



## An efficient and protective Eurodac

UNHCR comments on the Commission's amended 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 [.../...] (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 to request comparisons 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 (Recast version)

### Introduction

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'Eurodac' was created in 2000 by Regulation (EC) 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (hereafter 'Eurodac' Regulation).<sup>1</sup> On 3 December 2008, the European Commission proposed<sup>2</sup> to recast both the 'Eurodac' Regulation (hereafter 2008 proposal), as well as Council Regulation 343/2003 of 18 February 2003 establishing 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 (hereafter the 'Dublin II' Regulation).<sup>3</sup> Those proposals set out to remedy a number of shortcomings in the application of these instruments, as identified in the Commission's report on the evaluation of the Dublin System (hereafter 'Evaluation

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<sup>1</sup> Council of the European Union, *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*, 11 December 2000, Official Journal of the European Communities; 15 December 2000, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R2725:EN:HTML>

<sup>2</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [.../...] [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] (Recast version)*, 3 December 2008, COM(2008) 825 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0825:FIN:EN:PDF>; and European Commission, *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 (Recast)*, 3 December 2008, COM(2008) 820 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF>.

<sup>3</sup> *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing 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*, Official Journal ('OJ') L 050, 25/02/2003, p. 1-10, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:NOT>

Report') published in June 2007.<sup>4</sup> The European Parliament completed its first reading of the two proposals on 7 May 2009.<sup>5</sup>

**Withdrawal of the proposal of law enforcement access to 'Eurodac' data**

On 10 September 2009, the European Commission adopted two proposals: firstly, a proposal for a Council Decision on requesting comparisons with 'Eurodac'<sup>6</sup> data by Member States' law enforcement authorities and Europol for law enforcement purposes;<sup>7</sup> and secondly, an amended proposal for a recast of the 'Eurodac' Regulation (hereafter September 2009 proposals).<sup>8</sup> The proposals aimed at taking into account the position of the co-legislators, the Council and the European Parliament, and to introduce the possibility for law enforcement authorities and Europol to have access to 'Eurodac' data.

With the entry into force of the Treaty on the Functioning of the European Union (TFEU),<sup>9</sup> the September 2009 proposals lapsed. Consequently, on 11 October 2010, the European Commission presented another amended proposal for a recast of the 'Eurodac' Regulation (hereafter October 2010 proposal).<sup>10</sup> In order to accelerate the negotiations on the asylum package and agreement on 'Eurodac' in particular, the European Commission decided to withdraw the proposal for law enforcement authorities' access to 'Eurodac' data and proposed two further

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<sup>4</sup> European Commission, *Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System COM(2007)299*, 6 June 2007, available at: [http://ec.europa.eu/justice\\_home/news/intro/doc/com\\_2007\\_299\\_en.pdf](http://ec.europa.eu/justice_home/news/intro/doc/com_2007_299_en.pdf)

<sup>5</sup> European Parliament, *Legislative resolution of 7 May 2009 on the proposal for a regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No (.../...) [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] (recast)*, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0378&language=EN&ring=A6-2009-0283>; and European Parliament legislative resolution of 7 May 2009 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 (recast), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0377&language=EN&ring=A6-2009-0284>.

<sup>6</sup> 'Eurodac' refers to the database established under the 'Eurodac' Regulation.

<sup>7</sup> European Commission, *Proposal for a Council Decision on requesting comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes*, 10 September 2009, COM(2009) 344 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0344:FIN:EN:PDF>.

<sup>8</sup> European Commission, *Amended proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EC) No [.../...] [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]*, 10 September 2009, COM(2009) 342 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0342:FIN:EN:PDF>

<sup>9</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>

<sup>10</sup> European Commission, *Amended proposal for a Regulation of the European Parliament on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EC) No [.../...] [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] (Recast version)*, 11 October 2010, COM(2010)555 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0555:FIN:EN:PDF>.

technical amendments. The European Parliament supported this revised approach on the part of the Commission in its report adopted by the Committee on Civil Liberties, Justice and Home Affairs in February 2011.<sup>11</sup>

**New 2012  
proposal  
including law  
enforcement  
access**

In May 2012, the Commission presented a new proposal for an Amended 'Eurodac' Regulation which merges into a single regulation on the one hand the proposed amendments for the better functioning of 'Eurodac', and on the other hand law enforcement access to 'Eurodac' (hereafter the 2012 proposal).<sup>12</sup> The European Commission explains this new proposal by the fact that since 2010 it has become clear that "including law enforcement access for Eurodac is needed as part of a balanced deal on the negotiations of the Common European Asylum System (CEAS) package with a view to completing the package by the end of 2012".<sup>13</sup>

**UNHCR's  
Mandate**

UNHCR, pursuant to its supervisory function for the 1951 Convention and consultative role on EU asylum matters, puts forward comments and observations on EU legislative and policy proposals related to asylum and refugee protection.

In March 2009, UNHCR published its observations on the initial 2008 proposals. The comments below should be read in conjunction with this set of observations.<sup>14</sup> The aim of the recast of the CEAS standards is first and foremost to ensure the adoption of higher legislative standards than those put in place under the first generation asylum instruments. Principled agreements should therefore be sought which reflect international refugee and human rights law, as well as good practice and high quality standards.

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<sup>11</sup> European Parliament, *Report on the amended 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 (EC) No [...] [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] (recast)*, (COM(2010)0555 – C7-0319/2010 – 2008/0242(COD)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-450.875+01+DOC+PDF+V0//EN&language=EN>.

<sup>12</sup> European Commission, *Amended 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 [...] (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 to request comparisons 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 (Recast version)*, COM (2012)254 final, 30 May 2012, available at: [http://ec.europa.eu/home-affairs/doc\\_centre/asylum/docs/COM%202012%20254%20final%201 EN ACT part1 v13.pdf](http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/COM%202012%20254%20final%201 EN ACT part1 v13.pdf).

<sup>13</sup> *Ibid.*, p. 3.

<sup>14</sup> UNHCR, *Comments on the European Commission's Proposal for a recast of the 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 ("Dublin II")* (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008), 18 March 2009, available at: <http://www.unhcr.org/refworld/docid/49c0ca922.html>

**UN principles of lawfulness and fairness**

The 1990 UN General Assembly Guidelines for the Regulation of Computerized Personal Data Files<sup>15</sup> set out the principles of *lawfulness* and *fairness*, and the principle of *purpose-specification* as key principles of data protection regimes. In adopting this Resolution, the UN confirmed that data protection and privacy are central to its protection and human rights principles. Similarly, Article 8 of the European Convention on Human Rights<sup>16</sup> and Article 8 of the European Charter of Fundamental Rights<sup>17</sup> require that data collection be necessary and “*processed fairly for specified purposes*”.

**Necessity and proportionality Eurodac is not demonstrated**

‘Eurodac’ was established to facilitate the application of the ‘Dublin II’ Regulation. Extending access to ‘Eurodac’ for law enforcement authorities therefore constitutes a significant change in the original purpose. The proportionality, necessity and utility of this proposal for combating terrorism and other serious crime should be examined and confirmed before it can be agreed.<sup>18</sup>

**Change to ‘Eurodac’'s original purpose**

In addition, in UNHCR’s view, this change may lead not only to interference with the right to privacy and family life of asylum-seekers and refugees, but it may also place a refugee and his/her family at significant risk of harm, if the information is shared with countries of origin. It may also result in stigmatisation of asylum-seekers as a group by associating them with criminal activity. Furthermore, UNHCR takes note that the proposal to include the possibility to search latent fingerprints relies on technology in which the risk of error has not been fully examined and eliminated (latent fingerprints). The original purpose of ‘Eurodac’, as set out in the ‘Eurodac’ Regulation, is to facilitate the operation of the ‘Dublin II’ Regulation with the aim of determining the Member State responsible for examining the asylum application. Based on this, UNHCR considers that ‘Eurodac’ should be used for its original purpose.

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<sup>15</sup> UN General Assembly, *Guidelines for the Regulation of Computerized Personal Data Files*, 14 December 1990, available at: <http://www.unhcr.org/refworld/docid/3ddcafaac.html>.

<sup>16</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, available at: <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>

<sup>17</sup> European Union, *Charter of Fundamental Rights of the European Union*, available at: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>18</sup> The necessity for proportionality of access for law enforcement authorities to fingerprint data of asylum-seekers and refugees in the EU is not fully demonstrated. The 2009 impact assessment referred to the fact that “*access should be limited to designated authorities and only on a case-by-case basis*”, but did not include any justification demonstrating how the proposals meet any of the data protection requirements stated above. Expert sources have questioned whether the use of ‘Eurodac’ may enable law enforcers more effectively to find and convict criminals, or whether ‘Eurodac’ access would yield useful outcomes in terms of detecting more criminals, given the mismatches and errors that can occur between imperfect traces of fingerprints and fingerprints in ‘Eurodac’. More data and consultation may be useful on all of these issues.

**UNHCR  
recommends  
further  
safeguards**

UNHCR recommends that as a minimum, several safeguards are put in place.

**In particular, UNHCR recommends that:**

- **the possibility of error in matching fingerprints and the wrongful implication of asylum-seekers in criminal investigations is fully examined and eliminated to the greatest extent possible before the possibility to search ‘Eurodac’ with latent fingerprints is introduced;**
- **the provisions on the prohibition of transfer of information on asylum-seekers or refugees to third countries are reinforced and clarified to eliminate any gaps in the protection of data;**
- **the potential for stigmatisation of asylum-seekers as a particularly vulnerable group is evaluated;**
- **the scope of the instruments is limited to cases where there is substantial suspicion that the perpetrator or suspect has applied for asylum; and**
- **the applicant is informed that his/her data may be used for the purpose of criminal investigations.**

## **Risk of Error**

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**Searching  
latent  
fingerprints**

The European Commission proposes the possibility for law enforcement authorities to search ‘Eurodac’ based on latent fingerprints (article 2(1)(l)). A latent fingerprint is a fingerprint left on a surface touched by an individual which may be found at a crime scene. UNHCR notes that the 2012 proposal does not provide a detailed definition of what a latent fingerprint is. Usually latent fingerprints are limited to one or two fingers and are fragmentary or partial. UNHCR understands that assessing the possibility of error in matching latent fingerprints and fingerprints stored in ‘Eurodac’ (false match and false non matches) requires a high level of technical expertise. Any search in ‘Eurodac’ based on a latent fingerprint may lead to a high number of possible matches, given the wider range of possible correlations with partial or fragmentary prints. These would then have to be examined by a human investigator. The Commission seeks to reduce risks of error by clarifying that all automated hit results should be checked by a fingerprint expert (article 18(4)) – a requirement which UNHCR welcomes. Nevertheless, UNHCR notes that latent fingerprints require even greater interpretation than other prints matched in the automated process. This will be resource-intensive as it requires high technical expertise, and is not error-free. The consequences of a false match may be very serious and may lead to the wrongful implication of innocent persons in criminal investigations. In addition, the rate of error may be influenced by the quality of the latent fingerprints (which are often blurred or distorted by other matter, adding to the difficulty of matching these



fingerprints to those stored in 'Eurodac' which are taken in "clean" conditions). Other factors which may influence error rates include technology issues (varying software, algorithms), as well as variations in the law enforcement authorities' methodology. The high risk of error raises questions about how a possible match based on a latent fingerprint will be treated in any subsequent investigation.

**Damaging consequences of a possible false match**

UNHCR is particularly concerned about the potential consequences for innocent asylum-seekers of being wrongfully implicated in a criminal investigation as a result of a false match of a latent fingerprint in 'Eurodac'. Asylum-seekers often have limited knowledge of the language and legal culture of the country where they are seeking asylum, and are therefore at a significant disadvantage in seeking to assert their innocence. Furthermore, they are particularly vulnerable due to their provisional legal status as asylum-seekers, and their ongoing asylum application processes. These factors may make it difficult for asylum-seekers to challenge law enforcement bodies, even if they are innocent of the alleged crimes.

UNHCR takes note that no independent external expertise on the technical aspects of the suggested use of 'Eurodac' was sought ahead of the 2009 proposals or since.<sup>19</sup> In 2009, the Commission recognized that the current 'Eurodac' Regulation does not provide the possibility to search the database on the basis of latent fingerprints, and that such facility would be added later.

**Recommendation**

UNHCR suggests deleting the possibility to search 'Eurodac' data based on latent fingerprints from article 2(1)(l) until independent technical expert opinions are available confirming that the risk of error of matching between latent fingerprints and fingerprints stored in 'Eurodac' is eliminated to the greatest extent possible. This is particularly important considering the significant prejudice an asylum-seeker may face if wrongfully implicated in a criminal investigation.

**Protection risks linked to data sharing**

**Prohibition of sharing data with third countries**

UNHCR welcomes the explicit prohibition of the sharing of personal data with third countries, organizations or entities (article 35). Sharing of personal data of asylum-seekers with third parties, such as the authorities in the country of origin, which may be the agents of persecution or human rights violations, could seriously jeopardize the safety, not only of the asylum-seeker, but also of his/her family or associates. As underlined by the Commission in its evaluation on the compliance of the proposal with the right to asylum guaranteed by Article 18 of the Charter of Fundamental Rights,<sup>20</sup> insufficient guarantees could deter refugees from applying for asylum in the EU, thus denying them the necessary protection from harm to which they are entitled under international and regional protection regimes.

<sup>19</sup> See footnote 7, p. 5.

<sup>20</sup> See footnote 12, Explanatory Memorandum, p. 6

**Only “hits” are covered by prohibition**

UNHCR considers it vital to retain this prohibition on data transfer in a broader, unqualified form, and fears that the proposed safeguard is insufficient to ensure that all asylum-related information is not shared in a manner that places asylum-seekers and their families at risk. UNHCR shares the concern raised by the European Data Protection Supervisor (EDPS) that the proposal does not clearly specify that this prohibition extends to all possibilities of transferring personal data including for law enforcement purposes under Framework Decision 2006/960/JHA.<sup>21</sup>

In this respect, the prohibition only covers fingerprint data obtained from a hit in ‘Eurodac’. The ‘hit’/‘no hit’ system is put forward as a major safeguard in law enforcement access to ‘Eurodac’ data as “it will only determine if another Member State holds data on an asylum-seeker”<sup>22</sup> and prevent mass comparison of data. While UNHCR welcomes this safeguard, it cautions that it is likely that after a ‘positive hit’ on a fingerprint stored in ‘Eurodac’, authorities would make requests for further ‘underlying’ information from the concerned Member State. This could possibly include all information in the asylum claim file of the individual concerned, which may be sensitive and confidential, having been gathered for the specific purpose of assessing a person’s need for international protection.

**Data shared following a hit may be shared with third countries**

The 2012 proposal does not define what data may be shared following a hit in ‘Eurodac,’ proposing only that such information may be exchanged under the existing rules of instruments on information-sharing for law enforcement purposes.<sup>23</sup> However, the Framework Decision 2008/977/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union<sup>24</sup> and the proposed Directive which will replace the Framework Decision,<sup>25</sup> do not contain a prohibition on transferring data to third countries. The foreseen prohibition in Article 35 on transferring the data to third countries may therefore have little practical impact, and fail to fully protect asylum-seekers. This means that sensitive information, including data

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<sup>21</sup> European Data Protection Supervisor, *Opinion of the European Data Protection Supervisor on the amended 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 [.../...] [...] (Recast version)*, 5 September 2012, p. 10, available at:

[http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-09-05\\_EURODAC\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-09-05_EURODAC_EN.pdf).

<sup>22</sup> See footnote 12, Explanatory Memorandum, p. 7

<sup>23</sup> See footnote 12, Explanatory Memorandum, p. 7 “the proposal does not provide for new possibilities to process additional personal information in the follow up to a ‘hit’”.

<sup>24</sup> European Union: *Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union*, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:386:0089:0100:EN:PDF>

<sup>25</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data*, COM (2012) 10 final, 25 January 2012, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0010:FIN:EN:PDF>.

concerning his/her asylum claim, can potentially be shared with third parties, including the country of origin of the asylum-seeker. UNHCR shares the concerns raised by the EDPS on the lack of clarity with Framework Decision 2008/977/JHA which does not provide a prohibition of transferring data to third countries,<sup>26</sup> and recommends that this is clarified in Article 35.

## Recommendation

UNHCR recommends that article 35 is amended in order to ensure that the prohibition of transfer of data to third countries extends to all data and information exchanged between Member States on the basis of a 'positive hit' in Eurodac:

Personal data obtained by a Member State or Europol pursuant to this Regulation, *including personal data obtained by a Member State and processed further in national databases for law enforcement purposes*, from the EURODAC central database shall not be transferred or made available to any third country or international organisation or a private entity established in or outside the European Union. This prohibition shall be without prejudice to the right of Member States to transfer such data to third countries to which the Dublin Regulation applies.

## Procedure for comparisons with 'Eurodac' data for law enforcement purposes

### Two-step approach for searches

UNHCR welcomes the fact that a number of safeguards have been included in the 2012 proposal with the stated intention of mitigating the limitation of the right to protection of personal data. These safeguards include a two-step approach whereby comparisons with 'Eurodac' data are only authorized after searches in national databases and in the Prüm databases have returned negative decisions (article 20(1)). UNHCR notes that in cases where Member States may not have yet implemented Council Decision 2008/615/JHA<sup>27</sup> (Prüm Decision), they will not be able to conduct searches in 'Eurodac' for law enforcement purposes.<sup>28</sup>

<sup>26</sup> See footnote 21, para. 43

<sup>27</sup> Council of the European Union, *Council Decision 2008/616/JHA of 26 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime*, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0012:0072:EN:PDF>

<sup>28</sup> See footnote 12, Explanatory Memorandum, p. 7.



**Limiting searches to cases where there is a substantiated suspicion that the person has applied for asylum**

The proposed scope envisages that ‘Eurodac’ data may be searched for the purposes of the “prevention, detection and investigation of terrorist offences and other serious criminal offences” (article 1(2)). This scope is of some concern insofar as it does not restrict searches of fingerprint data to persons who are suspects, increasing the risk of implicating innocent persons. UNHCR recommends that the ‘Eurodac’ database may only be searched in relation to a specific criminal offence, where there is substantiated suspicion that the suspect is an asylum-seeker or has entered the territory irregularly, in the framework of an investigation under judicial control. UNHCR notes that Recital 9 refers to the need for law enforcement authorities to have access to ‘Eurodac’ data in well-defined cases “when there would be a substantiated suspicion that the perpetrator of a terrorist or other serious criminal offence has applied for asylum”. UNHCR would recommend that this safeguard is reflected in the conditions for access to ‘Eurodac’ data by designated authorities in Article 20.

## Recommendations

- ✓ UNHCR recommends that ‘Eurodac’ data searches by law enforcement authorities should be permitted in limited circumstances only, as part of an ongoing criminal investigation and in cases where there is a substantiated suspicion that the perpetrator or suspect has applied for asylum. UNHCR therefore recommends amending Article 20(1) to add a new subparagraph (d):

*(d) there is substantiated suspicion that the suspect or perpetrator of a terrorist or other serious criminal offence has applied for asylum.*

## Information regarding the rights of the data subject

**Information in a language that the person understands**

UNHCR welcomes the inclusion in Article 29 the requirement to include information on ‘Eurodac’ in the leaflet given to persons seeking international protection falling under the Dublin system. UNHCR notes however with concern that the person affected by the ‘Eurodac’ Regulation should receive information about his/her rights in a language which s/he understands “or may reasonably be presumed to understand.” It is particularly important that the person should fully understand his/her rights in the framework of the Regulation, if personal data might be used by law enforcement authorities. In addition, UNHCR considers that persons seeking international protection should be informed both of the aims of the ‘Dublin II’ Regulation, but also of the possibility that their fingerprints may be used for the purpose of the prevention, detection and investigation of terrorist offences and serious crimes.

## Recommendations

- ✓ UNHCR considers that Article 29(1) should be amended so that information is made available in “a language that the applicant understands” rather than one that s/he “is reasonably presumed to understand”. This change should also be made in the 4<sup>th</sup> indent with regards to be information contained in the leaflet:
- ✓ UNHCR recommends that article 29(1)(b) is amended to include the requirement to inform the asylum-seeker on the possibility of law enforcement access to Eurodac data:

(b) regarding the purpose for which his or her data will be processed within EURODAC including *the purposes in Article 1(2) and* a description of the aims of the Dublin Regulation, in accordance with Article 4 of that Regulation.

## Risk of stigmatisation of persons seeking international protection

**Asylum-seekers' whose fingerprints are stored are at increased exposure to investigation**

UNHCR is concerned that access for law enforcement authorities to 'Eurodac' data could lead to increased stigmatisation of asylum-seekers. People registered in 'Eurodac' with no criminal record would face greater likelihood of being subject to criminal investigation than other members of the community whose fingerprints are not collected or stored on a systematic basis. This increased exposure of asylum-seekers to investigation, simply because their fingerprints are in an accessible database, could fuel misperceptions that there is a link between asylum-seekers and crime, and feed xenophobia and racism. Where police records of such investigation are kept, even when the person is found to be innocent, this may further hamper the person's integration into society if s/he is subsequently granted protected status. This is because police records are consulted for a range of purposes in many Member States, including in connection with possible employment, rental of housing— including important steps in the process of integration and participation in society.

In this regard, UNHCR recalls that many persons in need of international protection, including those granted status and those still in the asylum procedure, may have suffered persecution, violence and human rights abuses inflicted by authorities in their countries of origin. In some cases, this may have been at the hands of police. Increased scrutiny by law enforcement authorities may therefore cause disproportionate pressure and potentially harm to people whose data is available, although they are not suspected of nor charged with any crime.

**Evaluation of stigmatisation after the fact is insufficient**

In its evaluation of the compliance of the proposal with the Charter on Fundamental Rights, the Commission considers *inter alia* the issue of stigmatisation when assessing if the 2012 proposal limits the right to asylum as guaranteed by Article 18 of the Charter.<sup>29</sup> The Commission concludes that the right to asylum is not limited as the extensive evaluation and monitoring mechanism included in Article 40 “will include whether the operation of the search functionality for law enforcement purposes will have led to the stigmatisation of persons seeking international protection.”<sup>30</sup> However, evaluating stigmatisation after it has occurred would not protect or assist persons who have already suffered from such stigmatisation. UNHCR considers that this issue should have been the subject of a comprehensive evaluation before law enforcement access to ‘Eurodac’ data was introduced, and that evaluating stigmatisation after its introduction is a minimum requirement. UNHCR would recommend that the evaluation of stigmatisation should be specifically referred to in the areas for evaluation in Article 40(5).

**Non-discrimination**

Non-discrimination is a key human rights principle applicable also to the collection of personal data of groups of persons. It is specifically highlighted in the UN General Assembly Guidelines for the Regulation of Computerized Personal Data Files<sup>31</sup> as an important principle for which there are strict conditions and limits to possible exceptions. Discrimination concerns arise in relation to ‘Eurodac’ as the database contains fingerprints only of certain groups of persons, including asylum-seekers. Similar information is however not available to law enforcement bodies for other groups of persons in the EU. This distinguishes the ‘Eurodac’ proposal from the Visa Information System (VIS) and the Schengen Information System (SIS), which already provide for law enforcement access to personal information on Third Country Nationals in general, including asylum-seekers, and therefore does not single them out as a group for particular scrutiny.

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<sup>29</sup> See footnote 17.

<sup>30</sup> See footnote 12, Explanatory Memorandum, p.6.

<sup>31</sup> UN General Assembly, *Guidelines for the Regulation of Computerized Personal Data Files*, 14 December 1990, available at: <http://www.unhcr.org/refworld/docid/3ddcafaac.html>

## Recommendation

UNHCR recommends that Article 40(5) is amended in order to include stigmatisation as one of the issues to be evaluated:

Three years after the start of application of this Regulation as provided for in Article 46(2) and every four years thereafter, the Commission shall produce an overall evaluation of EURODAC, examining results achieved against objectives and assessing the continuing validity of the underlying rationale, and any implications for future operations, ***including whether the operation of the search functionality for law enforcement purposes will have led to the stigmatisation of persons seeking international protection***, as well as make any necessary recommendations. The Commission shall transmit the evaluation to the European Parliament and the Council.

## Conclusion

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UNHCR appreciates the importance attached by Member States to law enforcement access to 'Eurodac' data, as well as the effort of the European Commission to achieve a balance between the Member States' positions and concerns raised by UNHCR, the European Data Protection Supervisor and civil society during the 2008 consultation process. UNHCR considers however that law enforcement access to 'Eurodac' data would make a significant change to the purpose of 'Eurodac'; and would create a risk that the data on asylum-seekers may be transferred to countries of origin, which could have serious consequences for the life and safety of refugees and their families. It would further risk putting persons seeking international protection at risk of stigmatisation. UNHCR considers that the lack of technical certainty could create further obstacles and risks for people seeking asylum in the European Union.

UNHCR  
Bureau for Europe  
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