JHA Counsellors on 11 June showed that some Member States continue to have concerns regarding the issue of a person accompanying unaccompanied minors at the time their biometric data are being taken as well as the length of the data storage period for asylum seekers.
5. The Presidency considers that the compromise as negotiated with the European Parliament on Article 2a(1) and as set out in the Annex to this Note, represents a balanced outcome of very complex negotiations on this issue. It is of utmost importance to Member States that the European Parliament has accepted the possibility for Member States to use a proportionate degree of coercion as a last resort to ensure the compliance of minors with the obligation to provide biometric data. At the same time, the European Parliament insists that all minors be accompanied at the time their biometric data are being taken either by an adult family

² 10079/17

³ 6016/18

member, a representative, a person temporarily designated to carry out the tasks of a representative or a person trained to safeguard the interests of the minor. The latter should not be the official responsible for taking the biometric data. In this context, several Member States considered it important, for practical reasons, that such a trained person could be formally part of the same service as the person taking the biometric data. In Presidency's understanding, the current compromise text allows for this possibility since it does not introduce a requirement for the presence of someone external but rather emphasises the independence of the trained person from the official and the service responsible for taking the biometric data.

6. Concerning the issue of a data storage period in Article 17(1) and 18(2a), the European Parliament is ready to accept the compromise as set out in the Annex to this Note. The acceptance of the Council's position of a 10-year data retention period in Article 17(1) is a major concession from the side of the Parliament and in Presidency's view it is now the right time to reach an agreement on this matter. In return, the Parliament insists in Article 18(2a) that the data of the persons who have been granted a long-term resident status be deleted from the Central System. Several Member States have expressed concerns regarding Article 18(2a). In addition, a number of Member States have evoked a link with the issue of stable responsibility in the discussions on the Dublin Regulation. The Presidency has argued on numerous occasions that stable responsibility is an issue which is separate from the Eurodac Regulation and which should take place in the context of discussions on the Dublin Regulation only.

In this context, the Presidency would also draw the attention of delegations to the new elements that the recast Regulation introduces which are clearly necessary to enhance the security and prevent abuses of the asylum systems as well as secondary movements within the European Union. All these aspects serve the interest of Member States and are independent from the discussions on the other CEAS proposals. To point out some of the main elements, the recast Eurodac Regulation provides for the addition of the facial image data, allows for comparisons of alphanumeric data, the taking of biometric data from all minors from the age of 6 as opposed to the age of 14, the extension and broadening of the law enforcement access, the possibility of storing the data of "category 3" persons⁴ and the retention of data for "categories 2"⁵ and "3" for 5 years instead of 18 months as currently set out for "category 2" persons.

7. The Presidency would also like to draw the attention of delegations to Article 38 concerning the transfer of data to third countries for the purpose of return. The compromise suggestion as set out in the Annex mirrors the text agreed in the negotiations on the SIS Return Regulation⁶. At the meeting of JHA Counsellors on 11 June, Member States indicated that they would be in a position to agree on such a text if agreed in the context of the SIS Regulation. To further align the text with the relevant provisions in the SIS Return Regulation, paragraph 2 of Article 38 has been redrafted as compared to the version of the Article discussed at the meeting of 11 June.
8. In view of the above, COREPER is invited to agree that the compromise suggestions as set out in the Annex to this Note constitute a basis for negotiations with the European Parliament at the next trilogue.

⁴ Those found illegally staying in a Member State.

⁵ Those apprehended in connection with the irregular crossing of an external border.

⁶ Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) for the return of illegally staying third-country nationals, COM (2016) 881 final.

"Article 2a

Special provisions relating to minors

- 1. The biometric data of minors from the age of six shall be taken by officials trained specifically to take a minor's biometric data in a child friendly and child-sensitive manner and in full respect of the best interests of the child and the safeguards laid down in the United Nations Convention on the Rights of the Child.**

The minor shall be accompanied by, where present, an adult family member throughout the time his or her biometric data are taken. The unaccompanied minor shall be accompanied by a [guardian], representative or, where a [guardian] or representative has not been designated, a person trained to safeguard the best interests of the minor and his or her general wellbeing, throughout the time his or her biometric data are taken.

Such a trained person shall not be the official responsible for taking the biometric data, shall act independently and shall not receive orders either from the official or the service responsible for taking the biometric data. Such a trained person shall be [the person designated to provisionally carry out the tasks of the representative] under [the Reception Conditions Directive], where that person has been designated.

Force shall not be used against minors to ensure their compliance with the obligation to provide biometric data. However, where permitted by relevant Union or national law, and as a last resort a proportionate degree of coercion may be used against minors to ensure their compliance with that obligation.

...

Recital 30-a

Member States should inform all persons required by this Regulation to give biometric data of their obligation to do so. Member States should also explain to those persons that it is in their interests to fully and immediately cooperate with the procedure by providing their biometric data. Where a Member State's national law allows for the taking of biometric data by use of coercion as a last resort, those measures must fully respect the Charter of Fundamental Rights of the European Union. **Only in duly justified circumstances and as a last resort, having exhausted other possibilities, a proportionate degree of coercion could be used to ensure the compliance of third-country nationals or stateless persons who are deemed to be vulnerable persons, and minors with the obligation to provide biometric data.**

Recital 25a

All minors from the age of six years old and above, including unaccompanied minors, should be accompanied at the time their biometric data are being taken for the purposes of Eurodac by, where present, an adult family member. Such a family member should be taken to mean an adult family member as defined in accordance with relevant Union law. An unaccompanied minor should be accompanied by a representative, [guardian] or a person trained to safeguard the best interests of the child and his or her general wellbeing at the time his or her biometric data are being taken.

Article 17(1)

Data storage

1. For the purposes laid down in Article 10(1), each set of data relating to an applicant for international protection, as referred to in Article 12, shall be stored in the Central System for ten years from the date on which the **biometric data** [...] were taken.

...

Article 18

Advanced data erasure

....

- 2a. Data relating to a person who has been granted long-term resident status in accordance with Directive 2003/109 by a Member State of origin before the expiry of the period referred to in Article 17(1) shall be erased from the Central System without delay by that Member State in accordance with Article 28(3).**

...

Article 38

Transfer of data to third countries for the purpose of return

1. By way of derogation from Article 37 of this Regulation, the personal data relating to persons referred to in Articles 10(1), 13(2), 14(1) obtained by a Member State following a hit for the purposes laid down in Article 1(1)(a) or (b) may be transferred or made available to a third-country. [...]

- 1a. **The transfer of the data to a third country shall be carried out in accordance with the relevant provisions of Union law, in particular provisions on data protection, including Chapter V of Regulation (EU) 2016/679, and, where applicable, readmission agreements, and the national law of the Member State transferring the data.**
 - 1b. **The transfers of data to a third country shall take place only when the following conditions are met:**
 - (a) **the data is transferred or made available solely for the purpose of identification of, and issuance of an identification or travel document to, an illegally staying third-country national in view of return;**
 - (b) **the third-country national concerned has been informed that his or her personal data and supplementary information may be shared with the authorities of a third country.**
 - 1c. **Implementation of Regulation (EU) 2016/679, including with regard to the transfer of personal data to third countries pursuant to this Article, and in particular the use, proportionality and necessity of transfers based on Article 49(1)(d) of that Regulation, shall be subject to monitoring by the national independent supervisory authority set up pursuant to Chapter VI of Regulation (EU) 2016/679.**
2. [...] **Transfers of personal data to third countries pursuant to this Article shall not prejudice the rights of persons related to Article 10(1), 12a (1) and 12d (1) of this Regulation, in particular as regards non-refoulement, and the prohibition to disclose or obtain information in accordance with [Article 30 of Directive 2013/32/EU].**
3. A third-country shall not have direct access to the Central System to compare or transmit **biometric** data or any other personal data of a third-country national or stateless person and shall not be granted access via a Member State's designated National Access Point.

Recital 49a

Data subjects should have the right of access to, rectification and erasure of personal data concerning them and of restriction of the processing thereof. Taking into account the purposes for which the data are processed, data subjects should have the right to completion of incomplete personal data, including by means of providing a supplementary statement. Those rights should be exercised pursuant to Regulation 2016/679 and in accordance with the procedures set out in this Regulation, Directive 2016/680 and Regulation 2016/794 as regards the processing of personal data for law enforcement purposes pursuant to this Regulation. In relation to the processing of personal data in Eurodac by national authorities, each Member State, for reasons of legal certainty and transparency, should designate the authority which is to be considered as controller in accordance with Regulation (EU) 2016/679 and Directive (EU) 2016/680 and which should have central responsibility for the processing of data by that Member State. Each Member State should communicate the details of that authority to the Commission.

Recital 51

In individual cases, information obtained from the Central System could be shared with a third-country in order to assist with the identification of a third-country national in relation to his/her return. Sharing of any personal data should be subject to strict conditions. Where such information is shared, no information should be disclosed to a third-country relating to the fact that an application for international protection has been made by **that** third-country national [...]. Any transfer of data to a third-country for the identification of a third-country national must be in accordance with the provisions of Chapter V of Regulation (EU) No. 2016/679 as well as in accordance with any additional safeguards set out in this Regulation. The third countries of return are often not subject to adequacy decisions adopted by the Commission under Regulation (EU) 2016/679. Furthermore, the extensive efforts of the Union in cooperating with the main countries of origin of illegally staying third-country nationals subject to an obligation to return has not been able to ensure the systematic fulfilment by such third countries of the obligation established by international law to readmit their own nationals. Readmission agreements, concluded or being negotiated by the Union or the Member States and providing for appropriate safeguards for the transfer of data to third countries pursuant to Regulation (EU) 2016/679 cover a limited number of such third countries and conclusion of any new agreement remains uncertain. In such situations, and as an exception to the requirement of an adequacy decision or appropriate safeguards, transfer of personal data to third-country authorities pursuant to this Regulation should be allowed for the purposes of implementing the return policy of the Union, and it should be possible to use the derogation from that requirement provided for in Regulation (EU) 2016/679, provided that the conditions laid down in that Regulation are met. According to Regulation (EU) 2016/679, its implementation, including with regard to transfers of personal data to third countries pursuant to this Regulation, is subject to monitoring by the national independent supervisory authority. Regulation (EU) 2016/679 applies regarding the responsibility of the Member States' authorities as 'controllers' within the meaning of that Regulation."