



Eurodac SCG

Mr Claude MORAES
Chair of the Committee on Civil
Liberties, Justice and Home Affairs
European Parliament
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EJ/LS/ssp/D(2016)2803 C2005-0156
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Subject: Letter regarding the 2016 recast of the Eurodac Regulation

Dear Mr Moraes,

On the 4th May 2016, the European Commission published a proposal for amending the Regulation (EU) No 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 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], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes¹ (hereinafter referred to as "the Eurodac 2016 recast"). Subsequently, legislative work have been conducted within the European Parliament and the Council of the European Union.

The proposal has raised several data protection concerns which were voiced *inter alia* by the Article 29 Working Party in its recent letter on the Entry/Exit System and other recent proposals on the large-scale IT systems used for border management, visa policy and asylum procedures² and by the European Data Protection Supervisor in its opinion 07/2016 on the first reform package on the Common European Asylum System (Eurodac, EASO and Dublin regulations)³.

¹ Proposal for a regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 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] , for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 272 final, hereinafter referred to as the Proposal for a Eurodac 2016 recast.

²http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2016/20160929_letter_of_the_chair_of_the_art_29_wp_smart_boarders_en.pdf

³https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2016/16-09-21_CEAS_opinion_EN.pdf

The Eurodac Supervision Coordination Group⁴ (hereinafter referred to as “the Eurodac SCG”) would like to support all the arguments presented in both abovementioned documents and to underline the following, most crucial, issues that should be taken into account during the upcoming trilogues on the Eurodac 2016 recast.

Purpose limitation

The Eurodac 2016 recast significantly changes the purpose of the system: from determining the Member State responsible for examining an asylum application made in the EU to identifying illegally staying third country nationals and those who have entered the European Union irregularly at the external borders, with a view to use this information to assist Member States to re-document a third country national for return purposes. Moreover the Eurodac 2016 recast includes an extension of the data collection from only dactyloscopic data (fingerprints) to a wide range of biometric and alphanumeric data. The Eurodac SCG is of the opinion that such an extension of the purpose and data collection raises serious doubts concerning the primary data protection principles such as proportionality, necessity and purpose limitation. Therefore, **the Eurodac SCG would like to firmly reiterate that as a minimum requirement, a proposal for such an extension must be accompanied by a detailed privacy and data protection assessment. Such an assessment has not been made.**

Biometric data

The Eurodac SCG would like to underline that the **EU legislator did not present any convincing argument on the need to introduce an additional biometric identifier such as the facial image**. The need to collect such sensitive data should be demonstrated at least by a prior analysis of necessity, which should clearly explain that the purpose of the system cannot be achieved in a less intrusive way. The Eurodac SCG recommends also that an evaluation of facial recognition software mentioned in the Explanatory Memorandum of the Eurodac 2016 recast⁵ should be performed before including such information into the Eurodac system.

The Eurodac SCG would furthermore like to express its **serious concerns on reducing the age limit for collecting and processing biometric information of children** to the age of 6 years old. As children are particularly vulnerable, special attention and care must be taken when considering to collect and process data about them. The vague terms of “taking fingerprints and facial images of minors from the age of six (...) in a child-friendly and child-sensitive manner”⁶ should be explained in details. Moreover the Eurodac SCG would like to recall its second inspection report⁷ which was partially dedicated to the assessment of the age of young asylum seekers. The Eurodac SCG is of the opinion that the problems identified in this document in 2009 have not been resolved. The European Commission should prepare a detailed assessment of the necessity and proportionality of collecting biometrics from young children, in which the purpose of the processing and the expected benefits are clearly described.

⁴ As established in Articles 30, 31 and 32 of the current Eurodac Regulation, data protection supervision of the Eurodac system is carried out at national level by the national data protection authorities (“DPAs”), while for the central (EU) level the European Data Protection Supervisor is competent. The coordination between these two levels is ensured by the Eurodac Supervision Coordination Group, which is composed by representatives of the DPAs and the EDPS. More information on the Eurodac SCG is available here:

<https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/CEurodac>

⁵ See Explanatory Memorandum to the Proposal for a Eurodac 2016 recast, p. 5.

⁶ Article 2 (2) of the Proposal for a Eurodac 2016 recast.

⁷ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Eurodac/09-06-24_Eurodac_report2_EN.pdf

The Commission should also prepare a detailed recommendation that lays down the rules of procedure for dealing with minors to guarantee that all necessary data protection and human dignity safeguards are taken.

Finally as regards biometric data, the Eurodac SCG would like to remind that the problem of using coercive measures to obtain dactyloscopic data of the asylum seeker was addressed by the Eurodac SCG in its report on the coordinated inspection on unreadable fingerprints⁸. In this regard, the Eurodac SCG recalls the recommendation that “the mere fact of having unreadable fingerprints should not adversely affect the asylum application”. Therefore, the **EU legislator should consider whether it is in line with the necessity and proportionality principles to introduce coercive measures, including detention, in the context of biometric data collection.**

Using real personal data for testing

The Eurodac SCG would like to strongly oppose the possibility to use real personal data for testing the Central System by eu-LISA. In accordance with the principle of necessity, only so called ‘dummy data’ should be used for these purposes. The Explanatory Memorandum⁹ states that the use of ‘dummy data’ by eu-LISA was not successful in practice. However at the same time any convincing argument or proof has not been given to justify this statement. Also, the eu-LISA representative who has been invited regularly to SCG meetings to present current developments and shortcomings concerning Eurodac has not raised any problems in this regard. The Eurodac SCG would like to stress as well that, contrary to what it is stated in the current proposal, biometric data cannot be anonymised as it always identifies an individual and in consequence need to be treated as personal data.

Sharing data with third countries

The Eurodac 2016 recast gives Member States the **possibility to exchange data of asylum seekers with third countries, including countries of origin**¹⁰, in order to facilitate their return and readmission. The Eurodac SCG is of the opinion that such a provision **may in some cases interfere with the principle of non-refoulement and consequently adversely affect persons who seek the protection from the persecutions.** Therefore, the Eurodac SCG recommends, in accordance with the principles of proportionality and data minimisation, that such transfers may be held only when strictly necessary and that only the data which are strictly necessary for the purposes of return may be transferred. Furthermore, the general rules on data transfers to third countries laid down in the Eurodac 2016 recast need to be adjusted with the rules on data transfers laid down in the General Data Protection Regulation¹¹ and in the Police and Justice Data Protection Directive¹².

⁸ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Eurodac/13-06-10_Report_unreadable_fingerprints_EN.pdf

⁹ Proposal for a Eurodac 2016 recast, p. 16.

¹⁰ Article 38 of Proposal for a Eurodac 2016 recast.

¹¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 4.

¹² Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89.

Retention periods

The Eurodac SCG has strong doubts regarding the extension of the **retention period to 5 years that is proposed for all data of non-asylum seekers. This seems excessive and disproportionate** and is not well justified in the proposal for a Eurodac 2016 recast nor in the Explanatory Memorandum to the proposal. The Eurodac SCG recalls that personal data must be only kept for a period necessary for the purposes for which the data were initially collected. The Eurodac 2016 recast should be supplemented with the precise indication that the retention period starts at the first collection of that individual's data.

Law enforcement access

Finally, the Eurodac SCG would like to draw the attention to **the problem of the necessity of law enforcement access to Eurodac**. Such a possibility was introduced to Eurodac in Article 1(2) of the current Eurodac regulation¹³. Eu-LISA statistics¹⁴ show that in 2015, only 95 requests were made by no more than five Member States. As the possibility for law-enforcement access to Eurodac data was a priority for the Council, it appears difficult to explain these very low levels of use by a lack of awareness among law-enforcement authorities. Moreover, Europol's connection to Eurodac appears to have been significantly delayed¹⁵. This clearly shows that basically **such access is not used and its necessity can therefore be questioned**. Taking this into consideration, the Eurodac SCG regrets that the Commission nevertheless proposes to broaden the access for law enforcement authorities even further, by providing access to all new categories of persons whose data will be processed in Eurodac and to significantly more kinds of data that will (as regards non-asylum seekers) be available to law enforcement authorities for a longer period, without giving any solid explanation or evidence to justify the proposal.¹⁶ Therefore the Eurodac SCG insists on the EU legislator to develop the security risk and privacy impact assessments with the aim to use their results for establishing the clear procedures and rules in performing law enforcement access. Furthermore, the Eurodac regulation provides for a verifying authority to ensure that law enforcement requests fulfil the conditions for such requests. However, in order to be able to act independently, the Eurodac SCG is of the opinion that the verifying authority should not be part of the same organisation as the designated authorities.

The Eurodac SCG would like to take this opportunity to declare its readiness to cooperate and to contribute with its knowledge and expertise in the further work.

¹³ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29.06.2013, p. 1.

¹⁴See eu-LISA 2015 Statistics on Eurodac, p. 14:

<http://www.eulisa.europa.eu/Publications/Reports/Eurodac%20-%202015%20Statistics.pdf>.

¹⁵ Commission Communication on enhancing security in a world of mobility: improved information exchange in the fight against terrorism and stronger external borders, COM(2016) 602 final, p. 14, footnote 33, implying that in September 2016, Europol was still not connected to Eurodac, more than a year after the applicability of Regulation (EU) 603/2013.

¹⁶ Article 17 of the Proposal for a Eurodac 2016 recast.

We remain at your disposal if you need any further information or clarifications.

Yours sincerely,

Elisabeth JILDERYD
Chair of the Eurodac Supervision Coordination Group

Cc: Mr Martin SCHULZ, President of the European Parliament
Ms Monica MACOVEI, Committee on Civil Liberties, Justice and Home Affairs
Mr Antoine CAHEN, Head of Unit, Committee on Civil Liberties, Justice and Home Affairs
Mr José Manuel DE FRUTOS GOMEZ, Administrator, Secretariat of Committee on Civil Liberties, Justice and Home Affairs