



Eurodac SCG

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Subject: Concerns regarding the amended proposal to reform the Eurodac Regulation

Dear Mr Aguilar,

The Eurodac Supervision Coordination Group (Eurodac SCG), constituting the representatives of the national Data Protection Authorities responsible for the supervision of the Eurodac information system, is writing in relation to the ongoing negotiations on the amended proposal for a Eurodac Regulation.¹

The 2020 amended proposal, together with the 2016 proposal for a Eurodac recast² on which it builds, has raised a number of data protection and fundamental rights concerns voiced by several stakeholders, among them the EDPS in its 2016 Opinion on the First Reform Package on the Common European Asylum System³ and its 2020 Opinion on the New Pact on Migration and Asylum.⁴ The Eurodac SCG addressed its own concerns in relation to the 2016 recast

¹ Amended proposal for a Regulation on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], 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 and amending Regulations (EU) 2018/1240 and (EU) 2019/818.

² Commission, '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 persons], 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.

³ EDPS Opinion 07/2016 on the First Reform Package on the Common European Asylum System (Eurodac, EASO and Dublin Regulations.)

⁴ EDPS Opinion 09/2020 on the New Pact on Migration and Asylum.

proposal in a letter to the European Parliament's LIBE Committee on 21 December 2016.⁵ We now wish to reiterate those views expressed in the EDPS' Opinions and our previous letter, as well as to draw attention to a number of critical issues concerning data protection which remain open.

In its letter to the LIBE Committee of 2016, the Eurodac SCG called attention to the extension of Eurodac's scope arising from the 2016 Eurodac recast proposal stemming from the inclusion of new categories of personal data and data subjects. We note that the additional set of changes now put forward under the 2020 amended proposal would further consolidate the expansion of Eurodac, from a system established to support the implementation of the Dublin Regulation to a database serving the additional purposes of identification, control and removal of irregular third country nationals and of border security checks/management, and as an instrument to support criminal investigations by law enforcement authorities.

The Eurodac SCG notes that the 2020 amended proposal also maintains the recast proposal's lowering of existing data protection safeguards, through simplifying and extending access by law enforcement authorities, prolonging data retention periods for certain categories of data subjects, and reducing the age threshold of biometric data collection of minors from 14 to 6 years old, among other changes.

Given the proposed transformation of the system and the privacy sensitive modifications foreseen, the Eurodac SCG joins those voices expressing deep regret that there has still been **no detailed impact assessment of the proposed changes**, including a thorough study of the fundamental rights implications and proportionality assessment.⁶ Such a necessity and proportionality assessment is a prerequisite for any limitation to fundamental rights, according to Article 52 of the EU Charter of Fundamental Rights. The absence of such an assessment puts into question the lawfulness of the proposed amendments, by failing to provide evidence that the safeguards laid down in the amended Eurodac proposal are sufficient to mitigate any disproportionate impact that such changes might have on individuals' fundamental rights, in particular the right to data protection.

Notably, the Eurodac SCG regrets that no evidence has been provided to demonstrate the necessity to **broaden law enforcement access** (i.e. through the removal of the requirement to prior check VIS, the possibility to access Eurodac in connection to specific persons and not only specific cases, and the ability to perform queries through both biometric and alphanumeric data), despite the potentially high stigmatising effect of these changes on the individuals concerned. The Eurodac SCG recalls that such safeguards were initially put in place by the legislator as a necessary condition to open the possibility to law enforcement access to Eurodac and to mitigate the high risks implied by this processing. We therefore underline that access to Eurodac for law enforcement purposes should be granted on an exceptional basis and be subject to strict conditions in view of the nature and purpose of Eurodac, which does not constitute a police record as such.

⁵ Letter of the Eurodac SCG of 21 December 2016:

https://edps.europa.eu/system/files/202204/letter_regarding_the_2016_recast_of_the_eurodac_regulation_en.pdf

⁶ The Eurodac SCG considers that the Explanatory Memorandum included by the Commission in the 2020 amended proposal does not meet these criteria. Furthermore, the 'targeted' consultation which stakeholders referred to omits the possibility for a meaningful engagement with a wider range of stakeholders (including national Data Protection Supervisory Authorities who have extensive experience in inspecting and supervising the implementation of the current system at national level).

In relation to **biometric data collection of minors**, and the decision to lower the age threshold from 14 to 6 years old: while we take note of the reasoning for the inclusion of data relating to very young children in Eurodac, we have unresolved concerns regarding the necessity and proportionality of this measure under EU law, which should have been supported by evidence of its likely efficacy for fulfilling objectives linked to child protection, and by an assessment of the reliability and accuracy of biometric data processing of minors as young as six. This is particularly important in view of the evidence suggesting decreasing reliability of a fingerprint match and lower efficiency in facial recognition systems deployed on children, as well as the Eurodac SCG’s inspection findings on challenges linked to age assessment of young asylum seekers.⁷

While we welcome the proposed provision stipulating that biometric data collection shall be carried out in a child-friendly and child-sensitive manner by trained officials, in the presence of a responsible adult or representative, there is a lack of specific information with regard to how the criteria of ‘child friendly’ or ‘child-sensitive’ shall be fulfilled; nor does the 2020 amended Eurodac proposal clarify this point. The Eurodac SCG would like to underline that this ambiguity may lead to the fragmentation of standards at Member State level and urges for more detailed guidance to be provided in order to ensure that effective safeguards are in place in all Member States.

Furthermore, the Eurodac SCG considers that there is insufficient justification to provide a legal possibility for **coercive measures**, including sanctions, penalties and detention, in the context of collecting biometric data for inclusion in Eurodac.⁸ The Eurodac SCG also stresses that such a possibility presents important issues in terms of fundamental rights that go beyond personal data protection considerations. It considers that this possibility cannot be allowed without the implementation of strong guarantees, in particular for minors.

With regard to the new provisions introduced in the 2020 amended proposal: the Eurodac SCG considers that the **inclusion of a “security flag”** in Eurodac, as a result of security checks carried out by authorities during the screening process against EU and national databases (outlined in the Commission’s proposal for a Screening Regulation),⁹ which would mark that a certain individual is deemed to be a security risk, should be subject to utmost scrutiny. Even if it would be determined that the Eurodac database is an appropriate location for such a flag (when this information will already be included in the debriefing form sent to national competent authorities), given the potentially severe and long-lasting impact of this kind of flagging on an individual, such a measure should only be introduced where the data it relies upon is accurate and reliable. It is therefore concerning that the current screening proposal lacks clearly defined modalities for verifying whether a third country national or stateless person constitutes a risk to security.¹⁰

As a minimum, if such a security flag is to be maintained in the amended Eurodac proposal, special attention should be paid to ensuring a higher level of harmonisation between national competent authorities’ practices (e.g. in laying down common criteria for verifying whether

⁷ https://edps.europa.eu/sites/edp/files/publication/09-06-24_eurodac_report2_en.pdf

⁸ The problem of using coercive measures to obtain dactyloscopic data of asylum seekers was addressed by the Eurodac SCG in its report on the coordinated inspection on unreadable fingerprints. See: https://edps.europa.eu/sites/edp/files/publication/13-06-10_report_unreadable_fingerprints_en.pdf

⁹ Proposal for a Regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612.

¹⁰ As also noted by the EDPS in his Opinion on the New Pact on Migration and Asylum, Opinion 9/2020, p.11.

third country nationals constitute a risk to internal security – such as, among other criteria, the impossibility of entering a security flag simply on the basis of a person's registration in a database. Without those additional specifications, the Eurodac SCG is concerned by the risk of irregularities and arbitrariness in the security assessment of individuals.

Given the high risk of the security flag to an individual's fundamental rights, the right of third-country nationals to rectify or supplement their data during the screening process is paramount. In this context, the Eurodac SCG understands that it is the intention of the legislator (as laid down in both the amended Eurodac proposal and the Screening proposal) that third-country nationals would not be informed, by default, of the creation of such a flag. This stands in tension with data protection principles of transparency and the right for data subjects to information in relation to the processing of their data, and should be reviewed.

As regards the provision to **link all datasets belonging to one person, regardless of their category, in a sequence**: while the Eurodac SCG takes note of the intention to improve statistical information on movements to and within the EU, it is important to highlight that this change can substantially impact privacy and data protection, if not accompanied by appropriate safeguards. National authorities and EU bodies with access to the system should not be able to view all datasets linked to an individual, but only the specific record relevant for their tasks (in accordance with principles of purpose limitation and data minimisation).¹¹ Furthermore, the linking of datasets should not affect the retention periods for each specific record.

The Eurodac SCG notes that the amended Eurodac proposal will provide a legal basis for the **functioning of Eurodac within the interoperability framework**. While we acknowledge that these changes are foreseen in the Interoperability Regulations and therefore, to an extent, pre-determined, we nevertheless wish to reiterate the serious concerns the Eurodac SCG has already raised in letters addressed to the European Parliament and European Commission in 2018 and 2020, respectively.¹² From a data protection perspective, the interoperability framework – including the series of amendments to the large scale IT systems concerned, some of which are not yet even in place – represents a highly complex set of interconnections of IT systems with different purposes and poses considerable risks to privacy and data protection. They raise serious questions in relation to compliance with the principle of purpose limitation, data subjects' rights and the ability of data protection authorities to fulfil their tasks.

With regard to the personal data of asylum seekers, refugees and other third country nationals processed in Eurodac: the sharing of their information in an interoperable system and between multiple authorities poses challenges regarding the traceability of the data, making it very complex for individuals to exercise their fundamental rights (e.g. access and rectify any potentially erroneous information), and could hinder access to justice of individuals, many of whom will already be in a position of vulnerability. Research shows asylum seekers and refugees lack awareness of their data subject rights.¹³ Findings of the Eurodac SCG confirm that requests by individuals relating to the processing of their data in Eurodac is already very low.¹⁴

¹¹ See also EDPS Opinion on the New Pact on Migration and Asylum, Opinion 9/2020.

¹² Refer to the letters of the Eurodac SCG addressed to the European Commission, Council and Parliament of 13 January 2020; and letter of the Eurodac SCG to the President of the European Parliament of 22 June 2018.

¹³ World Refugee Council Research Paper, Data Protection and Digital Agency for Refugees, May 2019.

¹⁴ Eurodac SCG, Report on the exercise of data subjects' rights in relation to Eurodac, November 2019: https://edps.europa.eu/sites/default/files/publication/2019_11_eurodac_report_data_subjects_rights_en.pdf

The Eurodac SCG considers that information about the inclusion of Eurodac data in the interoperability framework and the implications for individuals should be included, in a clear and intelligible form, in the list of information to be communicated to third country nationals at the time their biometric data is collected. More generally, further consideration must be given to **streamlining procedures for data subject rights within the interoperability framework** to ensure that individuals are not burdened with confronting multiple authorities and procedures in order to find out who is processing their data and who to contact in case of doubts regarding its accuracy.

Interoperability presents Data Protection Authorities with a serious challenge. It will no longer be sufficient to supervise one authority, agency or system separately; instead, national authorities will have to supervise a whole new ecosystem with a multiplicity of stakeholders (EUIs, national authorities), and of data flows with different purposes and legal regimes (national/EU/law enforcement/migration). **Cooperation between data protection authorities** will be paramount. The Eurodac SCG therefore underlines the importance of including in the amended Eurodac proposal, a reference to the single model of coordinated supervision of large scale IT systems, as provided by Article 62 of Regulation 2018/1725.¹⁵

Additionally, on a procedural point: the Eurodac SCG wishes to underline the systematic connection between the amended Eurodac proposal and the broader reform of the EU asylum and migration system. We consider it important for the sake of legal and procedural consistency that the amended **Eurodac proposal is not de-linked and fast-tracked** from the wider package of proposals but negotiated and adopted together with the other legal acts falling under the Asylum and Migration Pact, given the need that legislation be seamlessly aligned. In this regard, the Eurodac SCG draws attention to the lack of clarity in the relationship between the proposed Screening Regulation and the amended Eurodac proposal, particularly with regard to the precise content of the (alphanumeric) screening data that will be transmitted to Eurodac and the provisions in the proposed legislation concerning which data will be transferred by which authority (competent authorities responsible for conducting the screening and/or asylum authorities) to the Eurodac system¹⁶

At the same time, we emphasise the need to ensure a prompt recast of Eurodac, in particular with regard to the updating of data protection standards.

Finally, the Eurodac SCG wishes to recall and underline the validity of the following points made by the EDPS in its 2016 and 2020 Opinions: regarding the operational management, eu-LISA should not be allowed to use real data for testing purposes in view of the privacy risks this practice may pose for the individuals concerned. In relation to security and data storage, an update of the security framework for the Eurodac business and technical environment should be ensured, while it must be clarified exactly what data and in which systems (CIR and/or Eurodac central system) would data be stored.

¹⁵ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

¹⁶ See in particular Article 10 of the amended Eurodac proposal and Articles 10 and 14.6 of the proposed Screening Regulation.

Last but not least, the Eurodac SCG would like to take this opportunity to underline its readiness to cooperate and to contribute with its knowledge and expertise in further discussions on these issues.

The Eurodac SCG remains at your disposal for any further information or clarifications.

Yours sincerely,

Eleni Maragkou

Chair of the Eurodac Supervision Coordination Group

Cc: Ms Roberta Metsola, President of the European Parliament
Mr Jorge Buxadé Villalba, Rapporteur
Mr Karlo Ressler, Shadow Rapporteur
Ms Isabel Santos, Shadow Rapporteur
Ms Hilde Vautmans, Shadow Rapporteur
Mr Tom Vandendriessche, Shadow Rapporteur
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