

Asylum: Eurodac system for the comparison of fingerprints of third-country nationals or stateless applicants; requests for comparison with Eurodac data. Recast

2008/0242(COD) - 07/10/2009 - Document attached to the procedure

OPINION OF THE EUROPEAN DATA PROTECTION SUPERVISOR

on the amended proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No (.../...) (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person), and on the proposal for a Council Decision on requesting comparisons with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes

The EDPS has serious doubts whether these proposals are legitimate and whether legislative instruments should be adopted on the basis of these proposals. These doubts are based on the considerations in this opinion which can be summarised as follows.

Necessity and proportionality: the EDPS wishes to emphasize that a better exchange of information is an essential policy goal for the European Union. Governments need appropriate instruments to guarantee the security of the citizen, but within our European society they have to fully respect the citizen's fundamental rights. It is the task of the EU-legislator to ensure this balance. Measures to combat terrorist offences and other serious offences can be a legitimate ground to allow processing of personal data, provided that **the necessity of the intrusion is supported by clear and undeniable elements, and the proportionality of the processing is demonstrated**. This is all the more required since the proposals concern a vulnerable group in need of higher protection because they flee from persecution. Their precarious position has to be taken into account in the assessment of the necessity and proportionality of the proposed action. The EDPS also points at the risk of stigmatisation.

Legitimacy: the EDPS recommends assessing the legitimacy of the proposals in a wider context, notably:

- the tendency of granting law enforcement access to personal data of individuals that are **not suspected of any crime** and that have been collected for other purposes;
- the need for a **case-by-case assessment** of every proposal of this kind and for a coherent, comprehensive and future-oriented vision, preferably related to the Stockholm-programme;
- the need to first implement and evaluate the application of other new EU instruments that permit consultation by one Member State of fingerprints and other law enforcement data held by another Member State;
- the urgency of the proposal, in relation to the changing legal and policy environment.

European Convention on Human Rights (ECHR): in relation to the compatibility of the proposals with Article 8 ECHR, the EDPS questions the change of purpose of the system. To recall, Article 1(2) of the proposed Regulation now extends the purpose of the Eurodac system and adds the purpose of the prevention, detection and investigation of terrorist offences and other serious criminal offences, under the conditions set out in the proposals. The EDPS underlines that just **stating the change of purpose** in a

legislative proposal does not constitute such a change. Moreover, a legislative change does not in itself lead to a different assessment of whether the proposals are necessary in a democratic society, proportionate and otherwise acceptable, notably in view of the rules on purpose limitation in Directive 95/46/EC.

The EDPS emphasises that the **necessity should be proven by the demonstration of substantial evidence of a link between asylum applicants and** terrorism and/or serious crime. This is not done in the proposals.

Lastly, the EDPS welcomes the fact that he is consulted and recommends that reference to this consultation be made in the recitals of the proposal, in a similar way as in a number of other legislative texts on which the EDPS has been consulted, in accordance with Regulation (EC) No 45/2001.

He also makes a few comments on the substantive texts of the proposals.