

Coordinated Supervision of Eurodac

Activity Report 2008-2009

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Introduction

Eurodac is an information system established for the comparison of fingerprints of asylum applicants and illegal immigrants. It facilitates the application of the Dublin Convention¹ which aims at determining the State responsible for examining the asylum application². Eurodac has been created by Council Regulation (EC) [No 2725/2000](#) of 11 December 2000³ as completed by the Council Regulation (EC) [No 407/2002](#) of 28 February 2002⁴. Eurodac has been operational since 15 January 2003 in the then EU-15 Member States (except Denmark), as well as in Norway and Iceland. Since then, the system has been joined by the new Member States following the 2004 enlargement, as well as by Denmark, Romania, Bulgaria and Switzerland (in 2008). Agreements are being negotiated with Liechtenstein to allow this country to join the system as well.

In the period covered by this report, the legal framework of Eurodac has been undergoing a thorough revision (see below), which should lead to the adoption of a revised Eurodac legal basis (Regulation). Though the adoption of a recast Eurodac Regulation has not yet taken place (partly because of the entry into force of the Treaty of Lisbon, see below) it is already possible to have a good picture of the provisions likely to be adopted. It is evident that the recommendations made by the Eurodac Supervision Coordination Group ("the Group") in coordinated inspection reports in 2007 and 2009 have been taken into account by the European Commission, which is certainly welcome. It is also worth underlining that the new legal basis will confirm the model of coordinated supervision on which the Group operates.

The data protection supervision of the Eurodac system is carried out at national level by the national supervisory authorities (Data protection authorities, or "DPAs"), and at central (EU) level, by the European Data Protection Supervisor (EDPS). The coordination between the two levels is ensured by the Eurodac Supervision Coordination Group ("the Group"), which is composed by representatives of DPAs and the EDPS. This Group was chaired in 2008-2009 by Mr Peter Hustinx, (EDPS), while the Vice-Chair was Mrs Guro Slettemark (DPA Norway). The present document aims at reporting on the supervision activities of the Group for the period of 2008-2009.

The need for thorough data protection supervision of Eurodac is evident when one considers the category of persons affected by the Eurodac system: asylum seekers and (to a lesser extent) illegal immigrants. This need is also reinforced by the evolutions of the policies related to the area of freedom, security and justice in the recent years. Asylum policies need to be better coordinated, and, as a result, so does the protection of the rights and freedoms of asylum seekers. Furthermore, there is a growing tendency to exchange data between different authorities in the EU, and it makes it ever more relevant to embed

¹ The Dublin Convention has been replaced by Regulation (EC) N° 343/2003 of 18 February 2003 and Commission Regulation (EC) N° 1560/2003 of 2 September 2003. These two instruments are sometimes called "Dublin II".

² 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.

³ 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 "Eurodac Regulation".

⁴ Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, hereinafter "the Eurodac Regulation".

safeguards in the system to compensate for the increased risks caused by the exchange of data.

Data protection is also a key factor for the success of the operation of Eurodac, and consequently for the proper functioning of the Dublin system. Elements such as data security, technical quality of data and lawfulness of consultation of Eurodac data, all contribute to the smooth functioning of the system.

Finally, it should be noted that supervision is not only important for the enforcement of asylum seekers' rights to personal data protection, but also because this is to some extent a pilot exercise of great relevance for other upcoming large scale information systems, such as the future Schengen Information System (SIS II) or the Visa Information System (VIS).

Chapter I of this report clarifies the legal environment of the Eurodac Coordinated Supervision, and underlines in particular the developments of the framework in the period covered by this report.

Chapter II of this report gives details of the cooperation. Five coordination supervision meetings took place over this period and led to the adoption of a number of important documents such as the Second Inspection Report on information to data subject and assessment of the age of young asylum seekers and the Recommendations on the use of the DubliNet system.

Achievements are the subject of Chapter III. In 2008 and 2009, the Group has achieved considerable results. It developed supervisory actions on new subjects, while following up on previous work. It devoted time to the exchange of relevant information, while also keeping abreast of new developments in this area.

Finally, this report also addresses the prospects for future activities in Chapter IV, in a time of intensive change in the field of Eurodac.

1. General framework

1.a. Revision of the Dublin and Eurodac Regulations

Following the Commission's evaluation of the Dublin system of 6 June 2007⁵, the European Parliament adopted on 3 September 2008 a resolution on the Commission's evaluation of the Dublin system. It addressed a number of issues, the most relevant for the work of the Group being the following:

- Rights of the claimants: the Parliament called for additional provisions concerning the means by which the persons seeking protection are informed of the implications of the Dublin Regulation. In this context, it suggests drafting a

⁵ 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.

standard leaflet which could be translated into a certain number of languages and be distributed to all Member States.

- Principle of the best interest of the child: the Parliament reaffirmed the principle of the best interest of the child and recommends that a set of common guidelines on age-assessment be adopted so that the benefit of the doubt is always given to the child.

Following the evaluation report, the European Commission has undertaken a revision of both the Dublin and Eurodac Regulations. In the course of this procedure, the Commission has widely consulted stakeholders, aiming at ensuring that the relevant aspects were taken into account. The European Commission also took on board the results of the first coordinated inspection report issued by the 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, where the existence of the Group receives a legal basis),
- establishing a new management framework.

The EDPS has issued an opinion on the Eurodac proposal on 18 February 2009, where he addressed issues such as the supervision model, the rights of the data subjects, the method for fingerprinting, and retention periods. Both on the subject of information of the data subject and on the question of fingerprinting, the EDPS underlined that the coordination group would provide for useful guidance as a result of the coordinated inspection which was completed in 2009. The EDPS underlined how positive it was that several previous recommendations of this Group have been taken into account. For example, the Eurodac proposal foresees a mechanism of follow up of special searches and of the exercise of access rights by data subjects, which were two of the most important recommendations of the first inspection report.

The discussion on the revised instruments is still ongoing. The Group follows closely new developments with regard to this matter.

1.b. Evolutions in the EU institutional landscape

The recent entry into force of the Lisbon Treaty as well as the adoption of the Stockholm Programme led to a number of important evolutions in the EU institutional landscape. The Lisbon Treaty will – as such – not have a direct impact on the work of the Group. However, the application of the ordinary legislative procedure to areas which were formerly under the Third Pillar may impact on recent initiatives, such as the proposal to give access to law enforcement authorities. The Group should in any case follow these developments closely.

Moreover, although the recent adoption of the Stockholm Programme is also not likely to have a direct and immediate impact on the activities of the Group, it is

expected to have a significant effect on the future developments in this area. In particular, the Stockholm Programme has a focus on the protection of fundamental rights which are at the heart of the Group's work (e.g. rights of the data subject). Furthermore, the Stockholm Programme recommends an increased communication with civil society, which corresponds to a need also identified by the members (see also Chapter 4 on *What to expect in 2010 and 2011?*).

2. Organisation of coordinated supervision

2.a. Main principles

The cooperation took the form as in previous years of coordinated supervision meetings held on a regular basis with all DPAs in charge of supervising Eurodac at national level. The main purpose of these meetings was to discuss common problems related to supervision and find common solutions or approaches whenever possible.

DPAs participating in the meetings are all DPAs in charge of the supervision of Eurodac, i.e. at the date of publication of this report all EU Member States plus Norway, Iceland and Switzerland (Switzerland since end 2008). In view of the envisaged future linking of Liechtenstein to the Dublin system, the Liechtenstein DPA is also represented, with an observer status.

2.b. The supervision coordination meetings

In the period 2008-2009 five supervision coordination meetings have taken place on the following dates:

- 25 June 2008,
- 17 December 2008,
- 25 March 2009,
- 24 June 2009,
- 18 December 2009.

The meetings were held in Brussels, usually back to back with meetings of the Joint Supervisory Authorities of SIS, CIS and Europol. They have proven an effective platform for exchanging experiences and information about the functioning of Eurodac and its data protection related aspects.

Typically, the first part of the meeting is devoted to a presentation by the European Commission services involved in the management of Eurodac, either on technical or legal aspects. The second part is devoted to discussion between DPAs around the issues which are in need of checking at national level or around new developments of interest for Eurodac supervisors.

2.c. Summary of the meetings in 2008-2009

The Group met twice in 2008, namely in June and December, three times in 2009 (in March, June and December). Over this period, the Group adopted some highly relevant documents for coordinated supervision.

Meeting on 25 June 2008

This meeting focused on the discussion on a number of documents foreseen by the Work Programme 2008-2009 related in particular to the information of the data subjects, the use of the DubliNet system and the issue of *Children and Eurodac*.

Furthermore, as stipulated in Article 3 of the Rules of procedure, the Group elected a Chair (Mr Peter Hustinx) and a Vice-Chair (Mrs Guro Slettemark).

Meeting on 17 December 2008

At this meeting the Commission informed the Group of the legislative package of proposals "*to strengthen the rights of asylum seekers in the Union*" tabled on 3 December 2008. The Commission also made a presentation on the state of play of the revision of the Eurodac and Dublin Regulations, the Eurodac annual report 2007 and any relevant progress.

Moreover, the Group discussed the state of play of the second coordinated inspection. In this context, it was mentioned that the European Parliament adopted on 3 September 2008 a resolution on the Commission's evaluation of the Dublin system concerning in particular the efficiency of the Dublin system as well as the issue of the rights of the claimants and the best interest of the child. The second coordinated inspection focused on the issues mentioned in the European Parliament's Resolution.

The Group also considered the launching of an inquiry on the use of the DubliNet system. There was also a discussion on special searches in Eurodac on the basis of the statistics received from the Commission.

The Group also decided to amend the rules of procedure following modification of the EDPS rules for reimbursement of travel and hotel expenses.

Meeting on 25 March 2009

The EDPS made a presentation on its opinions issued on 18 February 2009 regarding the revision of the Eurodac and Dublin Regulations. The EDPS underlined that the proposed regulations integrate many of the recommendations made by this Group in the first Coordinated inspection report.

The Group also discussed the state of play of the second coordinated inspection. The DPA Portugal, the rapporteur on the topic of information of the data subject, presented the draft report. The rapporteur suggested that the Group could endeavour to provide with a standard information leaflet, which could then be used in the Member States after appropriate transposition and translations.

The EDPS presented the report on the assessment of the age of asylum seekers. The Group agreed on further steps with regard to this inspection.

The state of play of the inquiry on the use of DubliNet in the Member States was also discussed and further steps with regard to this inquiry were agreed.

Meeting on 24 June 2009

At this meeting the European Commission informed the members of the Group on the new developments related to the recast of the Dublin and Eurodac Regulations as well as on the state of play concerning the operation of Eurodac (including statistics on special searches).

The EDPS also informed of the current state of play of the upgrading of the Eurodac infrastructure. The points of the follow-up of the EDPS security audit carried out in December 2007 were also presented. In particular, it was announced that taking into consideration the new developing standards for large-scale IT systems which are audited every 4 years, the EDPS would conduct a mid-term review once the Eurodac plus project had been fully implemented. Moreover the EDPS also introduced the issued of the SOC inspection which would take place in the second part of the year.

The chairman informed the Group that the EDPS had received the Commission proposals on law enforcement access to Eurodac for consultation, and that the EDPS would issue an opinion on the proposals in due time.

Meeting on 18 December 2009

A representative of the Commission (DG JLS) made a comprehensive technical presentation on the current functioning of the Eurodac system as well as on the most important technical aspects of EURODAC PLUS. This presentation was followed by EDPS intervention on the provisional findings and recommendations of the "Report on the EDPS Inspection of the s-TESTA Support and Operations Centre security infrastructure" to be issued soon.

The Group also discussed the draft Recommendations on the use of the DubliNet as well as a supplementary document on this matter containing findings based on the questionnaires filled in by the Member States. Subject to a few modifications proposed by members, the recommendations were adopted. Regarding the distribution of the recommendations, the Group decided that they would be sent to the Commission and the European Parliament and be circulated at national level as appropriate.

The Group also discussed a draft Activity Report 2008-2009.

This discussion was followed by a strategic debate on a draft Work Programme 2010-2010, which also took into account the new political and legal context provided by the entry into force of the Lisbon Treaty and the adoption of the Stockholm Programme; the context in which the Group will operate in the future. Based on the discussion, it was agreed that a revised draft Working Programme would be presented to the Group for discussion and possible adoption at the next meeting.

3. 2008-2009: Issues discussed and achievements

3.a. Second coordinated inspection on information to data subjects and assessment of the age of young asylum seekers

The second inspection report was adopted by the Group on 24 June 2009. It is a very important achievement 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. The summary of the Report is available in 23 official languages of the EU.

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. The report has been communicated to the main institutional stakeholders at EU level, and to international organisations and NGOs dealing with asylum and immigration matters.

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.

Recommendations made in the second coordinated inspection report

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

Information to data subjects

- 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

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

- 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 seeker⁶.
- 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.

⁶ As is already the case under Directive 2005/85/EC.

- The Eurodac Regulation, currently under revision, should be modified to impose fingerprinting asylum seekers only from 18 year old on.

3.b. DubliNet Recommendations

The Work Programme of the Group refers to the use of DubliNet as a possible subject for further investigation. On this basis, the Group has decided to examine some aspects of the use of DubliNet in the different Member States. The objective of the Group was to issue recommendations addressing these issues, rather than conducting an in-depth investigation (which might well be done in the future by the Group).

More specifically, the objective of this exercise was based on the fact that given sensitive information which is transmitted by the Member States via DubliNet, the exchange of data in this network should be adequately regulated (in particular in terms of access rights, security, conservation of national papers or electronic files) and regularly assessed. This does not always seem to be the case nowadays.

Although certain aspects of the exchange of data have already been addressed in the Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one of the Member States by a third country national (hereinafter *Regulation (EC) No 1560/2003*)⁷, the current legislative framework does not seem to cover all practical aspects of the exchange of personal information via DubliNet, which is regrettable.

On the basis of a thorough analysis of the information gathered in the context of the inquiry on the use of DubliNet (a questionnaire sent to the Member States), the Group decided to adopt the following recommendations:

I. Need for systematic use of the DubliNet

The Group encourages the Member States to systematically and regularly use the DubliNet secure channel rather than less secure channels of communication.

The security of the network is of a high level and can be audited. A systematic use of DubliNet also increases the level of data protection in the system, by making transactions traceable. This contributes to a better data protection supervision of the system rather than unofficial channels which might be used as an alternative.

II. Need for complementary rules at national level (technical manuals, best practice guides) on how to use the system

On the basis of the information gathered in the context of the questionnaire on DubliNet, the Group came to the conclusion that in general the use of the system at national level seems to be in conformity with the legal framework laid down by the

⁷ Official Journal L 222 , 05/09/2003 P. 0003 - 0023.

Council Regulations 343/2003 and 1560/2003. However, only a few Member States have adopted complementary rules at national level containing supplementary information on how to use the system in practice, such as best practice guidelines or technical manuals. The Group considers this situation regrettable as it might have an impact on the regularity of the use of the system by national authorities as well as its effective functioning.

The Group recommends that practical technical manuals, including relevant emergency plans, be drafted in all Member States as soon as possible.

The Group also encourages those Member States which adopted internal complementary rules to exchange best practices on the use of DubliNet with other Member States.

III. Need for clearer and harmonised rules on the deletion of data once the purpose of the exchange has been achieved

The Group has also come to the conclusion that there is a need for clearer and more detailed (and preferably EU harmonised) rules regarding the deletion of data once the purpose of the exchange has been achieved. It is surprising to notice that some Member States do not have such rules at all.

The Group encourages the Commission to reflect on more harmonised rules regarding the deletion of data once the purpose has been achieved, which could be adopted at EU level in the future. This would result in a more regular use of the system and would increase the protection of personal data.

IV. Conclusion on the question regarding the authorities using the DubliNet

The DubliNet system, in the majority of cases, is used by the authorities competent for determining the State which has the jurisdiction to examine asylum applications, the so called Dublin authorities. No significant differences between Member States have been detected in this regard. The Group considers this satisfactory.

3.c. Revision of the Rules of procedure

The revised Rules of procedure were adopted by the Group on 17 December 2008 in order to take into account the EDPS rules for reimbursement of travel and hotel expenses.

4. What to expect in 2010-2011

The priorities for the next two years will be identified in the Work programme 2010-2011. The Group will deal with different questions, focussing on common/sensitive issues, where the group can make a difference.

The Work Programme 2010-2011 will build upon work already carried out successfully (e.g. the first and second coordinated inspection) and adopt a strategic and selective approach for the future. The resources of the members of the Group are

not unlimited and therefore should be devoted to selected issues which are susceptible to bring the most added value.

An interesting feature of the Work Programme and its explanatory document is the structuring of activities of the Group according to a timeline. This will allow for better forward planning, which the members find crucial. The work could be divided between activities to be carried out:

- every 4 years: e.g., according to the (not yet adopted) recast Eurodac Regulation, data protection authorities shall ensure that a full security audit shall be carried out both at national and central (EU) levels according to international standards.. A coordinated preparation of this audit by the Group would allow for more effectiveness and harmonised results.
- every 2 years: so far, the Group has produced two major inspection reports, which corresponds to one every second year. Experience has shown that this rhythm allows for good preparatory work and adequate inclusion of these inspections in the inspection/audit planning of the DPAs. This requires involvement in defining and performing coordinated inspections at regular intervals.
- on a yearly basis: shorter fact-finding activities with a more restricted perimeter than coordinated inspections can be carried out according to the needs identified by the Group. On a different issue, contacts should be organised with other stakeholders in this area (civil society, international organisations active in asylum,...) for instance once a year (or more if needed under special circumstances). This requires at least annual decisions on subjects and planning.
- on a permanent basis: this includes mainly follow up activities which are structurally needed: follow up on legislative and policy developments, on special searches, on previous recommendations, and so on. This requires a permanent focus on relevant issues and previous commitments.

Within these categories, several types of activities will be carried out in 2010-2011, according to priorities defined by the group. In particular, they concern: advanced deletion of data, the preparation of the security audit as (likely to be) imposed by the upcoming revised Eurodac regulation. On another point, the Group will also invest in increasing contacts and interactions with other stakeholders in this area (international organisations, civil society...). Finally, once the new legal basis is adopted, the Group will devote attention to improving the information of data subjects, as recommended in the second inspection report.

It should also be reminded in this context that the Group will now operate in a new framework provided both by the entry into force of the Lisbon Treaty as well as the Stockholm Programme regarding the future of an area of freedom, justice and security. In addition, the legal framework of Eurodac itself will also change soon with the adoption of the revised Dublin and Eurodac Regulations. These essential changes will have impact on the issues to be dealt with by the Group and its work planning.

5. Annexes

5.a. Second Coordinated inspection report

5.b. DubliNet Recommendations

5.c. Rules of procedure