

# **Eurodac Supervision Coordination Group**

## **Second Inspection Report - Executive Summary**

### **1. Background on Eurodac**

Eurodac is an information system set up with the purpose of identifying the Member State responsible for an asylum application lodged within the European Union, in order to speed up the asylum procedure.<sup>1</sup> The Eurodac system enables Member States to identify asylum seekers and persons who have crossed an external frontier of the Community in an irregular manner. By comparing fingerprints, Member States can determine whether an asylum seeker or a foreign national, found illegally present within a Member State, has previously claimed asylum in another Member State. In addition, by being able to check if an applicant has already lodged a request for asylum in another Member State, "asylum shopping" in other Member States after being rejected in one can be avoided.

In accordance with the Eurodac Regulation, all asylum applicants over the age of 14 have to have their fingerprints taken when they request asylum. The fingerprints are then sent in digital format to Eurodac's Central Unit, which is hosted within the European Commission. The system compares the prints with others already stored in the database, thus enabling authorities to check if the applicant has already lodged an application in another Member State or if they entered the European Union without the necessary papers.

### **2. Recent developments**

Following the Commission's evaluation of the Dublin system of 6 June 2007<sup>2</sup>, the European Commission has undertaken a revision of both the Dublin and Eurodac Regulations. In the course of this procedure, the Commission widely consulted stakeholders, aiming at ensuring that the relevant aspects were taken into account. The

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<sup>1</sup> Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (hereinafter, "the Eurodac Regulation"). The implementation rules for Eurodac are set out in Council Regulation (EC) No 407/2002 of 28 February 2002. Eurodac has been in operation since January 2003.

<sup>2</sup> The Dublin and Eurodac Regulations require the Commission to report to the European Parliament and to the Council on their application after three years of operation and to propose, where appropriate, the necessary amendments. Whilst acknowledging that the system set up in the Regulation has been implemented in the Member States in a generally satisfactory way, the Commission Evaluation Report identified certain issues related to the efficiency of the current provisions and highlighted those which needed to be tackled in order to improve the Eurodac system and facilitate the application of the Dublin Regulation.

European Commission also took on board the results of the first coordinated inspection report issued by the Eurodac Supervision Coordination Group in 2007.

The new proposals of revised instruments were presented on 3 December 2008. The "Eurodac" proposal aims at *inter alia*:

- improving the efficiency of the implementation of the Eurodac Regulation,
- ensuring consistency with the asylum *acquis* evolved since the adoption of the above-mentioned Regulation,
- updating a number of provisions taking account of factual developments since the adoption of the Regulation (i.a. on data protection supervision),
- establishing a new management framework.

### **3. Supervision of Eurodac**

In accordance with Article 20 of the Eurodac Regulation<sup>3</sup>, the supervision of Eurodac is ensured as follows:

- The European Data Protection Supervisor (EDPS) is the competent authority for monitoring the activities of the Central Unit to ensure that the rights of data subjects are respected when their data are processed by Eurodac.
- At national level, each state participating in the Eurodac system has a supervisory authority, the Data Protection Authority (DPA), to monitor the collection and use of data.
- Over the last four years, EDPS and DPAs have developed a coordinated supervision of the Eurodac system, aiming at promoting a coordinated response to common problems. The coordination group already issued one inspection report, the recommendations of which have been largely incorporated in the Commission's proposal for new Eurodac and Dublin Regulations.

### **4. Second Inspection Report - Issues examined and method of inspection**

The second inspection report was adopted by the Eurodac Supervision Coordination Group on 24 June 2009. It is based on the use of a standardised questionnaire by all participants. The report presents both the findings and the recommendations based on the replies to the questionnaire received from all the Member States. The Group hopes that the report will usefully contribute to the ongoing revision of the Eurodac and Dublin Regulations.

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<sup>3</sup> The EDPS replaced a provisional Joint Supervisory Body in 2004. Article 20, paragraph 11, lays down that: "The joint supervisory authority shall be disbanded upon the establishment of the independent supervisory body referred to in Article 286(2) of the Treaty. The independent supervisory body shall replace the joint supervisory authority and shall exercise all the powers conferred on it by virtue of the act under which that body is established". In accordance with Article 20 (3) of the Eurodac Regulation, the EDPS is thus responsible for examining implementation problems in connection with the operation of Eurodac, for the examination of possible difficulties during checks by the national supervisory authorities and for drawing up recommendations for solving existing problems. Furthermore under Article 20 (4), the EDPS shall be actively supported by the national supervisory authorities.

### Issues examined

Two main issues were scrutinised by the Group: the right of information of asylum seekers and the methods for assessing the age of young asylum seekers in view of their registration in the system.

#### 1. Information to data subjects

The first coordinated inspection report suggested as one of the likely causes for the scant exercise of the right of access by data subjects in Eurodac their probable lack of awareness about their rights. It was therefore suggested that the coordination group examines the way in which information is provided to asylum seekers or persons otherwise reported in Eurodac. The coordination group decided to take stock of existing practices in this area (which languages are used, is the impact of the information measured in any way,...), and where possible, examine the impact of the quality of the information given and the exercise of the right of access. The aim is also to identify and exchange best practices on this matter.

#### 2. Assessment of the age of young asylum seekers

According to Article 4 of the Eurodac Regulation, children from 14 years on should be fingerprinted. There is often a problem determining the age of a child who carries no reliable identity document and various methods are used to assess their age. In practice, the determination of the age is not only a question of data quality and insertion of data in Eurodac. It is also used to determine whether or not a young asylum seeker is a minor, which has a number of implications on the processing of the asylum application (underage asylum seekers are entitled to a range of protection measures not granted to adults).

The aim of this exercise was to take stock of existing practices and/or legislations existing at national level, with a view to assess their compliance with the legal European framework concerning Eurodac. It was also intended to determine whether further harmonization was need or desirable in this framework.

### Method of inspection

The Group first elaborated a questionnaire covering the two issues, with a view to obtaining answers in a relatively uniform format. The method used to gather the answers to the questionnaire was left to the appreciation of the DPAs. Some opted for field visits while some others chose desk work. Generally speaking, this combination of a standardised questionnaire and free inspection methodology has been appreciated. Most Member States found that on spot checks were more productive than an exchange of written material between their office and the Eurodac office.

## **5. Findings and Recommendations**

In view of the findings of the coordinated inspection, the Eurodac Supervision coordination group came to the following conclusions.

### **Information to data subjects**

#### **Findings**

The results of the evaluation exercise show that the information provided to asylum seekers about their rights and the use of their data tends to be incomplete, in particular as regards the consequences of being fingerprinted, and the right of access to and rectification of their data.

The information provided also differs widely among Member States and great differences have been observed as regards the practices for asylum seekers and illegal immigrants - the latter generally receiving less information, and in some cases, no information at all.

#### **Recommendations**

- Member States should improve the quality of the information on data protection for data subjects, which should contain all items laid down in Article 18 of the Eurodac Regulation. The information provided to the data subject should cover the rights of access and rectification as well as the procedure to exercise these rights, including information both about the data controller who should deal primarily with requests for access and rectification and about the national Data Protection Authority as the competent body to give assistance to the data subject where necessary.
- Member States should ensure that the information is provided on equal footing both to asylum seekers and illegal aliens.
- Asylum authorities should reconsider the way in which they provide information on data protection so as to ensure that it is clear enough and is well understood by data subjects. Particular emphasis should be put on data protection information in order to make it clearly visible and accessible.
- Information texts should be drafted in a clear, simple and understandable language, taking account of the level of education of the data subjects and, therefore, avoiding legal terminology which they are not familiar with. It should always be assessed whether the data subject has fully understood the information, provided both in writing and orally. Asking for the data subject's signature as a confirmation of his or her understanding of the information provided to him or her does not constitute a sufficient guarantee that the message was well understood (also considering the vulnerable position of the applicant).
- Member States should promote cooperation and experience sharing among national competent authorities, by encouraging a working group to study this matter and eventually develop harmonized practices.
- Member States should develop a standard form for the right to information, to the drafting of which the coordination group could give its valuable input. This would contribute to a better harmonization and compliance with the Eurodac Regulation. This solution could also have a positive impact in terms of translations, as many of the languages used are common among different Member States.
- The DPAs should consider publishing on their websites a best practice guide on how the individuals can exercise their rights.
- The DPAs should follow-up the situation at national level and provide guidance on how better comply with legal obligations.

## Assessment of the age of asylum seekers

### Findings

The evaluation of the replies to the questionnaire showed that methods for determining the age of asylum seekers (whether in the framework of Eurodac or in the wider context of the asylum procedure) are the subject of discussions in many Member States mainly as to their reliability and ethical acceptability.

Moreover, the lack of harmonisation of systems used in Member States to measure the age of young asylum seekers leads also to a great variety of results. This has obvious implications in terms of fairness of treatment of the concerned individuals.

### Recommendations

- Member States should ensure that the methods for assessing the age of asylum seekers as well as the whole procedure surrounding the tests are established in a clear text accessible by the public.
- Member States should ensure that the declaration of the asylum seekers on age is not disregarded in the procedure and that these statements are given an appropriate legal status and value, similar to the ones based on the results of medical examination. The argument that statements made by asylum seekers may not be correct or even be untrue should be weighted against the fact that medical examination as such may also lead to incorrect results or mistakes.
- The Member States should provide explicitly that a refusal to undergo medical examination cannot adversely affect the asylum seeker<sup>4</sup>.
- The asylum seeker should be entitled to ask for a second opinion regarding the medical results and the conclusions drawn from them without costs for him/her.
- Asylum authorities have to take account of the margin of error resulting from the use of some medical examinations when taking decisions affecting the legal status of the asylum seeker. More precisely, when the result is situated within a range of error, priority has to be given to other elements of proof, such as the declarations of the asylum seeker.
- The Commission should undertake an overall assessment of the reliability of the various methods used in the Member States for age assessment, with a view to ensure more harmonisation in this regard. Medical and ethical aspects should be taken into account in the assessment asked by the coordination group about the reliability of these techniques. This assessment should cover the methods used to assess the age of child asylum seekers both in the context of Eurodac and in the context of the examination of the asylum applications of young asylum seekers.
- Medical examination considered invasive under the previous recommendation should not be used to determine the age limit for Eurodac fingerprinting. If needed at all, it should be limited to the determination of whether a child asylum seeker is under 18 or not.
- The Eurodac Regulation, currently under revision, should be modified to impose fingerprinting asylum seekers only from 18 year old on.

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<sup>4</sup> As is already the case under Directive 2005/85/EC.