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van deskundigen in
internationaal vreemdelingen-,
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Secretariaat
postbus 201, 3500 AE Utrecht/Nederland
telefoon 31 (30) 297 42 14/43 28
telefax 31 (30) 296 00 50
e-mail cie.meijers@forum.nl
<http://www.commissie-meijers.nl>

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To Vice President Franco FRATTINI
European Commission
Wetstraat/Rue de la Loi 200
B-1049 Brussels

Reference CM0712-IV

Regarding Note on the proposal of the JHA Council to give law enforcement authorities access to Eurodac

Date 18 September 2007

Dear Mr. FRATTINI,

On behalf of the Standing Committee of Experts on International Immigration, Refugee and Criminal law, we hereby present a comment on recent proposals to extend the scope of EURODAC.

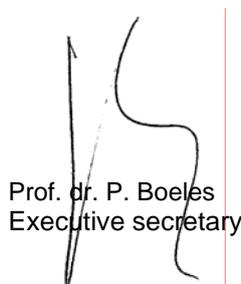
During their meeting of 12-13 June 2007, the JHA Council of Justice and Home Affairs (JHA Council) invited the European Commission to prepare a proposal to provide police and other law enforcement authorities with access to Eurodac 'for the purpose of consultation in the course of the exercise of their duties in relation to the prevention, detection and investigation of terrorist offences and other serious criminal offences.' In paragraph 2.3.4. of its Evaluation of the Dublin System of June 6th 2007, (COM(2007) 299 final), the European Commission announced that it will explore the possibility to extend the scope of EURODAC with a view to use its data for law enforcement purposes. The Standing Committee of Experts is deeply concerned about this development. EU measures or policies in the field of Freedom, Security, and Justice should not be based on the general presumption that migrants within the EU are to be treated as suspected terrorists. Such a policy would run against the general accepted principles in EU law of non-discrimination and equality. It is also devastating for the position of migrants and their further integration into the society of EU Member States.

We hope you will find these comments useful. Should any question arise, please do not hesitate to contact us.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman



Prof. dr. P. Boeles
Executive secretary

Note on the proposal of the JHA Council to give law enforcement authorities access to Eurodac

The Standing Committee is deeply concerned about the proposal to give law enforcement authorities access to Eurodac. During their meeting of 12-13 June 2007, the JHA Council of Justice and Home Affairs (JHA Council) invited the European Commission to prepare a proposal to provide police and other law enforcement authorities with access to Eurodac *'for the purpose of consultation in the course of the exercise of their duties in relation to the prevention, detection and investigation of terrorist offences and other serious criminal offences.'*

Already in its Presidency Paper of December 2006, the German government proposed to make the EU database Eurodac accessible by police and law enforcement authorities. This extended use of Eurodac was justified by stating that: *'Frequently, asylum-seekers and foreigners who are staying in the EU unlawfully are involved in the preparation of terrorist crimes, as was shown not least in the investigations of suspects in the Madrid bombings and those of terrorist organizations in Germany and other Members States...'*¹

It is alarming that this phrase links third-country nationals, whether they applied for asylum and accordingly may have been granted protection or whether they are illegally resident within the EU, directly to acts of terrorism. EU measures or policies in the field of Freedom, Security, and Justice should not be based on the general presumption that migrants within the EU are to be treated as suspected terrorists. Such a policy would run against the general accepted principles in EU law of non-discrimination and equality. It is also devastating for the position of migrants and their further integration into the society of EU Member States.

Undermining core principles of data protection

This and other proposals add to the current developments in which large EU databases (including the Visa Information System) are being made accessible not only for a large group of States, but also for different authorities, including Europol, Eurojust and national security agencies. Furthermore, the proposed 'expanded European Information Network' (see p. 3 of the abovementioned Presidency Paper) undermines the core principles of data protection, such as the purpose limitation principle, the principle of transparency, and the principle of data quality. Individuals can no longer rely on the principle that information submitted to one authority will not be used by different, foreign authorities as well. The set up of multipurpose central data bases impedes the transparency of further use of personal information stored in these systems.

According to the Standing Committee, there are at least four reasons why the use of Eurodac information should not be extended to law enforcement authorities.

Infringing on the principle of purpose limitation

Firstly, as mentioned above, this proposal infringes the data protection principle of *purpose limitation*. The proposal to extend the use of Eurodac is clearly in breach of the adopted rules with regard to the limited use of this database. Eurodac, operational since 15 January 2003, is based on the Regulation (EC) No 2725/2000 *concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention*.² The proposal of to give law enforcement authorities access to Eurodac would change this database into a criminal law investigation tool which is contrary to the limited purpose of this system. As agreed upon after lengthy debates, the sole purpose of Eurodac is to facilitate the application of the Dublin Regulation to establish which state is responsible for an asylum application submitted in any EU Member State.³ For this reason, Eurodac only contains fingerprints of the asylum seeker, an identification number, and the place and date of arrival. It does not include personal data: no name, no address or date of birth. Further, the fingerprints are only accessible via the Central Unit in Luxembourg to establish whether a person has been resident in another Member State. Precisely this limited use of Eurodac has been the reason for the Legal Service of the Council to conclude that the establishment of Eurodac could be based on Article 15 of the former Dublin Convention (now Article 21 of the Dublin II Regulation 343/2003. In its advice, the Legal Service explicitly stated that Eurodac should not be used for other purposes as for example 'the functioning of other international instruments' or 'starting criminal investigations against asylum seekers'.⁴

¹ Council doc. 17102/06, 22 December 2006, see p. 6.

² OJ L 50/1, 25.2.2003. Meanwhile, the Dublin Convention has been replaced by the Council Regulation 343/2003 (Dublin II) of 18 February 2003

³ Convention of 15 June 1990, OJ C 254, 1997, entered into force on the 1st of September 1997.

⁴ 5546/93, JUR 25.

Stigmatising asylum seekers

Secondly, as mentioned above, the use of fingerprints of asylum seekers for law enforcement purposes and in the fight against terrorism, will lead to *stigmatisation and discrimination* of this group of individuals. The fact that by this extended use of their information, asylum seekers are automatically considered as suspected persons, will influence the way this group of persons will be treated in society as well. This risk of stigmatisation has been recognised by the Constitutional Court in Germany in its 'Rasterfahndungsurteil' of 2006 with regard to the practice of data profiling by the German police and was one of the reasons to conclude that this practice was unconstitutional.⁵ The adoption of new rules at the EU level should not undermine the guarantees of the constitutional law of Member States.

Proliferating unreliable information

Thirdly, the extended use of Eurodac and the involvement of a large group of EU and non EU Member States will infringe *the reliability and the quality* of the information used by national authorities. National practice, for example in the Netherlands, has shown that contrary to the rules of the Eurodac Regulation, data on asylum seekers who obtained the refugee status or who acquired the nationality of one of the EU Member States are not automatically deleted. Furthermore, the Standing Committee refers to a recent judgment of the Immigration Tribunal in the United Kingdom in which the court even questioned the reliability of the identification of asylum seekers based on the fingerprint match in Eurodac.⁶ According to this judgment, the reliability of this fingerprint matching should be further investigated. The Standing Committee invites the European Commission to follow this advice and to investigate the reliability of data and of fingerprint matching, rather than to propose an extension of the use of Eurodac data by other national or foreign agencies and officials.

Endangering persons in need of protection

Fourthly, the Standing Committee emphasizes the extra *vulnerable position* of asylum seekers and the necessity to prevent that national officials of their countries of origin will get access to information on their asylum applications. Extension of the use of data in Eurodac to other authorities not dealing with asylum application implies the risk that this information will be accessible by other, foreign, authorities as well. With regard to this latter point, the Standing Committee emphasizes that the registration of fingerprints in Eurodac is *not voluntary*: each person applying for asylum in one of the EU Member States is obliged to submit his or her fingerprints.

Conclusion

Concluding, the Standing Committee urges the European Commission to reconsider the request by the JHA Council. In stead of extending the use of Eurodac data, the EU institutions should focus on reinforcement of the reliability and efficiency of the current system and on the compliance of the Member States with their obligations under the current Eurodac Regulation.

Utrecht, The Netherlands, 18.9.2007

⁵ Judgment of the Bundesverfassungsgericht, 4 April 2006, 1 BvR 518/02 published on 23. May 2006.

⁶ Decision of 24 May 2007, Asylum and Immigration Tribunal Y1 (Previous claims – Fingerprint match – EURODAC) Eritrea [2007] UKAIT 00054.