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from: Mr. Peter Hustinx, European Data Protection Supervisor
date of receipt: 11 July 2013
to: President of the Council of the European Union

Subject: Eurodac Supervision Coordination Group: Report on the Coordinated
Inspection on Unreadable Fingerprints

Delegations will find attached the report from the of the European Data Protection Supervisor.



PETER HUSTINX
SUPERVISOR

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Union
General Secretariat
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Rue de la Loi 175
1048 Brussels

Brussels, 10 July 2013
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Subject: Eurodac Supervision Coordination Group: Report on the Coordinated Inspection on Unreadable Fingerprints

Dear Mr. President,

Eurodac, a large scale information system for the comparison of fingerprints of asylum applicants for the facilitation of the application of the Dublin II Regulation, is supervised by the national Data Protection Authorities at national level and the EDPS at European level. Representatives of the DPAs of all Member States using Eurodac and the EDPS cooperate within the Eurodac Supervision Coordination Group (SCG), to ensure coordinated supervision of Eurodac.

In 2012-2013, the Group conducted a coordinated inspection to identify procedures followed when fingerprints of asylum seekers, intended to be enrolled in the Eurodac database, turn out to be unreadable. The report of this inspection was adopted following the last meeting of the Eurodac SCG.

As Chair of the Group, I am pleased to send this report to you for your information.

Yours sincerely,

Peter HUSTINX
Chair of the Eurodac Supervision Coordination Group

Annex: Eurodac Supervision Coordination Group Report on the Coordinated Inspection on Unreadable Fingerprints

cc: Mr Uwe CORSEPIUS, Secretary-General
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Eurodac Supervision Coordination Group

**REPORT ON THE COORDINATED INSPECTION
ON UNREADABLE FINGERPRINTS**

May 2013

Introduction and Background

The collection and further processing of fingerprints occupy a central place in the Eurodac system. The processing of such biometric data poses specific challenges and creates risks which have to be addressed. In this context, the problem of 'failure to enrol' —the situation in which persons find themselves if for some reason, their fingerprints are not usable— is one of the main risks.

The purpose of Eurodac is to ensure that asylum seekers do not lodge multiple applications in different Member States¹ by checking the fingerprints of applicants and persons apprehended irregularly crossing the external border against those of previous applicants for asylum and irregular border crossers. It forms part of the Dublin system for attributing the responsibility of dealing with an asylum request. This responsibility is attributed according to a number of criteria set out in the Dublin II Regulation.² These criteria are ordered by importance; the most important ones are family members already legally staying in the Dublin area and previous residence permits or visas issued by Member States. The principle of having the application examined by the first Member State in which an application was lodged is a low-ranking criterion on this list.³

If the fingerprints of a person are not readable, this check on whether there have been previous applications cannot be carried out. There are many reasons why fingerprints might be unreadable. Examples include recent burns or the worn-down prints of persons who have been working manually for a long time, such as artisans. Often, retaking fingerprints at a later point in time can yield readable prints, making a check possible, while in other cases, they are permanently unreadable. In some cases, the competent authorities suspect that applicants voluntarily damage their fingerprints in order to avoid earlier applications being found.

In this regard, the procedures established for dealing with such cases are important. Are fingerprints re-taken regularly? Are there medical examinations to determine whether fingerprints have been voluntarily rendered unreadable? What are the consequences for asylum seekers if their prints are permanently unreadable?

It came to the attention of the Group that in at least one Member State an administrative rule existed which stipulated that after three unsuccessful attempts to take fingerprints, it ought to be assumed that the prints have been destroyed

¹ In this report, the term 'Member States' refers to the members of the 'Dublin area', i.e. the EU-27 plus Iceland, Liechtenstein, Norway, and Switzerland.

² OJ L 50, 25.2.2003, p. 1, as amended.

³ Cf. Dublin II Regulation, Articles 5 to 14; higher-ranking criteria are e.g. having family member residing in a Member State or having possessed a residence permit in a Member State earlier.

voluntarily. This assumption could then be used against the applicant in the asylum procedure, accusing him/her of wanting to frustrate the examination of the application and cutting benefit entitlements. In the meantime, this practice has been overturned by court rulings. The updated work programme 2010-2012 of the Eurodac Supervision Coordination Group ('the Group') refers to the issue of unreadable fingerprints and the reactions of Member States in such cases.

As this issue might be relevant in other Member States as well, the Group decided to look into it. As the purpose of Eurodac is not to add the criterion 'having readable fingerprints' to the list of criteria for being granted asylum, but to detect and prevent multiple applications, the fact that a person has illegible fingerprints should not be used against him/her. In fact, this would be discriminating behaviour.

The legal basis for Eurodac does not specifically address this issue. Both under the current Eurodac Regulation⁴ and also in the current proposal for its reform⁵, only temporary failure to enrol is regulated. In other instruments dealing with biometric data, there are clearly defined rules for cases in which fingerprints are permanently unreadable. For visa applications, for example, the amended Common Consular Instructions⁶ stipulate in Point 1.2. (b) that '[...] Member States shall ensure that appropriate procedures guaranteeing the dignity of the applicant are in place in the event of there being difficulties in enrolling. The fact that fingerprinting is physically impossible shall not influence the grant or refusal of a visa.' The Eurodac Regulation should be interpreted along similar lines. The proposal for an Entry-Exit System published in early 2013 also contains similar provisions.⁷

The rest of this report is structured as follows: first the content and design of the questionnaire are explained, before analysing the results of the inspection. A concluding section sets out best practices and recommendations for competent authorities to implement.

⁴ Regulation (EC) 2725/2000, Article 4

⁵ COM(2012)254 final, Articles 9 and 25.

⁶ These amendments were introduced by Regulation (EC) No 390/2009 of 23 April 2009 amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications, OJ L 131, 28.5.2009, p.1.

⁷ COM(2013)95 final, Article 12(3), "3. Persons for whom fingerprinting is physically impossible shall be exempt from the requirement to give fingerprints for factual reasons. However, should the impossibility be of a temporary nature, the person shall be required to give the fingerprints at the following entry. The border authorities shall be entitled to request further clarification on the grounds for the temporary impossibility to provide fingerprints. Member States shall ensure that appropriate procedures guaranteeing the dignity of the person are in place in the event of encountered difficulties with capturing fingerprints".

Content of the questionnaire

The questionnaire, which was adopted following the Group's meeting on 21 October 2011, pursued two aims:

- To receive an overview of the practices for dealing with unreadable fingerprints;
- To identify best practices and possible improvements.

To this end, the questionnaire was divided into two sections:

- Five questions for the competent authorities, aiming to find out what procedures for dealing with unreadable fingerprints are in force;
- Three questions for data protection authorities (DPAs), focusing on legal aspects and their assessment of the situation.

The full questionnaire is reproduced below:

| Questions for EURODAC authorities | |
|-----------------------------------|---|
| Q 1 | Which procedures are used for taking fingerprints in the context of Eurodac (manual or live scan, procedures for ensuring quality)? |
| Q 2 | Please describe the national procedures for dealing with situations or cases when the fingerprints of a data subject cannot be read temporarily or permanently. If there are formal procedures, what is their status (e.g. law, internal regulations, guidelines for practitioners etc)? |
| Q 3 | Please provide statistics on cases where fingerprints have been rejected due to their poor quality. How often have national authorities faced situations where fingerprints were either temporarily or permanently unreadable? |
| Q 4 | If you have encountered such cases, please describe the consequences (administrative, social etc.) for the data subject. If after several attempts the fingerprints still cannot be read, do the procedures in force assume that the asylum seeker voluntarily rendered his/her fingerprints unreadable? |
| Q 5 | Do you get complaints in this regard? If yes, how many and how were they solved? |
| Questions for DPAs | |
| Q 6 | Do you agree that an updated legal framework for Eurodac should take such cases into account? Do you have any possible legislative suggestions? |
| Q 7 | What is your assessment of the situation? Please state any specific comments, remark or recommendation which you would find useful. |
| Q 8 | What is your assessment of the way persons with unreadable fingerprints are treated in the context of Eurodac? Do you get complaints about this issue? |

The questionnaire was sent to the Members on 29 November 2011. The choice between on-the-spot inspections and desk work was left to the Members.

Analysis of results

Answers were collected throughout 2012 and early 2013; this report is based on 30 answers.⁸

(Q1) Regarding how fingerprints are taken, a clear majority of Member States (19) uses live scanners, either exclusively or predominantly. Sometimes, these Member States use manual scans as a backup option in case the live scan fails, in special conditions, or simply when there are no live scanners available at the place of application. The latter is usually the case for those six additional Member States which indicated using both live scans and manual printing. Three Member States use manual prints only. One Member State did not provide information.

More than ten Member States appear not to have formally established procedures for dealing with unreadable fingerprints. One of these Member States was in the process of establishing formal procedures at the time of the inspection. Several Member States without formal procedures referred to guidelines, "best practices" or other non-binding documents on how to handle such cases. On the other hand, eleven Member States do have such formally established procedures or guidelines.

One Member State uses its rules for fingerprinting in a law-enforcement context.

(Q2) Whether they are formally established or informal practices, Member States usually try to take fingerprints again after a certain time. If the first scan fails, the established practice in most Member States is to retake after a period of a few days to up to eight weeks, with up to five retries and sometimes even more. This might take up to close to eight months. The most common period seems to be two weeks. Several Member States pointed out that fingerprints usually regenerate⁹ and noted that cases of permanently unreadable prints were quite rare.

In some Member States, assistance from experts from special departments can be requested to ensure that the prints are taken correctly. In one Member State, there is an informal cooperation procedure between the Eurodac authority and forensic institutes for checking whether fingerprints have been mutilated on purpose. One Member State schedules a medical examination after two months of unsuccessfully trying to collect fingerprints. However, nine Member States stated that they involve forensic, medical or other external experts in the final assessment of whether or not unreadable fingerprints are due to voluntary mutilation, actual wear and tear, medical conditions or other reasons.

Five Member States may decide to detain asylum seekers between fingerprinting attempts.

None of the procedures are identical.

⁸ AT, BE, BG, CH, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IS, IT, LI, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK, SL, UK.

⁹ One Member State's competent authority stated that ridges usually regenerate in the course of three weeks.

(Q3) While the absolute numbers of persons with unreadable fingerprints are not very high, this problem still concerns a significant number of individuals whose fingerprints are temporarily unreadable. Permanently unreadable fingerprints appear to be quite rare. Only about half of the replies contained statistics. The statistics collected do not necessarily specify the reason why a scan was considered to be of poor quality. Apart from damaged fingertips, poor quality can also be caused by technical problems or human error. The percentages for prints with poor quality vary widely between Member States - from 1% to 20% on the first try. In some cases, the replies differ from the numbers collected by the Commission for rejected transactions in the central unit. One reason for this is that fingerprints that clearly do not meet the quality standards are sometimes not sent to the central unit in the first place. This large range suggests that -at least for the first try- the equipment used and the training of persons taking the prints account for a part of the variation.¹⁰ On a second try, these numbers decrease significantly, but still affect a sizable number of persons. One Member State, which is among those dealing with a large amount of applications, has established a special unit dealing with such prints; this unit had 170 cases referred to it in 2011.

(Q4) In some Member States, if the asylum authority comes to the conclusion that fingerprints have been rendered unreadable on purpose, this can have adverse consequences for the further asylum procedure, up to a refusal of the application. In one Member State, temporary residence permits are withdrawn after three unsuccessful attempts. In another Member State, daily allowances for asylum seekers who are suspected of manipulating their fingerprints can be reduced.

The reason usually given is that applicants have a duty to cooperate with the asylum proceedings and that deliberately damaging fingertips is seen as an attempt to frustrate the proceedings. If on the other hand, it is determined that fingerprints are permanently unreadable for other reasons, such as medical conditions or wear and tear, the asylum procedure usually continues without the Eurodac check. It can also be decided to suspend the admission procedure until recovery of the person

As already mentioned, five Member States may decide to detain asylum seekers between fingerprinting attempts.

In several Member States, the asylum procedure is effectively put on hold between the retaking of the prints, with no interviews or other examination of the application's merits occurring.

One Member State mentioned practical experience with refugees whose fingerprints improve over time, only to deteriorate again when the next date for taking fingerprints approaches. In these cases -provided that there are no skin problems or other underlying medical conditions- this Member State considers it reasonable to assume that the new deterioration results from deliberate action. Three other Member States mentioned applicants from certain countries of origin as often deliberately damaging their fingertips.

In a majority of Member States, there are no negative consequences from having (temporarily) unreadable fingerprints, apart from lengthening the asylum procedure.

¹⁰ It seems that training of the staff taking the prints is especially important, as the percentages of low-quality prints do not seem to be highly correlated with the techniques used.

(Q5) There are no reports of complaints from asylum seekers to competent authorities in this regard.

(Q6, Q7) Even though they did not receive any complaints regarding this subject and some consider that the question of unreadable fingerprints is not an issue at the national level and their assessment of the situation is rather satisfactory, most DPAs (22) suggested that clarifications would be welcome. Some considered that the issue of unreadable fingerprints should be regulated in more detail in the upcoming reform of the Eurodac regulation, clearly stipulating that the simple fact of having unreadable fingerprints should not lead to adverse consequences for applicants for asylum; procedures for dealing with unreadable fingerprints should be laid down in binding texts. These provisions should establish that adverse consequences for applicants -if any- should be based on sufficient evidence of deliberate mutilation of fingertips for this purpose. Such provisions could be modelled on the passage on unreadable fingerprints in the Common Consular Instructions. It was also highlighted that while Eurodac was a tool to identify the Member State responsible for an application, it was not the only tool to authenticate asylum seekers. Other suggestions included establishing a best practice procedure and obliging Member States to use modern equipment and well-trained staff by including such a provision in the recast.

(Q8) There are no reports of complaints from asylum seekers to DPAs in this regard. Several Member States reported lawsuits challenging negative consequences of unreadable fingerprints. The results of these lawsuits vary, there are no clear patterns.

Conclusions & Recommendations

Based on the analysis of the replies received, the Group issues the following recommendations:

- Competent authorities in the Member States should establish clear and binding procedures for dealing with unreadable fingerprints that are consistent between Member States. Thus, the asylum seekers would benefit of a coherent practice throughout EU (avoiding possible discrimination) and would be able to get a clear picture of the situation. The procedures should clarify that unreadable fingerprints as such are not to be used against applicants, but that any adverse consequences for applicants need to be justified by sufficient evidence. Competent authorities should take appropriate steps to ensure compliance with this principle.
- As a best practice, this procedure should require competent authorities in the Member States to retake fingerprints after a certain time, for example two weeks, in order to allow the ridges to regenerate and, if possible, involve a specialist forensic or technical officer in the procedure. To decrease the administrative burden and individual stress, a common minimum time before retaking fingerprints should be established. Based on other comments and the given variation, a few weeks seem sensible. It should also be decided whether the applicant, when detained, is to be informed of the next attempt of taking

his or her fingerprints. It should also be ensured that asylum seekers have the possibility to lodge a complaint *vis-à-vis* responsible national authorities or even national data protection supervisory authorities;

- A provision clearly stating that the mere fact of having unreadable fingerprints should not adversely affect the asylum application should be taken into account by the EU legislator and introduced in the relevant legal framework. The text could be based on the relevant passages of the Common Consular Instructions.

Finally, the Group would like to point out that given that according to the Dublin II Regulation, there are also other, more important criteria for determining the Member State responsible for an application; the fact that the Eurodac check is still pending should not lead to not examining these other criteria.

Brussels, 27 May 2013