

EXPLANATORY MEMORANDUM (EM) ON EUROPEAN UNION DOCUMENT

COMMISSION STAFF WORKING DOCUMENT ON THE IMPLEMENTATION OF THE EURODAC REGULATION AS REGARDS THE OBLIGATION TO TAKE FINGERPRINTS

Submitted by the Home Office on 11 June 2015.

SUBJECT MATTER

1. This Explanatory Memorandum concerns a Commission Staff Working Document on the Implementation of the Eurodac Regulation as regards the obligation to take fingerprints. The Commission has presented this document with reference to its recent paper "A European Agenda on Migration", which outlines the Commission's view of the different steps that the European Union should take to address the variety of issues raised by the recent, tragic events in the Mediterranean, and is the subject of a separate EM 8961/15.
2. In the context of Europe's duty to provide international protection to those in need the European Agenda on Migration reiterates the need for Member States to fully implement the rules in the Eurodac Regulation on taking migrants' fingerprints, and highlighted that the Commission would provide guidance to facilitate systematic fingerprinting. That guidance is the subject of this Explanatory Memorandum.

SCRUTINY HISTORY

3. The Staff Working Document is a new document, without any previous scrutiny history.

MINISTERIAL RESPONSIBILITY

4. The Home Secretary has responsibility for UK immigration and asylum policy. The Foreign Secretary has overall responsibility for the Government's relationship with the EU.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

5. These are reserved matters but the devolved administrations have been consulted.

LEGAL AND PROCEDURAL ISSUES

6. The Staff Working Document is not a proposal for legislation.

i. Legal basis

The legal base for the current Eurodac Regulation (EC) No. 2725/2000 is Article 63(1)(a) of the Treaty Establishing the European Community (TEC). As of 20 July 2015 the recast Eurodac II Regulation (EU) No. 603/2013 will operate, its legal base is Article 78(2) of the Treaty on the Functioning of the European Union (TFEU).

ii. European Parliament Procedure

Not applicable in the context of this Staff Working Document.

iii. Voting procedure

Not applicable in the context of this Staff Working Document

iv. Impact on United Kingdom Law

In terms of powers to take fingerprints for immigration purposes Sections 141 and 142 of the Immigration and Asylum Act 1999 and paragraph 18(2) and (2A) of Schedule 2 to the Immigration Act 1971 (identifying persons detained under Schedule 2 or 3 to the Immigration Act 1971) provide the power in law for the Secretary of State to take the fingerprints of persons falling within the scope of the Eurodac Regulation.

v. Application to Gibraltar

Where the UK has opted in to a Title V measure, such as the Eurodac Regulation that is referenced in this document, the measure applies to Gibraltar by virtue of Article 355(3) TFEU.

vi. Fundamental rights analysis

This document comments on the collection of fingerprint data under the Eurodac Regulation, which may engage Article 8 of the European Convention on Human Rights (ECHR). The document sets out to provide guidance in the form of best practices to facilitate systematic fingerprinting and so improve the efficiency of the implementation of the Regulation.

In the document the Commission recalls the conclusions of the Justice and Home Affairs Council on 9 October 2014 that included the commitment of Member States to work on systematic identification, registration and fingerprinting, ensuring respect of fundamental rights where any coercion or restrictive measures, such as detention, are taken if migrants refuse fingerprinting.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

7. The provisions of the Eurodac Regulation are extended to Iceland and Norway by virtue of the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (19 January 2001). Liechtenstein has participated in the EURODAC Regulation since 19 December 2011 towards the end of the period covered by this Report. Liechtenstein is associated with the system by a Protocol to an Agreement with Switzerland signed on 28 February 2008.

SUBSIDIARITY

8. This Staff Working Document is not a legislative act, however, given the importance of ensuring that Member States systematically take fingerprints for transmission in accordance with the Eurodac Regulation it is appropriate for the Commission services to make recommendations on best practice.

POLICY IMPLICATIONS

9. The Commission's Staff Working Document does not contain legislative proposals, but observations on it are set out below.

Observations

10. The Commission services note that it has become apparent that groups of irregular migrants and asylum seekers from certain countries of origin, notably Eritrea and Syria, have refused to cooperate in being fingerprinted by Member State authorities. We agree and welcome the Commission's efforts to address this issue by shining a light on it with this paper and producing guidance for further debate.

11. We fully agree with the Commission in emphasising the need for Member States to fulfil their obligations under the Eurodac Regulation to take and transmit the fingerprints of asylum applicants (applicants for international protection) and migrants apprehended in connection with the irregular crossing of the external border by land, sea or air. Member States must respect their obligations and also work together to tackle attempts by others to thwart the correct application of fingerprinting laws. We must construct an environment which challenges the narrative put forward by smugglers that migrants should not cooperate with fingerprinting procedures when they arrive in the European Union. This behaviour has serious consequences for the functioning of the Dublin Regulation system as it allows secondary movements to go unchecked, which is unacceptable.

12. We agree that in order to challenge the "non-cooperation" narrative the provision of information to migrants about their rights and responsibilities is important. Migrants must also understand that their non-compliance with the process of identification and fingerprinting obligations will have consequences for the way in which their case is handled; such as the possibility of any asylum claim being considered in an accelerated procedure and/or the use of detention or coercion to

obtain fingerprints. In our own experience the appropriate use of detention - as described in the document (but in our case in accordance with national practice as the UK is not bound by the Return Directive 2008/115/EC) - can have the effect of bringing behavioural change.

13. Not capturing fingerprint data and transmitting it to Eurodac undermines the Dublin system. Given the large number of migrants arriving by sea, many of whom have refused to cooperate with the fingerprinting process, it is likely that a large amount of fingerprint data has not been transmitted to Eurodac. This means there will be increasing gaps in the database. Anomalies and gaps in the data stored in Eurodac will have a negative impact on Dublin Regulation operations at a practical level and will make it more difficult to determine the State responsible for assessing an asylum claim. It will also impact on the accuracy of the data used by the Commission when producing its evaluation Report on the application of the Dublin Regulation in 2016. This is regrettable, but further underlines the importance of this document as a basis for discussions to improve compliance with the Eurodac Regulation.

CONSULTATION

14. This is a reserved matter but the Devolved Administrations have been consulted. There has been no further external consultation.

IMPACT ASSESSMENT

15. Not applicable in the context of this Staff Working Document.

FINANCIAL IMPLICATIONS

16. None arising as a consequence of this Staff Working Document.

TIMETABLE

17. The document does not contain proposals for negotiation in Council.



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