

## I

*(Resolutions, recommendations and opinions)*

## OPINIONS

## EUROPEAN DATA PROTECTION SUPERVISOR

**Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council 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 (COM(2008) 820 final)**

(2009/C 229/01)

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty establishing the European Community, and in particular its Article 286,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular its Article 8,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data <sup>(1)</sup>,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data <sup>(2)</sup>, and in particular its Article 41,

Having regard to the request for an opinion in accordance with Article 28(2) of Regulation (EC) No 45/2001 received on 3 December 2008 from the Commission,

HAS ADOPTED THE FOLLOWING OPINION:

**I. INTRODUCTION***Consultation of the EDPS*

1. The proposal for a Regulation of the European Parliament and of the Council 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 (hereinafter 'Proposal' or 'Commission's Proposal') was sent by the Commission to the EDPS for consultation on 3 December 2008, in accordance with Article 28(2) of Regulation (EC) No 45/2001. This consultation should be explicitly mentioned in the preamble of the Regulation.

2. The EDPS contributed to the proposal at an earlier stage, and many of the points he raised informally during the preparatory process have been taken into account by the Commission in its final text of the Proposal.

*The proposal in its context*

3. The Proposal is a recasting of Council Regulation (EC) No 343/2003 of 18 February 2003 on the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national <sup>(3)</sup> (hereinafter 'the Dublin Regulation'). It has been presented by the Commission as a part of the first package of proposals which aim to ensure a higher degree of harmonisation in this area and better standards of protection for the Common European Asylum System, as called for by the Hague Programme of 4-5 November 2004 and as announced in the Commission's Policy Plan on Asylum of 17 June 2008. The Hague Programme invited the Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments and measures to the Council and the European Parliament with a view to their adoption before 2010.

<sup>(1)</sup> OJ L 281, 23.11.1995, p. 31.

<sup>(2)</sup> OJ L 8, 12.1.2001, p. 1.

<sup>(3)</sup> OJ L 50, 25.2.2003, p. 1.

4. The Proposal was subject to an intensive evaluation and consultation process. It takes into account in particular the results of the Commission's Evaluation Report on the Dublin system issued on 6 June 2007 <sup>(1)</sup>, which identified a number of legal and practical deficiencies existing in the current system, as well as contributions received by the Commission from various stakeholders in response to the Green Paper on the future of the Common European Asylum System <sup>(2)</sup>.
5. The primary aim of the Proposal is to increase the efficiency of the Dublin system and to ensure higher standards of protection afforded to applicants for international protection subject to the Dublin procedure. Furthermore, it aims to reinforce the solidarity towards those Member States which are faced with situations of particular migratory pressures <sup>(3)</sup>.
6. The Proposal extends the scope of application of the Dublin Regulation in order to include applicants for (and beneficiaries of) subsidiary protection. The modification is necessary to ensure consistency with the EU *acquis*, namely the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted <sup>(4)</sup> (hereinafter 'Qualification Directive'), which introduced the notion of subsidiary protection. The Proposal also aligns the definitions and terminology used in the Dublin Regulation with those laid down in other asylum instruments.
7. In order to increase the efficiency of the system, the Proposal determines in particular the deadline for submitting take back requests and reduces the deadline for replying to requests for information. It also clarifies the cessation of responsibility clauses as well as the circumstances and procedures for applying the discretionary clauses (humanitarian and sovereignty). It adds rules on transfers and extends the existing dispute settlement mechanism. The Proposal also contains a provision on the organisation of a compulsory interview.
8. Furthermore, and also in order to increase the level of protection granted to the applicants, the Commission's Proposal provides for the right to appeal against a transfer decision as well as for an obligation for the competent authority to decide whether or not its enforcement should be suspended. It addresses the right to legal assistance and/or representation and linguistic assistance. The Proposal also refers to the principle that a person should not be held in detention only because he/she is seeking international protection. It also extends the family reunification right and addresses the needs of unaccompanied minors and other vulnerable groups.

#### *Focus of the opinion*

9. This opinion is to address mainly the modifications of the text which are the most relevant from the point of view of the protection of personal data:
  - provisions aiming at better implementation of the right to information, e.g. the content, form and timing for providing information have been clarified and the adoption of a common information leaflet has been proposed,
  - a new mechanism on sharing of relevant information between the Member States before transfers are being carried out,
  - use of the secure transmission channel DubliNet for the exchange of information.

#### II. GENERAL REMARKS

10. The EDPS supports the objectives of the Commission's Proposal, in particular to increase the efficiency of the Dublin system and to ensure higher standards of protection afforded to applicants for international protection subject to the Dublin procedure. He also shares the understanding of the reasons for which the Commission has decided to undertake the revision of the Dublin system.
11. Ensuring an adequate level of protection of personal data is a *condicio sine qua non* to ensure also the effective implementation and high level of protection of other fundamental rights. The EDPS issues this opinion in full awareness of a wide fundamental rights' dimension of the Proposal which concerns not only the processing of personal data but also many other rights of third country nationals and/or stateless persons, such as in particular the right to asylum, the right to information in a broad sense, the right to family reunification, the right to an effective remedy, the right to liberty and freedom of movement, the rights of the child or the rights of unaccompanied minors.
12. Both Recital 34 of the Proposal and the Explanatory Memorandum, stress the efforts made by the legislator to ensure consistency of the Proposal with the Charter of Fundamental Rights. In this context, the Explanatory Memorandum refers explicitly to the protection of personal data and the right to asylum. The Explanatory Memorandum also underlines the fact that the Proposal was made subject to an in-depth scrutiny in order to make sure that its provisions are fully compatible with fundamental rights as general principles of Community and international law. However, given the remit of the EDPS, this opinion will mainly focus on the data protection aspects of the Proposal. In this context, the EDPS welcomes the considerable attention which has been devoted in the Proposal to this fundamental right and considers this essential for ensuring an efficiency of the Dublin procedure in full compliance with fundamental rights' requirements.

<sup>(1)</sup> COM(2007) 299.

<sup>(2)</sup> COM(2007) 301.

<sup>(3)</sup> See: Explanatory Memorandum to the Proposal.

<sup>(4)</sup> OJ L 304, 30.9.2004, p. 12.

13. The EDPS also notes that the Commission's Proposal strives to consistency with other legal instruments governing the establishment and/or use of other large-scale IT systems. In particular, he wishes to stress that both the sharing of responsibilities vis-à-vis the database and the way the supervision model is formulated in the Proposal, are consistent with the framework of the Schengen Information System II and the Visa Information System.
14. The EDPS welcomes that his role in the supervision area has been clearly established, which was not the case, for obvious reasons, in the former text.

### III. THE RIGHT TO INFORMATION

15. Article 4(1)(f)-(g) of the Proposal stipulates:

'As soon as an application for international procedure is lodged, the competent authorities of Member States shall inform the asylum seeker of the application of this Regulation, and in particular of:

- (f) the fact that the competent authorities can exchange data on him/her for the sole purpose of implementing the obligations arising under this Regulation;
- (g) the existence of the right of access to data relating to him/her, and the right to request that inaccurate data relating to him/her be corrected or that unlawfully processed data relating to him/her be deleted, including the right to receive information on the procedures for exercising those rights and the contact details of the National Data Protection Authorities which shall hear claims concerning the protection of personal data.'

Article 4(2) describes the manners in which the information referred to in paragraph 1 of the provision should be provided to the applicant.

16. Effective implementation of the right to information is crucial for the proper functioning of the Dublin procedure. In particular, it is essential to ensure that information is provided in such a way that it enables the asylum seeker to fully understand his situation as well as the extent of the rights, including the procedural steps he/she can take as follow-up to the administrative decisions taken in his/her case.
17. As to the practical aspects of the implementation of the right, the EDPS wishes to refer to the fact that in accordance with Article (4)(1)(g) and (2) of the Proposal, the Member States should use a common leaflet for applicants, which shall contain, amongst other information, 'the contact details of the National Data Protection Authorities competent to hear claims concerning the protection of personal data'. In this context, the EDPS wishes to stress that while the National Data Protection

Authorities (hereinafter 'DPAs'), referred to in Article (4)(2) of the Proposal, are indeed competent to hear claims concerning the protection of personal data, the wording of the Proposal should not prevent the applicant (data subject) from addressing a claim primarily to the data controller (in this case national competent authorities in charge of the Dublin cooperation). The provision of Article (4)(2) as it reads now seems to imply that the applicant should put his request — directly and in each case — with the National Data Protection Authority, whereas the standard procedure and the practice in the Member States is that the applicant lodges his/her claim first with the data controller.

18. The EDPS also suggests that the wording of Article 4(1)(g) should be reformulated to clarify the rights to be given to the applicant. The wording as proposed is unclear, as it can be interpreted as considering 'the right to receive information on the procedures for exercising those rights [...]' a part of the right of access to data and/or the right to request that inaccurate data be corrected [...]. Moreover, according to the current wording of the above-mentioned provision, the Member States are to inform the applicant not of the content of the rights but of their 'existence'. As the latter seems to be a stylistic issue, the EDPS suggests that Article (4)(1)(g) be redrafted as follows:

'As soon as an application for international protection is lodged, the competent authorities of Member States shall inform the asylum seekers [...] of [...]:

- (g) the right of access to data relating to him/her, and the right to request that inaccurate data relating to him/her be corrected or that unlawfully processed data relating to him/her be deleted, as well as on the procedures for exercising those rights, including the contact details of the authorities referred to in Article 33 of this Regulation and the National Data Protection Authorities.'

19. As far as the methods to provide information to the applicants are concerned, the EDPS refers to the work undertaken by the Eurodac Supervision Coordination Group<sup>(1)</sup> (composed of representatives of the Data Protection Authority of each of the participating States and the EDPS). This Group is currently examining this issue in the framework of EURODAC in view of proposing relevant guidance, as soon as the results of the national investigations are available and have been compiled. Although this coordinated investigation concerns specifically EURODAC, its findings are also likely to be of interest in the context of Dublin since they address such issues as languages/translations and the assessment of the real understanding of the information by the asylum seeker etc.

<sup>(1)</sup> For an explanation of the work and status of this Group, see: <http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/pid/79>. This Group is exercising a coordinated supervision of the EURODAC system. However, from a data protection point of view, its work will also have an impact in the general context of the Dublin exchange of information. This information relates to the same data subject and is exchanged in the same procedure regarding him/her.

#### IV. TOWARDS TRANSPARENCY

20. As to the authorities mentioned in Article 33 of the Proposal, the EDPS welcomes the fact that the Commission shall publish a consolidated list of the authorities referred to in paragraph 1 of the above-mentioned provision in the *Official Journal of the European Union*. Where there are amendments thereto, the Commission shall publish once a year an updated consolidated list. The publication of the consolidated list will help to ensure transparency and facilitate supervision by the DPAs.

#### V. NEW MECHANISM ON EXCHANGE OF INFORMATION

21. The EDPS notes the introduction of the new mechanism on exchange of relevant information between the Member States before transfers are being carried out (laid down in Article 30 of the Proposal). He considers the purpose of this exchange of information legitimate.
22. The EDPS also notes the existence of specific data protection safeguards in the Proposal, in compliance with Article (8)(1)-(3) of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data, such as: (a) explicit consent of the applicant and/or of his representative, (b) immediate deletion of data by the transferring Member State once transfers have been completed and (c) the 'processing of personal health data only by a health professional subject to national law or rules established by national competent bodies to the obligation of professional secrecy or by another person subject to an equivalent obligation of secrecy' (having obtained appropriate medical training). He also supports the fact that the exchange will only be done via the secured 'DubliNet' system and by the authorities notified in advance.
23. The manner in which this mechanism is to be structured is of crucial importance for its compliance with the data protection regime, in particular given that the information exchange will also cover very sensitive personal data, such as for instance information on 'any special needs of the applicant to be transferred, which in specific cases may include the information on the state of the physical and mental health of the person concerned'. In this context, the EDPS fully supports the inclusion of Article 36 of the Proposal which obliges the Member States to take the necessary measures to ensure that any misuse of data [...] is punishable by penalties, including administrative and/or criminal penalties in accordance with national law.

#### VI. REGULATION OF EXCHANGE OF INFORMATION IN THE FRAMEWORK OF THE DUBLIN SYSTEM

24. Article 32 of the Commission's Proposal regulates *information sharing*. The EDPS contributed at an earlier stage to this provision, and he supports the wording as proposed by the Commission.

25. The EDPS stresses that it is important that the Member States authorities exchange information about individuals using the DubliNet network. This allows not only to provide for better security but also to ensure better traceability of the transactions. In this regard, the EDPS refers to Commission Staff Working Document of 6 June 2007 'Accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system'<sup>(1)</sup> in which the Commission recalls that 'the use of DubliNet is always compulsory safe for the exemptions defined in Article 15(1) second subparagraph' of 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<sup>(2)</sup> (hereinafter 'the Dublin Implementing Regulation'). The EDPS insists that the possibility to derogate from the use of DubliNet referred to in the above-mentioned Article 15(1) should be interpreted restrictively.
26. Some provisions have been inserted or redrafted in the Proposal to ensure this, and the EDPS welcomes all these efforts. For instance, the new Article 33(4) of the Proposal has been redrafted in order to clarify that not only requests but also replies and all written correspondence shall be subject to rules relating to the establishment of secure electronic transmission channels (laid down in Article 15(1) of the Dublin Implementing Regulation). Moreover, the deletion of paragraph 2 in the new Article 38 which in the former text (Article 25) obliged the Member States to send the requests and replies 'via a method that provides proof of receipt', is to clarify that the Member States should use DubliNet also in this respect.
27. The EDPS notes that relatively little has been regulated in the framework of the Dublin system as regards the exchange of personal information. Although certain aspects of the exchange have already been addressed in the Dublin Implementing Regulation, the current regulation does not seem to cover all aspects of the exchange of personal information, which is regrettable<sup>(3)</sup>.
28. In this context, it is worth mentioning that this issue of exchange of information about the asylum seeker has also been subject of discussion within the Eurodac Supervision Coordination Group. Without anticipating the results of the work of the Group, the EDPS wishes to mention already at this stage that one of the possible recommendations could be the adoption of a set of rules similar to the ones agreed in the Schengen SIRENE Manual.

<sup>(1)</sup> SEC(2007) 742.

<sup>(2)</sup> OJ L 222, 5.9.2003, p. 3.

<sup>(3)</sup> This becomes even more evident when one compares it with the extent to which the exchange of supplementary information has been regulated in the framework of the Schengen Information System (SIRENE).

## VII. CONCLUSIONS

29. The EDPS supports the Commission's Proposal for a Regulation 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. He shares the understanding of the reasons to revise the existing system.
30. The EDPS welcomes the consistency of the Commission's Proposal with other legal instruments regulating the complex legal framework of this area.
31. The EDPS welcomes considerable attention devoted in the Proposal to the respect of fundamental rights, in particular the protection of personal data. He considers this approach as an essential prerequisite to the improvement of the Dublin procedure. He draws particular attention of the legislators to the new mechanisms of exchange of data, which will involve, amongst others, the extremely sensitive personal data of the asylum seekers.
32. The EDPS also wishes to refer to the important work undertaken in this area by the Eurodac Supervision Coordination Group and believes that the results of the Group's work can usefully contribute to a better formulation of the features of the system.
33. The EDPS considers that some of the observations made in this opinion can be further developed when seeing the practical implementation of the revised system. In particular, he intends to contribute to the definition of implementing measures concerning the exchange of information through the DublinNet as mentioned in point 24 to 27 of this opinion.

Done at Brussels, 18 February 2009.

Peter HUSTINX

*European Data Protection Supervisor*

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