

Coordinated Supervision of Eurodac

Activity Report 2010-2011

Brussels, 24 May 2012

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1. Introduction

Eurodac is an information system established for the comparison of fingerprints of asylum applicants and irregular immigrants. It facilitates the application of the Dublin Regulation¹ which aims at determining the State responsible for examining the asylum application.² Eurodac has been created by Council Regulation (EC) No 2725/2000 of 11 December 2000³ as completed by Council Regulation (EC) No 407/2002 of 28 February 2002.⁴ The system has been operational since 15 January 2003 and is currently used by the 27 EU Member States as well as Iceland, Liechtenstein, Norway and Switzerland.⁵

As established in the Eurodac regulation, data protection supervision of the Eurodac system is carried out at national level by the national supervisory authorities (data protection authorities, hereafter "DPAs"), while for the central (EU) level, the European Data Protection Supervisor (EDPS) is competent. The coordination between the two levels is ensured by the Eurodac Supervision Coordination Group (hereafter "the Group"), which is composed by representatives of the DPAs and the EDPS. In 2010-2011, this Group was chaired by Mr Peter Hustinx (EDPS), while the Vice-Chair was Ms Elisabeth Wallin (Swedish DPA). The present document reports on the activities of the Group for this period.

The need for thorough data protection supervision of Eurodac is evident when considering the category of persons affected by the Eurodac system: asylum seekers and (to a lesser extent) irregular immigrants. This need is also reinforced by the evolution of policies in the area of freedom, security and justice in recent years. Asylum policies need to be better coordinated, and, as a result, so does the protection of the rights and freedoms of asylum seekers.

Data protection is also a key factor for the success of the operation of Eurodac, and consequently for the proper functioning of the Dublin system. Elements such as data security, quality of data and lawfulness of consultation of Eurodac data all contribute to the smooth functioning of the system.

¹ Regulation (EC) N° 343/2003 of 18 February 2003 and Commission Regulation (EC) N° 1560/2003 of 2 September 2003, OJ L 222, 05/09/2003 P. 3 - 23. These two instruments are sometimes called "Dublin II".

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 irregularly present within a Member State has previously claimed asylum in another Member State.

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 "Eurodac Regulation", OJ L 316, 15/12/2000 P. 1 - 10.

⁴ Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 62, 5/3/2002, P. 1-5.

⁵ When Eurodac was established, it was used in the then EU-15 Member States (except Denmark), as well as in Norway and Iceland. Since then, the system has been joined by the ten new Member States following the 2004 enlargement, by Denmark (2006), Bulgaria and Romania following the 2007 enlargement, as well as Switzerland (2008). Finally, a protocol between the Union, Switzerland and Liechtenstein, allowing the latter to join the system, entered into force on 1 April 2011.

Section 2 of this report clarifies the legal environment including the challenges posed by the evolution of the legal framework. In the period covered by this report, the discussions on a reform of the Eurodac Regulation have continued, with the Commission putting forward new proposals. However, as of writing, no proposal has been adopted. Section 3 summarises the proceedings at the five coordination supervision meetings which took place during the reporting period. Achievements are the subject of section 4: during the last two years, the Group kept up its good work from the previous reporting period, conducting an inspection on advance deletion, reaching out to stakeholders and keeping abreast of new developments in this area. Section 5 concludes the report by giving an overview of activities to come in the next reporting period to the extent they can already be anticipated.

2. Legal framework: Revision of the Eurodac Regulation

During the time covered by this activity report, no revision of the Eurodac Regulation has been adopted.

To recall, the first proposal for a revision was put forward by the Commission in December 2008.⁶ An amended proposal was presented in September 2009.⁷ As a result of discussions in the Council, this document included the possibility of accessing Eurodac for law-enforcement purposes. In October 2010⁸ the Commission put forward an updated proposal, which largely mirrored the earlier proposal of December 2008, except that the provisions on access for law-enforcement purposes were removed.

The stated Commission rationale behind this was that excluding this controversial issue could allow for quicker adoption. This way, other changes, such as stricter provisions on the security of the system and decreased retention periods for category 2 entries (persons apprehended irregularly crossing the border) could come into force quicker. Nonetheless, the negotiations between Parliament and Council are frozen as of writing. It is open how the issue will develop in the future; negotiations could be resumed on the basis of the current proposal or the Commission could re-introduce access for law-enforcement purposes with a new proposal.

From a data protection perspective, the current proposal would present some improvements, notably shorter retention periods in some cases as well as more stringent security safeguards. The Group also welcomes that the current proposal excludes access for law-enforcement purposes. The proposal would not change anything regarding the approach to coordinated supervision – the model of coordination between national DPAs and the EDPS, each acting within their respective competences, is proven and is not planned to be changed in the revision.

⁶ COM(2008)825 final

⁷ COM(2009)342 final

⁸ COM(2010)555 final

3. Organisation of coordinated supervision

3.1. *Main principles*

As in previous years, the cooperation took the form of coordinated supervision meetings held on a regular basis with all DPAs in charge of supervising Eurodac at national level and the EDPS. The main purpose of these meetings was to discuss common problems related to supervision and find common solutions or approaches whenever possible. According to Article 5 of the Group's rules of procedure, these meetings shall take place at least once a year. In practice, two to three meetings are held per year.

DPAs participating in the meetings are all DPAs in charge of the supervision of Eurodac, i.e. at the date of publication of this report all 27 EU Member States plus Liechtenstein, Norway, Iceland and Switzerland. Before the protocol allowing Liechtenstein to join entered into force, Liechtenstein's DPA was represented with an observer status. The Commission is also invited to parts of the meetings in order to update the Group on new developments regarding Eurodac.

3.2. *The supervision coordination meetings*

In the period 2010-2011 five supervision coordination meetings have taken place on the following dates:

- 8 March 2010
- 13 October 2010
- 8 December 2010
- 8 June 2011
- 21 October 2011

The meetings were held in Brussels, usually back to back with meetings of the Joint Supervisory Authorities/Bodies of SIS, CIS and Europol on Council premises. The meeting in October 2011 was held as a stand-alone meeting on premises of the European Parliament. The meetings have proven to be an effective platform for exchanging experiences and information about the functioning of Eurodac and its data protection related aspects.

Typically, the first part of the meeting is devoted to a presentation by the European Commission services involved in the management of Eurodac, either on technical or legal aspects. This helps to ensure that the Group is always up-to-date on recent developments in order to ensure effective supervision. The second part is devoted to discussion between DPAs on issues that are in need of checking at national level or on new developments of interest for Eurodac supervisors.

The following paragraphs quickly recapitulate the topics discussed and actions taken at the different meetings. A more detailed description of selected actions will follow in section 3 of this report.

Meeting on 8 March 2010

At this meeting the group adopted the 2008-2009 activity report. It also discussed and –with minor changes– adopted the work programme for 2010-2011, which set out the activities to be taken during this reporting period. The Group proceeded to re-elect Mr Peter Hustinx as chair; Ms Elisabeth Wallin (Swedish DPA) was elected as vice-chair.

Meeting on 13 October 2010

The Commission presented its annual report on Eurodac, as well as the new proposal for reforming the Regulation, which removed the provisions on access for law-enforcement purposes present in the previous proposal. The secretariat presented a discussion document on advance deletion; after general agreement that the topic was important, the chair suggested that the secretariat amend and transform the document into a questionnaire. The UK delegation had prepared a working paper on stakeholder engagement, on the basis of which the secretariat prepared a more precise document. The Group endorsed the documents and decided to go ahead with the stakeholder engagement, while being careful not to overreach its mandate.

Meeting on 8 December 2010

In this meeting, the Group adopted the questionnaire on advance deletion, which was subsequently sent to the Members to start their inspections. The second part of the meeting was devoted to a discussion with representatives of the United Nations High Commissioner for Refugees and of the European Council for Refugees and Exiles. The Group and the external stakeholders discussed information to data subjects, the age of asylum seekers, the quality of fingerprints/enrolment, and law enforcement access to Eurodac. The French delegate informed the Group of recent developments in France, where administrative authorities established a rule that after three unsuccessful attempts at fingerprinting, if the fingerprints of the asylum seeker are still unreadable, it is assumed that the person has tried to voluntarily render his/her identification impossible, e.g. by self-mutilating. As a consequence, provisional residence permits and social assistance should be withdrawn. The Group decided to follow the issue.

Meeting on 8 June 2011

The Commission updated the Group on the state of play regarding the reform of the Eurodac Regulation, general developments and first experiences with the new technical platform Eurodac+, which went live in February 2011. The Greek representative presented the methodology used in auditing the Eurodac National Access Point, in order to provide input into the development of a common methodology. The secretariat presented a preliminary draft report for the advance deletion exercise, based on the replies submitted before the meeting.

Meeting on 21 October 2011

The Commission presented its annual report on the activities of the Eurodac central unit and updated the Group on the state of play regarding the revision of the Eurodac Regulation, as well as on the development of "special searches" until September 2011. Afterwards, the Group discussed and –with minor changes– adopted an adapted work programme to cover 2012, as well as a memo and questionnaire for a coordinated inspection on unreadable fingerprints, both of which had been prepared by the secretariat. For the report on advance deletion, some late contributions were still expected; therefore, the report was sent to the written procedure once those contributions arrived and adopted subsequently. The Group also discussed the possibility of a common framework for a security audit on EURODAC and was informed of the results of a national audit carried out in Spain. It also looked into possibilities to streamline its workflows and increase transparency. Additionally, this meeting also included an informal discussion on how to establish coordinated supervision for the Visa Information System, which had been launched one month earlier.

4. 2010-2011: Issues discussed and achievements

4.1. *Coordinated inspection on advance deletion*

This inspection was prompted by the fact that there seemed to be an implementation deficit regarding advance deletion. This term refers to the obligation to delete fingerprint data of persons who for different reasons –such as having acquired the nationality of a Member State or having left the Dublin Area– must no longer be included in the EURODAC database before the end of the normal retention periods. Implementation deficits have been noted on multiple occasions.

Advance deletion is important as it ensures that data is not stored longer than necessary for achieving the purpose for which it was collected; it is also part of the sound management of large-scale IT databases as it contributes to data quality and helps to avert negative consequences to data subjects due to faulty information. DPAs represented in the Group carried out inspections at the national level and answers –in total 26– were collected throughout the year.

The results made clear that some Member States still lacked appropriate procedures for dealing with advance deletion. Also, the Group noted problems with the statistics supplied by the Member States, which sometimes did not match those provided by the Commission.

The Group addressed three recommendations to the Member States:

- Those Member States which have not yet done so should include a procedure for automatic advance deletion in the workflow of their competent authorities and to set clear and short deadlines in the procedure, in order to be compliant with the Regulation;
- Member States should also provide information to data subjects as regards the right to advance deletion, in line with the applicable legislation on data protection;
- The Commission and the Member States should explore ways of improving statistics and making them more comparable, which could include the establishment of common criteria, because, as the Group pointed out, adequate, reliable and comparable statistics are a necessary ingredient of evidence-based policy.

4.2. *Security audit methodology*

Significant progress has been made on the development of a common framework for security audits. To this end, the Group exchanged experiences from inspections on the national level and -in a subgroup- drafted a questionnaire that can serve as a common baseline for inspections, ensuring consistency and comparability of results. As far as possible, the audit framework will also include any new security requirements that might be introduced in the revision of the Eurodac Regulation. Work is expected to be finalised within the next year.

4.3. Stakeholder dialogue

In the December 2010 meeting, the Group met with representatives of the United Nations High Commissioner for Refugees, who supervises the implementation of the 1951 UN Convention on refugees and its 1967 Protocol, and the European Council for Refugees and Exiles (ECRE), an umbrella organisation for a number of NGOs working with refugees all over Europe.

Although the mandates and objectives of the participants to this dialogue differ, all participants found the exchange worthwhile and called for it to be institutionalised. Common areas of interest included the question of law-enforcement access, determining the age of asylum seekers and the information provided to data subjects. A second stakeholder dialogue will be organised in 2012.

4.4. VIS

In its October 2011 meeting, the Group also informally discussed coordinated supervision of the VIS. The VIS was launched shortly before the meeting and will be implemented in different phases. Its legal basis includes provisions for a supervision coordination group similar to that for Eurodac. The Commission informed the Group about the VIS and its day-to-day operations. Afterwards, the Group discussed an approach to coordinated supervision of the VIS, aiming to formalise supervision by the end of 2012.

5. What to expect in 2012-2013

Planning ahead is difficult due to the unclear situation regarding the revision of the Eurodac Regulation. One development which can already be foreseen is the transfer of the management of Eurodac from the Commission to the newly established Agency for the operational management of large-scale IT systems in the Area of Freedom, Security and Justice.⁹ While this transfer –which is supposed to take place when the Agency will start operational work, currently scheduled for December 2012– will not affect other legal aspects, it is still an important development.

In order to provide a certain amount of planning, the Group decided to amend and extend the 2010-2011 work programme to also include the year 2012. Planned activities include the following:

- Ongoing work on the methodology for a security audit, which should be finished in 2012;
- A coordinated inspection on the issue of unreadable fingerprints;
- A repetition of the stakeholder outreach meeting.

However, some of the activities envisaged in the programme had to be put on hold until the revision is adopted. For example, drafting information sheets that would quickly become obsolete after release would not be a wise use of the Group's resources, which is why this action has been frozen for the time being. As soon as a revision is adopted, these items will come back onto the agenda.

⁹ See Regulation (EU) N°1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale it systems in the area of freedom, security and justice, OJ L 286, 01/11/2011, P. 1-17.