

## UNHCR COMMENTS

on the European Commission Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast) - COM (2016) 272

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These comments complement UNHCR’s overarching proposals for Europe as set out in: “Better Protecting Refugees in the EU and Globally”, UNHCR’s proposals to rebuild trust through better management, partnership and solidarity, of 05 December 2016<sup>1</sup>. The proposals focus on four elements: Engagement beyond EU borders, Preparedness, a well-managed asylum system and greater emphasis on integration.

The events of 2015 highlighted the need for a revitalized asylum system in the EU. In its overarching proposals UNHCR recommends that, in addition to ensuring access to territory is guaranteed and new arrivals are registered and received properly, a new asylum system would also allocate responsibility for asylum seekers fairly among EU Member States, and ensure that EU Member States are equipped to meet the task.

To complement and elaborate on these overarching proposals, UNHCR is setting out its position on the European Commission’s proposals to reform the CEAS in a series of detailed commentaries. This paper sets out UNHCR’s comments on the specific aspects of the EC’s proposal for a recast of the Eurodac Regulation. Specifically, UNHCR calls for the adoption of a common EU registration system to facilitate the orderly processing of arrivals, and access to protection, family reunion and security, both for arrivals and the Member States, as well as to help the monitoring functions of mandated EU agencies such as the proposed European Union Asylum Agency (EUAA). A common registration system could be built upon Eurodac and other relevant EU databases to improve data management and sharing, interoperability and establish a close link to case processing in line with applicable safeguards. This should be done, based on a comprehensive assessment of the suitability of the existing technical and policy instruments, to fully benefit from the cost-effectiveness the common registration system would offer. The common registration system would also serve as the logical tool to record the making, registering and lodging of applications for international protection. UNHCR regrets that the establishment and effective use of a common registration system is not seen by the EU as a priority for 2017, and expresses hope that this position is reconsidered.

<sup>1</sup> UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR’s proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: <http://www.refworld.org/docid/58385d4e4.html>

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# 1

## INTRODUCTION

### Legal Framework

The Eurodac database was created in 2000 by Regulation (EC) 2725/2000 (hereafter Eurodac Regulation) to facilitate the comparison of fingerprints for the application of the Dublin Convention. Together with the Dublin Regulation, they form the so-called Dublin System. In June 2013, the Eurodac Regulation was amended to address the shortcomings identified by the European Commission (Commission) in its report on the evaluation of the Dublin System<sup>2</sup> and to provide for law enforcement access to the database for the prevention, detection and investigation of serious crimes and terrorist offences.

In 2015, as a follow-up to the European Agenda on Migration,<sup>3</sup> the Commission issued a Staff Working Document on the Implementation of the Eurodac Regulation as regards the obligation to take fingerprints.<sup>4</sup> The Staff Working Document notes the divergent practices of Member States to facilitate the collection of fingerprints, including different approaches towards the use of detention and coercion in case of non-compliance.<sup>5</sup> To ensure that the Member States fulfill their obligations under the Eurodac Regulation, the Staff Working Document recommends specific practices in the area and offers guidance on a common approach.<sup>6</sup>

On 4 May 2016, the Commission tabled proposals<sup>7</sup> to recast the Dublin and Eurodac Regulations. The proposal for a recast of the Eurodac Regulation (hereafter 'proposal') notes that the database has sufficiently served its original purpose, which is to facilitate the implementation of the Dublin Regulation. Nevertheless, the Commission proposes to extend the scope of Eurodac to support the control of irregular migration, address secondary movements within the EU, and facilitate the identification, including for the purpose of removal and repatriation, of third country nationals who have entered or are staying in the EU irregularly.

To achieve this, a number of new provisions are introduced. Based on the proposal, Member States would be obliged to take the biometric data of persons covered by the Regulation and to impose the requirement to provide such data on them. In case of non-compliance, Member States would be allowed to apply administrative sanctions in accordance with their national law. The scope of data collected and stored would be significantly broader – further to fingerprints and information about the person's gender, the proposal sets forth the collection of additional biometric information (facial image) and personal details (including name, surname, nationality and place and date of birth) – and comparison and transmission of the data of all three categories of persons covered by the Regulation (i.e. applicants for international protection, irregular arrivals and over stayers) would be made. Whereas the current Eurodac Regulation strictly prohibits sharing personal information with a third country, international organization or a private entity, under the proposal, the identity of a person may be shared with third countries where a travel document to facilitate return is required. The proposal also allows eu-LISA to use real personal data instead of "dummy" data when testing the Eurodac system for diagnostics and repair, as well as the use of new technologies and techniques for the collection, storing and comparison of personal data sets.

<sup>2</sup> European Union: European Commission, *Report From the Commission to the European Parliament and the Council on the Evaluation of the Dublin System*, COM(2007) 299 final, 6 June 2007, available at: <http://www.refworld.org/docid/466e5a082.html>

<sup>3</sup> European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A European Agenda on Migration"*, COM(2015) 240 final, 13 May 2015, available at: <http://www.refworld.org/docid/555c861f4.html>

<sup>4</sup> European Commission, *Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, COM(2015) 150 final, 27 May 2015, available at: <http://data.consilium.europa.eu/doc/document/ST-9346-2015-INIT/en/pdf>

<sup>5</sup> *Idem*, page 2.

<sup>6</sup> *Idem*, page 3.

<sup>7</sup> Proposal for a Regulation of the European Parliament and of the Council on the establishment of Eurodac for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) – COM (2016) 272, 4 May 2016, available at: <http://goo.gl/pXakrZ> and proposal for a Regulation of the European Parliament and of the Council 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), 4 May 2016, available at: <http://goo.gl/aJ7w0g>

## UNHCR's Mandate

The United Nations High Commissioner for Refugees (UNHCR) is mandated by the General Assembly of the United Nations (Resolution 428 (V), December 1950) to provide international protection to refugees and together with Governments, seek permanent solutions to the problems of refugees.<sup>8</sup> Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>9</sup> whereas Article 35 of the Convention Relating to the Status of Refugees (hereafter "1951 Refugee Convention")<sup>10</sup> and Article II of the 1967 Protocol relating to the Status of Refugees (hereinafter "1967 Protocol")<sup>11</sup> oblige States Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Refugee Convention and 1967 Protocol.

UNHCR's supervisory responsibility is reflected in European Union law, including pursuant to Article 78 (1) of the Treaty of the Functioning of the European Union,<sup>12</sup> which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Refugee Convention. This role is reaffirmed in Declaration 17 to the Treaty of Amsterdam, which provides that "*consultations shall be established with the United Nations High Commissioner for Refugees...on matters relating to asylum policy.*"<sup>13</sup> In addition to refugees, as defined by the 1951 Refugee Convention, persons of concern to UNHCR include people who are entitled to subsidiary forms of international protection under other international and regional treaties.

UNHCR's mandate encompasses individuals who meet the refugee criteria under the 1951 Convention and 1967 Protocol, and has been broadened through successive UNGA and UN Economic and Social Council resolutions.<sup>14</sup> UNHCR's competence extends to individuals who are entitled to subsidiary protection within the meaning of Article 15 of the EU Qualification Directive.<sup>15</sup>

In line with its mandate, UNHCR has consistently called for protection safeguards in European asylum, border and migration management legislation, policies and procedures to guarantee that the rights of refugees and persons seeking international protection are respected, and that they are identified and given access to EU territory, as well as to fair and efficient asylum procedures.

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<sup>8</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paragraph 1, available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>9</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paragraph 8(a), available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>10</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951 (hereinafter "1951 Refugee Convention"), United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

<sup>11</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967 (hereinafter "1967 Protocol"), United Nations Treaty Series No. 8791, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

<sup>12</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/52303e8d4.html>.

<sup>13</sup> European Union, *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities*, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997], available at: <http://www.refworld.org/docid/51c009ec4.html>.

<sup>14</sup> UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, p. 3, <http://www.refworld.org/docid/5268c9474.html>.

<sup>15</sup> Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>.

## General observations on the recast proposal

UNHCR notes that the proposal provides for the transformation of Eurodac into a wider migration database, aimed at enhancing the control and prevention of irregular movements to and within the EU, as well as the identification and documentation of persons for return and readmission purposes. UNHCR acknowledges the challenges outlined by the Commission with regard to ensuring the systematic fingerprinting of applicants for international protection and migrants at the EU external borders, in particular, in view of the rise in the number of irregular arrivals in 2015. In absence of a common registration system for arrivals to the EU, different types of data are recorded by Member States; at times, data and, in particular, fingerprints are not collected or uploaded to Eurodac, and individuals are not registered at all sometimes to avoid potential Dublin take-charge and take-back requests. Security checks are not carried out in a consistent manner and copies of available personal identification or other relevant documents are not retained. By contrast, some Member States collect personal data, including fingerprints, multiple times in parallel or successive registration processes, which are not interconnected. This results in an inefficient use of resources and may potentially lead to fraud going undetected owing to the lack of interoperability. In addition, there has been a considerable lack of coordination among concerned actors both at the national as well as EU levels. As a result, significant gaps in data persist. The European Commission, which is mandated to monitor the effective implementation of EU legislation, has not taken measures to address these shortcomings. In UNHCR's view, the proposal does not adequately address these gaps.

UNHCR supports solutions for a more efficient management of the situation in Europe and considers that the purpose and scope of Eurodac could be extended in the context of setting up a common registration system for all irregular arrivals, including children; aimed at ensuring orderly processing, access to protection and security both for the arrivals and the Member States. The new system would need to go beyond what the existing Eurodac database offers, by enabling improved data sharing, interoperability in line with applicable safeguards and standards, and thorough security checks. In UNHCR's view, it would also serve as the logical tool for border guard and police authorities to record the making and the registering of applications for international protection, and also for the subsequent lodging of applications by the competent asylum authorities, in line with the provisions of the proposal for the adoption of an Asylum Procedures Regulation.<sup>16</sup> Accordingly, UNHCR welcomes the provisions of **proposed recast Articles 10(3) and 13(7)**, which allow Member State experts deployed by Frontex and EASO to take and transmit fingerprints to Eurodac within the confines of their respective mandates. Effective interoperability would also have to allow for the possibility to share the information collected with other relevant databases, including the SIS II, to avoid the need to obtain personal data multiple times, as well as to perform cross-checks.

The development of such a system should, however, stem from a comprehensive assessment of the suitability of the existing technical and policy instruments as well as the consideration of innovative approaches. This should be followed by the selection of the best-suited solution, which would, in the long-term, allow for the orderly and fair registration of arrivals and asylum applications in a common EU system. In UNHCR's view, the proposal is not based on such a comprehensive suitability assessment and subsequent selection of the best-suited solution. In addition, it does not clarify how the existing difficulties with regard to the collection and administration of biometric data would be addressed to enable the Member States to obtain and manage a significantly greater amount of data, and to ensure its accuracy.

UNHCR also notes that the proposal does not consistently refer to stateless persons, or provide consideration for their specific situation. While the definition of a third-country national in Article 3 of the proposal may cover stateless persons, the explicit mention of stateless persons throughout most of the text correctly indicates their specific situation, namely not having a country of nationality which could provide protection and to which they may be able to return. UNHCR recommends that the definition of a stateless person as per Article 1 of the 1954 Convention Relating to the Status of Stateless Persons<sup>17</sup> be incorporated under Article 3 of the proposal.

In line with this, UNHCR encourages the Council of the European Union and the European Parliament to assess the measures outlined in the proposal with a view to ensuring that they contribute towards a harmonized Common European Asylum System (CEAS), built on high and uniform standards.

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<sup>16</sup> Article 5 of the European Commission proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 13 July 2016, available at: <http://goo.gl/IFVQd7>

<sup>17</sup> UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <http://www.refworld.org/docid/3ae6b3840.html>.

Additionally, UNHCR would like to offer a number of recommendations that aim to contribute to ensuring that the reform of the CEAS is undertaken in a manner that is fully compliant with Member States' international protection responsibilities.

These recommendations build on UNHCR's observations on previous amendments to the Eurodac Regulation, proposed by the Commission in 2009 and 2012,<sup>18</sup> and are read in conjunction with UNHCR's comments on the proposed recast of the Dublin Regulation, issued separately.<sup>19</sup>

## 2

### DATA COLLECTION

#### Obligation to take biometric data and sanctions for non-compliance

UNHCR notes that **proposed recast Article 2** obliges Member States to take the fingerprints and a facial image of persons covered by the Regulation, including children aged 6 years and over, and to impose the requirement on them to provide such data. In instances of non-compliance, the proposal allows the Member States to introduce administrative sanctions, in accordance with their national law.

While it is stipulated that these sanctions shall be "effective, proportionate and dissuasive" (**proposed recast Article 2(3)**), UNHCR considers that an unwarranted margin of discretion is left to the Member States to decide on the exact measures to be applied. The divergent practices of Member States in instances of non-compliance have been confirmed by the Commission – some Member States permit the use of detention for the purpose of collecting fingerprints, some allow coercion, while others employ neither.<sup>20</sup> UNHCR acknowledges that claimants for international protection have obligations and a duty to cooperate, and is not opposed to administrative sanctions for non-compliance. In UNHCR's view, to ensure harmonized practice in full respect of fundamental rights, Article 2(3) should provide an exhaustive list of administrative sanctions for non-compliance, which would constitute an effective, proportionate and dissuasive incentive for persons to provide their biometric data. UNHCR reiterates that, owing to the hardship which it involves, detention should normally be avoided. As mentioned in the proposal, detention should only be used as a measure of last resort in order to determine or verify the identity of claimant and not merely as a sanction for non-compliance. In addition, if necessary, detention may be resorted to only on the grounds prescribed by law to verify identity; to determine the elements on which the claim for international protection is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.<sup>21</sup> Importantly, UNHCR reiterates its position that *children* should not be detained for immigration related purposes, irrespective

<sup>18</sup> UN High Commissioner for Refugees (UNHCR), *An efficient and protective Eurodac – UNHCR comments on the Commission's 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)*, November 2012, available at: <http://www.refworld.org/docid/50ad01b72.html> and *UNHCR comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council 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 ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)*, 18 March 2009, available at: <http://www.refworld.org/docid/49c0ca922.html>

<sup>19</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council 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) – COM (2016) 270, 22 December 2016*, available at: <http://www.refworld.org/docid/585cdb094.html>

<sup>20</sup> European Commission, *Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, COM(2015) 150 final, 27 May 2015, available at: <http://data.consilium.europa.eu/doc/document/ST-9346-2015-INIT/en/pdf>

<sup>21</sup> ExCom, *Detention of Refugees and Asylum-Seekers*, 13 October 1986. No. 44 (XXXVII) – 1986, available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>



of their legal/migratory status or that of their parents.<sup>22</sup> Instead, appropriate care arrangements and alternatives to detention, including arrangements which may involve restrictions on movement in an appropriate child protection setting, need to be in place.<sup>23</sup>

UNHCR supports the registration of children in a common EU system as it could, if accompanied by other measures, have a positive impact on child protection outcomes and help States to detect and protect child victims of trafficking as well as support the tracing of unaccompanied children, including those who go missing, abscond or otherwise disappear. As with all actions concerning children, the principle of the best interests of the child should always be a primary consideration in the collection of the biometric and other personal data of children. In this regard, UNHCR recommends that further references are included in the text, in particular in **proposed recast Article 1**, to ensure that facilitating family tracing and unity and/or assistance in locating those who may disappear and/or otherwise be at risk, including victims of trafficking, remains a primary objective for the registration of children, in line with the data protection principles of legitimate purpose, necessity and proportionality.

In addition, while welcoming **proposed recast Article 2(4)** prohibiting the use of administrative sanctions where vulnerable persons or children cannot provide biometric data due to, for example, the condition of their fingertips or face, UNHCR recommends the inclusion of an explicit statement in **proposed recast Article 2(4)** prohibiting the detention of children in the context of refusal to comply with providing biometric data. Furthermore, UNHCR suggests that **proposed recast Article 2(4)** be amended to state that in the case of other persons, attempts are first made to obtain compliance through counselling prior to applying any administrative sanctions.

In the specific situation where a person is physically unable to provide specific biometric data, for example fingerprints, the collection of alternative biometric data, may be considered. However, the introduction of additional types of accurate biometric data in Eurodac should only be done on the basis of a data protection impact assessment, conducted in line with Article 35 of the EU Data Protection Regulation,<sup>24</sup> as well as a feasibility study of the expected effectiveness and the associated costs. Further, UNHCR also highlights the importance of steps being taken to ensure that children and vulnerable persons are not further traumatized during the collection of biometric data.

As also highlighted by the European Data Protection Supervisor (EDPS),<sup>25</sup> UNHCR calls for the avoidance of mental and physical coercion, and any use of force, in all instances. In UNHCR's view, compliance with the obligation to provide biometric and personal data should instead be primarily obtained through provision of information and effective counseling.

Given that, under the current and proposed EU legal framework, the taking of fingerprints is required to facilitate access to the asylum procedure, appropriate counselling, support and information must be provided to any persons unwilling to provide specific biometric data. Trauma, fear and cultural misunderstandings may lead to non-co-operation and these factors need to be addressed through expert counselling to enable persons to develop an understanding of why biometric data is collected and the importance of compliance. Where children are concerned, age-appropriate techniques must be employed to help children understand the purpose of collecting biometric data. Refusal or inability to provide specific biometric data should not result in violations of fundamental rights such as the prohibition of *refoulement*, torture, inhuman and degrading treatment or punishment, and unlawful, disproportionate and arbitrary limitations to the right to liberty and security of a person.

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<sup>22</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <http://www.refworld.org/docid/5885c2434.html>.

<sup>23</sup> UNHCR acknowledges and welcomes the existing State practice in providing care arrangements and alternatives to detention for children and families and has compiled a number of examples in its *Options Paper 1*. See UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, available at: <http://www.refworld.org/docid/5523e8d94.html>

<sup>24</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) available at: <http://goo.gl/u0gUcE>

<sup>25</sup> European Data Protection Supervisor, "Opinion on the First reform package of the Common European Asylum System", 21 September 2016, p. 14, available at: <https://goo.gl/KOMIF5>

## RECOMMENDATIONS:

UNHCR reiterates that the collection and processing of biometric and other personal data must be carried out in an age, gender and culture-sensitive manner, respecting the necessary fundamental rights safeguards.

UNHCR calls for Article 2(3) to provide an exhaustive list of permissible administrative sanctions, which must be lawful, proportionate and compliant with relevant fundamental rights provisions, including Articles 1, 3, 4, 6 and 7 of the Charter of Fundamental Rights of the EU.

UNHCR reiterates that detention should normally be avoided and only be used as a measure of last resort in order to determine or verify the identity of claimant and not merely as a sanction for non-compliance. UNHCR reiterates its position that *children* should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents. Accordingly, it calls for Article 2(4) to introduce a prohibition on the use of detention against children in the context of refusal to comply. UNHCR further calls for an explicit step to be included whereby counselling is attempted to obtain compliance before the use of any administrative sanctions against other persons.

UNHCR recommends that Article 2(3) explicitly state that use of mental and physical coercion should be avoided, and that compliance with the requirement to provide biometric data should be obtained following effective counselling and information provision, respecting the fundamental rights of the persons concerned. Any use of force should be explicitly prohibited.

The collection of alternative biometric data may only be considered for applicants that are unable to provide fingerprints, and should only be introduced after a data protection impact assessment is conducted, in line with Article 35 of the EU Data Protection Regulation, and a feasibility study of the expected effectiveness and associated costs.

## Extension of the scope of data collected and related risks

Further to fingerprints and information on the person's gender as per the current Eurodac Regulation, **proposed recast Article 12, Article 13(2) and Article 14(2)** set forth the collection, storage and transmission of additional biometric data – a facial image – and other personal details, such as the name, surname, name at birth, any previous names and aliases used, age, place and date of birth, nationality, type and number of identity or travel documents, as well as information specific to each of the three categories of persons covered by the proposal, including applicants for international protection.

## RECOMMENDATION:

UNHCR considers that said data should be complemented by information on family links and vulnerabilities, also enabling the authorities to trace and unite missing family members.

As noted by the European Union Agency for Fundamental Rights, instances of applicants for international protection altering their fingerprints to avoid being registered in Eurodac have been documented.<sup>26</sup> UNHCR is also concerned by the potential issues related to the quality and accuracy of the data recorded in Eurodac. Deficiencies in this regard have been observed, whereby fingerprints have been mistakenly linked to the wrong individual, in particular where the system is overloaded. This leads to incorrect “hits” and exposes persons to a risk of violation of their rights. UNHCR therefore stresses the need to consider the increased dangers associated with self-harming and potential errors in data credibility in view of the enlarged amount of information to be managed.

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<sup>26</sup> Fundamental Rights Agency of the European Union, “Fundamental Rights implications of the obligation to provide fingerprints for Eurodac”, available at <http://goo.gl/Aqa1Gz>



While **proposed recast Articles 37 (1) and 37 (3)** prohibit the sharing of personal data and the disclosure of information regarding the fact that an application for international protection has been made in a Member State with any third country, and Article 38(3) bans access to the Eurodac central system by a third country, UNHCR reiterates that if detailed personal information on applicants for international protection and refugees were to become inadvertently available to their countries of origin, their life, liberty or physical integrity, or that of their families or other associates, may be jeopardized. Therefore, UNHCR calls for safeguards to be put in place to prevent this, such as through industry standard encryption technology, access rights through security profiles and detailed standard operating procedures on the handling of confidential data.

UNHCR also considers that information obtained through Eurodac, in particular where it leads to “hits” which could result in a transfer of a person to another country, should be considered together with, and weighted against, all other available evidence concerning the identity of the individual.

#### RECOMMENDATION:

Should the adopted proposal require the recording of a person’s nationality, UNHCR recommends that Article 12, Article 13(2) and Article 14(2) specify that both the claimed and the presumed nationality or statelessness be registered, where nationality cannot be conclusively determined.

## Right of access to, rectification and erasure of personal data

UNHCR regrets that **proposed recast Article 31** limits the right of access to, rectification and erasure of personal data of the individual. In particular, UNHCR is concerned by the removal of provisions on the right of any person to request that factually inaccurate data be corrected or that data recorded unlawfully be erased; on the obligation of the national supervisory authority to render assistance to persons in exercising their rights in this area; as well as on the right of any person to bring an action or a complaint concerning access to, rectification and erasure of their personal data. UNHCR emphasizes that all persons covered by the Regulation whose biometric and other personal data is collected and stored in the Eurodac database, must be granted the right to rebut false assumptions, to request the rectification or erasure of inaccurate or unlawfully obtained data, and to bring an action or a complaint before the competent authorities or courts.

#### RECOMMENDATION:

UNHCR calls for Article 31 to retain provisions on the right of any person to request that data, which are factually inaccurate be corrected, or that data recorded unlawfully be erased, on the obligation of the national supervisory authority to render assistance to persons in exercising their rights in this area, as well as on the right of any person to bring an action or a complaint concerning access to, rectification and erasure of their personal data before competent authorities or courts.

## Provision of information

UNHCR welcomes those provisions in the proposal which strengthen the existing obligation upon the Member States to provide information to persons covered by the Eurodac Regulation. This concerns the language the information is provided in, the sharing of the contact details of the data protection officer, information on the right to lodge a complaint to the supervisory authority, storage of data, access to data and completion of incomplete data, and restrictions on data processing. In particular, UNHCR welcomes the provisions of **proposed recast Article 2(2)** on standards for collecting biometric data from children, which stipulate that minors shall be informed in an age-appropriate manner using specifically designed materials, but notes that there are no provisions requiring the presence of a responsible adult, guardian or representative at the time they are informed or the biometrics are collected.

UNHCR notes, however, that **proposed recast Article 30(1)(c)** weakens the obligation upon Member States to provide information on the recipients of personal data by introducing the possibility to only share the “categories of recipients of data”. In addition, the proposal does not place an obligation on the Member States to provide information on the aims of the Dublin Regulation, on the fact that personal biometric data may be used for the purpose of prevention, detection and investigation of terrorist offences and serious crimes, administrative sanctions in case of non-compliance, as well as on advance data erasure and marking applicable (**proposed recast Article 30**). UNHCR also notes that, while **proposed recast Article 30(2)** stipulates that information to children shall be provided in an age-appropriate manner, it does not mandate that this be done by appropriately trained personnel and in child-friendly environments. A similar provision concerning provision of information to survivors of torture is also lacking.

### RECOMMENDATIONS:

UNHCR recommends that Article 30 be amended to ensure that persons are provided harmonized and updated information on the recipients of their biometric and other personal data, on the aims of the Dublin Regulation, on the fact that their biometric and other personal data may be used for the purpose of prevention, detection and investigation of terrorist offences and serious crimes, administrative sanctions in case of non-compliance, as well as the advance data erasure and marking applicable.

UNHCR also recommends that Articles 2(2) and 30(2) be amended to ensure that information to children is provided only by appropriately trained officials in child-friendly environments. Provisions of Article 2(2) on standards for collecting biometric data from children, which stipulate that minors shall be informed in an age-appropriate manner using specifically designed materials should be incorporated under Article 30.

UNHCR recommends that Article 2(2) be amended to include the obligation that children should be accompanied by a responsible adult, guardian or representative at the time they receive information and their biometric data is collected.

UNHCR recommends that Article 30 be amended to ensure that information to survivors of torture is provided by appropriately trained officials in suitable environments.

# 3

## DATA COMPARISON AND STORAGE

UNHCR notes that proposed article Article 15 allows for the comparison of all three categories of persons covered by the Regulation, whereas previously only the data on applicants for international protection (category I) could be compared against the data of persons apprehended crossing the border irregularly (category II).

In this regard, UNHCR welcomes the provision introduced under Article 15(4) of the proposal, which ensures that, where evidence of a “hit” suggests that an application for international protection has already been filed in the EU, the Member State conducting the search must ensure the primacy of the Dublin procedure for the person concerned over return to a third country (**proposed recast Articles 15(4) and 16(5)**). To ensure that this provision is duly applied, UNHCR also calls for a clarification on whether applicants for international protection who have entered the EU irregularly, will be recorded only under Category I or both Categories I and II, or all three Categories. In UNHCR’s view, if applicants for international protection are to be recorded under all three categories, proportionate technical and procedural safeguards should be put in place to ensure that the management, access to and comparison of Eurodac information does not lead to violations of international protection obligations – potentially including Member States’ obligation to ensure penalties are not imposed on refugees on account of their irregular entry or presence in a country,<sup>27</sup> *non-refoulement* and personal data protection. UNHCR wishes to reiterate that if detailed personal information on applicants for international protection and refugees were to become inadvertently available to their countries of origin, their life, liberty or physical integrity, or that of their families or other associates, may be jeopardized.

### RECOMMENDATION:

UNHCR recommends that proportionate technical and procedural safeguards be put in place to ensure that the management, access to and comparison of Eurodac information does not lead to violations of international protection obligations and personal data protection, if applicants for international protection are to be recorded under all three categories. This, in particular, is important to ensure that personal data of applicants for international protection is not inadvertently made accessible to their country of origin prior to a final decision on return.

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<sup>27</sup> In accordance with Article 31(1) of the 1951 Refugee Convention.

# 4

## DATA ACCESS AND SHARING

UNHCR notes that Articles 20 – 23 of the proposal retain access to Eurodac by law enforcement authorities for the prevention, detection and investigation of terrorist offences or other serious criminal offences. It sets forth that designated law enforcement authorities can request access to the database (all three categories of persons covered), where there are reasonable grounds to consider that the access will substantially contribute to the prevention, detection or investigation of the criminal offense in question, as verified by a designated law enforcement authority.

In this regard, UNHCR notes that classification of criminal offences differs from one EU Member State to another. To safeguard the rights of persons seeking international protection, UNHCR considers it necessary that the proposal specify the definition of terrorist offences and other serious criminal offences, which would warrant access to the Eurodac database by law enforcement authorities who are competent to investigate terrorist or other serious offences in the EU. The data that is accessed in Eurodac should further be *necessary* and *proportionate* to prevent, detect or investigate (i.e. as part of an ongoing investigation and where there is a substantial suspicion that the perpetrator or suspect has applied for international protection). In UNHCR's view, said access by law enforcement authorities should be verified by an independent authority, instead of a designated authority within the same organization, to avoid conflict of interest and to ensure the necessary independent oversight. In this context, UNHCR notes that the European Data Protection Supervisor recommends modifying Article 7 to “impose that designated authorities and verifying authority are not part of the same organization”.<sup>28</sup>

UNHCR welcomes the provisions of Article 37, which prohibit the sharing of personal data with any third country, international organization or private entity established in or outside the EU, in particular, regarding the fact that an application for international protection has been made in a Member State (Article 37(3)) and Article 38(3), which bans access to the Eurodac central system by a third country either directly or via a Member State. UNHCR welcomes, in particular, the final clause in Article 37(3), which reflects the well-established principle that personal data of applicants for, as well as persons who were granted, international protection should not be made accessible to or shared with, the country of origin. This non-disclosure obligation covers not only the fact that they have applied for international protection, but includes any data that can be used to identify the location and/or identity of the individual. In exceptional cases, where it is determined, in line with established principles and standards of data protection, and with due consideration for what is permissible under international refugee law, that it is necessary to contact the authorities in the country of origin, there should be no disclosure of the fact that the individual has applied for international protection.

In this context, UNHCR notes that an exemption to this provision is introduced in Article 38 of the proposal, allowing the sharing of personal data with third countries in order to prove the identity of third country nationals or stateless persons for the purpose of return, subject to the safeguards provided for in Article 46 of the EU Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Even in the context of returns, including in relation to the return of applicants properly deemed not to have a need for international protection, UNHCR considers it essential that appropriate safeguards be put in place to ensure that decisions on return, which lead to the sharing of personal data with third countries, are taken in line with relevant European and international standards, and that no link is made to an application for international protection. In this regard, UNHCR notes the recommendation of the European Data Protection Supervisor to specify, in Article 38(1), that only the data strictly necessary for the purpose of return can be transferred by the Member States.<sup>29</sup>

<sup>28</sup> European Data Protection Supervisor, *Opinion on the First reform package of the Common European Asylum System*, 21 September 2016, pp. 15-16, available at: <https://goo.gl/KOMIF5>

<sup>29</sup> European Data Protection Supervisor, *Opinion on the First reform package of the Common European Asylum System*, 21 September 2016, pp. 13 and 19, available at: <https://goo.gl/KOMIF5>

Finally, UNHCR would like to reiterate Member States obligation under Article 29 (1)(b) of the Asylum Procedures Directive,<sup>30</sup> requiring UNHCR to be permitted to have access to information on individual applications for international protection, on the course of the procedure and on the decisions taken, provided that the applicant agrees thereto.

#### RECOMMENDATIONS:

UNHCR recommends that Article 21 of the proposal define terrorist offences and other serious criminal offences, which would warrant access to the Eurodac database by law enforcement authorities.

UNHCR further recommends that access is limited to law enforcement authorities who are *competent* to investigate terrorist or other serious offences, and that the data that is accessed in Eurodac should be *necessary* and *proportionate* to prevent, detect or investigate these offenses (i.e. as part of an ongoing investigation and where there is a substantial suspicion that the perpetrator or suspect has applied for asylum).

In addition, UNHCR calls for access to be verified by an independent national authority, such as the European Data Protection Supervisor or Ombudsperson, instead of a designated law enforcement authority.

UNHCR also recommends that the non-disclosure obligation in Article 37(3) be clarified so as to include any data that can be used to identify the location and/or identity of the individual(s).

Finally, UNHCR recommends cross-reference is made to Article 29(1)(b) of the Asylum Procedures Directive (or successor instrument), allowing UNHCR to have access to information, including personal data.

## 5

### DATA TESTING

UNHCR notes that Article 5(2) of the proposal allows eu-LISA to use personal data when testing the Eurodac system for diagnostics and repair, as well as the use of new technologies and techniques. UNHCR reiterates that biometric and other personal data of persons seeking international protection is particularly sensitive and should not be used for testing purposes. This position is echoed by the European Data Protection Supervisor, which raises concerns about the risks associated with the use of real data for testing purposes and the absence of added value of such use.<sup>31</sup>

#### RECOMMENDATION:

UNHCR recommends that “dummy data” be used for the testing of the database, and that a specific prohibition to use data of persons registered under Category I for testing purposes be established.

<sup>30</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <http://www.refworld.org/docid/51d29b224.html>

<sup>31</sup> European Data Protection Supervisor, *Opinion on the First reform package of the Common European Asylum System*, 21 September 2016, p. 15, available at: <https://goo.gl/KOMIF5>

# 6

## TERMINOLOGY

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UNHCR considers it important that the terminology relevant to the protection of fundamental rights of people at EU external borders employed in the proposal reflect applicable legal obligations, norms and European values, and be used in a consistent manner. To this end, UNHCR encourages the use of the term '*irregular*' instead of '*illegal*' when referring to migration, arrivals and stay, to avoid the implication that persons in need of international protection who may have entered the EU irregularly in order to seek international protection and who have subsequently regularized their status by doing so, have acted unlawfully and may permissibly be penalized.

UNHCR, May 2017