Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [.../...] (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person) (COM(2008) 825)

(2009/C 229/02)

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty establishing the European Community, and in particular its Article 286,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular its Article 8,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1],

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2], and in particular its Article 41,

Having regard to the request for an opinion in accordance with Article 28(2) of the Regulation (EC) No 45/2001 received on 3 December 2008 from the Commission,

HAS ADOPTED THE FOLLOWING OPINION:

I. INTRODUCTION

Consultation of the EDPS

1. The Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [.../...] (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person) (hereinafter 'Proposal' or 'Commission's Proposal') was sent by the Commission to the EDPS for consultation on 3 December 2008, in accordance with Article 28(2) of Regulation (EC) No 45/2001. This consultation should be explicitly mentioned in the preamble of the Regulation.

2. As mentioned in the Explanatory Memorandum, the EDPS has contributed to this Proposal at an earlier stage, and many of the points he raised informally have been taken into account in the final text of the Commission's Proposal.

The proposal in its context

3. The Council Regulation (EC) No 2725/2000 [3] for the establishment of 'Eurodac' (hereinafter 'the Eurodac Regulation') came into force on 15 December 2000. Eurodac, a Community-wide information technology system, was created to facilitate the application of the Dublin Convention which aimed at establishing a clear and workable mechanism for determining responsibility for asylum applications lodged in one of the Member States. The Dublin Convention was afterwards replaced by a Community law instrument, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [4] (hereinafter 'the Dublin Regulation') [5]. Eurodac started operations on 15 January 2003.

4. The Proposal is a revision of the Eurodac Regulation and its implementing regulation, Council Regulation (EC) No 407/2002, and it aims at inter alia:

— improving the efficiency of the implementation of the Eurodac Regulation,

— ensuring consistency with the asylum *acquis* evolved since the adoption of the above-mentioned Regulation,

— updating a number of provisions taking account of factual developments since the adoption of the Regulation,

— establishing a new management framework.

5. It should also be stressed that one of the main objectives of the Proposal is to better ensure the respect of fundamental rights, in particular the protection of personal data. This opinion will analyze whether the provisions of this Proposal adequately meet this objective.

[1] OJ L 281, 23.11.1995, p. 31.
[2] OJ L 8, 12.1.2001, p. 1.
[3] OJ L 316, 15.12.2000, p. 1.
[4] OJ L 50, 25.2.2003, p. 1.
[5] The Dublin Regulation is currently also subject to revision (COM(2008) 820 final), 3.12.2008 (recast version). The EDPS has also issued an opinion on the Dublin proposal.

6. The Proposal takes account of the results of the Commission Report on the evaluation of the Dublin system of June 2007 (hereinafter 'Evaluation Report'), which covers the first 3 years of the operation of Eurodac (2003-2005).

7. Whilst acknowledging that the system set up in the Regulation has been implemented in the Member States in a generally satisfactory way, the Commission Evaluation Report identified certain issues related to the efficiency of the current provisions and highlighted those which needed to be tackled in order to improve the Eurodac system and facilitate the application of the Dublin Regulation. In particular, the Evaluation Report observed the continuing late transmission of fingerprints by some of the Member States. The Eurodac Regulation currently only provides for a very vague deadline for the transmission of fingerprints, which can cause significant delays in practice. This is a key issue for the effectiveness of the system since any delay in transmission may lead to results contrary to the responsibility principles laid down in the Dublin Regulation.

8. The Evaluation Report also underlined that lack of an efficient method for the Member States to inform each other of the status of the asylum seeker has led in many cases to inefficient management of deletions of data. The Member States which enter data on a specific person are often unaware that another Member State of origin deleted data and therefore do not realise that they should also delete their data relating to the same person. As a consequence, the respect of the principle that 'no data should be kept in a form which allows the identification of data subjects for longer than is necessary for the purposes for which data were collected' cannot be sufficiently ensured.

9. Moreover, according to the analysis presented in the Evaluation Report, unclear specification of national authorities having access to Eurodac hinders the monitoring role of the Commission and of the European Data Protection Supervisor.

Focus of the opinion

10. Given his current role as the supervisory authority for Eurodac, the EDPS is particularly interested in the Commission Proposal and the positive outcome of the revision of the Eurodac system as a whole.

11. The EDPS notes that the Proposal involves various aspects relating to fundamental rights of asylum seekers, such as the right to asylum, the right to information in a broader sense, the right to the protection of personal data. However, given the mission of the EDPS, this opinion will mainly focus on the data protection matters tackled by the revised Regulation. In this regard, the EDPS welcomes the considerable attention devoted in the Proposal to the respect and protection of personal data. He takes this opportunity to stress that ensuring a high level of the protection of personal data and its more efficient implementation in practice should be considered an essential prerequisite to the improvement of the working of Eurodac.

12. This opinion addresses mainly the following modifications of the text since they are the most relevant from the point of view of the protection of personal data:

— the supervision by the EDPS, including in cases where part of the management of the system is entrusted to another entity (such as a private company),

— the procedure for taking fingerprints, including the definition of age limits,

— the rights of the data subject.

II. GENERAL REMARKS

13. The EDPS welcomes that the Proposal strives to consistency with other legal instruments governing the establishment and/or use of other large-scale IT systems. In particular, the sharing of responsibilities vis-à-vis the database as well as the way the supervision model has been formulated in the Proposal, are consistent with the legal instruments establishing the Schengen Information System II (SIS II) and Visa Information System (VIS).

14. The EDPS notes the consistency of the Proposal with Directive 95/46/EC and Regulation (EC) No 45/2001. In this context, the EDPS welcomes in particular the new Recitals 17, 18 and 19, which stipulate that Directive 95/46/EC and Regulation (EC) No 45/2001 apply to the processing of personal data carried out in application of the proposed Regulation respectively by the Member States and by the Community institutions and bodies involved.

15. Finally, the EDPS draws attention to the need to also ensure full consistency between the Eurodac and Dublin Regulations and he takes the opportunity of the present opinion to provide for more precise indications as to this consistency. He notes however that in some respects this issue has already been tackled in the Proposal, e.g. in the Explanatory Memorandum, which mentions that 'consistency with the Dublin Regulation (as well as data protection concerns, notably the principle of proportionality) will be ensured by aligning the storage period for data on third country nationals and stateless persons fingerprinted in connection with the irregular crossing of an external border with the period until which Article 14(1) of the Dublin Regulation allocates responsibility on the basis of that information (i.e. one year).'

III. SPECIFIC REMARKS

III.1. Supervision by the European Data Protection Supervisor

16. The EDPS welcomes the supervision model laid down in the Proposal, as well as the specific tasks he has been entrusted with by virtue of Articles 25 and 26 of the Proposal. Article 25 entrusts the EDPS with two supervisory tasks:

— 'checking that the personal data processing activities of the Management Board are carried out in accordance with the Regulation' (Article 25(1)), and

— 'ensuring that an audit of the Management Authority's personal data processing activities is carried out in accordance with international auditing standards at least every four years'.

Article 26 addresses the issue of co-operation between National Supervisory Authorities and the EDPS.

17. The EDPS also notes that the Proposal puts forward a similar approach to the one used in the SIS II and the VIS: a layered system of supervision where national Data Protection Authorities (DPAs) and the EDPS supervise the national and EU levels respectively, with a cooperation system established between the two levels. The manner in which the co-operation model is envisaged in the Proposal also reflects the current practice which proved efficient and encouraged close collaboration between the EDPS and DPAs. Therefore, the EDPS welcomes its formalization in the Proposal and the fact that while providing for this, the legislator ensured consistency with the systems of supervision of other large-scale IT systems.

III.2. Subcontracting

18. The EDPS notes that the Proposal does not address the issue of subcontracting a part of the Commission tasks to another organisation or entity (such as a private company). Nevertheless, subcontracting is commonly used by the Commission in the management and development both of the system and the communication infrastructure. While the subcontracting does not in itself run contrary to data protection requirements, important safeguards should be put in place to ensure that the applicability of Regulation (EC) No 45/2001, including the data protection supervision by the EDPS remains entirely unaffected by the subcontracting of activities. Furthermore, additional safeguards of a more technical nature should also be adopted.

19. In this regard, the EDPS suggests that similar legal safeguards as envisaged in the SIS II legal instruments should be provided in the framework of the revision of the EURODAC Regulation, specifying that even when the Commission entrusts the management of the system to another authority, this shall 'not adversely affect any effective control mechanism under Community law, whether of the Court of Justice, the Court of Auditors or the European Data Protection Supervisor' (Article 15(7), SIS II Decision and Regulation).

20. The provisions are even more precise in Article 47 of the SIS II Regulation, which stipulates: 'Where the Commission delegates its responsibilities (…) to another body or bodies (…) it shall ensure that the European Data Protection Supervisor has the right and is able to fully exercise his tasks, including carrying out on-the-spot checks and to exercise any other powers conferred on him by Article 47 of Regulation (EC) No 45/2001'.

21. The above-mentioned provisions provide for a necessary clarity in terms of the consequences of subcontracting a part of the Commission tasks to other authorities. The EDPS therefore suggests that provisions aiming at the same effect be added to the text of the Commission's Proposal.

III.3. Procedure for taking fingerprints (Articles 3.5 and 6)

22. Article 3(5) of the Proposal addresses the procedure for taking fingerprints. This provision stipulates that the procedure 'shall be determined and applied in accordance with the national practice of the Member State concerned and in accordance with the safeguards laid down in the Charter of Fundamental Rights of the European Union, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention on Human Rights and in the United Nations Convention on the Rights of the Child.' Article 6 of the Proposal provides that the lowest age limit for taking fingerprint of an applicant shall be 14 years and shall be taken no later than within 48 hours after the lodging of the application.

23. First of all, with regard to the age limit, the EDPS stresses the need to ensure consistency of the Proposal with the Dublin Regulation. The Eurodac system has been established with a view to ensuring the effective application of the Dublin Regulation. That means that if the outcome of the ongoing revision of the Dublin Regulation has an impact on its application to underage asylum seekers, this should be reflected in the Eurodac Regulation [1].

[1] In this regard, the EDPS draws attention to the fact that the Commission's Proposal on the revision of the Dublin Regulation presented on 3 December 2008 (COM(2008) 825 final) defines a 'minor' as 'a third-country national or a stateless person below the age of 18'.

24. Secondly, as to the determination of age limits for fingerprinting in general, the EDPS wishes to point out that most of the currently available documentation tends to indicate that the accuracy of fingerprinting identification decreases with the ageing process. In that regard, it is advisable to follow closely the study on fingerprinting carried out in the framework of the implementation of the VIS. Without anticipating the results of the study, the EDPS wishes to stress already at this stage that in all cases where taking fingerprints proves impossible or would lead to delivering unreliable results, it is important to refer to fall back procedures, which should fully respect the dignity of the person.

25. Thirdly, the EDPS notes the efforts taken by the legislator to ensure compliance of the provisions on taking fingerprints with international and European human rights' requirements. Nonetheless, he draws attention to the difficulties occurring in several Member States to determine the age of young asylum seekers. Very often, asylum seekers or illegal immigrants do not have identification documents, and in order to establish whether they should be fingerprinted, their age has to be determined. The methods used to do this cause a lot of debates in different Member States.

26. In this regard, the EDPS draws attention to the fact the Eurodac supervision coordination Group [1] launched a coordinated inspection on this issue, the results of which — expected in the first half of 2009 — should facilitate the determination of common procedures in this regard.

27. As a concluding remark on this issue, the EDPS sees the need to better coordinate and harmonize at EU level the procedures for fingerprinting to the greatest possible extent.

III.4. **Best available techniques (Article 4)**

28. Article 4(1) of the Proposal stipulates: 'After a transitional period, a Management Authority, funded from the general budget of the European Union, shall be responsible for the operational management of Eurodac. The Management Authority shall ensure, in cooperation with the Member States, that at all times the best available technology, subject to a cost-benefit analysis, is used for the Central System'. Although the EDPS welcomes the requirement laid down in Article 4(1), he wishes to note that the expression the 'best available technology' referred to in the above-mentioned provision, should be replaced with the wording the 'best available techniques' which includes both the technology used and the way in which the installation is designed, built, maintained and operated.

III.5. **Advance data erasure (Article 9)**

29. Article 9(1) of the Proposal addresses the issue of advance data erasure. This provision obliges the Member State of origin to erase from the Central System 'data relating to a person who has acquired citizenship of any Member State before the expiry of the period referred to in Article 8' as soon as the Member State of origin becomes aware that the person has acquired such citizenship. The EDPS welcomes the obligation to erase the data as it well corresponds with the data quality principle. Moreover, the EDPS believes that the revision of this provision provides for an opportunity to encourage the Member States to put in place procedures ensuring reliable and timely (automatic if possible) erasure of data when an individual obtains citizenship of one of the Member States.

30. Furthermore, the EDPS wishes to point out that Article 9(2) dealing with advance deletion should be redrafted as the proposed wording is unclear. As a stylistic remark, the EDPS suggests that the word 'it' in the provision should be replaced with the word 'they'.

III.6. **Retention period of data on third country national who is apprehended in connection with the irregular crossing of the border (Article 12)**

31. Article 12 of the Proposal deals with storage of data. The EDPS wishes to note that establishing 1 year as the retention period for data (instead of 2 years in the current text of the Regulation) constitutes a good application of the principle of data quality which stipulates that data should not be kept for longer than necessary to accomplish the purpose for which they are processed. It is a welcome improvement of the text.

III.7. **List of authorities with access to EURODAC (Article 20)**

32. The provision providing for the publication by the Management Authority of the list of authorities having access to Eurodac data is welcome. This will help to achieve better transparency and create a practical tool for better supervision of the system, e.g. by the DPAs.

III.8. **Logs (Article 21)**

33. Article 21 of the Proposal concerns keeping of records of all data processing operations within the Central System. Article 21(2) states that such records should be used only for the data-protection monitoring of the admissibility of the processing (…). In this regard, it could be clarified that this also includes self-auditing measures.

[1] For an explanation of the work and status of this Group, see: http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/pid/79. This Group is exercising a coordinated supervision of the EURODAC system.

III.9. **Rights of the data subject (Article 23)**

34. Article 23(1)(e) of the Proposal reads as follows:

'A person covered by this Regulation shall be informed by the Member State of origin (…) of:

(e) the existence of the right of access to data relating to them, and the right to request that inaccurate data relating to them be corrected or that unlawfully processed data relating to them be deleted, including the right to receive information on the procedures for exercising those rights and the contact details of the National Supervisory Authorities referred to in Article 25(1), which shall hear claims concerning the protection of personal data.'

35. The EDPS notes that effective implementation of the right to information is crucial for the proper functioning of Eurodac. In particular, it is essential to ensure that information is provided in a way that enables the asylum seeker to fully understand his situation as well as the extent of the rights, including the procedural steps he/she can take as follow-up to the administrative decisions taken in his/her case.

36. As to the practical aspects of the implementation of the right, the EDPS wishes to stress that while the DPAs are indeed competent to hear claims concerning the protection of personal data, the wording of the Proposal should not prevent the applicant (data subject) from addressing a claim primarily to the data controller. The provision of Article 23(1)(e) as it reads now seems to imply that the applicant should put his request — directly and in each case — with the DPA, whereas the standard procedure and the practice in the Member States is that the applicant lodges his/her claim first with the data controller.

37. The EDPS also suggests that the wording of Article 23(1)(e) should be reformulated to clarify the rights to be given to the applicant. The wording as proposed is unclear, as it can be interpreted as considering 'the right to receive information on the procedures for exercising those rights (…)' a part of the right of access to data and/or the right to request inaccurate data be corrected (…). Moreover, according to the current wording of the above-mentioned provision, the Member States are to inform the person covered by the Regulation not of the content of the rights but of their 'existence'. As the latter seems to be a stylistic issue, the EDPS suggests that Article 23(1)(e) be redrafted as follows:

'A person covered by this Regulation shall be informed by the Member State of origin (…) of (…):

(g) the right of access to data relating to him/her, and the right to request that inaccurate data relating to him/her be corrected or that unlawfully processed data relating to him/her be deleted, as well as on the procedures for exercising those rights, including the contact details of the National Supervisory Authorities referred to in Article 25(1)'.

38. In the same logic, Article 23(10) should be modified as follows: 'In each Member State, the national supervisory authority shall, where appropriate (or: on the request of the data subject), assist the data subject in accordance with Article 28(4) of Directive 95/46/EC in exercising his/her rights'. Again, the EDPS wishes to stress that an intervention of the DPA should in principle not be necessary; the data controller should, on the contrary, be encouraged to respond in an appropriate manner to the claims of the data subjects. The same applies when cooperation is needed between authorities of different Member States. The data controllers should be primarily responsible for dealing with the requests and cooperating to that effect.

39. As far as Article 23(9) is concerned, the EDPS welcomes not only the very purpose of this provision (which envisages control of the use of 'special searches' as recommended by the Data Protection Authorities in their first report on coordinated inspections), but he also notes with satisfaction the proposed procedure to achieve it.

40. As far as the methods to provide information to the applicants are concerned, the EDPS refers to the work undertaken by the Eurodac Supervision Coordination Group. This Group is currently examining this issue in the framework of EURODAC in view of proposing — as soon as the results of the national investigations have been known and compiled — relevant guidance.

IV. **CONCLUSIONS**

41. The EDPS supports the Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No […/…] establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

42. The EDPS welcomes the supervision model proposed in the Proposal as well as the role and tasks he has been entrusted with in the new system. The envisaged model reflects the current practice which proved efficient.

43. The EDPS notes that the Proposal strives to consistency with other legal instruments governing the establishment and/or use of other large-scale IT systems.

44. The EDPS welcomes considerable attention devoted in the Proposal to the respect of fundamental rights, and in particular the protection of personal data. As also mentioned in the opinion on the revision of the Dublin Regulation, the EDPS considers this approach as an essential prerequisite to the improvement of the asylum procedures in the European Union.

45. The EDPS draws attention to the need to ensure full consistency between the EURODAC and Dublin Regulations.

46. The EDPS sees the need for a better coordination and harmonization at EU level of the procedures for fingerprinting, whether they concern asylum seekers or any other persons subject to the Eurodac procedure. He draws special attention to the question of the age limits for fingerprinting, and in particular the difficulties occurring in several Member States to determine the age of young asylum seekers.

47. The EDPS insists on a clarification of the provisions regarding the rights of the data subjects, and in particular he underlines that the national data controllers are primarily responsible to ensure the application of these rights.

Done at Brussels, 18 February 2009.

Peter HUSTINX

European Data Protection Supervisor