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REPORT

on the proposal for a Council regulation concerning the establishment of
'Eurodac' for the comparison of the fingerprints of applicants for asylum and
certain other aliens
(COM (1999) 260 – C5-0082/1999 – 1999/0116(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Hubert Pirker

<i>Symbols for procedures</i>	<i>Abbreviations for committees</i>
<p>* : Consultation procedure <i>majority of the votes cast</i></p> <p>**I : Cooperation procedure (first reading) <i>majority of the votes cast</i></p> <p>**II : Cooperation procedure (second reading) <i>majority of the votes cast, to approve the common position</i> <i>majority of Parliament's component Members, to reject or amend the common position</i></p> <p>*** : Assent procedure <i>majority of Parliament's component Members, except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty</i></p> <p>***I : Codecision procedure (first reading) <i>majority of the votes cast</i></p> <p>***II : Codecision procedure (second reading) <i>majority of the votes cast, to approve the common position</i> <i>majority of Parliament's component Members, to reject or amend the common position</i></p> <p>***III : Codecision procedure (third reading) <i>majority of the votes cast, to approve the joint text</i></p> <p>(The type of procedure depends on the legal basis proposed by the Commission.)</p>	<p>I. AFET: Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy</p> <p>II. BUDG: Committee on Budgets</p> <p>III. CONT: Committee on Budgetary Control</p> <p>IV. LIBE: Committee on Citizens' Freedoms and Rights, Justice and Home Affairs</p> <p>V. ECON: Committee on Economic and Monetary Affairs</p> <p>VI. JURI: Committee on Legal Affairs and the Internal Market</p> <p>VII. INDU: Committee on Industry, External Trade, Research and Energy</p> <p>VIII. EMPL: Committee on Employment and Social Affairs</p> <p>IX. ENVI: Committee on the Environment, Public Health and Consumer Policy</p> <p>X. AGRI: Committee on Agriculture and Rural Development</p> <p>XI. PECH: Committee on Fisheries</p> <p>XII. REGI: Committee on Regional Policy, Transport and Tourism</p> <p>XIII. CULT: Committee on Culture, Youth, Education, the Media and Sport</p> <p>XIV. DEVE: Committee on Development and Cooperation</p> <p>XV. AFCO: Committee on Constitutional Affairs</p> <p>XVI. FEMM: Committee on Women's Rights and Equal Opportunities</p> <p>XVII. PETI: Committee on Petitions</p>

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Procedural page – Consultation procedure

By letter of 29 July 1999, the Council of the European Union consulted the European Parliament, pursuant to Article 63(1) of the Treaty on European Union, on the proposal for a Council regulation concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens (COM (1999) 260 – C5-0082/1999 – 1999/0116(CNS)).

At the sitting of 13 September 1999, the President of the European Parliament announced that she had forwarded this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and to the Committee on Legal Affairs and the Internal Market for an opinion.

At its meeting of 29 July 1999, the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Mr Pirker rapporteur.

The committee considered the proposal and the draft report at its meetings of 18 October 1999 and 9 November 1999.

At the latter meeting, it adopted the draft legislative resolution by 30 votes to 5.

The following were present for the vote: Watson, chairman; Evans, vice-chairman; Pirker, rapporteur; Banotti, Boumediene-Thiery, Cappato, Cashman, Ceyhun, Coelho, Cornillet, Deprez, Di Pietro (for Wiebenga), Ferri, Frahm, Gebhardt (for Terron I Cusi), Harbour (for Cederschiöld, pursuant to Rule 153(2)), Jeggle (for Hannan, pursuant to Rule 153(2)), Kessler, Kirkhope, Klamt, Krivine (for Sylla), Lechner (for Dell'Utri), Lund, Ludford, Newton Dunn (for Nassauer), Oostlander (for Bötticher), Paciotti, Pack (for Hernandez Mollar, pursuant to Rule 153(2)), Roure (for Duhamel), Schmid, Schulz, Sousa Pinto, Swiebel, Turco (for Vanhecke), Valdivielso de Cue (for Buttiglione), Van Lancker (for Karamanou), Vattimo and Zappalá (for Posselt, pursuant to Rule 153(2)).

The opinion of the Committee on Legal Affairs and the Internal Market is attached.

The report was tabled on 11 November 1999.

The deadline for the tabling of amendments will be indicated in the draft agenda for the part-session at which the report will be considered.

LEGISLATIVE PROPOSAL

Proposal for a Council regulation concerning the establishment of ‘Eurodac’ for the comparison of the fingerprints of applicants for asylum and certain other aliens (COM (1999) 260 – C5-0082/1999 – 1999/0116(CNS))

The proposal is amended as follows:

Text proposed by the Commission¹

Amendments by Parliament

(Amendment 1)

Title and text

alien

Replace with third country national
throughout the text

Justification

The term ‘alien’ has negative connotations and the term ‘third country national’ is an adequate substitute.

(Amendment 2)

Title

Council Regulation (EC) concerning the establishment of ‘Eurodac’ for the comparison of the fingerprints of applicants for asylum and certain other aliens

Council Regulation (EC) concerning the establishment of ‘Eurodac’ for the comparison of the fingerprints of applicants for asylum and certain other aliens in order to simplify the implementation of the Dublin Convention

Justification

This amendment seeks to make it clear that this regulation relates exclusively to the implementation of the Dublin Convention.

¹ Not yet published

(Amendment 3)

Recital 5

It is also necessary to require the Member States promptly to take fingerprints of every applicant for asylum

and of every alien who is apprehended in connection with the irregular crossing of a Community border, if they are at least 14 years of age.

It is also necessary to require the Member States promptly to take fingerprints of every applicant for asylum and of every alien who is apprehended in connection with the irregular crossing of a Community border, if they are at least 21 years of age.

Justification

The minimum age of 14 is contrary to the international instruments in force concerning children's rights.

(Amendment 4)

Recital 8

The conservation period should be shorter in certain special situations where there is no need to keep fingerprint data for that length of time: fingerprint data should be erased immediately once aliens obtain Union citizenship.

The conservation period should be shorter in certain special situations where there is no need to keep fingerprint data for that length of time: fingerprint data shall be erased immediately once the person concerned obtains a residence permit.

Justification

There can be no justification for keeping someone's fingerprint data where that person's legal status has been regularised.

(Amendment 5)

Article 4(1)

Each Member State shall promptly take the fingerprints of every applicant for asylum of at least 14 years of age and shall promptly transmit the data referred to in points (a) to (f) of Article 5 (1) to the Central Unit. The procedure for taking fingerprints shall be determined in accordance with the national

Each Member State shall promptly take the fingerprints of every applicant for asylum of at least 18 years of age and shall promptly transmit the data referred to in points (a) to (f) of Article 5 (1) to the Central Unit. The procedure for taking fingerprints shall be determined in accordance with the national

practice of the Member State concerned.

practice of the Member State concerned and in accordance with the safeguards laid down in the European Convention on Human Rights and in the UN Convention on the Rights of the Child.

Justification

The safeguards on privacy of the European Convention on Human Rights and, in the case of under-18s, of the UN Convention on the Rights of the Child are a necessary protection to any abusive application of the regulation. 14 is too young for routine fingerprinting and 18, as the age of majority, should be the standard minimum age.

(Amendment 6) Article 4(6)

The results of the comparison shall be immediately checked in the Member State of origin. Final identification shall be made by the Member State of origin in cooperation with the Member States concerned, pursuant to Article 15 of the Dublin Convention.

The results of the comparison shall be immediately checked in the Member State of origin. Final identification shall be made by the Member State of origin in cooperation with the Member States concerned, pursuant to Article 15 of the Dublin Convention.

Should the results of the comparison made by the Central Unit not reveal a clear match of the fingerprints, the Member State which asked for the comparison shall be considered the Member State of origin and shall initiate the asylum procedure.

Information received from the Central Unit relating to any data mismatch or other data found to be unreliable shall be erased by the Member State of origin as soon as the mismatch or unreliability of the data is established.

Information received from the Central Unit relating to any data mismatch or other data found to be unreliable shall be erased by the Member State of origin as soon as the mismatch or unreliability of the data is established.

Justification

The greater the number of fingerprint comparisons made, the greater the chances of errors arising in respect of similar and identical fingerprints.

(Amendment 7)

Article 7

Data relating to a person who has acquired citizenship of the Union before expiry of the period referred to in Article 6 shall be erased from the central database, in accordance with Article 15(3) as soon as the Member State of origin becomes aware that the person has acquired citizenship of the Union.

Data relating to a person who has acquired citizenship of the Union, or has been granted refugee status or a subsidiary or complementary form of protection or any other legal status, shall be erased from the central database, in accordance with Article 15(3) as soon as the Member State of origin becomes aware that the person has acquired citizenship of the Union or has been granted refugee status or a subsidiary or complementary form of protection or any other legal status.

Justification

If someone has been granted refugee status or granted protection on an individual basis in accordance with other international obligations or humanitarian considerations or any other legal status, there is no longer any need to store the data since the purpose of such storage - to stop 'forum shopping' - is removed once the asylum application has been dealt with.

(Amendment 8)

Article 8(1)

Each Member State shall promptly take the fingerprints of every alien of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back.

Each Member State shall, in accordance with the safeguards laid down in the European Convention on Human Rights, promptly take the fingerprints of every third- country (non-EU) national of at least 18 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back.

Justification

As for Amendment 5.

(Amendment 9)

Article 10(2)(d)

(d) the third-country national has been granted refugee status or a subsidiary or complementary form of protection.

Justification

As for Amendment 7.

(Amendment 10)

Article 11(1), first subparagraph

1. With a view to checking whether an alien found illegally present within its territory has previously lodged an application for asylum in another Member State, each Member State may communicate to the Central Unit any fingerprints which it may have taken of any such alien of at least 14 years of age together with the reference number used by that Member State.

1. With a view to checking whether an alien found illegally present within its territory has previously lodged an application for asylum in another Member State, each Member State may communicate to the Central Unit any fingerprints which it may have taken of any such alien of at least 18 years of age together with the reference number used by that Member State.

Justification

As for Amendment 5.

(Amendment 11)

Article 12(1)

Data relating to a person who has been recognised and admitted as a refugee in a Member State shall be blocked in the central database. Such blocking shall be carried out by the Central Unit on the instructions of the Member State of origin.

Data relating to a person who has been recognised and admitted as a refugee in a Member State shall be erased from the central database.

Justification

Data relating to anyone who has obtained refugee status must be erased automatically from the central database.

(Amendment 12)

Article 15(5a) (new)

5. No data shall be transferred or made accessible to the authorities of any non-EU state, nor to any agency or authority in a Member State other than that which collects the original data referred to in Articles 4 and 8, except with the express written agreement of the joint supervisory authorities.

Justification

This is an additional data protection safeguard and, in the case of a third-country agency, one which may be necessary to the safety from persecution of the individual concerned.

DRAFT LEGISLATIVE PROPOSAL

Legislative resolution of the European Parliament on the proposal for a Council regulation concerning the establishment of ‘Eurodac’ for the comparison of the fingerprints of applicants for asylum and certain other aliens (COM (1999) 260 – C5-0082/1999 – 1999/0116(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the Commission proposal to the Council (COM (1999) 260),
 - having been consulted by the Council pursuant to Article 63(1) of the Treaty on European Union (C5-0082/1999),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0059/1999),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;
 3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 4. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;
 5. Instructs its President to forward its position to the Council and Commission.

EXPLANATORY STATEMENT

1. Introduction

By letter of 29 July 1999, the Council consulted the European Parliament on the Commission proposal for a Council regulation concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens.

The European Parliament has previously been consulted on this issue on two occasions. A draft Council Act drawing up the Convention concerning the establishment of 'Eurodac' for the comparison of fingerprints of applicants for asylum was submitted to it on 6 October 1997. That proposal was approved on 15 January 1998, subject to certain amendments.

On 27 November 1998, a proposal was submitted to it for a Council Act drawing up a Protocol to the Convention, which extended the scope of Eurodac to certain illegal immigrants. It was rejected by a narrow majority in the vote taken on 13 April 1999.

The Member States signed neither the Convention nor the Protocol. At its meetings of 3 and 4 December 1998 and of 12 March 1999, the Council of Justice and Home Affairs Ministers decided to shelve both proposals and called on the Commission to submit a proposal for a legal instrument of the Community after the entry into force of the Treaty of Amsterdam.

This proposal constitutes the Commission's response to the Council's request.

2. Legal basis and legal instrument

The Treaty of Amsterdam introduced a new Title IV to cover 'Visa, asylum, immigration and other policies related to the free movement of persons'. Pursuant to Article 63(1)(a) of the EC Treaty, the Council is to adopt 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States' within a period of five years. That implies a commitment on the part of the Council to revise the Dublin Convention¹ determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Union, the proper application of which this regulation seeks to guarantee. The Commission has opted not to carry out a joint revision of the Dublin Convention and Eurodac but rather to reorganise Eurodac. It bases its proposal on Article 63(1)(a) of the EC Treaty.

Selection of that legal basis means this regulation will not be applicable in Denmark, Ireland and the United Kingdom which, on the basis of the relevant protocols and as a matter of principle, do not participate in measures taken under Title IV and are, consequently, not bound thereby. However, at the meeting of the Justice and Home Affairs Council held on 12 March 1999, the United Kingdom and Ireland did indicate their willingness to participate fully in the Community's activities involving asylum issues. Denmark has not yet made any announcement about this matter.

¹ OJ C 254, 19.8.1997, p. 1.

A decision was taken to frame the legislation in the form of a regulation, since the system of comparing fingerprints in order to determine the Member State in which an application for asylum was first made requires rules that are binding in all the Member States. The regulation subsumes both the Convention and the Protocol.

3. Brief summary of the regulation

The computer-assisted Eurodac system for the taking and comparison of the fingerprints of applicants for asylum and certain other aliens seeks to simplify the implementation of the Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Union, which the Member States signed on 15 June 1990. Pursuant to Article 8 of the Dublin Convention, where no Member State responsible for examining the application for asylum can be designated on the basis of the other criteria listed in the Convention, the first Member State with which the application is lodged is deemed to be responsible for examining it. Indisputable identification of the applicant is essential for the determination of that first Member State. Reliance on identity documents is inappropriate in this instance, not only because such documents may be forged but also because many asylum-seekers do not possess any such documents, given the circumstances in which they were forced to leave their own countries. Other indisputable identification features must therefore be used. Of all the theoretically possible features (for example, retina prints or DNA analysis), the taking of fingerprints constitutes the most reliable method and was, quite correctly, selected as the means of indisputably identifying applicants for asylum. Like the original draft Convention, the regulation therefore also provides for all asylum-seekers to have their fingerprints taken. Such fingerprints would then be stored in a uniform system for a period of ten years, so that a comparison would identify the Member State in which the application was first lodged and, hence, the Member State responsible for examining that application.

The regulation does not, however, restrict itself to a comparison solely of fingerprints of applicants for asylum, it also provides the opportunity for comparison with the fingerprints of two categories of illegal immigrants, firstly, those of ‘every alien ... who is apprehended ... in connection with the irregular crossing ... of the [external] border of a Member State’ (Article 8 et seq.) and, secondly, ‘alien[s] found illegally present [in a Member State]’ (Article 11). The inclusion of those categories, which has aroused a great deal of criticism, is essential because, if they were not included, it would be impossible to guarantee the implementation of the Dublin Convention.

Aliens apprehended in connection with the illegal crossing of an external border must be covered by the regulation because Article 6 of the Dublin Convention provides that it is not the State in which the application was first lodged which is responsible for the examination of applications for asylum but the Member State entered illegally from a non-member State. Fingerprints must be taken from such persons if we are to be able to determine which State is responsible for examining the application for asylum. Those fingerprints can then be compared with those of the applicant.

Article 8(1) of the regulation therefore requires Member States to take the fingerprints of every alien of at least 14 years of age who is apprehended in connection with the illegal crossing of an external border. However, the fingerprints of aliens apprehended in connection with the illegal crossing of an external border may not be compared with all the fingerprints stored in the database, only with those of applicants for asylum which are stored subsequently. The fingerprints

of applicants for asylum already in the database at the time of the examination may not, therefore, be used for the purposes of comparison. Article 9(1) lays down further that Eurodac may not be used for the comparison of the fingerprints of aliens apprehended in connection with the illegal crossing of an external border. Pursuant to Article 10(1), such fingerprints may be stored in the database for no longer than two years from the date on which they were taken. Upon expiry of that period, they are to be automatically erased. Article 10(2) lays down that the data are to be erased sooner if the person concerned receives a residence permit, leaves the territory of the Member States or acquires citizenship of the Union.

The second group of aliens, i.e. those who are present illegally upon the territory of a Member State, is included in the scope of the regulation because Article 10 of the Dublin Convention requires the Member State responsible for the examination of applications for asylum to take back an applicant for asylum who has subsequently travelled to another Member State. That is designed to prevent States from getting rid of applicants for asylum simply by allowing them to travel to another Member State. Member States may exercise their right to return applicants for asylum only where it is established beyond any doubt that the person within their territory has already lodged an application for asylum in another Member State. Accordingly, the Member States must be put in a position where they can compare the fingerprints of such a person with those of the applicant for asylum. Article 11 of the regulation covers that eventuality.

The taking of the fingerprints of aliens illegally present on the territory of a Member State is not compulsory. It is permissible only where the national law of that Member State so allows. Similarly, Article 11(2) stipulates that such fingerprints may be compared solely with those of other applicants for asylum already recorded in the database. Article 11(4) lays down, further, that they are not to be stored in the central database but are to be immediately destroyed, once the results of the comparison have been communicated to the Member State of origin.

4. Assessment

This proposal for a regulation will ensure the proper application of the Dublin Convention and ensure that the Member States are in a position to fulfil the obligations incumbent upon them by virtue of that Convention.

It is to be welcomed that Eurodac is now to be regulated in a single document rather than being split between a Convention and a Protocol, all the more so since the designation 'Protocol' is not commensurate with the significance of its substance, namely the extension of the comparison of fingerprints of applicants for asylum to that with fingerprints of certain categories of illegal immigrants. Uniform cover in a regulation is, at all events, appropriate. It is to be welcomed in that it provides legal certainty.

As regards the substance of the legislation, although the indisputably unfortunate result of the common treatment of asylum-seekers and illegal immigrants in the regulation and the application of the same procedure, namely the taking of fingerprints, cannot be avoided, we would not want to jeopardise the applicability of the Dublin Convention which guarantees that asylum-seekers' applications will be examined in so far as it determines responsibility for such examination and is thus in the asylum-seekers' interests. Nor must it be overlooked that the inclusion of illegal immigrants in the scope of the regulation will be handled in as considerate a manner as possible. The obligation to take fingerprints is restricted to the absolute minimum, and the comparison of

the fingerprints of illegal immigrants with other fingerprints is admissible only to a clearly defined extent.

We should also welcome the fact that the proposal is very restrictive as regards the collection and processing of data concerning illegal immigrants. As we have already seen, the comparison of fingerprints is hedged about with restrictions, and the storage of data by the Central Unit, where permissible, is restricted to the absolute minimum. We should also note that this proposal lays down in detail which data may be stored.

Many of the substantial divergences from the Council's drafts result from the 'change in pillars', e.g. changes in the rules governing the jurisdiction of the Court of Justice, in the entry into force, in applicability and in the territorial scope. However, there are some innovations which exceed the bounds of what is required by the new legal basis. For example, Article 22 lays down that implementing powers will in future lie with the Commission, which will be assisted by a regulatory committee. In addition, in the light of the SEM 2000 (efficient financial management) Initiative, a separate article (Article 23) was inserted concerning monitoring and evaluation of the system. Account is taken of the provisions of the Data-Protection Directive (95/46/EC) not merely by a global reference to the principles thereof; they were spelt out in detail for this specific field of application, and this will serve to promote legal certainty (see, for example, Article 18). The wording of some provisions was also clarified in order to improve legal certainty, without radical changes being made to their substance compared with the drafts. It is also to be welcomed that Article 18(1)(a) of the regulation grants to asylum-seekers and to illegal immigrants the right to be informed as to the reasons why their fingerprints are being taken. The European Parliament called for such a provision to be inserted, for the benefit of the persons concerned, when it was originally consulted. It is pleasing to note that, in this instance, the Commission has endorsed Parliament's basic approach.

To sum up, we may say that the proposal for a regulation does not go beyond its objective, which is to enable the Dublin Convention to be implemented. If we wish to guarantee the effectiveness of that Convention, such legislation is imperative. Furthermore, the Commission proposal for a regulation represents an improvement on the drafts of a Convention and of a Protocol. Accordingly, the proposal is to be welcomed.

26 October 1999

OPINION

(Rule 147)

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the proposal for a Council Regulation concerning the establishment of "Eurodac" for the comparison of the fingerprints of applicants for asylum and certain other aliens

(COM(1999) 260 – C5-0082/1999 – 1999/0116) (report by Hubert Pirker)

Committee on Legal Affairs and the Internal Market

Draftsperson: Astrid Thors

PROCEDURE

At its meeting of 23 September 1999 the Committee on Legal Affairs and the Internal Market appointed Astrid Thors draftsperson.

It considered the draft opinion at its meetings of 11 October 1999 and 26 October 1999.

At the last meeting it adopted the following conclusions by 12 votes to 8, with 6 abstentions.

The following were present for the vote: Palacio Vallelersundi, chairman; Beysen, vice-chairman; Thors, draftsperson; Berenguer Fuster, Berger, Cederschiöld, Crowley, De Clercq, Dehousse, Echerer, Ferri, Fourtou, Garaud, Gebhardt, Hager, Lechner, Lehne, MacCormick, Manders, Mathieu, Mayer, Medina Ortega, Miller, Musotto (for Wieland pursuant to Rule 153(2)), Tajani, Wallis, Wuermeling, Wuori, Zappalá and Zimeray.

1. Background

The Dublin Convention lays down detailed provisions for determining the Member State responsible for examining an application for asylum lodged in a Member State.¹ The Member State responsible is determined by the following ranking: (1) the Member State of lawful residence of family members, (2) the Member State of which the asylum seeker possesses a valid residence permit, (3) the Member State of the illegal entry; however, the Member State of application is responsible if the applicant has been living therein for at least six months; (4) the Member State responsible for controlling the entry of the alien into the territory of the Member States, (5) the Member State of the first application for asylum.²

¹ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (OJ C 254, 19.8.1997, p. 1), as supplemented by Decisions 1/97 and 2/97 (OJ L 281, 14.10.1997, pp. 1 and 26) and Decision 1/98 (OJ L 196, 14.7.1998, p. 49) of the Dublin Committee.

² Articles 4 to 8 of the Dublin Convention.

As it is very difficult in practice to determine which of the aforementioned cases applies, the proposed Eurodac system supplements the Dublin Convention. Proof is made more easily available by taking and transmitting fingerprints of

- applicants for asylum (Art. 4(1))
- aliens who are apprehended in connection with the irregular crossing of Member States' borders coming from a third country (Art. 8(1))
- aliens found illegally present within the territory of a Member State (Art. 11(1)).

This proposal has become necessary following the entry into force of the Amsterdam Treaty. The new Article 63 EC Treaty is now the correct legal basis and it authorises the adoption of a regulation rather than a combination of a Convention and a Protocol based on the third pillar as was the case before the Amsterdam Treaty entered into force. Whereas the Eurodac Convention¹ and the Eurodac Protocol² never entered into force, the adoption of a regulation would put in place a directly applicable legal instrument coming under the first pillar.

2. General appraisal

The draftsman **agrees** that the Dublin Convention needs to be complemented speedily by a Eurodac Regulation in order to make the former operable in practice.

However, it will have to be **examined** in depth whether the proposal is sufficiently protective of the rights of those individuals whose fingerprints have been taken and processed. Under normal circumstances, fingerprints may be taken only from criminals or persons suspected of a criminal offence. In no circumstances asylum seekers must suffer adverse consequences as a result of the taking and processing of their fingerprints.

3. Comments concerning the operation of Eurodac

The key provisions governing the operation of Eurodac as follows:

Fingerprints of every **applicant for asylum** are to be compared with fingerprints **already stored** in the central database (Art. 4(1) and (3)).

Fingerprints of every alien apprehended in connection with the **irregular crossing of the border** of a Member State having come from a third country are recorded for the sole purpose of comparison with data on **applicants for asylum** transmitted **subsequently**. (Art. 8(1) and (2)).

With a view to checking whether an alien **found illegally present** within its territory has previously lodged an application for asylum in another Member State, his or her fingerprints are to be communicated to the Central Unit **solely** for the purpose of comparison with the fingerprints of **applicants for asylum** transmitted by other Member States and **already recorded** in the central database (Art. 11).

¹ Cf. annex to document COM(1999)260 as well as EP report A4-0402/97 and EP resolutions of 15.1.1998 and 13.4.1999.

² Cf. annex to document COM(1999)260 as well as EP report A4-0138/99 and EP resolution of 13.4.1999.

Those provisions are at odds with some of the criteria laid down by the Dublin Convention.

First, the Dublin Convention establishes more criteria than the three used in the draft regulation. The emphasis put on those three criteria could distort the hierarchy of criteria enshrined in the Dublin Convention.

Secondly, the material times under the Dublin Convention are those when the facts occurred (e.g. date of illegal crossing of a border), whereas the relevant times under the draft regulation are those, when the fingerprint data were transmitted (e.g. time of transmission of fingerprints taken from a person who has illegally crossed the border).

Thirdly and speaking in general terms, there is a risk that the Dublin Convention might be interpreted in the light of the Eurodac Regulation, which would pose a methodological problem.

4. Refugees

Article 12 concerns “data” relating to recognised and admitted **refugees**. This is an innovation since the Dublin Convention makes no reference to refugees. The notion of ‘refugee’¹ is clearly distinct from the expression ‘applicant for asylum’. The wording of Article 12 is vague in that it is unclear whether such refugees must also satisfy one of the other conditions referred to in the Regulation (i.e. whether the person concerned must also be an applicant for asylum, a person who has illegally crossed the border, or a person who is illegally present) or whether all refugees are concerned. Furthermore, it remains unclear whether the expression “data” includes fingerprints. As Eurodac mainly deals with fingerprints, this would appear to be the case.

Article 12 in its present form would seem to be fraught with potential dangers.

5. Protecting the fundamental rights of the individuals concerned

The legal framework

According to Article 6 of the EU Treaty, “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms protects – *inter alia* – private life.² This right includes access to personal data.³

The European Court of Justice has consistently held in terms similar to Article 6 EU Treaty that

¹ For further details see Documents COM(97)93, EP report A4-0284/97, resolution of 23.10.1997 and COM(98)0372, EP report A4-0399/98, resolution of 20.11.1998.

² “Everyone has the right to respect for his private and family life, his home and his correspondence.”

³ European Court of Human Rights, judgment of 26.3.1987, Leander, A series, No 116; judgment of 7.7.1989, Gaskin, A series, No 160; Judgment of 27.8.1997, M.S. v. Sweden, 20837/92, Reports 1997/IV.

it ensures the observance of fundamental rights.¹

Directive 95/46/EC (OJ L 281, 23.11.1995, p. 31) aims at protecting individuals with regard to the processing of personal data and the free movement of such data. It has been complemented by Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ L 24, 30.1.1998, p. 1).

Article 286 of the EC Treaty provides: “From 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.”

The issue of personal data protection clearly gives rise to the utmost concern where an instrument provides that fingerprints of certain individuals, whether or not third country nationals, must be taken and processed. In civilised societies, only criminals and suspected criminals are subjected to such treatment.

On the other hand, Community law fully enables the Community legislator to protect fundamental rights. It shall be examined in the following whether the proposal as it stands today can be regarded as being sufficiently protective of fundamental rights and what respects it needs to be improved.

Obligations under the draft regulation

Member States of origin (Art. 2(1)f)) are extensively responsible for data use (Art. 13(1) to (3)) such as

- the taking of fingerprints
- the transmission of fingerprints to the Central Unit
- the accuracy of data
- the operation of the central database (without prejudice to the responsibilities of the Commission)
- the lawful use of results of fingerprint comparisons.

Likewise, Member States of origin are to take very detailed measures in order to prevent abusive operations by unauthorised persons (Art. 14).

No Member State may conduct searches in the data transmitted by another Member State, nor may it receive such data apart from data resulting from authorised fingerprint comparisons (Art. 15(1)).

The **Commission** is to “ensure” that the Central Unit is operated in accordance with the Regulation and its implementing rules (Art. 13). It is also to take detailed measures in order to

¹ Cf. judgment of 13 December 1979 in Case 44/79, Hauer, point 3; judgment of 29 April 1999 in Case C-293/97, The Queen v. Secretary of State for the Environment and Another, ex.p. Standley and Metson, point 54.

prevent abusive operations by unauthorised persons in the Central Unit (Art 14).

Factual corrections

Data subjects have a right of *access to data*. **Any person** may request that factually inaccurate data be *corrected* or that data recorded unlawfully be *erased*. (Art. 18). In case of a dispute, claims can be lodged with a **national supervisory authority** (Art. 19 and Art. 18 (10)).

Sanctions

It would appear that sanctions for a breach of the above mentioned obligations *by a Member State* are governed by national law (for liability see Art. 17 (3)). A particularly difficult issue might be where the Member State of origin and the Commission share responsibility for the operation of the central database. Member States' penalties applicable to infringements must be effective, proportionate and dissuasive (Art. 24).

It can only be inferred from general Community law what kind of sanctions might apply in case of mis-operation of the *Central Unit (i.e the Commission)*. Non-contractual liability as enshrined in Article 288(2) EC-Treaty would certainly be a possibility, but the case-law on non-contractual liability of the Community leaves a great deal to be desired.¹ In addition, disciplinary proceedings against officials and agents might be initiated – but not by the injured parties. Moreover, officials and other servants of the EC are immune from legal proceedings (such as criminal proceedings) in respect of acts performed by them in their official capacity (Art. 12 of the Protocol on the Privileges and Immunities of the European Communities). This immunity may be waived, but the injured party cannot substantially influence this process (Art. 18). It should also be borne in mind that the Commission has its seat in Brussels and that the prosecution would have to be exercised by Belgian authorities. This points once again to the potential utility of a **European Public Prosecutor** (with competencies extended to the field of data protection), which has been called for, *inter alia*, in the Second Report of the Committee of Independent Experts².

Generally, therefore, the question of how to ensure deterrent and effective sanctions against unauthorised actions of the Central Unit remains unanswered.

The joint supervisory authority

A joint supervisory authority with merely decorative 'monitoring', 'examining' and 'consulting' functions is put in place by Article 20. Its severest sanction consists of reports which "shall be made public and shall be forwarded" to various bodies and institutions (Art. 20(8)). It appears unacceptable that all Member States are to be represented on the joint supervisory authority, but not the European Parliament.

The EC-Treaty and the case-law of the Court of Justice limit the possibility of setting up new bodies not provided for in the Treaty itself. This explains to some extent the anodyne and toothless nature of the joint supervisory authority.

However, if the Commission, as the institution responsible for running the Central Unit, takes

¹ For references see EP resolution of 30.1.1997 on the 13th annual report on monitoring the application of Community law (A4-0001/97)

² Second Report, Volume II, pp. 38 – 43, on <http://www.europarl.eu.int>

binding decisions relating to the rights of data subjects, its decisions will automatically be subject to judicial review (Art. 230 of the EC Treaty).

Fortunately, “[t]he joint supervisory authority shall be disbanded upon the establishment of the independent supervisory body referred to in Article 286(2) of the Treaty.” And: “The independent supervisory body shall replace the joint supervisory authority and shall exercise all the powers conferred on it by virtue of the act under which that body is established.” (Art. 20(11)). This last phrase is an absolute necessity. Without it, the European Parliament would run the risk of seeing its competencies under Article 286(2) of the EC Treaty undermined.

6. Conclusions

The Committee on Legal Affairs and Internal Market adopted the following conclusions:

1. The draft regulation is a useful proposal. It clearly makes the Dublin Convention more effective in practice.
2. As far as protection of fundamental rights is concerned, the question of how to guarantee deterrent and effective sanctions against unauthorised actions on the part of the Central Unit remains open. The idea of a European Public Prosecutor could be fruitfully discussed in this context.