Eurodac Supervision Coordination Group
Second Inspection Report

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I. Introduction

This Report is the second one[1] to be issued by the Eurodac Supervision Coordination Group, composed of representatives from the Data Protection Authorities (DPA) of each of the participating States and the European Data Protection Supervisor (EDPS). It is the result of fact-finding exercises, inspections and evaluation carried out in a coordinated fashion by the DPAs supervising Eurodac.

The report considers two different issues raised in the course of the operation of Eurodac: information to the data subjects (asylum seekers or persons otherwise concerned by Eurodac) and the methods for assessing the age of young asylum seekers in view of their registration in Eurodac. The report uses a common approach to analyse these issues.

The Eurodac Supervision Coordination Group is pleased with the level of participation and welcomes the efforts invested in this project. The results of the inspections have provided valuable insights into the two issues under scrutiny and will help the coordination group provide guidance to both policy makers and national authorities in charge of the operation of the system.

In Chapter II, the report explains the background of this inspection (especially the important new developments in this area, and how supervision is organised). Chapter III details the issues which were selected (information of the data subject and methods to assess the age of the young asylum seekers) and the method for inspection of these issues. In Chapter IV, the legal framework and reason for inspection are explained, followed by findings and evaluation, for each one of these two issues. A list of the coordination group's principal conclusions and recommendations is set out in Chapter V.

Terminology
For the purpose of this report, the following acronyms or terms must be understood as follows:

- Member State: any state to which the Dublin system applied on 31 December 2008. In practice, this means all Member States of the EU, plus Norway, Iceland and Switzerland.
- Coordination meetings: meetings held by the European Data Protection Supervisor and national DPAs (the "coordination group") in order to coordinate the supervision of Eurodac.
- Coordinated inspection: the coordinated inspection, which is the object of the present report, is an inspection launched by the coordination group. It is based on a common questionnaire and does not necessarily constitute a fully fledged inspection in all member states. Some worked on the basis of an exchange of written information, sometimes complemented by an informal meeting, while others performed a complete inspection. See Chapter III for more precisions.

[1] The first report was issued in 2007 and can be found on: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Eurodac/07-07-17_Eurodac_report_EN.pdf

II. Background

1. What is Eurodac?

Eurodac is an information system which was set up with the purpose of identifying the Member State responsible for an asylum application lodged within the European Union, in order to speed up the asylum procedure.[2] The Eurodac system enables Member States to identify asylum seekers and persons who have crossed an external frontier of the Community in an irregular manner. By comparing fingerprints, Member States can determine whether an asylum seeker or a foreign national, found illegally present within a Member State, has previously claimed asylum in another Member State. In addition, by being able to check if an applicant has already lodged a request for asylum in another Member State, "asylum shopping" in other Member States after being rejected in one can be avoided.

Created by a Regulation of the Council of Ministers[3], Eurodac has been operational since 15 January 2003.

In accordance with the Eurodac Regulation, all asylum applicants over the age of 14 have to have their fingerprints taken when they request asylum. The fingerprints are then sent in digital format to Eurodac's Central Unit, which is hosted within the European Commission. The system compares the prints with others already stored in the database, thus enabling authorities to check if the applicant has already lodged an application in another Member State or if they entered the European Union without the necessary papers.

The Eurodac system is equipped with an Automated Fingerprint Identification System (AFIS) and an electronic data transmission application (provided by TESTA). AFIS receives data and transmits positive and negative replies to the National Access Points (NAPs) in the Member States. Only national authorities dealing with asylum have access to the database.

Personal data processed by Eurodac falls into three categories: applicants for asylum of at least 14 years of age ("category 1"), aliens apprehended in connection with the irregular crossing of an external border ("category 2") and aliens found illegally present in a Member State ("category 3"). The following data are recorded:

- the Member State of origin,
- the fingerprint,
- the sex, and
- the reference number used by the Member State of origin.

[2] The implementation rules for Eurodac are set out in Council Regulation (EC) No 407/2002 of 28 February 2002.

[3] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (hereinafter, "the Eurodac Regulation"). The implementation rules for Eurodac are set out in Council Regulation (EC) No 407/2002 of 28 February 2002.

In case of a hit, an additional exchange of data takes place through the DubliNet system. The Members States concerned can thus exchange personal data different from the Eurodac data: name, date of birth, nationality and photo, particulars of family members, addresses.

2. Recent developments

The Dublin and Eurodac Regulations require the Commission to report to the European Parliament and to the Council on their application after three years of operation and to propose, where appropriate, the necessary amendments. This was done in a report, published on 6 June 2007. Whilst acknowledging that the system set up in the Regulation has been implemented in the Member States in a generally satisfactory way, the Commission Evaluation Report identified certain issues related to the efficiency of the current provisions and highlighted those which needed to be tackled in order to improve the Eurodac system and facilitate the application of the Dublin Regulation.

Moreover, the European Parliament adopted on 3 September 2008 a resolution on the Commission's evaluation of the Dublin system. It addressed a number of issues, the most relevant for the present report being the following:

- Rights of the claimants: the Parliament calls for additional provisions concerning the means by which the persons seeking protection are informed of the implications of the Dublin Regulation. In this context, it suggests drafting a standard leaflet which could be translated into a certain number of languages and be distributed to all Member States.
- Principle of the best interest of the child: the Parliament reaffirms the principle of the best interest of the child and recommends that a set of common guidelines on age-assessment be adopted so that the benefit of the doubt is always given to the child.

Following the evaluation report, the European Commission has undertaken a revision of both the Dublin and Eurodac Regulations. In the course of this procedure, the Commission has widely consulted stakeholders, aiming at ensuring that the relevant aspects were taken into account. The European Commission also took on board the results of the first coordinated inspection report issued by the coordination group in 2007.

The new proposals of revised instruments were presented on 3 December 2008.
The "Eurodac" proposal aims at *inter alia*:

- improving the efficiency of the implementation of the Eurodac Regulation,
- ensuring consistency with the asylum acquis evolved since the adoption of the above-mentioned Regulation,
- updating a number of provisions taking account of factual developments since the adoption of the Regulation (i.a. on data protection supervision),
- establishing a new management framework.

The EDPS has issued an opinion on the Eurodac proposal on 18 February 2009, where he addressed issues such as the supervision model, the rights of the data subjects, the method for fingerprinting, and retention periods. Both on the subject of information of the data subject and on the question of fingerprinting, the EDPS underlined that the coordination group would provide for useful guidance as a result of the coordinated inspection.

3. Supervision of Eurodac

Article 20 of the Eurodac Regulation provides that the supervision of Eurodac would initially be ensured by a provisional Joint Supervisory Authority, which was replaced by the EDPS at the beginning of 2004[4].

- The EDPS is therefore the competent authority for monitoring the activities of the Central Unit to ensure that the rights of data subjects are respected when their data are processed by Eurodac.
- At national level, each state participating in the Eurodac system has a supervisory authority, the DPA, to monitor the collection and use of data.
- Over the last four years, EDPS and DPAs have developed a coordinated supervision of the Eurodac system, aiming at promoting a coordinated response to common problems. The coordination group has already issued one coordinated inspection report, the recommendations of which have been widely incorporated in the Commission's proposal for new Eurodac and Dublin Regulations.

The Commission's proposal on the review of the Eurodac Regulation aims at giving legal confirmation to this model. Indeed it has not only proven useful and effective in practice, but is also the model chosen for upcoming large-scale IT systems like the VIS or the SIS II.

This report is the result of the coordinated inspection and has been adopted on 24 June 2009. It aims at presenting the findings and recommendations with regard to the selected issues.

III. Issues for inspection and methodology

1. Issues

The coordination group adopted on 18 December 2007 a work programme for 2008-2009. The objective of this work programme was to establish priorities and translate them into concrete actions.

After careful consideration of issues of interest for the coordination group as well as timeliness with regard to the legislative process, two issues were selected for a coordinated action:

1. information to the data subject,
2. assessment of the age of young asylum seekers.

[4] Article 20, paragraph 11, lays down that: "The joint supervisory authority shall be disbanded upon the establishment of the independent supervisory body referred to in Article 286(2) of the Treaty. The independent supervisory body shall replace the joint supervisory authority and shall exercise all the powers conferred on it by virtue of the act under which that body is established". In accordance with Article 20 (3) of the Eurodac Regulation, the EDPS is thus responsible for examining implementation problems in connection with the operation of Eurodac, for the examination of possible difficulties during checks by the national supervisory authorities and for drawing up recommendations for solving existing problems. Furthermore under Article 20 (4), the EDPS shall be actively supported by the national supervisory authorities.

1. Information to data subjects

The first coordinated inspection report suggested as one of the likely causes for the scant exercise of the right of access by data subjects in Eurodac their probable lack of awareness about their rights. It was therefore suggested that the coordination group examines the way information is provided to asylum seekers or persons otherwise reported in Eurodac. The coordination group decided to take stock of existing practices in this area (which languages are used, is the impact of the information measured in any way,…), and where possible, examine the impact of the quality of the information given and the exercise of the right of access. The aim is also to identify and exchange best practices in this matter
The Portuguese DPA acted as rapporteur on this subject.

2. Assessment of the age of young asylum seekers

According to Article 4 of the Eurodac Regulation, children from 14 years on should be fingerprinted. There is often a problem determining the age of a child who carries no reliable identity document and various methods are used to assess their age. In practice, the determination of the age is not only a question of data quality and insertion of data in Eurodac. It is also used to determine whether or not a young asylum seeker is a minor, which has a number of implications on the processing of the asylum application (underage asylum seekers are entitled to a range of protection measures not granted to adults).
The methods for determining the age of asylum seekers (whether in the framework of Eurodac or in the wider context mentioned above) are the subject of discussions in many Member States mainly as to their reliability and ethical acceptability. Moreover, the lack of harmonisation of systems used in Member States to measure the age of young asylum seekers leads also to a great variety of results. This has obvious implications in terms of fairness of treatment of the concerned individuals.
The aim of this exercise was to take stock of existing practices and/or legislations existing at national level, with a view to assess their compliance with the legal European framework concerning Eurodac. It also intended to determine whether further harmonization was desirable.

2. Method of inspection

The coordination group opted for standardised questionnaires prepared by the rapporteur and secretariat. The questionnaires are attached to this report.
As to the method used to gather the answers to the questionnaire, this was left to the appreciation of the DPAs. Some have opted for field visits while some others chose desk work. Generally speaking, this combination of a standardised questionnaire and free inspection methodology has been appreciated. Most Member States found that on spot checks were more productive than an exchange of written material between their office and the Eurodac office.

IV. Findings and evaluation

1. Preliminary observations

Written answers to the questionnaire were received from all the members of the coordination group.
This general participation to the evaluation is welcomed as it allows for a complete overall picture of the situation in all Member States.
Moreover, information gathered in the framework of this coordinated inspection is complemented with information given by various stakeholders in this area, at EU institutional level or national level. The question of the assessment of the age of young asylum seekers in particular attracted a lot of attention in various member states, and some outstanding analyses are mentioned in this report. They were in themselves not part of this investigation, but the coordination group wants to underline the interest to situate this exercise in a wider context where relevant[5].

2. Information to the data subject

a. Legal framework

The rights of the data subject, including the right to information and access are regulated under Article 18 of the Eurodac Regulation. Furthermore, Directive 95/46 is also applicable, as the *lex generalis*[6], which entails that when the Eurodac Regulation is incomplete or silent, the provisions of the Directive shall apply.

Article 18 of the Eurodac Regulation provides for a rather detailed set of rules governing the rights of the data subject. In this context, the right to information is obviously important not only in itself, but also as a precondition for the exercise of other rights (access, rectification,…).

Article 18 of Eurodac Regulation stipulates the following:

Rights of the data subject
1. A person covered by this Regulation shall be informed by the Member State of origin of the following:
(a) the identity of the controller and of his representative, if any;
(b) the purpose for which the data will be processed within Eurodac;

[5] Among the number of documents concerning this issue, the coordination group refers especially to the following.
United Kingdom: House of Lords-House of Commons, Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth Report of Session 2006–07, pp. 65-68.
France: *Avis n°88 du Comité Consultatif National d'Ethique sur les méthodes de détermination de l'âge à des fins juridiques*, 23 June 2005. The Committee had been mandated by Mrs Claire Brisset, Défenseure des enfants (Secretary of State in charge of child protection).
The Netherlands: *De migratiemachine: De rol van technologie in het migratiebeleid*, Huub Dijstelbloem en Albert Meijer (red.), Van Gennep, Amsterdam, 2009, pp. 99-122.

[6] According to Recital (15) of the Eurodac Regulation, "*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 applies to the processing of personal data by the Member States within the framework of the Eurodac system*".

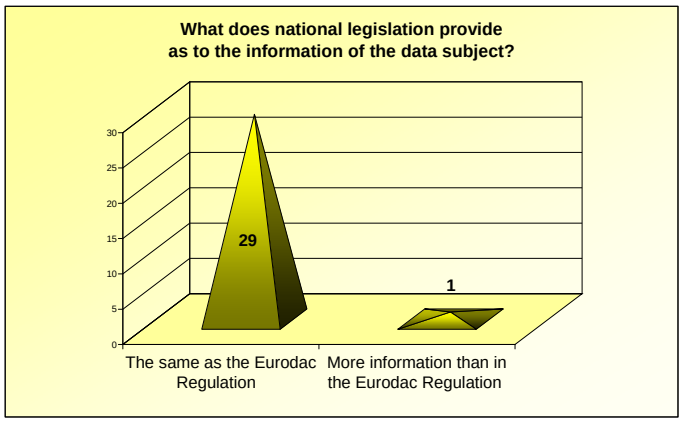
(c) the recipients of the data;
(d) in relation to a person covered by Article 4 or Article 8, the obligation to have his/her fingerprints taken;
(e) the existence of the right of access to, and the right to rectify, the data concerning him/her.
In relation to a person covered by Article 4 or Article 8, the information referred to in the first subparagraph shall be provided when his/her fingerprints are taken.
In relation to a person covered by Article 11, the information referred to in the first subparagraph shall be provided no later than the time when the data relating to the person are transmitted to the Central Unit. This obligation shall not apply where the provision of such information proves impossible or would involve a disproportionate effort.

b. Findings

b.1. National legal framework and practices

Apart from the direct application of the Eurodac Regulation, also national legal frameworks shall provide for necessary provisions to enable the effective exercise of the right to information of data subjects. All Data Protection Authorities (DPAs), but one[7], answered that their national legislations provide for the same information as the Eurodac Regulation.

In most of the Member States, data protection laws are the applicable national legislation for the right to information, being however combined in some Member States with the relevant dispositions in other legislation related to aliens, asylum, immigration or police regimes. Some Member States referred to the fact that the information to be given to the data subject within the Eurodac procedures is regulated by these specific provisions.



In the majority of the Member States, the legislation provide for control mechanisms, remedies or sanctions in case data controllers do not comply with their obligation to provide information. The possibility of applying sanctions mainly results from the dispositions of data protection laws and the competences of the DPAs.

Besides the national legislation, only very few countries have additional guidelines or administrative instructions from the competent authorities to further deal with the obligation of providing information to the data subject. These internal directives truly represent an improvement to the right to information, adding up new information, imposing its intelligibility and also determining specific procedures to the right of access to prevent unlawful special searches.

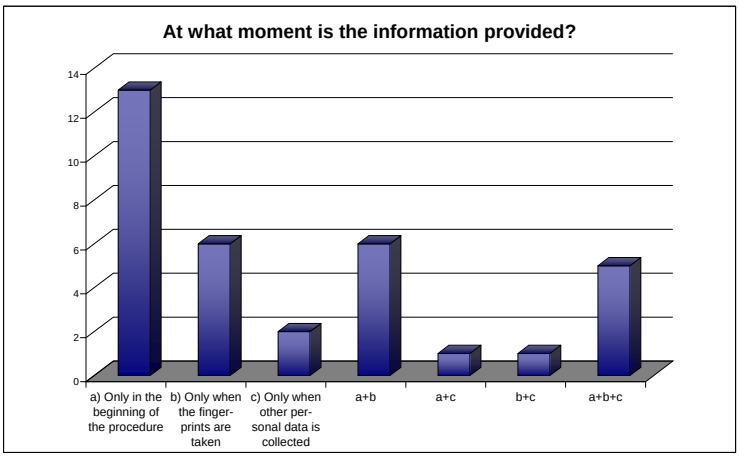
[7] One DPA pointed out that according to the Data Protection Law in this country, the right to information is more demanding than in the Eurodac Regulation, in particular concerning the moment when the information should be provided (prior to the collection) and the identification of the data processors.

b.2. Provision of the information

To better understand how the information is given to the data subjects and to be able to evaluate the quality of this information, the questionnaire detailed the circumstances, the means, the persons involved as well as the practices of this procedure.

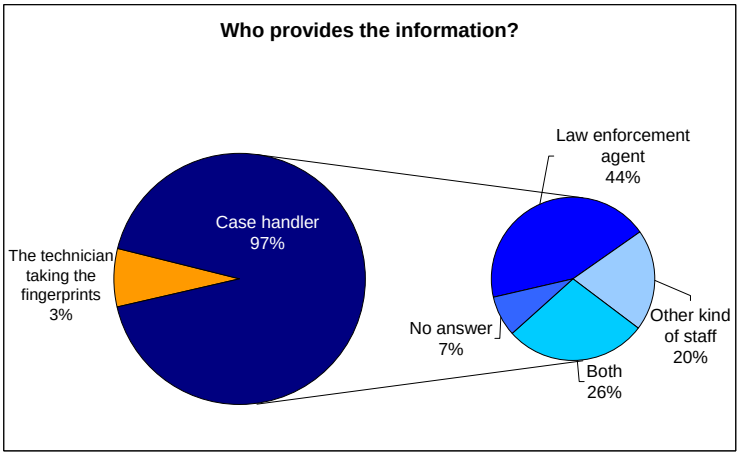
At what moment is the information provided?

Regarding the moment in the procedure when the information is provided, the situation differs to some extent between the Member States, since although almost half of the countries indicated the beginning of the procedure as the moment for providing the information; some countries mentioned that the information is being provided when the fingerprints are taken and some other pointed out that it is given on the two above-mentioned occasions. Furthermore, some countries informed that the information is given when other personal data are collected; a country informed that it was occurring at the start of the procedure as well as later on when personal data were collected. Some States provide information in these three phases of the procedure.



While this seems to be an improvement of the provision of information to give it at several different phases of the procedure, this apparent reinforcement of the information provisions might be misleading, as the reasons for it are also different. In some cases, the two distinctive moments depend on the information given to an asylum seeker or to an illegal alien; in other cases, it is not clear whether there is a corroboration of the information already provided or whether it means the information is not all given at the same time, but in a piecemeal way along the whole procedure.

Regarding the person who is entrusted with the task of providing information, it is the case-handler in all countries but one, whose obligation falls over the technician taking the fingerprints. The case-handler is in some Member States a law enforcement agent, in some other (less frequently) it is other kind of staff and, in six countries, the person handling the case can be either a LEA or a civil servant, often depending on whether they are dealing with an asylum seeker or with an illegal alien. In some countries the case-handler takes the fingerprints as well.



As the procedure is generally controlled by law enforcement agents, this means that the obligation to provide information falls upon them.

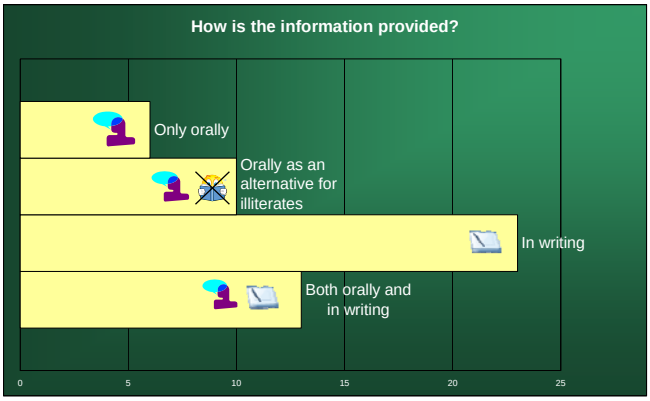
How is the information provided?

Concerning the way information is given to the data subject, the written form is used in the great majority of the Member States, although some countries provide it only orally. However, verbal information ends up being the mainly common practice, as it is also used as an alternative procedure for illiterates and whenever the data subject does not understand any available translated language. Nearly a half of the Member States provide it in both ways, whether supplementary or depending on the category of the data subjects.

For the information given orally, there are always interpreters for several languages, except in one country, and one can see the significant efforts made by the competent authorities to understand and be understood by the applicants, including the use of videoconference when there is no local interpreter for a specific language.

Moreover, the role of the interpreter seems very important also in terms of assessment whether the data subject has fully apprehended the message. This evaluation is made through additional questions, further explanations and in some countries the data subject is asked to sign a document by which he or she confirms that the information was provided and understood.

Nevertheless, in some countries, there is no attempt whatsoever to guarantee that the applicant is aware of the significance of what is being told to him or her, though almost all Member States claim to have, in fact, enough time for the asylum procedure. Only one third of the member States clearly indicated that asylum authorities make sure the data subject understands the given information.

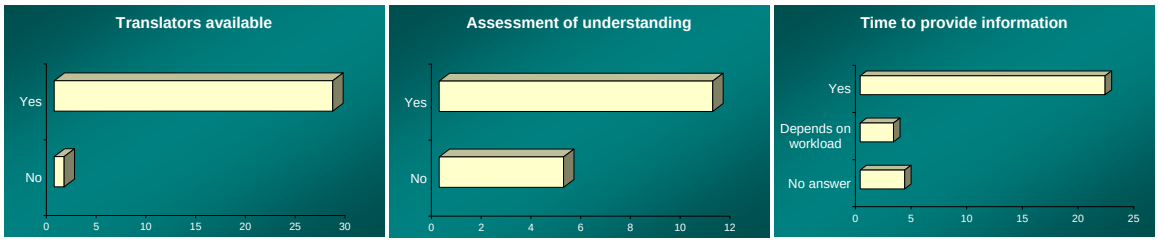


Among the countries where the information to the data subject is given in written, all countries but one provide it in several languages. In general, it seems that the documents containing the information are translated into the most widespread native languages of the applicants. Some countries have the information translated into more than 20 languages.

Furthermore, in all Member States but one the data subject receives a copy of the information provided, either in the form of a separate brochure or as part of the administrative documents given to the data subject, who has therefore the possibility of reading it again later on.

Assessment whether the information has been understood

It is a common practice in the great majority of the countries to assess whether the data subject has understood the information provided to him or her. This is carried out with the assistance of the interpreter who attends the procedure, and in some countries the data subject signs a document acknowledging that he or she understood the information provided to him or her.



For those situations when the data subject cannot read, most of the Member States provide the information orally, by reading the written text or by explaining it through the interpreters who advise the authorities in case the data subject shows that he or she did not comprehend the information.

Role of NGOs

Some countries have also highlighted the role of the NGOs in following the Eurodac procedure, in particular in cases involving asylum seekers. At different levels, the NGOs somehow intervene in the process, by offering additional assistance to individuals, such as legal counselling, providing the relevant Eurodac information or issuing specific leaflets to be distributed among the applicants. In one country, it was noted that the only written information the data subjects receive is issued by an NGO, as the competent authorities only provide it orally.

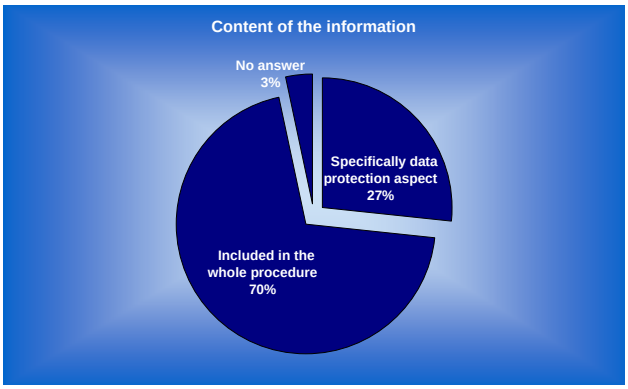
b.3. Content of the information

The answers provided to the questionnaire indicate great differences regarding the content of the information given to the data subject.

First of all, the right to information on data protection is seen in most countries as part of information related to the whole application procedure. In two countries, the Eurodac information is given among other information on fingerprints' national procedures. Only in few countries, the data protection aspects are dealt with separately.

Therefore, the data protection information seems to be diluted into the huge amount of information given to an asylum seeker or to an illegal alien. Besides, it tends to be more general and incomplete.

Although the majority of the Member States refer that the fact that the information contains explanations on the consequences of being fingerprinted, as well as on the exchange of personal data with other countries, there is still a significant number of countries that do not provide such information.



Indeed, according to the general assessment made by the DPAs on the quality of the right to information, only a minority considered the information provided is fully in compliance with the Eurodac Regulation meaning "complete", "clear" or "appropriate".

In the countries where the information is only provided orally, the DPAs

pointed out that it was both very difficult to make an assessment of a situation as well as to verify the adequacy of the information given to the data subject.

In the majority of the countries providing written information, the DPAs considered that the quality of the information needs to be improved. Most of the DPAs emphasized that the information given to the data subject was “insufficient”, “incomplete”, “too general”, “not fully appropriate” or “not clear enough”.

However, the situation is not exactly the same in these countries. While some DPAs believe that only few adjustments should be made, in particular putting together spread data protection information or better clarify some of its aspects, other countries stressed that the information should be highly improved and completed, in order to comply with Eurodac Regulation.

Moreover, on one hand, some DPAs underlined the need to substantially expand the information provided to data subjects, including information on their rights of the data subject, as well as other additional explanations which are provided in a very brief manner. On the other hand, the importance to provide information in a clear and intelligible way to assure that it is fully understood by the data subject, avoiding legal and “Euro-jargon” language, is also a key-point for many DPAs.

b.4. Assessment of the effectiveness of the information

In most of the countries, the national competent authorities do not make any additional assessment of the effectiveness of the information they provide, apart from what is done during the Eurodac procedure to make sure that the data subject understands the message. A country mentioned a project for assessing the information on asylum procedure in general, and some countries mentioned, without providing further detail, that the effectiveness of information is evaluated.

With regard to the number of requests to access data submitted by the data subjects, which could eventually lead to legitimate special searches in the Eurodac system, the majority of the countries indicated that they had not received any requests of this kind so far. In some countries, the right of access has already been exercised and a country specified that the requests are usually presented by data subjects’ representatives.

b.5. Asylum authorities observations

Concerning whether the asylum authorities have specific needs to enable them to fulfill their tasks relating to the obligation to ensure data protection information, some countries informed that they did not have any requests in this area, while other countries highlight some particular needs.

The need to share practices and get harmonized rules is the most common necessity pointed out by the competent asylum authorities. In fact, knowing the practices of others, harmonising interpreting rules and obligations, having standard information and a network of contact points are the most relevant items underlined by the States. Also, some countries mention the need for additional translations, provided by the European Commission and for unusual languages. The competent authority of one Member State even mentioned in this context the need to amend national legislation in order to enable it to be compliant with Eurodac Regulation.

Indeed, most of the countries do not have any expertise sharing organised in this regard. There are, however, some possibilities of doing so within the regular European meetings in the Dublin coordination group, and some countries refer to the experience of sharing information materials among them.

c. Evaluation

National legal framework, mostly the national data protection laws and the applicable legislation on the right to information, provide for the same information as laid down in Article 18 of the Eurodac Regulation. Few countries have additional internal guidelines, which represent a further improvement of the above legal dispositions.

Control mechanisms are generally in place, mostly within the competences of the Data Protection Authorities, in terms of supervision, remedies or sanctions, or in case of non-compliance with the obligations regarding the data protection information.

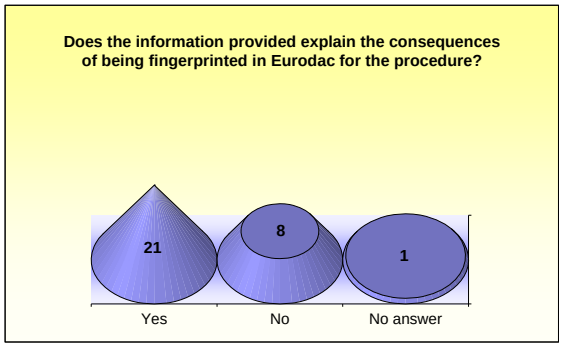
The information provided to the data subjects differs very much among the countries and it is evident that there the practices differ for asylum seekers and illegal aliens; in general illegal aliens receive undoubtedly less information, and in some cases, do not receive information at all.

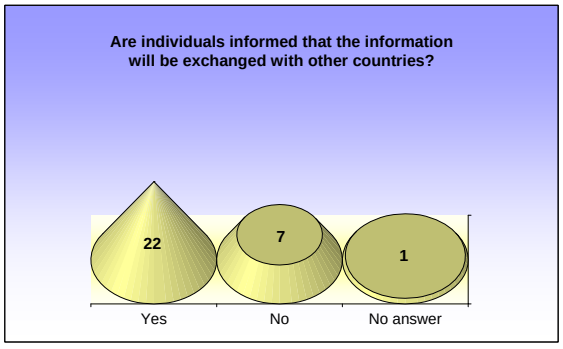
The data protection information is mostly provided among other information related to the whole Eurodac procedure or in the context of other procedures, which seems to water down the information on data protection in Eurodac.

A significant number of countries do not provide information in written, which prevents the data subject from further examining the information he or she received, and at the same time impede the Data Protection Authorities to examine how the right to information is provided and whether it is in compliance with the law.

In some countries, the duties entrusted to the competent authorities are partially fulfilled by NGOs. Despite the important role performed by NGOs during the Eurodac procedures, which is even in some cases foreseen by national laws, the involvement of NGOs cannot replace the responsibilities which the data controllers carry in terms of the protection of personal data and the obligation to provide information.

The quality of the content of the information provided to data subjects should be highly improved; otherwise even the efforts made by some of the national authorities to have several available languages in order to communicate with the data subjects, or to guarantee that the data subject understands the information provided are wasted, if the information itself is not adequate.





In general, the information on data protection aspects seems to be incomplete, in particular on the consequences of being fingerprinted, the transmission of personal data to other countries, and the right of access, rectification and deletion; the information is not intelligible, mainly taking into consideration the level of education and the legal knowledge of the addressees.

National competent authorities do not have in place sufficient tools to assess the effectiveness of the data protection information, which could eventually point out to some weaknesses of the process.

The lack of knowledge of the rights afforded by law to the data subjects may explain the very few requests presented for the access to personal data. Notably, in general the countries where such requests are being presented are the same ones in which the information which is being provided to data subjects is deemed to be complete, adequate and in compliance with Eurodac Regulation.

Asylum authorities seem to be aware of all these difficulties and fragilities, as they often emphasized the need to share experiences as well as the necessity to provide for harmonized rules and practices.

3. Assessment of the age of asylum seekers

a. Legal framework

According to Article 4, Article 8 and Article 11 of the Eurodac Regulation, individuals from 14 years on should be fingerprinted, whether they are asylum seekers, aliens apprehended in relation with the irregular crossing of an external border or aliens found illegally present in a Member State (hereinafter "illegal aliens").

Moreover, these provisions state that "*the procedure for taking fingerprints shall be determined in accordance with the national practice of the Member State concerned and in accordance with the safeguards laid down in the European Convention on Human Rights and in the United Nations Convention on the Rights of the Child*" ("the Convention").

The relevant provisions of the Convention in this context are:

Article 3: *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*[8].
Article 16: *No child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
Article 22: *States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present*

[8] The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, (the "Article 29 Data Protection Working Party") elaborated on this principle in its Working Document 1/2008 on the protection of children's personal data, available on http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2008/wp147_en.pdf

Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Also relevant to this debate are the guidelines set out in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. These have been held to be an important source of law (although without the force of law) and are often cited as a guide to what the international understanding of Convention obligations is. They remind the decision-maker that, i.e.:

197. The requirement of evidence should not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.
198. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.
199. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case.
203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. (...) It is therefore frequently necessary to give the applicant the benefit of the doubt.
214. The question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enrol the services of experts conversant with child mentality. A child--and for that matter, an adolescent--not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests. In the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.

216. It should, however, be stressed that these are only general guidelines and that a minor's mental maturity must normally be determined in the light of his personal, family and cultural background.

Finally, it should be noted that Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status provides for specific procedural guarantees for unaccompanied minors.
This Directive addresses specifically the general issue of the age assessment, in the framework of the examination of an asylum application[9] (while the coordination group focussed on this question in the framework of the use of Eurodac). However, Directive 2005/85/EC obviously may be used as a source of inspiration for the present analysis and recommendations. The relevant provision is:

Art. 17 par. 5. Guarantees for unaccompanied minors
Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum.
In cases where medical examinations are used, Member States shall ensure that:

[9] Recital (29) of the Directive provides that *"This Directive does not deal with procedures governed by Council Regulation (EC) No 43/2003 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".*

(a) unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;
(b) unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned; and
(c) the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal.
The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.
6. The best interests of the child shall be a primary consideration for Member States when implementing this Article.

It should be noted that the Commission will be required to report on the application of the Directive (and to 'propose any amendments that may be necessary') by 1 December 2009 (article 42). Even though the present report addresses the situation in Eurodac, the recommendations made by the coordination group will contribute to that evaluation.

b. Findings

b.1. Applying Eurodac Regulation provisions or more specific guarantees

The majority of the Member States who provided their contributions to the questionnaire replied that their laws provide for general principles as laid down in the Eurodac Regulation.

Some Member States referred in their replies to more specific guarantees or procedures. Many of them refer in this regard to the relevant standards and requirements of the European Convention on Human Rights and the UN Convention on the Rights of the Child, as well as to specific national provisions laid down in their laws on Asylum, Aliens or Immigration, or more generally to the asylum legal regimes.

It should also be noted that while some Member States regulate the issue in question by way of laws enacted by their parliaments, some others, in addition to laws, regulate the matter in various types of decrees and other administrative acts and guidelines (e.g. internal guidelines within the Migration Board, guidelines of the Police Commander, internal police regulations,...).

b.2. Use of medical examination to assess the age of asylum seekers

An important conclusion of the analysis of the questionnaire is that in the vast majority of the Member States **medical examination** (of different kind and types) aiming at assessing the age of asylum seekers is allowed by law and used in practice. Only 5 Member States do not use medical examination to assess the age of asylum seekers. The medical examination may consist of interviews with medical doctors and psychiatrists, visual examination by specialised staff, dental examinations, X-Ray bone examination, blood tests and the so called sexual development test by a doctor at the pathological institute. In many Member

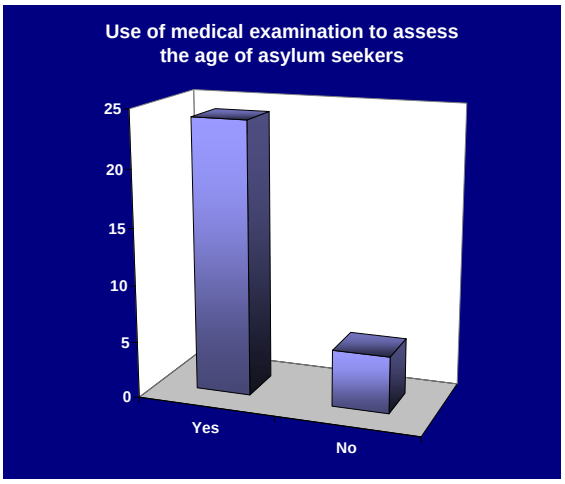
States medical examination is combined with other types of assessments, e.g. retrieval of census records and/or other relevant documents.

It is also worth noting that some Member States regulate the sensitive issue of the choice of the methods for assessing the age of asylum seekers, including the type of medical examination, in soft law provisions such as a manual of asylum procedure or an internal police regulation. In some Member States the age examination methods may also vary depending on the place where they take place, as this matter falls under the responsibility of regional authorities.

The extent of the use of medical examination to assess the age also varies between the Member States. Some Member States use medical examination only in very sporadic situations in which they consider it absolutely necessary, when other types of examinations do not prove sufficient, or in case of doubt.

Some Member States raise the issue of difficulties to assess a precise age of the asylum seekers based on the methods used in their systems, and they admit that such methods, including various types of medical examination, give only a range, not a precise age. For instance, a Member State mentioned in this context that "*the assessment should be done as far as possible in favour of the data subject*". Other Member States mentioned that although the method was well established, there were disputes on the accuracy of the assessment. However, some Member States, admittedly fewer, mention that there are no disputes as to the accuracy of the method.

In some Member States only "non invasive" or "less intrusive" medical examinations are allowed. For instance, in a Member State X-Ray examination is not allowed, as it is considered to be an interference with the right to integrity, as ensured by the European Convention on Human Rights. The law of this State provides however for other types of medical examinations, such as visual examination or an oral interview with a paediatrician, neurologist or psychiatrist. In another Member State, only anthropological and psychological examinations are allowed, and they are used rarely.



In this regard, it should be mentioned that the understanding of which methods are actually "invasive" or "intrusive" vary between the Member States, e.g. 3 Member States mentioned that they consider the use of x-rays as a not-invasive method, whereas others consider this issue as a human rights dilemma and assess it in light of the respect for the right to integrity and the obligation to ensure the respect of the European Convention on Human Rights.

b.3. Declaration of the asylum seeker

An interesting issue to be discussed and further analyzed is the legal validity/effect and the priority given to a **statement** made by the asylum seeker on his/her age during the procedure. In some Member States, the data subject's declaration prevails.

In some Member States, in cases of doubts, the statement of the asylum seeker concerning his/her age has to be regarded as true ("*in dubio pro*").

b.4. Estimation of the case-handler

Some Member States base their assessment on the declarations completed by the case-handlers and only if the age is disputed, the case is subject to further examination, either medical examination or an interview with specialized staff. In 2 Member States the estimation of the case-handler prevails and no medical examination is used.

b.5. Consequences of an objection to undergo medical examination

Another issue examined is a question of whether, and if so to which extent, the asylum seeker can **object** to medical examination, and what kind of legal consequences such objection would have on his/her situation.

The situation seems to differ between the Member States. In some Member States, objection is possible, however should the asylum seeker object to the procedure this can negatively affect his/her application. In several Member States objection to the procedure is possible and is not *per se* an element of exclusion, but it is considered to be an additional indicator in the assessment of the asylum procedure. Some Member States mentioned that although, from a legal perspective, the data subjects were entitled to object to the procedure, in practice this was not usually the case. This raises a question of why in these cases the practice does not build upon the opportunities offered by the legal framework. Many of the Member States did not provide details about the issue of objection to procedure.

In many Member States the possibility to object to undergo medical examination is not provided in the law[10].

b.6. Right to ask a second medical opinion

Some Member States give the asylum seeker the possibility to ask a second medical opinion regarding the assessment of his/her age, however normally at his/her own charge. In some Member States, the second opinion consists of another medical examination, which raised ethical concerns, as should the asylum seeker ask for the second opinion, he/she might be subject to two X-Rays examination for one application.

In a Member State, there is even a third opinion: the asylum seeker may ask for a new expert. If the opinion of the new expert is not inconformity with the opinion of the first one, the asylum authority weights the situation up or requests a third expert.
In other Member States, no second opinion is envisaged by the laws.

In some Member States the asylum seeker cannot appeal against the result of the age test but he/she is able to appeal against the decision on the asylum application in which the result of the age is taken into account.

In some Member States, the appeal is only possible on the final decision, not on the assessment of the age of the asylum seekers.

[10] It should be reminded that this report addresses the Eurodac procedure. Normally under the general procedure of examination of an asylum application, objection to the medical procedure should be allowed, by application of Directive 2005/85/EC.

b.7. Involvement of Data Protection Authorities

In the vast majority of the Member States, the DPAs are not involved in the procedure. In fact, all the Member States who replied factually on this issue, mentioned that the DPAs were not involved. Only a few Member States referred to some kind of "indirect involvement", i.e. when the DPA received a complaint concerning data protection or an audit/inspection is performed. In that case, the DPA will intervene.

c. Evaluation

The first observation that can be made is it is difficult to have a clear picture of the situation in the different Member States: there is a variety of approaches to the problem of assessing the age of a child asylum seeker. Not only the procedures and techniques vary widely, but also the assessment of the reliability and ethical aspects of these techniques are questioned with variable intensity in the different countries.

This leads to the following remarks, both about procedural aspects and about the principle itself of age assessment by medical examination.

c.1. Formal procedure

The procedure for assessing the age of young asylum seekers in order to determine whether they should be registered in Eurodac involves some acts which represent an intrusion in the private life of individuals. According to the case law concerning Article 8 ECHR[11], such an intrusion shall always be based on a clear, accessible and foreseeable regulation.

It is questionable whether the Member States which establish these procedures in internal guidelines or other non published administrative documents can be considered as complying with this rule.

c.2. Weight of the declaration of the asylum seeker

The place that medical examinations are taking in the procedure, for instance their relative importance compared to the importance of the declaration of the asylum seeker should be underlined. There is a risk that Member States authorities will rely solely or primarily upon that medical assessment as if it is by essence superior to any other element of proof.
Relying primarily on medical examinations rather than on the declarations of the asylum seekers has been viewed in some inspection reports as a significant shift to treating them as suspect immigrants rather than as children.
However, as a matter of principle, a technical assessment should not replace completely the declaration of the asylum seekers. It should be noted that in some Member States, in cases of doubts, the statement of the asylum seeker concerning his/her age has to be regarded as true ("*in dubio pro*").

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[11] Article 8

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

c.3. Consequences of refusal to undergo the examination

This raises the question of informed and free consent to the medical examination. In some Member States, asylum seekers who refuse to take the test are automatically considered as adults for the procedure. In several Member States, the refusal to undergo the examination will be considered as a negative element, to be held against the asylum seeker. However, it can be said that it does not seem justified to assume that a young person who has just arrived in the EU, possibly deeply traumatized, and who refuses an x-ray is automatically going to be an adult. This is indicated in some Member State's legislations (i.a. those legislations which implement Directive 2005/85).

c.4. Consequences of lying about age

This question was not as such a part of the initial questionnaire, but it emerged as an issue of interest from some national contributions. In this regard, it is worth reminding that even if a refugee has made false declaration about his or her age, this should not be seen as the proof of falsity of the rest of the declaration. We refer to the guidelines set out in the UNHCR Handbook and in particular its Para 199 *("Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case").*

c.5. Right to a second opinion

Here also, the situation varies very much from one Member State to another. This matter requires a recommendation by the coordination group, given the need to ensure the right to effective legal remedy to be guaranteed all over the European Union. A second opinion or any relevant way to challenge the assessment made by the case handlers should be provided without costs for the applicant. Indeed the cost represents a barrier for most applicants.

c.6. Reliability

There are very different estimations of the reliability of the various tests performed to assess the age of the young asylum seekers. The medical/scientific criticisms are mainly addressed to the methods using X-rays. The critics point out mainly to the facts that X-rays are accurate only to within plus or minus two years in assessing age, so could not distinguish with certainty between a 14 and a 16-year-old, particularly from racial groups for which the EU holds no official data on size and age.

Scientific aspects are obviously beyond the realm of this coordination group and have not been analyzed in the same way by the different Member States. This group therefore encourages national authorities to assess the reliability of the various methods used for age assessment and to do this in a harmonized way.

As a rule, the imprecision of the results or rather, the margin of error, has to be considered when taking decisions affecting the legal status of the asylum seeker. More precisely, when the result is situated within a range of error, priority has to be given to other elements of proof, such as the declarations of the asylum seeker.

These discussions, as well as the discussion concerning ethical acceptability of some medical procedures (see hereunder) concern both the Eurodac age assessment and the use of medical procedures to determine whether or not an asylum seeker is a minor in the general examination of an asylum application. It should be reminded that, even for the 18

year old threshold, Directive 2005/85/EC does not impose medical examinations, but allows for them. Therefore, there is room for discussion in this regard.

c.7. Ethical aspects

This is a difficult aspect of this question. There is not a uniform approach on what is acceptable from an ethical point of view: some Member States accept without too much discussion medical examinations which can be qualified as invasive, while others have a more cautious approach or even prohibit them altogether. The criticisms stem mainly from the medical profession. They can be summarized as follows:

- medical assessments can be very traumatic and invasive for children who have experienced persecution;
- moreover, there are serious concerns as to the use of a medical procedure for non-medical purposes. The use of x-ray analysis of teeth, wrists and collar bones to determine age is seen as unethical because it obliges to take radiographs of people without any health benefit to them;
- several scientific sources call these techniques potentially harmful.

Some in the scientific community advocate that at the very minimum, if an invasive medical technique is to be used, that x-rays are replaced by echography or MRI which do not produce the same kind of harmful radiations. These medical aspects, although, again, clearly beyond the competences of the coordination group, should certainly be taken into account in the assessment of the reliability of these techniques.

c.8. The question of the age threshold

In general, it is considered that control of compliance with age threshold is crucial in the framework of asylum procedures because under-18-year-olds receive higher levels of support and protection than adults. Authorities in Member States are concerned that some asylum seekers try to pass themselves off as younger than they are to qualify. Hence, a non trivial number of asylum applications ending up in age disputes.
Moreover, it should be noted that the "Dublin" system also makes a difference between minors and adult asylum seekers (the 14 year old threshold is not used in the "Dublin" system).

The question at stake in this inspection is the assessment of the age of child asylum seekers in view of their fingerprinting in Eurodac. The age threshold is not 18 year old, but 14 year old, and the result of the age assessment is accordingly the fingerprinting of the asylum seeker and the processing of their fingerprints in Eurodac.

This nuance is crucial; it entails that, theoretically, Eurodac users should make a double age assessment: one (the 14 year old threshold) for fingerprinting of Eurodac and another one (age threshold of 18 year old) in view of determining the type of protection to be granted to the asylum seeker. It seems obvious that the first purpose seems to have minor consequences compared to the second.

In data protection terms, it would make more sense to assess the issue of exemptions from the biometric requirements in light of the purposes of Eurodac ("the effective application of the Dublin Convention"). Applying this assessment to this case, there is no link between the objective of facilitating the application of the Dublin rules and the taking of fingerprints of children under 18. Arguably, the lack of necessity and proportionality of taking fingerprints for such persons would mean that taking their fingerprints would constitute an unjustified

interference with their right to privacy pursuant to both Article 8 of the European Convention on Human Rights[12] and national legislation implementing Directive 95/46/EC.

In several Member States, the medical and ethical acceptability of the use of medical examination for age assessment of child asylum seekers in order to determine whether or not they are under 18 is under discussion[13]. Hence, it is even more questionable to use these techniques with the only objective to verify whether a child asylum seeker qualifies for fingerprinting in Eurodac.

As a conclusion, one could say that the application of the 14 year old threshold raises many issues, from both legal and practical points of view, without bringing substantial benefit to the authorities. The coordination group advocates a solution whereby this issue is addressed structurally, i.e., the suppression of the 14 year old age limit in the Eurodac Regulation. If this does not prove possible and in any case as an interim solution, the coordination group recommends that invasive medical examination should not be used to determine this age limit for Eurodac fingerprinting. An invasive medical examination, if any should be limited to the determination of whether a child asylum seeker is under 18 or not.

c.9. Conclusion: Need for harmonisation of techniques and procedures

There is a wide variety of techniques used in this context, each with their own pros and cons. Procedures also differ very much from one Member State to another. The result of this is that child asylum seekers will be treated differently and be given different chances to be accepted according to the Member State where they lodge the first application. In order to ensure equal chances and a more harmonised and fair treatment of asylum seekers, it should be advisable to encourage harmonisation both of the methods used to determine the age of asylum seekers as well as of procedural rights. However, this cannot take place before there has been a serious and exhaustive evaluation of the accuracy, reliability and medical and ethical acceptability of the different methods.

[12] Very relevant in this issue is the case of S. and Marper v. the United Kingdom - 30562/04 [2008] ECHR 1581 (4 December 2008).

[13] It should be reminded that, even for the 18 year old threshold, Directive 2005/85/EC does not impose medical examinations, but allows for them.

V. Recommendations

In view of the findings of the coordinated inspection, the Eurodac Supervision coordination group recommends the following:

Information to data subjects

- Member States should improve the quality of the information on data protection for data subjects, which should contain all items laid down in Article 18 of the Eurodac Regulation. The information provided to the data subject should cover the rights of access and rectification as well as the procedure to exercise these rights, including information both about the data controller who should deal primarily with requests for access and rectification and about the national Data Protection Authority as the competent body to give assistance to the data subject where necessary.
- Member States should ensure that the information is provided on equal footing both to asylum seekers and illegal aliens.
- Asylum authorities should reconsider the way in which they provide information on data protection so as to ensure that it is clear enough and is well understood by data subjects. Particular emphasis should be put on data protection information in order to make it clearly visible and accessible.
- Information texts should be drafted in a clear, simple and understandable language, taking account of the level of education of the data subjects and, therefore, avoiding legal terminology which they are not familiar with. It should always be assessed whether the data subject has fully understood the information, provided both in writing and orally. Asking for the data subject's signature as a confirmation of his or her understanding of the information provided to him or her does not constitute a sufficient guarantee that the message was well understood (also considering the vulnerable position of the applicant).
- Member States should promote cooperation and experience sharing among national competent authorities, by encouraging a working group to study this matter and eventually develop harmonized practices.
- Member States should develop a standard form for the right to information, to the drafting of which the coordination group could give its valuable input. This would contribute to a better harmonization and compliance with the Eurodac Regulation. This solution could also have a positive impact in terms of translations, as many of the languages used are common among different Member States.
- The DPAs should consider publishing on their websites a best practice guide on how the individuals can exercise their rights.
- The DPAs should follow-up the situation at national level and provide guidance on how better comply with legal obligations.

Assessment of the age of asylum seekers

- Member States should ensure that the methods for assessing the age of asylum seekers as well as the whole procedure surrounding the tests are established in a clear text accessible by the public.
- Member States should ensure that the declaration of the asylum seekers on age is not disregarded in the procedure and that these statements are given an appropriate legal status and value, similar to the ones based on the results of medical examination. The argument that statements made by asylum seekers may not be correct or even be untrue should be weighted against the fact that medical examination as such may also lead to incorrect results or mistakes.

- The Member States should provide explicitly that a refusal to undergo medical examination cannot adversely affect the asylum seeker[14].
- The asylum seeker should be entitled to ask for a second opinion regarding the medical results and the conclusions drawn from them without costs for him/her.
- Asylum authorities have to take account of the margin of error resulting from the use of some medical examinations when taking decisions affecting the legal status of the asylum seeker. More precisely, when the result is situated within a range of error, priority has to be given to other elements of proof, such as the declarations of the asylum seeker.
- The Commission should undertake an overall assessment of the reliability of the various methods used in the Member States for age assessment, with a view to ensure more harmonisation in this regard. Medical and ethical aspects should be taken into account in the assessment asked by the coordination group about the reliability of these techniques. This assessment should cover the methods used to assess the age of child asylum seekers both in the context of Eurodac and in the context of the examination of the asylum applications of young asylum seekers.
- Medical examination considered invasive under the previous recommendation should not be used to determine the age limit for Eurodac fingerprinting. If needed at all, it should be limited to the determination of whether a child asylum seeker is under 18 or not.
- The Eurodac Regulation, currently under revision, should be modified to impose fingerprinting asylum seekers only from 18 year old on.

[14] As is already the case under Directive 2005/85/EC.