

# **The Eurodac Debate: Is It Blurring the Line Between Asylum and Fight Against Terrorism?**

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## **Introduction**

Eurodac is a transnational database, established in 2000 and came into force in 2003, which contains personal and biometric information of all asylum seekers and illegal immigrants found within the European Union.<sup>1</sup> The database primarily established to help EU Member States find out whether an asylum applicant has previously claimed asylum in another EU Member State or whether an asylum seeker has previously apprehended when entering EU territory illegally. It aims to facilitate the application of Dublin Regulation and hence to assist Member States in the determination of the country responsible for examining as asylum application. It obliges all Member States to take fingerprints from the asylum applicants who are 14 and over or others apprehended for illegally crossing the borders.

Having said that, new Eurodac Regulation which was adopted in June 2013 by the European Council and will come into force in 2015 with introducing a number of changes to the system. The most notable change is the provision on granting national law enforcement authorities and Europol access to Eurodac for law enforcement purposes.<sup>2</sup> Hence, widespread concerns have been voiced by different stakeholders. This

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<sup>1</sup> Within this essay the term Eurodac is used as a reference to the database itself.

<sup>2</sup> It is pertinent to note here that a number of changes to the system will also come into force in 2015. However, this essay is primarily concerned with the most controversial change introduced to the system which is granting access to national law enforcement and Europol access to Eurodac.

essay seeks to analyse different comments and concerns made pro or contra. The emphasis will be placed upon whether it is necessary and proportionate to widen the access to Eurodac for law enforcement purposes taking the public safety on one hand and fundamental rights of the asylum seekers as the target group on the other. The central discussion in respect of potential breaches of fundamental rights of this target group will be based on the right to privacy, right to protection of personal data and prohibition of discrimination. I will argue that there is lack of evidence to support the necessity to allow access to national law enforcement authorities and Europol.

To support my argument the essay will briefly explain the establishment of Eurodac. Having framed the current system, the essay will continue with illustrating the map leading to enabling access to Eurodac for law enforcement purposes. Later it will approach to this change from a human rights perspective, arguing whether it is compatible with right to privacy and protection of personal data. Finally, it will deal with intrusions of the rights of a very vulnerable group, asylum seekers and discrimination concerns over them.

## **I. The Establishment of Eurodac**

### **A. First Initiatives and its Original Purpose**

The journey through the EU law relating to asylum is a complex area. With the Schengen Agreement abolishing the internal borders, Member States agreed upon strengthening the control of external borders by police and judicial co-operation. Abolishment of internal borders also created the fear of uncontrolled asylum applications since once entered into the territory of the EU, an asylum seeker can apply for asylum in member states with most generous procedures.<sup>3</sup> Hence, in order to regulate asylum claims, the EU established the Dublin Convention in 1990, entered into force in 1997.<sup>4</sup> This convention then was replaced by

<sup>3</sup> P. Boeles et al. *European Migration Law* (Intersentia 2009) 316.

<sup>4</sup> Convention Determining the State Responsible for Examining Applications for Asylum

Dublin Regulation in which a list of criteria to allocate asylum seekers to one of the Member States was introduced in order to prevent asylum seekers from applying asylum in multiple Member States.<sup>5</sup> Hence, it determines the first Member State that an asylum seeker reaches as responsible to investigate an asylum application.<sup>6</sup> Inevitably, the effectiveness of this rule depends on the possibility to identify asylum seekers and to establish their travel route into the EU.<sup>7</sup> However, generally, asylum applicants have no documents or they have fake ones and this creates one of the most important problems in the application of the criteria for determining the Member State responsible for asylum claims.<sup>8</sup>

Back in 1991, at a very early stage of the Dublin system, it was acknowledged that there has to be an objective mechanism for ascertaining responsibility for asylum claims and negotiations on establishing an automated fingerprint application system began<sup>9</sup>. On February 1993, the Working Group on Asylum asked the Legal Service of the Council to give advice on the question whether former Article 15 of the Dublin Convention could be used as the legal basis for the creation of Eurodac. According to this former article Member States shall exchange, upon request, the individual data which are necessary for the examination of an application for asylum, allocate the Member State which is responsible

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lodge in one of the Member States of the European Communities (Dublin Convention) (1990) OJ C 254. This regulation was also replaced by Regulation No. 604/2013 (i.e. Dublin III) in June 2013.

<sup>5</sup> Evelien Brouwer *Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (Martinus Nijhoff 2008) 118. Dublin Regulation was also replaced by Regulation 604/2013 of 26 June 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 person (recast) (Dublin III) (2013) OJ L 180/31.

<sup>6</sup> Brouwer *Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (n 5) 118.

<sup>7</sup> Kay Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International 2000) 401

<sup>8</sup> *ibid.*

<sup>9</sup> Jonathan P. Aus, 'Eurodac: a solution looking for a problem' (2006) European Integration Online Papers <[http://eiop.or.at/eiop/index.php/eiop/article/view/2006\\_006a/24](http://eiop.or.at/eiop/index.php/eiop/article/view/2006_006a/24)> accessed 12 April 2014, 7.

for examine this application, and for the execution of all obligations resulting from the Convention. In its advice, the Legal Service confirmed that former Article 15 of the Dublin Convention provided sufficient legal basis for the establishment of Eurodac. It is striking that the Legal Service made an important restriction to the use of it. As *Brouwer* pointed out, the Legal Service explicitly stated that the database could not be used for other purposes, like “the functioning of other international instruments or for starting criminal investigations against asylum seekers.”<sup>10</sup> Overall, it was this limited purpose that the Eurodac could be established in the first place.

At its meeting on 23 November 1995, the Council of Justice and Home Affairs (i.e. JHA) having declared that the exchange of asylum seekers’ fingerprints through Eurodac is technically and legally feasible and decided to start the legislative work.<sup>11</sup> However, only after 5 years that the Eurodac Regulation was finally adopted. One of the reason behind this relatively late adoption was because of the political debate revolved around the interests of the Member States for establishing a central registration system for fingerprints. Some Member States, such as Germany, the Netherlands and Austria were especially interested in such a system. On the contrary the Southern Member States which were often the first country for arrival for asylum seekers, such as Italy and Greece were less interested.<sup>12</sup>

During the Eurodac negotiations, it was agreed to extend the personal scope of the system to illegal migrants. After the arrival of a large number of immigrants from Iraq to Europe in mid-1997, response to this refugee crisis was urged by some Northern European countries in particular.<sup>13</sup> In December 1997, the Schengen Executive Committee de-

<sup>10</sup> *Brouwer Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (n 5) 118.

<sup>11</sup> 11476/95 ASIM 308 cited in *Brouwer Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (n 5) 119.

<sup>12</sup> Aus (n 9). Elspeth Guild, “The Bitter Fruits of an EU Common Asylum Policy” 61-76 in: Thierry Balzacq and Sergio Carrera (eds.), *Security Versus Freedom? A Challenge for Europe’s Future* (Ashgate 2006).

<sup>13</sup> *Brouwer Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in*

cided to create a Task Force and on 21 April 1998, under strong pressure from the German delegation, it adopted a formal decision with regard to “fingerprinting of every foreign national entering the Schengen area illegally whose identity cannot be established with certainty on the basis of valid documents.”<sup>14</sup> In line with the ongoing technical preparations for launching the Eurodac database, the Schengen Group also called for the “retention of fingerprints for the purpose of informing the authorities in other Schengen States.”<sup>15</sup>

Under the current regulation, each Member States are obliged to take fingerprints of three categories of individuals; from every asylum seekers aged 14 or over, persons who were apprehended when crossing a Member State’s external border irregularly and persons who were found illegally present on the territory of a Member State.<sup>16</sup> The data which is recorded in respect of an asylum seeker are limited to the information on the sex of a person, the EU country of origin, their reference number, the place and date of the asylum application or the apprehension of the person, the date on which the fingerprints were taken and the date on which they were transmitted to the Central Unit.<sup>17</sup> As for asylum seekers, this information be kept for ten years unless they receive a residence permit or have left the EU.

For irregular cross-borderers, the information which is recorded is limited than for the asylum seekers and is only stored for two years, unless the individual has been issued a residence permit left the territory of the EU or acquired citizenship of a Member State and must solely be used for future comparisons.<sup>18</sup> Fingerprints from persons illegally present in one Member State is cannot be stored. This data can only be used for comparison and cannot be stored.<sup>19</sup>

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*the Schengen Information System* (n 5) 123.

<sup>14</sup> Aus (n 9).

<sup>15</sup> *ibid.*

<sup>16</sup> Brouwer *Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (n 5) 121.

<sup>17</sup> *ibid.*, 122.

<sup>18</sup> *ibid.*, 124.

<sup>19</sup> *ibid.*

The basic aim of the current Eurodac is twofold. First, it tries to prevent asylum seekers to apply for an asylum in several Member States, namely 'asylum shopping'. Second, it tries to avoid 'refugees in orbit', by sustaining asylum seekers to at least one Member State for an asylum application.<sup>20</sup> After all, the system has been based upon to allocate the asylum seekers to one Member State to where they have first entered, disregarding the preferences or wishes of the asylum seeker as a person seeking a right to reside or access to the labour market.<sup>21</sup>

So far, we try to take a look at the current system for Eurodac. Further, we will continue with focusing on the new regulation of Eurodac that will be applicable in 2015. Of particular importance, the key change in respect of introducing the use of database for law enforcement authorities and Europol on the basis of reducing terrorism and serious crime will be our main concern below. It is widely accepted in EU that exchange of information is essential to investigate transnational crimes.<sup>22</sup> Especially, in the case of biometrical information, this exchange would lead to an efficient way of identifying persons related to a criminal case. This being the case, what are the motives behind opening access for information related to only one targeted and a very vulnerable group, asylum seekers? Have the similar and existing databases proven that they are able to significantly reduce terrorism and serious crime? The further chapter will shortly demonstrate the background of this change and will seek to answer whether this can be seen as balanced measures to combat terrorism and serious crime or whether it neglect the human rights concerns in the field of migration and justice.

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<sup>20</sup> Brouwer *Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (n 5) 117.

<sup>21</sup> Guild, 'The Bitter Fruits of an EU Common Asylum Policy' (n 12) 75.

<sup>22</sup> Council, 'The Hague Programme: strengthening freedom, security and justice in the European Union' (Brussels, 13 December 2004).

## **B. The Re-Establishment of Eurodac**

### **1. Proposals Towards the New Eurodac Regulation**

The amended legislation on Eurodac is coming into force in July 2015 with a number of changes into the system. One of the most important and controversial change is the provision of opening access to Eurodac for national law enforcement authorities and Europol. However, it is crucial to note here that many proposals were made to extend the use of the database for law enforcement purposes since Eurodac was first established.

A commitment to make Eurodac accessible for law enforcement authorities was made by the Interior Minister of the EU's six largest Member States at their G6 meeting in Heiligendamm, Germany, on 22-23 March 2006.<sup>23</sup> Furthermore, a paper discussed on 2006 states the following concerning the use of Eurodac for law enforcement purposes:

“Frequently, asylum-seekers and foreigners who are staying in the EU unlawfully are involved in the preparation of terrorist crimes, as was shown not least in the investigations of suspects in the Madrid bombings and those of terrorist organizations in Germany and other Member States (for instance, two of the five accused in German proceedings against the terrorist group “Al Tawhid”, which prepared attacks against Jewish institutions in Berlin and Dusseldorf, were asylum-seekers)... Access to EURODAC can help provide the police and law enforcement authorities of the Member States with new investigative leads making an essential contribution to preventing or clearing up crimes.”<sup>24</sup>

With the same motives in the agenda, on September 2009, the European Commission adopted two proposals: one as a proposal for a Council Decision on requesting comparisons with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement

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<sup>23</sup> *HL Select Committee on European Union 40th Report* (HL Paper 2005-06).

<sup>24</sup> Council ‘Common 18-months Presidency Programme on Police and Customs Co-operation’, 1712/06, 22 December 2006, 6.

purposes and one as an amended proposal for a recast of the Eurodac regulation. With the entry into force of the Treaty Establishing on the Functioning of the European Union (i.e. Treaty of Lisbon), the September 2009 proposals lapsed. Consequently, on 11 October 2010, the European Commission presented another amended proposal for a recast of the Eurodac regulation, dropping the proposal for access to Eurodac for law enforcement purposes. However, this withdrawal led the ministers of justice and home affairs “voice their disappointment that the provision for law enforcement access to the Eurodac data had been omitted from the latest Commission proposal”<sup>25</sup>

The latest stage of the amendments leading towards to law enforcement access was on May 2012 when the European Commission re-enacted the provisions allowing national law enforcement authorities and Europol to access to Eurodac in order to prevent, detect and investigate terrorist offences and other serious crimes, enabling the European agency for the management of large scale information technology systems in the area of freedom, security and justice to supervise Eurodac data. The European Commission explained this new proposal on the basis of since 2010 it has become clear that “including law enforcement access for Eurodac is needed as part of a balanced deal on the negotiations of the Common European Asylum System package”<sup>26</sup> Consequently, in June 2013, this proposal was adopted by the European Council and will be applicable in 2015.

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<sup>25</sup> *Justice and Home Affairs 3043rd meeting* (Press Release 15848/10 2010), 9.

<sup>26</sup> Commission, ‘Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘EURODAC’ for the comparison of fingerprints for the effective application of Regulation (EU) No [...] (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person) and to request comparisons with EURODAC data by Member States’ law enforcement authorities and Europol for law enforcement purposes and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (Recast version)’,(Recast version of Eurodac Regulation), COM (2012)254 final, 30 May 2012, 3.

## **2. What are the Motives behind Allowing National Law Enforcement Authorities and Europol Access to Eurodac?**

An analysis of enabling Eurodac for law enforcement purposes can better be understood with a result of different factors. In a more general picture, the initiative to use databases extensively in EU has its roots for the immigration and border controls.<sup>27</sup> With the impacts of the attacks in New York, Madrid and London, the key concern to respond the terrorist threats and strengthen the security especially revolved around enhancing the data surveillance and information exchange. As an example, following the attacks in New York, the Council Action Plan on Combating Terrorism made several references to strengthening control and surveillance.<sup>28</sup> Although this Action Plan only referred to inclusions of biometric in identity cards and travel documents and the establishment of Visa Information System and SIS II, it illustrates the anxiety to strengthening of surveillance. This anxiety later being reflected in the Hague Programme, where the Council underlined the need to examine “how to maximize the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border control”.<sup>29</sup>

The driving force behind this initiative was also explained with the emerging new technologies on storing and capturing the data in the new digital age.<sup>30</sup> It has been argued that, leaning back to the trust in information technology, new ideas and proposals to allow public authorities to gather, store, process and exchange huge amount of personal data are being put forward frequently.<sup>31</sup> This new policy on improving the exchange

<sup>27</sup> Cian C. Murphy, *EU Counter-Terrorism Law Pre-Emption and the Rule of Law* (Hart Publishing 2012) 147.

<sup>28</sup> Council, ‘EU Action Plan on combating terrorism’, (Brussels, 9 March 2007) 10.

<sup>29</sup> Council, ‘The Hague Programme: strengthening freedom, security and justice in the European Union’ (n 22).

<sup>30</sup> Florian Geyer, ‘Taking Stocks: Databases and Systems of Information Exchange in the Area of Freedom, Security and Justice’ (May 2008) CEPS Challenge Programme < [http://aei.pitt.edu/43185/1/LSE\\_No\\_56\\_Dataveillance.pdf](http://aei.pitt.edu/43185/1/LSE_No_56_Dataveillance.pdf) > accessed on 12 April 2014, 1.

<sup>31</sup> *ibid.*

of information has been voiced as a starting point of a new information age in EU.<sup>32</sup> This policy first can be observed in the Hague Programme in which the principle of availability was introduced, dictating for information flow through the EU.<sup>33</sup> Basically, this principle entails fast and direct access for any law enforcement authority to necessary information held in any other Member State.<sup>34</sup> Considering for our subject, it is likely to say that this principle runs counter to the data protection principle of limiting the use of data for purposes other than the specified purpose for which data was collected in the first place. However, it seems that the reversal is held in the Stockholm Programme in which the exchange of information stated even more powerful.<sup>35</sup>

Against this background, the Commission defended opening Eurodac for law enforcement authorities – completely in line with the Hague Programme- on the basis of its necessity to prevent, detect and investigate terrorism and other serious criminal offences.<sup>36</sup> In general, irrespective of the nature and the original aim of the Eurodac, the extensive exchange of information may deemed to be essential for tracking the suspected criminals or terrorist and investigating transnational crimes. Especially, as biometric data relies on the permanent physical features of the human body, such data is the one that law enforcement authorities are eager to capture since it is very promising to identify the persons related to a

<sup>32</sup> Michiel Besters and Frans W. A. Brom, 'Greedy Information Technology; The Digitalization of the European Migration Policy', *Eur. J. Migration & L*, (2010) 12 455-456.

<sup>33</sup> This principle of availability should be distinguished from the principle of interoperability. Whereas the former is focused on the exchange of available information between different national authorities for law enforcement purposes only, the latter is focused on interlinking of different databases. See; Evelien Brouwer, 'Data Surveillance and Border Control in the EU: Balancing Efficiency and Legal Protection', 137-154, 137 in Thierry Balzacq and Sergio Carrera (eds.), *Security Versus Freedom? A Challenge for Europe's Future* (Ashgate 2006).

<sup>34</sup> Geyer (30) 2.

<sup>35</sup> Maria Tzanou 'The EU as an emerging 'Surveillance Society': The function creep case study and challenges to privacy and data protection', (2010) 4 *Vienna Online J. on Int'l Const. L.* 407, 411.

<sup>36</sup> Commission 'Proposal for a Council Decision on requesting comparisons with EURO-DAC data by Member States' law enforcement authorities and Europol for law enforcement purposes', COM (2009) 344, 10 September 2009, Preamble 2 and Article 1.

criminal case. However, there are certain facts to consider as regards the law enforcement authorities' access to Eurodac.

First of all, in a general picture, a query by the law enforcement authorities and Europol is justified under the amended regulation on the basis of combating organised crime and terrorism, irrespective of individuals with real or suspected behaviour from the past and with clean criminal records. What is more severe is the fact that the database consists of biometrics data of a certain group of people. But, how high is the risk that asylum seekers will commit terrorism or serious crime? If this cannot be proved, then one cannot advocate that taking their biometric data is more necessary than non-asylum seekers. Are there any concrete facts that asylum seekers should be treated different from any others for law enforcement purposes?

Data on criminal records and asylum applications are collected for particularly different purposes. And yet, a general presumption that asylum seekers are more likely to commit terrorist and serious offences than any other part of the group is too narrow to account for. Along the same line, European Data Protection Supervisor (i.e. EDPS), an independent supervisory whose primary objective is to ensure that the European institutions and bodies respect their data protection obligations as well as advising them, emphasised the necessity for a proper justification. The EPDS also drew the attention to the fact that reasons why information of asylum seekers should be accessible whereas similar information is not available on any other group in society are not given by the European Commission.<sup>37</sup>

An equal observation was also made by the European Court of Justice (i.e. ECJ) when dealing with a centralised German database containing certain personal data relating to both EU citizens and non-EU citizens.<sup>38</sup> The information contained in this database were used for the purposes of application of the legislation relating to right to residence, statistics as well as for the purpose offight against crime. A similar da-

<sup>37</sup> EDPS, 'Opinion on the proposal of law enforcement access to Eurodac', OJ C 92/1, para. 31

<sup>38</sup> C-524/06 Huber v. Germany ECLI:EU:C:2008:724.

tabase for German nationals also did not exist. Here, the ECJ held that the systematic processing of personal data related to other Member State nationals for the purposes of fight against crime constituted a discrimination on the ground of nationality which is prohibited under Article 12 of Treaty Establishing the European Community.<sup>39</sup> Even though this case was decided for the processing of personal data of EU citizens, it underlies the fact that if a general processing is important for the fight against crime, it should include everyone living within a particular country regardless of his or her nationality.<sup>40</sup>

Again departing from the fight against terrorism, the European Commission defended granting law enforcement authorities access to Eurodac based on the effectiveness and costs of harmonizing and integrating databases. Arguments for a degree of so-called interoperability between different databases reflects the European Commission's position of granting such access on the basis of productivity and reduce on the costs. In its own word, the European Commission conceives interoperability as a "technical rather than a legal or political concept".<sup>41</sup> So, can information be used only because it exists and new technologies permit their exchange? To answer in the affirmative, one need to think that opening the existing EU central databases for law enforcement purposes is also a political question. This is because much criticism has been given the European Commission's trust to technology, neglecting the creation of multipurpose surveillance systems, creating an erosion on fundamental rights and undermining the position of asylum seekers and illegal migrants. Before further exploring arguments on a human rights perspective, in order to address the issue of interoperability we should consider whether similar databases have proven to be cost efficient, or

<sup>39</sup> *ibid*, para. 80.

<sup>40</sup> That is not to say that such a system establishing a database for the fight against terrorism and crime and containing information on every nationals on country is not subject to the examination in regards with fundamental human rights. This is also a lengthy issue to discuss, however, it is unnecessary here to devote too much space to it. My aim here is to emphasize the non-discriminatory nature of databases contains information on a particular group of people regardless of their past or suspected criminal behaviour.

<sup>41</sup> Commission 'Improving efficiency and interoperability of large-scale databases in the field of justice, Freedom and Security' MEMO/05/440, 24 November 2005.

have they demonstrated that they are able to significantly reduce terrorism and serious crime.

So as to measure the effectiveness of using databases similar to Eurodac for the law enforcement purposes, we take the US-VISIT Programme as an example. This programme was developed aftermath of terrorist attacks in US in 2001 for collecting massive amounts of biometric data from the visitors of US and therefore law enforcement agencies was allowed to access to the system.<sup>42</sup> From the time the programme was first deployed in 2004 to 2008, biometrics were collected from 113 million individuals and 1.800 criminals or immigration violators were detected.<sup>43</sup> Throughout the year 2009, this programme cost close to \$2 billion. Therefore, each suspect stopped at the border cost over \$1 million and somewhat demonstrating a disappointing result. And hence, the programme was regarded as being very expensive project without any security gain.<sup>44</sup> Given the experiment of this programme, it was argued that expensive projects involving massive data collection, biometrics etc. without any certain results should only be contemplated if there are clear evidence that they are central to implementing EU law.<sup>45</sup> Returning back to our discussion on Eurodac, it is important not to lose sight of the fact that not only the effectiveness of the system, but also its impacts on fundamental rights of the asylum seekers must be assessed.

## **II. Human Rights Infringements**

Under the amended regulation, taking fingerprints of asylum seekers and illegal migrants for the purposes law enforcement directly and specifically affects private life. Furthermore, this system also falls under the scope of right to protection of personal data and therefore necessarily has to be compatible with the data protection requirements. However,

<sup>42</sup> Besters and Brom (n 32) 468.

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> D. Bigo, S. Carrera, and E. Guild, 'What future for the area of freedom, security and justice? Recommendations on EU migration and borders policies in a globalising world', (March 2008) CEPS Policy Brief <[www.ceps.eu](http://www.ceps.eu)>, accessed on 12 April 2014, 2.

this regulation raises doubts in respect of its compatibility with right to respect private life, right to protection of personal data and thus creates the potential stigmatisation asylum seekers and illegal migrants<sup>46</sup>.

To have a better understanding on the human right infringements concerns over the right to private life and protection of personal data, Article 7 of the Charter of the Fundamental Rights (i.e. the Charter) and Article 8 of the Charter of the Fundamental must be considered. Moreover, the amended regulation refers to the Directive 95/46/EC on the protection of individuals with regard to the processing and personal data and Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. To support the argument on the incompatibility of the amended regulation, one should also look to the right to respect for private life protected under the Article 8 of the European Convention of Human Rights (i.e. the Convention). Moreover, the introduced change on purpose in question also runs counter to the prohibition of discrimination laid down under the Article 14 of the Convention.<sup>47</sup>

### **A. Right to Respect for Private Life and Protection of Personal Data**

The interference caused by requiring the registration of fingerprints of asylum seekers and thus by enabling access to these information constitutes interference with the right to respect for private life protected under the Article 7 of the Charter and right to protection of personal data protected under the Article 8 of the Charter. Therefore, any interfer-

<sup>46</sup> The current Eurodac Regulation has also been criticised as being incompatible with the data protection requirements and right to respect for private life. For more information see; Elspeth Guild, 'Seeking Asylum: Storm Clouds Between International Commitments and EU Legislative Measures' (2004) 29 ELR 198.

<sup>47</sup> Suffice it to say that the amended regulation has also been criticised as breaching other fundamental human rights such as right to asylum and right to protection against torture and inhuman treatment. UNHR, 'An efficient and protective Eurodac' (November 2012) < <http://www.unhcr.org/50adf9749.html> > accessed on 12 April 2014; Standing Committee of Experts on International Immigration, Refugee and Criminal Law, 'Note on the Proposal for a Regulation on the Establishment of Eurodac' (10 October 2012).

ence with the rights protected under these articles must be justified. In this regard, Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law, respect their essence and, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Under the new amended regulation, the Commission reiterates the justification criteria. It therefore certifies that as far as the proportionality requirement concerned, Eurodac be queried by law enforcement authorities when there is an overriding public security concern and that is also necessary to ensure the public safety. Here, a threshold of several crimes for which law enforcement authorities can access to Eurodac is also included. In this respect, the amended regulation refers to several crimes also mentioned in other documents on international police and judicial co-operation, such as the European Arrest Warrant and the European Evidence Warrant.<sup>48</sup>

However, a closer look at the amended regulation will show that it is not compatible with the Charter. As for the question of whether the interference satisfies an objective of general interest concerned, it is doubtful that widening the access to Eurodac for law enforcement purposes can be considered as such. It is apparent from the case-law of ECJ that the fight against terrorism and serious crime in order to maintain international peace and security constitutes an objective of general interest.<sup>49</sup> However, the picture is different in the case of Eurodac. There are not enough evidences to make a clear link between terrorism and serious crime on one hand and asylum seekers on the other.<sup>50</sup>

<sup>48</sup> Commission, 'Recast version of Eurodac Regulation' (n 26) Preamble 8-10.

<sup>49</sup> Joined Cases C293/12 and C594/12 *Digital Rights Ireland v. The Minister for Communications, Marine and Natural Resources and Others* EU:C:2014:238, para.42.

<sup>50</sup> *Guild* argues that the relationship between the threat of terror and asylum seekers is indirect, as a result of a displacement of linkages made at the political level. Elspeth Guild, 'International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001' (2003) *European Foreign Affairs Review*, 331.

Even if one assumes that the fight against terrorism and serious crime is satisfactory as an objective general interest, the question remains whether it complies with the requirement of necessity and proportionality. The assessment of compliance with these requirements depends on a number of factors; including the area concerned, the nature of the right at issue protected under the Charter, the nature and seriousness of the interference and the object pursued by the interference.<sup>51</sup> In the case of Eurodac, although similar data is not available for all other groups of the society, the Commission has not given any justification for a difference in treatment between asylum seekers and other individuals.<sup>52</sup> Therefore the EDPS also argues that there already exist a number of legal instruments which permit that one Member State consults fingerprints data held by another Member State.<sup>53</sup> The EDPS suggests to carry out an evaluation so as to see whether existing instruments would not be sufficient before creating a new instrument. Moreover, the proportionality requirement necessitates an assessment on whether the extent of the limitation is outweighed by the achievement of the aim. The EDPS underlines the fact that asylum seekers constitute a vulnerable group and their precarious position must be taken into account when assessing both requirements.<sup>54</sup> The amended regulation was also strongly opposed by the Meijers Committee, which is consist of experts on international immigration, refugee and criminal law, on the basis of the Commission failing to show any evidence in order to prove that widening the access to Eurodac is necessary.<sup>55</sup>

The same conclusion can be made when taken the Article 8 of the Convention and jurisprudence of the European Court of Human Rights

<sup>51</sup> Digital Rights Ireland v. The Minister for Communications, Marine and Natural Resources and Others EU (n 49), para. 46.

<sup>52</sup> EDPS, 'Opinion of the European Data Protection Supervisor on the amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) No [... / ...] [.....] (Recast version)', (5 September 2012). 9

<sup>53</sup> *ibid*, 7.

<sup>54</sup> *ibid*, 9.

<sup>55</sup> Standing Committee of Experts on International Immigration, Refugee and Criminal Law (n 47) 2.

(i.e. the Court). In *S and Marper v. the United Kingdom*, the Court dealt with taking biometrics from individuals who having been suspected of committing crime but not convicted and storage of this information in police database.<sup>56</sup> In its ruling, the Court considered the mere storage of data such as fingerprints, cellular samples and DNA profiles as an interference with right to privacy, irrespective of their subsequent use.<sup>57</sup> The storage of these data is “capable of affecting his or her private life and retention of this information without the consent of the individual cannot be regarded as neutral or insignificant”.<sup>58</sup> More importantly, the Court took the view that the storage of such data conveys by itself a risk of stigmatisation, stemming from the fact that the applicants who were not convicted of any offence and were entitled to the presumption of innocence, were treated in the same way as convicted persons.<sup>59</sup>

In light of the above, the amended regulation introducing the provision of enabling access to Eurodac for law enforcement purposes is unlikely to comply with the requirement of necessity and proportionality. Eurodac is a Europe-wide database including fingerprints of asylum seekers irrespective of their past or present criminal behaviour. The dimension of the database is very wide and this must be taken into account when dealing with its compliance with these requirements. Therefore, because they fled from persecution asylum seekers, from whom the data had been collected, are a highly vulnerable group. Hence, it is unlikely to consider that a fair balance has been struck between the public interest and the protection of rights of the this group of individuals since the new system will likely to lead an unjustified unequal treatment of persons.<sup>60</sup>

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<sup>56</sup> *S and Marper v. the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR 4 December 2008).

<sup>57</sup> *ibid*, para. 67.

<sup>58</sup> *ibid*, para. 84.

<sup>59</sup> *ibid*, para. 122.

<sup>60</sup> Standing Committee of Experts on International Immigration, Refugee and Criminal Law (47) 2.

## **B. Principle Of Purpose Limitation And Risk Of Function Creep**

Data protection requires limits of collecting and storing of personal data. Purpose limitation is one of the key principles of data protection and it is also the centre of the arguments raised against the key change of the system. In general, this principle prohibits the collection of personal data for unknown or unspecified purposes. Also, it prohibits the use of the data for purposes other than the specified purposes for which it was first collected for. Finally, it provides that data should not be retained any longer than necessary for the specified purpose.<sup>61</sup>

The purpose limitation is a starting point for considering the potential inconsistencies of the amended regulation with right to protection of personal data. The initial purpose behind the establishment of Eurodac was solely for the purpose of facilitating the Dublin system and thus determining the Member State responsible for examining the asylum application. It did not concerned with granting access to national law enforcement authorities and Europol. Therefore, the primary function of Eurodac was purely administrative.<sup>62</sup> Under the amended regulation, however, the access had been conferred for the law enforcement purposes is contrary to its original purpose. The data still will be collected for the purpose of examining asylum applications, but it would also be used for other purposes. This is a clear example of “function creep”, when information that has been collected for one limited purpose is gradually allowed to be used for other purposes.<sup>63</sup>

In its opinion, EDPS took a strong opposition for this approach and stated that just because the data is already collected, it should not be easily accepted that it can as well be used for purposes which might have a bigger impact on the life of individuals.<sup>64</sup> To support otherwise will lead to the question of whether or not the interest of EU outweighs the interest

<sup>61</sup> Brouwer *Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (n 5) 205.

<sup>62</sup> *ibid*, 143.

<sup>63</sup> Besters and Brom, (n 32) 455-464.

<sup>64</sup> EDPS (n 52) 7.

of asylum seekers and migrants.<sup>65</sup> By the same token, the Commissioner for Human Rights emphasized the purpose limitation principle when addressing the debates revolving around combating terrorism and the right to privacy in the information age. The Commissioner was reiterated that the purpose limitation principle requires that data collected for one specific purpose can only be used for another specific purpose, if the data could have been independently collected for that second purpose.<sup>66</sup>

### **C. Risk of Stigmatisation of Asylum Seekers and Illegal Migrants**

Asylum seekers are too often judged, assessed and viewed as evidence of various political systems, or despotic regimes who failed to safeguard basic rights of others.<sup>67</sup> They have been seen as images of a country that has broken the duty of protection towards its citizens.<sup>68</sup> And in particular for irregular migrants, the conduct of their arrivals are perceived as a threat to the cohesion of the nation.<sup>69</sup> The public opinion towards asylum seekers and illegal migrants, thus, have been prejudicially linked with terrorism and criminal behaviour. Instead of suppressing thus prejudice, the misperception of linking terrorism and criminal behaviour with asylum seekers likely to be fuelled because people registered in Eurodac without a criminal record might face more with being subject to criminal investigation than other members of the community whose fingerprints are neither collected nor stored. Hence, widespread concerns over stigmatising and causing discrimination against this group of individuals have been raised from different organisations.<sup>70</sup>

<sup>65</sup> Besters and Brom (n 32) 455-466.

<sup>66</sup> The Commissioner for Human Rights, 'Protecting the right to privacy in the fight against terrorism', (CommDH/IssuePaper), 2008(3).

<sup>67</sup> Claudia Tazreiter *Asylum Seekers and the State The Politics of Protection in a Security Conscious World* (Ashgate 2004) 213.

<sup>68</sup> Guild, 'International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001', 333.

<sup>69</sup> Tazreiter (n 67) 223.

<sup>70</sup> UNCHR (n 47); Standing Committee of Experts on International Immigration, Refugee and Criminal Law (n 47) 3.

Complainments on databases in which the link between the individual and serious crime asserted to be insufficient were also brought before the European Court of Human Rights. The Court therefore, condemned these databases and considered them as an unjustified unequal treatment. Pointing at the risks of stigmatisations, the Court stated that; “even if the retention of private data on a person cannot be equated with the voicing of suspicions, nonetheless, their perception that they are not being treated as innocent could be heightened by the fact that their data are dealt within the same way as convicted persons”<sup>71</sup>

By the same token, the German Federal Constitutional Court recognised such risk and limited the possibility to preventively screen Muslims suspected to be terrorist sleepers. According to the court, a general threat situation that existed after the terrorist attacks in New York in 11 September 2001 was not sufficient enough to justify this screening. In this regard, at least a concrete threat had to exist, which requires more than the mere assumption of a future threat.<sup>72</sup>

In light of the above, the use of fingerprints of asylum seekers for law enforcement purposes will lead more criminal cases brought before this particular group of individuals since a comparable databases for non-asylum seekers does not exist. This in turn fuel the misperception of linking terrorism and criminal behaviour with asylum and create a higher stigmatisation of asylum seekers. Human Rights Watch 2014 World Report, therefore, highlighted concerns over EU’s migration and asylum policies. The report states that “amid economic crisis and much contested austerity measures in many Member States, discrimination, racism and homophobia remained serious problems in EU Member States. Roma, migrants, and asylum seekers are particularly marginalized”<sup>73</sup> Little doubt exists that contrary to this report, widening the access to Eurodac will cause asylum seekers to be marginalized more than before.

<sup>71</sup> *S. and Marper v. the United Kingdom* (n 56), para. 112.

<sup>72</sup> Felix Müller and Tobias, ‘Report on the Bundesverfassungsgericht’s (Federal Constitutional Court) Jurisprudence in 2005/2006’ (2008) 9 German Law Journal 161, 178.

<sup>73</sup> Human Rights Watch World Report (2014) <<http://www.hrw.org/world-report/2014/country-chapters/european-union>> accessed on 12 April 2014.

## **Conclusion**

The amended Eurodac Regulation, which will come into force in 2015, introduces a very controversial provision on enabling access for national law enforcement authorities and Europol to Eurodac in which fingerprints of asylum seekers are stored. Granting this access was advocated by the Commission for the purpose of fight against terrorism and serious crime. However, the initial purpose behind establishing a fingerprint database was to facilitate the Dublin system and to determine the Member State responsible for processing asylum application. Therefore it aimed at preventing multiple asylum applications. Allowing access to Eurodac for law enforcement purposes suggests a new regime and a new assessment for the public safety in one hand and the fundamental rights of the asylum seekers on the other is needed.

Arguments on allowing access to Eurodac for law enforcement purposes and justifying this on the basis fight against terrorism and serious crime lacks evidence since concrete facts about why a specific group of individuals are being put under scrutiny have not been shown. Moreover, introduced provision is not compatible with right to privacy and protection of personal data. When assessing the proportionality and necessity requirements, the amended regulation does not take the precarious position of asylum seekers into account and therefore it is highly likely to say that the measure is disproportionate. Focusing only on this particular group of individuals without any clear link between asylum seekers and terrorism also will lead to stigmatization of them. Equally, the Court and the ECJ have condemned similar measures on the basis of unequal treatment of people without inefficient link between the target group and crime. Many other things can also be argued when the regulation comes into force. At the core of this new system, one should not lose the sight from the fact that the fundamental rights of individuals and of particular importance in the case of Eurodac a vulnerable group of individuals should not be omitted for the pursuit of security.

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