

FOCUS ON EURODAC: DISENTANGLED FROM THE ‘PACKAGE APPROACH’ BUT IS IT FIT TO FLY?

THE PAPER EXAMINES THE AMENDMENTS TO THE EURODAC PROPOSAL PROPOSED BY THE COUNCIL AND THE EUROPEAN PARLIAMENT AND THE CONNECTIONS BETWEEN EURODAC AND OTHER CEAS REFORM PROPOSALS.

IT PROVIDES RECOMMENDATIONS FOR THE TRILOGUES AND FOR IMPLEMENTATION OF THE REVISED RULES.

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ECRE Working Papers present research and analysis on asylum and migration. Their purpose is to stimulate debate by showcasing emerging ideas. Working Papers are commissioned by ECRE; the views they contain are those of their authors and do not necessarily represent ECRE's positions.

1. INTRODUCTION

Eurodac, which stands for European Asylum Dactyloscopy Database, is an EU-wide information system that primarily processes the fingerprints of asylum seekers and certain categories of irregular migrants, in particular those apprehended irregularly crossing the external borders of the EU or found irregularly staying on national territory. Eurodac has been operational since 2003 and constitutes the EU's first experiment with biometric identifiers. It was designed to assist with implementing the Dublin system to determine the member state responsible for examining an application for international protection.¹ Eurodac forms an integral part of the Common European Asylum System (CEAS), but it is also one of the six interoperable large-scale IT systems for third-country nationals (the others being the Schengen Information System (SIS), the Visa Information System (VIS), the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS), and the European Criminal Record Information System for Third-country Nationals (ECRIS-TCN)).

Eurodac's current legal basis is Regulation 603/2013 (recast Eurodac Regulation)² which came into force in July 2015. On 4 May 2016, the Commission adopted a recast Eurodac proposal³ within the framework of revising CEAS-related legal instruments.⁴ The proposal essentially detached Eurodac from its asylum framework and re-packaged it as a system pursuing 'wider immigration purposes', particularly in relation to supporting returns of irregular migrants.⁵ The negotiations on that proposal led to a (secret) interinstitutional agreement in mid-2018 between the co-legislators.⁶ The main changes to Eurodac, in line with the proposal as accorded in the Interinstitutional Agreement, could be summarized as follows: expansion of its scope by lowering the threshold for storing personal data in the system to the age of six; and storage of records on persons found to be irregularly staying on national territory and records on resettled individuals. Although Eurodac is primarily a fingerprint database, additional categories of personal data will be stored in the system, including individuals' facial images and copies of travel and identity documents. The conditions governing access to Eurodac data by law enforcement, authorized following the adoption of Regulation 603/2013, were

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Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31 (Dublin III Regulation).

2. Regulation 603/2013 of the European Parliament and of the Council of 26 June 2013 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 and on requests for the comparison 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) [2013] OJ L180/1 (recast Eurodac Regulation).

3. 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 persons], 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 final (2016 Eurodac Proposal).

4. 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 final; 'Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM(2016) 466 final; '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' COM(2016) 467 final; 'Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection' COM(2016) 465 final; 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010' COM(2016) 271 final; Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council' COM (2016) 468 final (Proposal for resettlement).

5. Commission, '2016 Eurodac Proposal' (No. 4) 6.

6. The interinstitutional agreement can be found here: [https://www.europarl.europa.eu/RegData/publications/divers/2016/0132/NEGO_CT\(2016\)0132\(2018-06-21\)_XL.pdf](https://www.europarl.europa.eu/RegData/publications/divers/2016/0132/NEGO_CT(2016)0132(2018-06-21)_XL.pdf)

watered down.⁷

However, because the European Parliament wanted all the legislative proposals to be agreed before they were adopted, instead of each one being adopted individually at its own pace, (the so-called ‘package approach’ to CEAS) and there were significant difficulties reaching agreement on other dossiers, particularly issues related to the Dublin IV Regulation and the EU resettlement framework, the negotiations were halted.

On 23 September 2020, the Commission proposed further amendments to the Eurodac regime⁸ within the framework of the New Pact on Migration and Asylum.⁹ The amended proposal calls for several additional amendments to how Eurodac operates, both within the framework of CEAS and migration control, and within an interoperable environment, whilst taking into account the interinstitutional agreement between the Council and the European Parliament. In a nutshell, the 2020 Commission proposal calls for the following amendments:

- a) Counting applicants for international protection in addition to counting applications;¹⁰
- b) Creation by eu-LISA of cross-system statistics using data from Eurodac, EES, ETIAS and VIS;¹¹
- c) Creation of a new category for persons disembarked following a search and rescue (SAR) operation and consistency with the proposal for a Regulation on Asylum and Migration;¹²
- d) Consistency with the Proposal for a Screening Regulation regarding the collecting of biometric and alphanumeric data;¹³
- e) Addition of new categories of personal data, namely: where an application for international protection has been rejected; where the applicant has no right to remain and has not been allowed to remain in a member state, recording whether voluntary return and reintegration assistance (AVRR) has been granted to a third-country national; whether it appears that the person could pose a threat to internal security following a screening process; where there are indications that a visa was issued to the applicant, the member state which issued or extended the visa or on behalf of which the visa has been issued and the visa application number; mention of the responsible member state, the shift of responsibility to another member state and the cessation of responsibility, as well as the relocation of international protection beneficiaries.¹⁴
- f) Consequential amendments relating to the forthcoming interoperability of large-scale IT systems.¹⁵

This policy paper builds on a previous policy paper, published in January 2021, which analysed the transformation of Eurodac from the digital sidekick of the Dublin system to a multipurpose database supporting EU policies on asylum (including resettlement) and irregular migration.¹⁶ It analyses the Council’s general approach and the European Parliament’s updated negotiating mandate in respect of the amended Eurodac

7. Niovi Vavoula, ‘The Transformation of Eurodac from 2016 to the New Pact: From the Dublin System’s Sidekick to a Database in Support of EU Policies on Asylum, Resettlement and Irregular Migration’ (European Council on Refugees and Exiles - ECRE, 2021).

8. Commission, ‘Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], 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 and amending Regulations (EU) 2018/1240 and (EU) 2019/818\ COM(2020) 614 final (2020 Eurodac Proposal).

9. Commission, ‘Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817’ COM(2020) 612 final (Proposal for a Screening Regulation); ‘Amended 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’ COM(2020) 611 final; ‘Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum’ COM(2020) 613 final. On Eurodac see n (6). Also see Commission, ‘Recommendation of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities’ C(2020) 6468 final (SAR Recommendation); ‘Recommendation of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways’ C(2020) 6467 final; ‘Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence’ C(2020) 6470 final. For an analysis see Evelien Brouwer and others, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (Study for the LIBE Committee of the European Parliament, PE697.130, 2021).

10. Commission, ‘2020 Eurodac Proposal’ (No. 8) art 4(6).

11. Ibid Art. 9.

12. Ibid Art. 14a.

13. Ibid Art. 10(1),

14. Ibid Arts 12(1), 13(1), 14(1) and 14a(1).

15. Ibid Arts 8a-8d.

16. Vavoula, ‘The Transformation of Eurodac’ (No. 7).

proposal, highlights the main amendments proposed and explores and other challenges, included those related to fundamental rights, posed by the amendments proposed by the co-legislators. The policy paper therefore aims to provide the necessary framework for informing policymaking as negotiations on this dossier will move swiftly. This is in line with the Joint Roadmap of the timeline for negotiations between the co-legislators on the CEAS and the New European Pact on migration and asylum. It aims to have all new migration and asylum legislation adopted by spring 2024.¹⁷

Furthermore, this policy paper aims to position the Eurodac reforms alongside other proposals, including on screening and resettlement, and identify the extent to which Eurodac reform is connected to such proposals and how the adoption of revised Eurodac rules will have an impact on those proposals. This is particularly important considering that on 15 December 2022 the co-legislators reached agreement on the Resettlement Framework Regulation and the recast Reception Conditions Directive. Eurodac is decoupled from the 'package approach' and therefore it is crucial to examine how these rules will interact with other legal instruments.

Consequently, the policy paper first provides concise overviews of the main amendments proposed by the Council (Section 2) and the European Parliament (Section 3). It then assesses their impact on fundamental rights, taking into account other factors such as the efficiency, effectiveness and fairness for member states. Section 4 then explains where the two co-legislators converge and where it could be more difficult to reconcile their positions, bearing in mind the other legislative instruments under negotiation. Finally, Section 5 provides recommendations for the trilogues and the last section considers an overall overhaul of the Eurodac rules to put forward recommendations for civil society and supervisory authorities regarding implementation of the revised rules.

17. Joint Roadmap of the European Parliament and Rotating Presidencies of the Council on the organisation, coordination, and implementation of the timeline for the negotiations between the co-legislators on the CEAS and the New European Pact on migration and asylum <https://www.europarl.europa.eu/resources/library/media/20220907RES39903/20220907RES39903.pdf>

2. ASSESSING THE COUNCIL'S GENERAL APPROACH

The Council adopted its General Approach on 22 June 2022 and agreed with the vast majority of the reforms proposed by the Commission (all but the cross-references to the Screening Regulation and the Migration and Asylum Management Regulation which are still being negotiated).¹⁸ The importance and added value of Eurodac as a system, which is not only part of the CEAS but also an integral part of the changing landscape of large-scale IT systems, and the interoperability currently under development have meant that the system is considered from the perspective of security. Therefore, there is strong impetus to decouple it from the CEAS package approach and move forward separately. In addition to the reforms accepted by the member states, the following additional amendments have been proposed by the Council:

1. Creation of additional statistical data regarding persons disembarked following a SAR operation and beneficiaries of temporary protection (Section 2.1);
2. (Partial) decoupling from the screening process (Section 2.2);
3. Explicit obligation for multiple registrations of the same individual (Section 2.3)
4. Storage of information regarding the departure of an applicant for international protection (Section 2.4);
5. Decoupling Eurodac from relocation (Section 2.5);
6. Extension of the Deadline for Transmitting Personal Data of Persons Disembarked Following A SAR Operation (Section 2.6);
7. Reference to resettlement (Section 2.7).

In addition, the Council proposes the following:

8. Expansion of Eurodac's scope to beneficiaries of temporary protection (Section 2.8).

2.1. Creation of Additional Statistical Data

Article 9 of the amended Eurodac proposal concerns the drawing up of statistical data on a monthly basis. The 2020 Commission proposal introduced additional statistical data to be taken from Eurodac, also in conjunction with other information systems (e.g., numbers of applicants for international protection, rejected applicants, hits against persons disembarked following a SAR operation).

The General Approach expands the list of statistical data in two main respects: inclusion of statistical data on hits against beneficiaries of temporary protection and drawing up statistics on the number of persons disembarked following SAR operations. With regard to the latter, the main aim of such statistical information is to enable member states in Mediterranean countries (the so-called Med 5) to obtain evidence of the pressure they face due to increased arrivals following SAR operations and therefore request solidarity from other member states. However, it has been well documented that to a significant extent SAR capacity stems from the involvement of private and commercial vessels, including those operated by NGOs. This is recognised in the SAR recommendation as well.¹⁹

Although this issue is addressed later in the policy paper where it is argued that the European Parliament has correctly removed this separate category from Eurodac, it is still worth exploring the implications of the statistical data on SAR rescued persons in terms of explaining the Council's amendments. In neutral terms, such statistical data are meant to inform future policymaking but a key concern surrounding the compilation of such statistics is that they are not going to be used merely by affected member states to substantiate requests for greater solidarity. On the basis of public policy concerns, they could also reinforce policies seeking to increase scrutiny and overall policing, and criminalise or suppress the work of SAR NGO vessels providing humanitarian assistance. Furthermore, such statistical data may be used to infer patterns through Artificial Intelligence (AI) tools and those patterns may then be encoded and translated in algorithms used to predict migration and asylum flows. Predictive analytic systems may then be used to allocate resources from member states and enhance preparedness, but they may also have a very significant impact on access to international protection procedures. This is because predictive analytical systems may be used to interdict, curtail and

18. Council, Document 10583/22 (22 June 2022).

19. SAR Recommendation, Recitals 4-5.

prevent migration. By generating predictions as to where there may be a risk of irregular migration, these systems may potentially be used to facilitate preventive responses to forbid or halt movement, either through the co-option of third countries or through illegal pushbacks.²⁰ Therefore, there is a risk that such statistical data may be used to inform punitive and unlawful border control policies that prevent individuals from seeking protection and expose them to risks of non-refoulement and violations of their rights to life and human dignity. As a result, it is unclear what the purpose of such additional statistical data will be and how it may be used in future policymaking. A safeguard that such statistical data should not be used to inform policies that interdict migration would be of added value.

Overall, statistical data on persons rescued following a SAR operation should not be collected and this amendment should not be passed.

2.2. (Partial) Decoupling of Eurodac from the Screening Process

A key reform in the 2020 Commission proposal has been to create synergies between the screening process for third-country nationals at external borders, as provided for in the proposal for a Screening Regulation, and the operation of Eurodac. The screening process requires the performance of identity and security checks through searches of EU and national information systems with biometric, identity or travel document data, or other information, provided by the individual concerned. This has translated in two main reforms: first, biometrics (fingerprints and a facial image) must be collected during the screening process in line with adjusted time limits mirroring the various possible scenarios provided for in the screening process; and second, information as to whether it appears that the person could pose a threat to internal security following the screening process will also be indicated.

The General Approach distinguishes between lodging an application and making an application at external border crossing points or in transit zones by a person who does not fulfil the entry conditions, without explicitly referring to the screening process.²¹ Therefore, there is no reference to the screening process. However, the inclusion of information as to whether the person could pose a threat to internal security has remained for all categories of persons falling within the scope of Eurodac (applicants for international protection, irregular border crossers, irregular migrants and persons disembarked following a SAR operation), except beneficiaries of temporary protection. Instead of screening, the General Approach refers to “any security checks.”²²

The lack of reference to the screening process is attributed to Eurodac’s separation from the other more controversial dossiers on screening. Those trilogues are expected to start in early 2023. However, there is significant divergence between the co-legislators surrounding, amongst other things, the health and vulnerability checks conducted on individuals and the location of the screening process which includes screening within the territory. Importantly, a key cause of divergence is the scope of the fundamental rights border monitoring mechanism. The disassociation of the two dossiers means that Eurodac could be adopted separately as there is no cross-reference with the screening process. However, concerns regarding the insertion of a security flag in Eurodac, as expressed in the previous policy paper, remain and will be further fleshed out below when discussing the negotiating position of the European Parliament (Section 3.6).

2.3. Explicit Obligation for Multiple Registrations of the Same Individual

As Eurodac moves into becoming a multipurpose tool aimed at tracking the movements of third-country nationals who fall within its scope to seek protection in another EU member state, the 2020 Commission proposal marks an important change in the system, moving from counting applications to also counting applicants. In that regard, the General Approach has inserted the requirement that individuals apprehended in connection with an irregular crossing of external borders, irregularly staying on a member state’s territory, disembarking following a SAR operation or registered as beneficiaries of temporary protection apply for international protection afterwards or simultaneously. According to revised Articles 10(4a)-(4ca), member states will be obliged to register the individuals concerned under both categories involved.²³ It is true that at the moment it is unclear how many applicants for international protection are recorded in Eurodac. However, at

20. Access Now, ‘Joint Statement: The EU AI Act Must Protect People on the Move’ (6 December 2022) <https://www.accessnow.org/joint-statement-ai-act-people-on-the-move/>.

21. Council, Document 10583/22 (No. 18) Arts 12(1a)(g); 13(2a)(c), 14(2a)(c) and 14a(2a)(e).

22. Ibid.

23. Similar rules exist in Article 14c in respect of beneficiaries of temporary protection.

the same time, this amendment is in line with the transformation of Eurodac into a system fully tracking individuals' potential secondary movement and application(s) for international protection. Such tracking may translate into more precise information about the routes taken by individuals and their preferences for settlement.

2.4. Storage of Information on the Departure of an International Protection Applicant

Article 11(2)(c) of the recast Eurodac Regulation requires certain additional categories of personal data to be stored depending on what happens to the individual concerned, i.e., recording transfers based on 'take back' or 'take charge' requests. The General Approach has suggested adding information on the date the person concerned left the territory of the member state. This change is meant to assist with implementation of the Dublin rules upon cessation of the responsibility of the member state concerned, in accordance with Article 19(3) and 20(5) of the Dublin III Regulation. However, it is unclear how this rule will be applied and to which situations it refers. This is because Article 11(2)(d) of the recast Eurodac Regulation refers to persons who have left a territory following a return decision or removal order. This must refer to situations where the member state of origin establishes that a person has left its territory of his/her own volition and therefore there is a presumption of secondary movement. However, this is very vague and difficult to implement. How can the member state of origin identify whether an applicant for international protection has left its territory? Will this be based on information from another member state where this person may be found? If so, then the member state will still not know when the applicant actually left its territory, but only be in a position to provide an estimated timeframe - unless, for example, the General Approach assumes that all applicants for international protection will be detained in closed facilities, whereby they will essentially be under surveillance. This is the case at the Greek refugee camps, for example.

2.5. Decoupling Eurodac from Relocation and RAMM

Despite Eurodac's forthcoming multipurpose function, the system remains inextricably linked to the allocation of responsibility for the examination of an application for international protection (Dublin rules). Considering that the New Pact on Migration and Asylum includes a proposal for a Regulation on Asylum and Migration Management, replacing the Dublin III Regulation (RAMM), the 2020 Eurodac proposal made explicit references to that instrument, inserted Article 14b on Information on the relocation status of the data subject to be included, and made reference to the relocation mechanism laid down in that proposal. This involves recording information on the relocation member state.

As with the screening process, the General Approach has removed the obligation to record such information.²⁴ Moreover, Article 14b of the 2020 Eurodac proposal has been removed. In addition, all references to a Regulation on the Management of Migration and Asylum have also been replaced with references to the Dublin III Regulation. This is a workable solution considering that, in line with the Joint Agreement between the co-legislators, negotiations on all pending legal instruments, including the RAMM proposal, must be completed by February 2024. However, as a result the Eurodac rules may have to be further amended by RAMM in the very near future to replace all existing references, thus creating additional bureaucracy.

2.6. Extension of the Deadline for Transmitting Personal Data of Persons Disembarked Following a SAR Operation

Finally, as mentioned earlier, Article 14a of the 2020 Eurodac proposal has created a new category within Eurodac's scope covering third-country nationals and stateless persons disembarked following a SAR operation.²⁵ The time limit for transmitting the personal data of such persons to the Central System and the CIR is 72 hours, as for other categories of persons covered by the Eurodac rules. The proposal only provides for the possibility of extending this time limit by 48 hours in the event of serious technical problems.

The General Approach has added a provision whereby in the event of a sudden influx member states may extend the 72-hour deadline by a maximum of a further 48 hours. The derogation will come into force on the

24. See Articles 12, 13, 14, 14a.

25. Addition of definition of a Search and Rescue Operation (SAR) in Article 3(ea): SAR is defined as operations of search and rescue as per the 1979 International Convention on Maritime Search and Rescue. This definition is thus in line with international law and should be accepted.

day it is notified to the Commission and the other member states, for the duration provided for in the notification which cannot exceed one month. In terms of efficiency, such an extension to the deadline has both positive and negative implications. It is in the interests of persons disembarked following a SAR to have their personal data collected and transmitted so that they can access the asylum procedure as soon as possible. Any extension would therefore delay the process. It may particularly affect especially vulnerable individuals, such as minors (both accompanied and unaccompanied), pregnant women or elderly people. Considering that individuals may be detained pending registration, in accordance with the Reception Conditions Directive, until their identity is verified, this delay may have additional impact on their right to liberty.²⁶ The fact that the General Approach indicates that the duration of the derogation cannot exceed one month is welcome, but there is no limitation for renewal of that notification.

Considering that this policy paper argues against the registration of persons disembarked following a SAR operation as a separate category in Eurodac, this amendment should not be retained.

2.7. References to Resettlement Schemes

Article 12a of the 2016 Eurodac proposal expanded Eurodac's scope to include individuals who are beneficiaries of resettlements schemes as a separate category of persons to be recorded in the system. This was in line with the 2016 Commission proposal for Regulation on an EU resettlement framework. A provisional agreement between the co-legislators on this proposal in 2018 was vetoed by some member states. As a result, although the expansion of Eurodac had been agreed in principle and relevant provisions feature in the Interinstitutional Agreement,²⁷ a series of issues remained unresolved pending the adoption of that Regulation, such as the categories of personal data processed, the retention period and the marking of those data.

The General Approach does not contain concrete rules on these matters. Article 12a of the 2016 Commission proposal does not feature at all and the marking of the data of relocated persons has also been removed. As a result, the Council does not seem to have an additional mandate on this matter or, at least, not one that is any different from its General Approach to the 2016 Eurodac proposal.²⁸ This creates some uncertainty about the Eurodac rules, particularly since the 2020 Eurodac proposal added more categories of personal data to be collected.

During the negotiations, references to resettlement schemes must be clarified in concrete rules.

2.8. Expansion of Eurodac's Scope to Beneficiaries of Temporary Protection

At the moment, Eurodac processes the personal data of three categories of third-country nationals: (a) applicants for international protection (Category 1); persons apprehended in connection with an irregular crossing of the external borders (Category 2); and persons found to be staying irregularly on the territory of member states (Category 3). Category 4 includes individuals from the previous categories whose personal data have been consulted for law enforcement purposes. In addition to the creation of a separate category for persons disembarked following a SAR operation, perhaps the most important amendment proposed by the Council concerns the expansion of the personal scope of Eurodac to register persons enjoying temporary protection, in accordance with Council Directive 2001/55/EC (Temporary Protection Directive),²⁹ to enable information on these persons to be exchanged for the purposes of effective implementation of that Directive. This has resulted in a series of amendments throughout the text:

1. Addition of Recitals 4d and 4da;
2. Addition of Recital 33a;
3. Addition of Article 1(1)(a) (additional purpose of Eurodac);
4. Addition in Article 3(1)(b)(vii) on the definition of member state of origin;

26. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L10/96, Art. 8(3)(a).

27. Interinstitutional Agreement, 131-144, 170 and 173-174.

28. Council, Document 10079/17 (12 June 2017).

29. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

5. Addition of Article 3(b) on the definition of “beneficiary of temporary protection”;
6. Reforms in Article 4 regarding the categories of personal data to be stored in the Common Identity Repository (CIR) and in the Eurodac Central System;
7. Creation of statistical data under Article 9 in respect of beneficiaries of international protection;
8. Addition of Article 14c on the collection and transmission of personal data of beneficiaries of temporary protection;
9. Reform to Article 19 regarding the marking of data of beneficiaries who obtain a residence permit.

This amendment has been prompted by the war in Ukraine which necessitated a speedy response to the displacement crisis. Following activation of the Temporary Protection Directive, in accordance with Council Implementing Decision 2022/382³⁰ establishing the existence of a mass influx of displaced persons from Ukraine, the Commission published Guidelines³¹ on the implementation of the Decision. Amongst other things, the Guidelines focused on the registration of personal data under Article 10 of the Temporary Protection Directive which obliges member states to register the personal data (name, nationality, date and place of birth, marital status and family relationship) of persons enjoying temporary protection on their territory, laid down in Annex II of that Directive.³² The Commission explained that in this process member states should consult relevant international, EU and national databases during their checks and investigations, and in particular alerts about persons and documents in the Schengen Information System (SIS).³³

As there is no legal basis for registering beneficiaries of temporary protection in any large-scale EU IT system, the Commission advised member states to register those persons in their national registers for foreigners or other national registers. Member states should not register any personal data other than those covered by Annex II which, as will be explained later, does not offer much guidance due to the vague and contradictory wording of the Temporary Protection Directive. The Commission already recognised at this stage that this arrangement is challenging because it limits the ability of member states to exchange information. Such exchanges can only take place bilaterally via Dublinet, for example, to trace and detect if the same person is benefiting from the rights attached to temporary protection in more than one member state.

In the extraordinary Justice and Home Affairs Council of 28 March 2022, a 10-Point Plan for stronger European coordination on welcoming people fleeing the war from Ukraine³⁴ was agreed. Among its priorities was the establishment of an EU-wide technical platform for registration to enable member states to exchange information to ensure that people enjoying temporary protection or adequate protection under national law can effectively benefit from their rights in all member states, while addressing instances of double or multiple registrations and limiting possible abuse. This technical solution, which was developed by the Commission and implemented by eu-LISA, was launched³⁵ on 31 May 2022.

Adapting Eurodac by adding beneficiaries of temporary protection as a new category within its personal scope takes its cue from the efforts to ensure the registration of people fleeing the war against Ukraine, a group which may include both Ukrainians and non-Ukrainians. The expansion of Eurodac’s scope signifies that beneficiaries of temporary protection will be subject to the same requirements in terms of collecting and storing personal data, as agreed in the Interinstitutional Agreement and following any additional reforms, e.g., in terms of additional categories of personal data processed. The idea behind this reform has been presented as being directly linked to Article 10 of the Temporary Protection Directive. Furthermore, Articles 26 and 27 of the Temporary Protection Directive specify the purposes for this registration obligation, particularly the exchange of information between member states and including in view of the transfer of a beneficiary of temporary protection from one member state to another. Moreover, registration of beneficiaries of temporary protection

30. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1.

31. Commission, ‘Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01’ [2022] OJ C126/1.

32. Ibid 10.

33. Ibid.

34. Commission, ‘The 10-Point Plan For stronger European coordination on welcoming people fleeing the war from Ukraine’ https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine_en.

35. Commission, ‘Solidarity with Ukraine: Commission launches an EU platform for registration of people enjoying temporary protection or adequate protection under national law’ (*EU Debates, News & Opinions*, 31 May 2022) <https://www.pubaffairsbruxelles.eu/eu-institution-news/solidarity-with-ukraine-commission-launches-an-eu-platform-for-registration-of-people-enjoying-temporary-protection-or-adequate-protection-under-national-law/>.

also seeks to detect and prevent further secondary movements of individuals.

The French Presidency proposed³⁶ expanding the Eurodac database to include beneficiaries of temporary protection and received explicit support³⁷ from some member states. Others, notably Hungary and Poland, strongly opposed this extension because universal application of the registration requirement would cover Ukrainian beneficiaries of temporary protection. They therefore requested an exemption from the personal scope. A source of concern involved the 72-hour timeframe for transmitting the personal data collected to the Eurodac Central System³⁸ and the Common Identity Repository (CIR) – a new database under the interoperability framework with certain personal data from all the underlying systems, except the SIS.³⁹ The representation from Poland, which has received almost two million refugees fleeing Ukraine⁴⁰, took the view that, due to the arrival of people in countries bordering Ukraine, the proposal was “unrealistic” “due to the limited human resources [...] and the Automated Fingerprint Identification System (AFIS) under which the Eurodac Interface operates which is not intended to allow such volume of data to flow.”⁴¹

The General Approach addresses these concerns to a large extent. Given that the registration of temporary protection beneficiaries fleeing Ukraine is handled by the technical platform in any event, it is proposed that the Eurodac rules “will not apply to those persons benefiting from temporary protection pursuant to Council Implementing Decision 2022/382, and any other equivalent national protection taken pursuant thereto, any future amendments to Council Implementing Decision 2022/382, and any extensions thereto.”⁴² Beneficiaries of temporary protection are not limited to those defined in the Temporary Protection Directive, but will include those benefiting from any other equivalent national protection introduced in response to similar events in the future.

To curb concerns about the feasibility of these registration requirements, Article 14c(2) of the General Approach introduces a 10-day deadline for submission of the relevant data to the Eurodac Central System and the CIR.⁴³ The time limit may be further extended for 48 hours due to serious technical problems or measures to ensure the health of the individual concerned or to protect public health.⁴⁴ Registration as a beneficiary of temporary protection would follow the possible apprehension of a person in connection with an irregular crossing of the external borders, irregularly staying on national territory or disembarkation following a search and rescue operation.⁴⁵ This means that the registration of an individual as a beneficiary of temporary protection – except Ukrainians – does not exempt member states from registering those persons first under the other categories, depending on which will apply to them, e.g., if they have entered irregularly, they will also be registered under Category 2. The proposed retention period of such data is three years from the date of the entry into force of the relevant Council Implementing Decision activating the Temporary Protection Directive rules.⁴⁶

The rationale behind this expansion is very unclear and does not sit well with the Temporary Protection Directive with which it is linked. Indeed, Article 10 of the latter stipulates that, in order to enable effective application of the Council Decision recognising the existence of a mass influx of displaced persons, member states must register the personal data referred to in Annex II with respect to persons enjoying temporary protection on their territory. Annex II confusingly states that the information “includes to the extent necessary *one or more* of the following documents or data” [author’s emphasis]: (a) personal data on the person concerned (name, nationality, date and place of birth, marital status, family relationship); (b) identity documents and travel documents of the person concerned; (c) documents concerning evidence of family ties (marriage certificate, birth certificate, certificate of adoption); (d) other information essential for establishing the person’s identity or family relationship; (e) residence permits, visas or residence permit refusal decisions issued to the person

36. Council, Document 8562/22 (2 May 2022) <https://www.statewatch.org/news/2022/may/eu-ukraine-new-proposal-to-add-temporary-protection-beneficiaries-to-eurodac-database/>.

37. Council, Document 9103/22 (18 May 2022) <https://www.statewatch.org/news/2022/may/eu-tracking-the-pact-plan-for-biometric-registration-of-ukrainian-refugees-unrealistic/>.

38. Recast Eurodac Regulation, arts 9(2) and 14(2).

39. Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 [2019] OJ L135/85.

40. ‘How Many Ukrainian Refugees Are There and Where Have They Gone?’ (BBC News, 4 July 2022) <https://www.bbc.com/news/world-60555472>.

41. Council, Document 9103/22 (No. 27).

42. Council, Document 10583/22 (No. 18), Recital 4da and the last sentence of Article 47.

43. Ibid Art. 14c(3).

44. Ibid Art 14c(4) – (5).

45. Ibid Art 14c(6) – (10).

46. Ibid Art 17(3d).

concerned by the member state and documents forming the basis of decisions; (f) residence permit and visa applications lodged by the person concerned and pending in the member state and the stage reached in the processing of such.

Therefore, Annex II does not provide a precise, fixed and exhaustive list of information to be collected at national level, but rather gives member states the discretion to decide what is necessary (and also available). In turn, according to the proposed rules, in relation to beneficiaries of temporary protection Eurodac will store very similar categories of personal data, namely: (a) fingerprints; (b) a facial image; (c) surname(s) and forename(s), name(s) at birth and previously used names and any aliases, which may be entered separately; (d) nationality/nationalities); (e) date of birth; (f) place of birth; (g) member state of origin, place and date of registration as beneficiary of temporary protection; (h) sex; (i) where available, the type and number of identity or travel documents, the three letter code of the issuing country and expiry date; (j) where available, a scanned colour copy of an identity or travel document, along with an indication of its authenticity, or, where unavailable, another document; (k) reference number used by the member state of origin; (l) date on which the biometric data were taken; (m) date on which the data were transmitted to the Central System and to the CIR as appropriate; (n) operator user ID; (o) where relevant, the fact that the person previously registered as beneficiary of temporary protection falls under one of the exclusion grounds pursuant to Article 28 of Directive 2001/55/CE; (p) reference of the relevant Council Implementing Decision.⁴⁷

Juxtaposing the two lists demonstrates that the categories of personal data only partly correspond to one another. However, this disconnection inconsistency may be forgiven considering that Annex II does not provide fixed categories of the personal data that should be collected at national level and that, in any event, Eurodac is not designed to store some categories of personal data, such as family relationships, or other types of documents, except travel documents. The collection of biometric data is also not mandated under the Temporary Protection Directive, although one might counter that “other information essential to establish the person’s identity” may include biometric identifiers such as fingerprints and facial images.

The inconsistency between Eurodac and the Temporary Protection Directive may also be inferred from the following: Annex II requires the collection of personal data in connection with family reunification (as referred to in Article 15), transfers of beneficiaries of temporary protection from one member state to another (as laid down in Article 26), and to enable the effective application of the Council Decision which is adopted for activation of the Temporary Protection Directive (as referred to in Article 10). This wording is arguably vague and does not allow for precise conclusions as to what effective cooperation entails. However, the first two purposes for data collection suggest that the spirit of the Directive is to facilitate information exchange to the benefit of temporary protection beneficiaries, not to promote a climate of suspicion where exchanges of information should be facilitated for the purposes of detecting people benefitting from temporary protection in more than one member state. Furthermore, the initial proposal for a Temporary Protection Directive only included data collection for the purpose of member state cooperation, something which arguably highlights the legislators’ objectives in this regard.⁴⁸ Overall, extension of the scope of Article 10 is not in line with the spirit and purpose of the Temporary Protection Directive.

Moreover, evidence of beneficiaries of temporary protection moving across EU member states is scarce and it could be argued that Ukrainian refugees might perhaps be more interested in remaining in neighbouring countries in anticipation of the end of the war and a return to their homes. Current statistics demonstrate that this is indeed the case: more than six million Ukrainians refugees have returned home despite being warned not to.⁴⁹ Furthermore, to maintain a balance of responsibility among EU member states, free onward movement of Ukrainian refugees could actually be an ideal solution.⁵⁰ This was what the Commission argued in its proposal to activate the Temporary Protection Directive,⁵¹ reflected in the Operational Guidelines

47. Please note that the numbering in the General Approach is incorrect.

48. Commission, ‘Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof’ COM(2000) 303 final.

49. Anna Fleck, ‘Ukrainian Refugees Return Home Despite Warnings Not To’ (*Statista*, 28 October 2022) <https://www.statista.com/chart/28579/number-of-ukrainians-returning-home/>.

50. Lucas Rasche, ‘Ukraine’s Refugee Plight: A Paradigm Shift for the EU’s Asylum Policy?’ (Hertie School Jacques Delors Centre, 2022).

51. Commission, ‘Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection’ COM(2022) 91 final, recital 16.

proposed by the Commission⁵² and agreed upon by member states in the Council Decision. In Recital 15, it is noted that member states have agreed in a statement that they will not apply Article 11 of Directive 2001/55/EC on taking back beneficiaries who are found in the territory of another member state.⁵³ It appears that this is a pre-emptive approach for future-proofing the legislation under the premise that “further issues of registration of potential beneficiaries of temporary protection should be anticipated”⁵⁴, without any discussion as to what these might be and who the temporary protection beneficiaries whose registration is necessary might be.

Furthermore, the Temporary Protection Directive was adopted in 2001 when the original Eurodac Regulation had already been adopted. However, there was a distinct period when negotiations over the two instruments overlapped. Research has not identified a discussion to include third-country nationals who are beneficiaries of temporary protection within the scope of Eurodac, which was at the time only established to serve Dublin-related purposes. The disentanglement of Eurodac from its Dublin origins and its rebranding as a multipurpose tool has resulted in the inclusion of individuals who have not been subject to personal data collection and storage in an EU-wide database, although it might be inferred from this that Eurodac was never supposed to cover this group of people.⁵⁵

The following is proof that the system was never meant to include those individuals as a separate category. As Ineli-Ciger explains,⁵⁶ until this year the Temporary Protection Directive had not been activated. The Commission had even proposed that it be replaced and suggested that, as part of its New Pact on Migration and Asylum, “immediate protection be introduced” into the Proposal for a Regulation addressing crisis situations and force majeure in the field of migration and asylum.⁵⁷ However, the 2020 Eurodac proposal, which was published at the same time, did not provide for beneficiaries of immediate protection being registered in Eurodac under a separate category. This is presumably because the applicants would first have to apply for international protection and therefore be registered in accordance with Eurodac rules as applicants for international protection (Category 1) anyway, and then the member states could apply the asylum crisis management procedure.⁵⁸ Moreover, there would not have been a temporary protection status as it would have been replaced by a new regime. However, this presumption is rather weak because, as explained earlier, the fact that individuals will be registered as beneficiaries of temporary protection does not mean that they will not be registered under another category as well. This means that including them was not an obstacle because they would be registered anyway. The fact that the 2020 Eurodac proposal did not provide for registration with regards to individuals who would be offered immediate protection was a conscious policy choice.

In addition, one might also wonder whether the expansion of the Eurodac scope is necessary considering that Ukrainian nationals – the only beneficiaries of temporary protection in the Temporary Protection Directive’s 20-year history – will actually be excluded from its scope due to the creation of the technical platform. In other words, displacement from Ukraine has simply been an excuse for further expanding Eurodac’s scope. Eventually the Polish and Hungarian governments won, leaving behind an uneven and unequal model of responsibility regarding the new Eurodac obligations among EU member states. Reading between the lines, it could also be interpreted as meaning that there is potential for another activation of the Temporary Protection Directive in the future. Nevertheless, the incentive to activate the Temporary Protection Directive in respect of other groups of individuals remains non-existent. Commissioner Johansson has clarified that the Temporary Protection Directive is not likely to be activated in respect of mass arrivals of refugees in the central

52. Commission, ‘Commission Communication - Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders’ 2022/C 104 I/01 [2022] OJ C104I/1.
53. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1,
54. Council, Document 8562/22 (No. 26) 2.
55. See Niovi Vavoula, *Immigration and Privacy in the Law of the European Union – The Case of Information Systems*’ (Brill Nijhoff 2022), 307-396.
56. Meltem Ineli Ciger, ‘What A Difference Two Decades Make? The Shift from Temporary to Immediate Protection in the New European Pact on Asylum and Migration’ (*EU Migration and Asylum Law and Policy*, 11 November 2022) <https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/?print=print>.
57. Commission, ‘Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum’ COM/2020/613 final. For an analysis see Meltem Ineli Ciger, ‘Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?’ in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* (Nomos 2022).
58. Commission, ‘Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum’ COM(2020) 613 final.

Mediterranean area.⁵⁹ Therefore, if there is no such possibility the creation of a separate category will remain on paper only and will be of no use. It will however have budgetary implications to amend the database accordingly without evidence about necessity and proportionality in light of the purpose of monitoring the secondary movement of beneficiaries of temporary protection to other member states. Moreover, in the event of millions of individuals in need of protection arriving, the difficulty of abiding by registration requirements should not be underestimated, thus potentially making the rules unworkable and unrealistic. Overall, future-proofing the legislation against future issues that may arise in connection with beneficiaries of temporary protection seems a rather remote and vague justification. It is possible that even if the Temporary Protection Directive is activated in connection with other people in the future, member states may equally decide not to apply Article 11 of the Directive. The solution of the technical platform has proved to be good enough, and if in the future another such occasion were to arise a similar approach could be taken as well. Research does not demonstrate any concerns about how the platform functions.

More positively, it could be argued that excluding beneficiaries of temporary protection on the basis of the Council Decision from Eurodac's scope breaks a long-standing pattern of surveillance of movement of nearly the entire non-EU population with an administrative or criminal law connection to the EU.⁶⁰ Ukraine is a visa-free country for entry into the EU which means that Ukrainian nationals are free to cross the Union's external borders for stays of no more than 90 days in any 180day period. However, it does raise further questions about possible discrimination among different groups of third-country nationals, considering that Ukrainians may be considered as benefiting from a higher degree of privacy protection compared to other groups of third-country nationals. This is partially correct as beneficiaries of temporary protection are not only Ukrainians but also nationals from third countries beyond Ukraine who were displaced from Ukraine on or after 24 February 2022 and who, alongside their family members, had refugee status or equivalent protection in Ukraine. However, one should be cautious because this argument is applicable at the moment because there is no centralised information system containing the personal data of visa-free travellers. This will change by next year as both the Entry/Exit System (EES) and the European Travel Information and Authorisation Systems (ETIAS) are set to become operational in 2024, both of which are aimed at processing the personal data of visa-free travellers. As a result, the addition of a separate category in Eurodac is arguably redundant considering that these individuals may be registered elsewhere.

In light of the above, efforts should be made to ensure that this amendment by the Council does not remain in the final text.

59. Eleonora Vasques, 'No Temporary Protection Directive for Mediterranean crisis, Commissioner says' (*euractiv*, 22 November 2022) <https://www.euractiv.com/section/justice-home-affairs/news/no-temporary-protection-directive-for-mediterranean-crisis-commissioner-says/>.

60. For an analysis, see Vavoula, *Immigration and Privacy in the Law of the European Union* (No. 44).

3. ASSESSING THE EUROPEAN PARLIAMENT'S NEGOTIATING POSITION

Considering the relative minor amendments contained in the revised Commission proposal, the European Parliament added safeguards and clarifications in line with the Interinstitutional Agreement.⁶¹ The main amendments can be summarised as follows:

1. Removal of SAR-related provisions (Section 3.1);
2. Clarifications on the objectives of Eurodac (Section 3.2);
3. Addition of fundamental rights clauses, including in connection with law enforcement access to children's data (Section 3.3);
4. Addition of safeguards on the interlinking of Eurodac records (Section 3.4);
5. Additional Provision on Access to Eurodac by the European Border and Coast Guard (EBCG) Standing Corps Teams and Asylum Support Teams (Section 3.5);
6. Creation of additional statistical data (Section 3.6);
7. (Partial) Decoupling of Eurodac from the Screening Process (Section 3.7);
8. Explicit obligation for multiple registrations of the same individual (Section 3.8);
9. Resettlement-related provisions (Section 3.9);
10. Protection-sensitive collection of personal data (Section 3.10).

3.1. Removal of SAR-related provisions

Perhaps one of the biggest differences between the two co-legislators' positions is the inclusion of persons disembarked following a SAR operation as a distinct category in Eurodac. The European Parliament has removed all such references. This category is only meant to be used by certain EU member states as evidence to put pressure on other member states to increase solidarity. However, this is already possible by analysing statistical data broken down by member state with regard to individuals apprehended in connection with an irregular border crossing (Category 2). At the same time, distinguishing maritime rescuees on the basis of how they reached the prospective country of refuge could arguably be viewed as being in violation of Article 3 of the Refugee Convention⁶² which prohibits discrimination amongst refugees.⁶³ Considering the dangers of misusing the data from Eurodac, these individuals may be placed at a potential disadvantage on grounds unrelated to their protection needs. It creates an incentive to introduce differentiated treatment depending on the category in which people are registered as well.

3.2. Clarifications on the Objectives of Eurodac

Article 1(1)(b) identifies one of the purposes of Eurodac to be assistance with application of the proposed Resettlement Regulation. The European Parliament has aimed to elaborate on this purpose by adding that the system will assist with identifying the secondary movements of resettled third-country nationals.

Furthermore, the European Parliament has added assistance with the protection of child victims of human trafficking and identification and protection of missing children to the purposes of Eurodac. This purpose is explicitly stated because one of the criticisms of the 2016 Commission proposal was the fact that it featured in the explanatory memorandum as a primary justification for expanding the scope of Eurodac to require the collection of personal data (including biometrics) from minors over the age of 6 but without such a justification featuring among the system's purposes.⁶⁴ Therefore, this change is welcome and should remain in the text.

61. See No. 6.

62. Convention relating to the Status of Refugees, 189 UNTS 150.

63. Violeta Moreno-Lax, 'Towards a Thousand Little Morias: The EU (Non-)Rescue Scheme – Criminalising Solidarity, Structuring Defection' in Daniel Thym (ed), *Reforming the Common European Asylum System* (Nomos 2021) 161, 182.

64. Commission, '2016 Eurodac proposal' (No. 3) 10.

Moreover, Eurodac will be used for cross-checking applications for travel authorisations, visas and residence permits in accordance with the ETIAS and VIS rules respectively. As a result, the 2020 Eurodac proposal calls for Eurodac to support the objectives of the ETIAS and the VIS. The European Parliament has altered the wording: instead of “support of information sharing with the ETIAS” and “support the information sharing with the VIS”, the amendments refer to “support the information sharing with ETIAS” and “support the information sharing with the VIS.” Whilst the European Parliament’s amendments allow for more precision and therefore are a welcome change,⁶⁵ the wording in the Commission proposal has featured in other dossiers and it is likely that these amendments will not remain in the final text to ensure cohesion with other legal instruments governing large-scale IT systems.

Finally, another amendment has added enabling the production of statistics to support evidence-based Union asylum and migration policymaking to Eurodac’s objectives. This is in line with previous recommendations⁶⁶ and it will be in line with the legal framework of the EES, This addition therefore makes sense. However, in line with the analysis in Section 2.2, one must be cautious about the use of statistical data for the purposes of preventing and curtailing the entry of individuals in need of protection.

3.3. Addition of Fundamental Rights Clauses

The European Parliament has added Article 1, paras 2a-2d, which introduce four fundamental rights clauses:

1(2a). The Regulation shall fully respect human dignity and fundamental rights in full compliance with the Charter of Fundamental Rights, including the right to respect for one’s private life, to the protection of personal data, to asylum and non-refoulement, and the prohibition of torture, inhuman or degrading treatment. In that respect, processing of personal data should not lead to any kind of discrimination.

1(2b). This regulation shall be applied with respect to the best interests of the child. This includes implementing the relevant provisions and child rights safeguards when applying this Regulation to persons who state that they are a child or, depending on the case, persons with regard to whom there are reasons to believe that they are a child and no supporting proof of age is available; in the event of uncertainty in relation to the age of the child, the authorities shall accord the individual the benefit of the doubt, such that if there is a possibility that the child is under 6 years old, s/he shall be treated as such.

1(2c). Where the Eurodac data pertain to a child under the age of 14, those data shall only be used for law enforcement purposes, other than those relating to child trafficking, based on additional evidence of the relevance of those data for the prevention, detection or investigation of terrorist offences or other serious criminal offences.

1(2d). No child shall be detained to determine or verify their identity or collect their biometric data, irrespective of their age and whether they are unaccompanied or accompanied by their families. Community-based, non-custodial alternatives to detention shall always be implemented when children and their families are concerned.

These additions are welcome and should remain in the text of the Regulation. They aim to bring back aspects of the 2016 Commission proposal which lowered the age limit for collecting and subsequently processing the personal data of minors over the age of 6. They should not be moved to recitals which tend to become the depository for issues where one party (usually the Parliament) wishes to see regulation in the text but could not persuade the other co-legislator to include and overall have doubtful legal status. The argument that these amendments go beyond the interinstitutional agreement should not be accepted either because there is nothing that prevents the legislature from adding safeguards in the legislation if these are *in line with* the Interinstitutional Agreement. Minor changes to the wording could be foreseen, if necessary. For example, with regards to law enforcement access the wording could be reformed for the following reason: in accordance with the Interinstitutional Agreement, a request for law enforcement access must be based on reasonable grounds.⁶⁷ In respect of children below the age of 14, it could be asked that any request be evidence-based only.

65. Vavoula, *Immigration and Privacy in the Law of the European Union* (No. 44) 389.

66. Vavoula, ‘The Transformation of Eurodac’ (No. 7).

67. Whereas in connection with other information systems, evidence or reasonable grounds should form the basis of a request. For a critical analysis, see Niovi Vavoula, ‘Consultation of EU Immigration Databases for Law Enforcement Purposes: A Privacy and Data Protection Assessment’ (2020) 22 *European Journal of Migration and Law* 139; Vavoula, *Immigration and Privacy in the Law of the European Union* (No. 44) 374.

3.4. Safeguards on the Interlinking of Eurodac Records

The European Parliament has added a safeguard regarding the linking of datasets registered in Eurodac and corresponding to the same person.⁶⁸ According to this amendment, “its access by both the designated member state authorities and the European Union authorised agencies shall be strictly regulated, in order to effectively safeguard a person’s right to privacy and to data protection. Hence, such access shall, namely, be limited in time and respected to the data relevant for the very specific performance of their tasks.” A similar safeguard has been added to Recital 14 so that Member State authorities and Union bodies should be able to see only the personal data that are strictly relevant for the performance of their tasks, even if the data are linked in a sequence. The retention period of each dataset is not affected. In addition, in Articles 10(4), 13(8) and 14(6) the European Parliament has added that linking with other datasets must respect the limitations therein established.

This amendment is meant to ensure that Eurodac records are not going to be routinely accessed unless it is proportionate to do so. It is in line with earlier recommendations that the storage period of interlinked records should remain unaltered compared to the recast Eurodac Regulation and that the authorities of member states and EU bodies should continue to be able to see only the data that is relevant for the performance of their specific tasks.⁶⁹ As a result, for example, the dataset of an irregular migrant who is recognised as a beneficiary of international protection will cease being linked after the five-year expiration period.

3.5. Additional Provision on Access to Eurodac by the European Border and Coast Guard (EBCG) Standing Corps Teams and Asylum Support Teams

The European Parliament has added Article 8c(a) on access to Eurodac by the European Border and Coast Guard (EBCG) Standing Corps Teams and Asylum Support Teams deployed by the EU Asylum Agency (EUAA) in order to collect and transmit biometric and alphanumeric data in the system. Members of the Agencies’ teams must only process data when requested to do so by the member states hosting the operation and in accordance with the operational plan agreed between that member state and the EBCG or the EUAA. Members of the teams shall act on behalf of and under the instructions of the competent authorities of the host member state, as laid down in the operational plan. Regulation (EU) 2018/1725 and the General Data Protection Regulation will apply to the EBCG and the EUAA respectively.

This amendment is supposed to add to the provisions of the 2016 Commission proposal which enabled these Agencies to process Eurodac data.⁷⁰ It is in line with Regulation (EU) 2019/1896 on the EBCG Agency and particularly Article 10(1)(m)(i) within the framework of the migration management support teams at hotspot areas by deploying operational staff and technical equipment to provide assistance in screening, debriefing, identification and fingerprinting.⁷¹ It is also in line with Article 16(2)(a) of the Regulation which provides for the EUAA to assist member states with identifying and registering third-country nationals, as appropriate, in close cooperation with other Union bodies, offices and agencies.⁷²

The provision partly mirrors Article 36 of Regulation (EU) 2018/1862 on the Schengen Information System (SIS) and therefore in principle it is welcome. The SIS-related provision is more elaborate in that it requires the members of the Agencies’ teams, for example, to have received training, access should not be extended to the members of other teams, it contains logging obligations and it is prohibited for the system to be copied. Similar rules could be considered for the Eurodac text. Training for officers is addressed by the European Parliament in its proposed amendment to Article 10(3). This is welcome as it will ensure that officers taking biometric and alphanumeric data have received appropriate training in how to conduct the collection and transmission of data in accordance with fundamental rights and data protection rules. However, the relationship between this amendment and Article 8a of the Interinstitutional Agreement should be explored further in the negotiations to ensure coherence and constancy, and avoid overlaps. The European Parliament’s negotiating position contains additional safeguards compared to the Interinstitutional Agreement and is more elaborate. Therefore, efforts could be made to synthesise the two provisions with a view to providing a high degree of

68. European Parliament’s Negotiating Position, Art. 4(6).

69. Vavoula, ‘The Transformation of Eurodac’ (No. 7) 25-26.

70. Commission, ‘2016 Eurodac proposal’ (No. 3) 10(3), 12a(2), 13(7) and 14a(7).

71. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1.

72. Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010 [2021] OJ L468/1.

protection.

Furthermore, issues that may arise in this context include whether the system will indicate that the members of such teams collected and transmitted biometric and alphanumeric data, and how to ensure the responsibility of the agencies as data processors under the data protection rules, for example in cases where incorrect data has been collected and transmitted. Presumably, such liability may be ensured as Eurodac must store information on the operator's user ID so the identity of the operator should be tracked. However, there is no legal certainty on this matter. One final aspect concerns the wording of the provision: it should refer to Article 30(6) of Regulation (EU) 2021/2303 and not to Article 30(4b) as per the European Parliament's position. Also, reference to Regulation (EU) 2018/1725 would be appropriate in connection to both the EBCG and the EUAA. Currently, the text refers to the Regulation but only in respect of the EBCG and not the EUAA.

3.6. Creation of Additional Statistical Data

The European Parliament has added a series of statistical data to be compiled on the number of hits:⁷³

- » for international protection applicants who have been granted international protection in another member state;
- » for international protection applicants who were minors at the time when the dataset was registered in Eurodac;
- » for irregular border-crossers who have been granted international protection in another member state;
- » for irregular border-crossers who were minors at the time when the dataset was registered in Eurodac;
- » for irregular migrants apprehended on national territory who have been granted international protection in another member state;
- » for irregular migrants apprehended on national territory who were minors at the time when the dataset was registered in Eurodac.

Another amendment regarding the compilation of statistical data concerns the addition under Article 9(2) that all personal data shall be anonymised and the production of statistical data shall be conditional upon provisions on the possible rectification of incorrect data. Furthermore, the European Parliament has added itself to the list of recipients of statistics from the system either created under Article 9 or requested by the Commission.⁷⁴ In addition, it has enhanced the safeguards regarding the use of statistical data: cross-system statistics shall not be used in connection to individuals, nor allow for their identification, and they cannot be used to deny access to EU territory. Similarly, Article 9(6a) added that “[t]o ensure the accuracy of data collected and quality of statistics produced, the production of statistical data should be accompanied by strict rules requiring the rectification of incorrect data by Member States within specific deadlines.”

The creation of additional statistical data will probably improve Eurodac's efficiency in terms of identifying protection needs in certain member states with regards to children on the move, who are, by default, particularly vulnerable and therefore in need of increased protection, and refugees who have received refugee protection in member states where they do not wish to stay for whatever reason (economic, family or community ties elsewhere). As such, these data may provide evidence for future policymaking and assist in identifying deficiencies in MS asylum/reception systems.

The additional safeguards regarding the use of statistical data are particularly welcome as they will prevent their abuse for purposes which may effectively prevent individuals from entering the EU, in line with the analysis in Section 2.2. Comprehensive monitoring of how the statistical data is to be used for future policymaking will be vital in this context. As regards the requirement for accuracy, accompanied by strict rules on rectification, it is feared that this provision, which touches upon an ongoing problem in information systems relating to data quality, is not sufficient because the provision does not explain how quality control will take place and whether member states should conduct such quality control at their own instigation. It is known that eu-LISA conducts automated quality checks on a monthly basis and these do not result in a substantial decrease in the numbers of records flagged every month for potentially containing inaccurate data.

73. Statistical data hits for persons disembarked following a SAR operation remain, pending the result of the vote.

74. European Parliament's Negotiating Position, Art. 9(3) and (5).

3.7. (Partial) Decoupling of Eurodac from the Screening Process

The European Parliament has also removed references to the proposal for a Screening Regulation. As such, Article 10 refers to the collection of biometric data upon registration of an application for international protection or when an application is made if this is at a border crossing point or transit zone by a person who does not fulfil the entry conditions. As a result, this is a point where both co-legislators agree. However, as with the Council, the European Parliament retains Article 12(1)(v) calling for information about whether a member state's competent authorities consider that the person could pose a threat to internal security following examination to be stored in Eurodac. The European Parliament links such examination to RAMM which, in turn, refers to the proposal for a Screening Regulation.

However, the European Parliament's stance on storing such information in respect of individuals apprehended in connection to their irregular border crossing (Article 13) or found to be irregularly present on national territory (Article 14) is less clear. The European Parliament negotiating position contains two compromise options in that respect: one not including this category of personal data and one including it, as per the Rapporteur's position.

In line with the analysis in the previous policy paper and ECRE's analysis on the proposal for a Screening Regulation,⁷⁵ it is recalled that this is a particularly problematic category of information to be included in the system. First, there are no clear and objective criteria to determine what constitutes a threat to internal security. This means that such an assessment, which may in reality be hasty and incorrect, is left entirely to the discretion of the authority doing the checks. Such an assessment may entail searches of national and EU databases which may contain incorrect data in any event.⁷⁶ However, in the absence of specific rules being in place as Eurodac is decoupled from screening, it is utterly unclear how this assessment will take place. It may be that no additional personal data are collected from the individual and only checks against other systems are conducted (such as Interpol databases, national databases or the other operational EU databases, although this is merely a speculation). However, it is also possible that additional information will be requested about the individual to be assessed. Another issue is that it is unclear what information will be included in Eurodac with regards to the fact that a person poses a threat to EU internal security. This may range from a simple 'tick box' process to a free text input system where a national authority can add as much information as it wishes. Therefore, this category is not in line with the requirement for clarity and precision, in accordance with the case law of the Court of Justice of the EU.⁷⁷ The assessment may not even be verifiable. In light of the above, the quality of this category of information stored in the system may be particularly problematic and in violation of the principle of data accuracy under EU data protection law.⁷⁸ Individuals will not know that the system is going to store such information about them and therefore they will not have the possibility of exercising other individual rights, such as their right to seek access to and rectify their Eurodac record. Moreover, this category of information transforms the system into a law enforcement tool which is openly available for consultation (and therefore not subject to strict conditions) by any competent national authority.

Overall, this additional category of information must not be stored in Eurodac because, aside from the important privacy and data protection challenges, it may lead to arbitrary and potentially wrong assessments of individuals and those assessments may have a significant and long-lasting impact on a number of issues, such as prospects for relocation, negative assessment of their application for international application or automatic commencement of border procedures. Individuals could be heavily disadvantaged when their application for international protection is examined, thus affecting their right to seek asylum enshrined in Article 18 of the Charter. Finally, in the absence of rules it seems to establish a new obligation regarding the performance of security checks.

If this additional category of personal data is maintained in accordance with the second option, and considering the fact that the proposal for a Screening Regulation is under negotiation, additional clarifications should be included regarding how the assessment is conducted to ensure protection of individuals' fundamental rights

75. ECRE, 'ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612' <https://ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf>.

76. Databases are known to contain incorrect data. See EU Agency for Fundamental Rights, 'Under watchful eyes: biometrics, EU IT systems and fundamental rights' (28 March 2018).

77. Opinion 1/15 ECLI:EU:C:2017:592, paras 155-163. See 'Warnings against arbitrariness and mass surveillance in EURODAC' (*European Digital Rights*, 22 November 2022) <https://edri.org/our-work/warnings-against-arbitrariness-and-mass-surveillance-in-eurodac/>.

78. 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) [2016] OJ L119/1, Art. 5(1)(d).

and the presumption of innocence, and to prevent discriminatory treatment in the procedure followed or assessment of the application for international protection. Furthermore, disproportionate treatment of individuals could be detected through the inclusion of an additional category of statistical data. The latter could enable best and worst national practices to be detected in terms of the lack of specific criteria for making such assessments, what information is included in Eurodac to assist with improving decision-making, and tracking the impact of a red flag on individuals, the status and procedures for any applications they make or are subject to, and the outcomes of remedies.

3.8. Explicit Obligation for Multiple Registrations of the Same Individual

The Rapporteur has added references about the obligation for member states to record individuals apprehended in connection with an irregular crossing of external borders or irregularly staying on the territory of member states and who subsequently or simultaneously apply for international protection under both categories concerned. This amendment mirrors the Council General Approach (see above in Section 2.4), the sole difference being that the Rapporteur has inserted these references into the Preamble and not included them as Articles.

3.9. Resettlement-related Provisions

The European Parliament has elaborated on the registration of resettled third-country nationals or stateless persons in line with the Interinstitutional Agreement. A definition is introduced in Article 3 and Article 12a requires the prompt collection and transmission of fingerprints and facial images for comparison in the Eurodac Central System. Non-compliance with the requirement to take all fingerprints and capture facial images promptly shall not relieve member states of their obligation to do so. Where the condition of an individual's fingertips makes taking fingerprints of a sufficient quality to ensure appropriate comparison impossible, the resettlement member state shall take the fingerprints again and resend them as soon as possible, no later than 48 hours after they have been successfully taken again. By way of derogation, where it is not possible to take the fingerprints or the facial image of a resettled person, or both, due to measures taken to ensure their health or the protection of public health, then the time limit is adjusted to 48 hours after those health grounds no longer prevail.

With regards to personal data, the European Parliament proposes registering the following categories of personal data: fingerprints, facial image, surname, name, name at birth and previously used names and any aliases, nationality, place and date of birth, member state of resettlement, place and date of the registration, sex, the type and number of identity or travel document where applicable, the three letter-code of the issuing country and validity, the reference number used by the member state of origin, the date on which the fingerprints and/or facial image were taken, the date on which the data were transmitted to the Central System, and the operator user ID.

There are some issues here that need to be clarified:

1. The Interinstitutional Agreement contains additional information to be collected: namely, where available a scanned colour copy of an identity or travel document along with an indication of its authenticity and, if not available, another document which facilitates identification of the third-country national or stateless person, along with an indication of its authenticity;⁷⁹
2. There are pending aspects in respect of Article 12b on the addition of information regarding the status of the individual;
3. There is a lack of clarity as to whether resettled persons' data will be linked in a sequence in the event they move to another member state.

Moreover, with regard to the retention period of personal data on resettled persons, the European Parliament proposed five years. It is unclear whether this is a proportionate retention period or whether this has been proposed in order to align the rules with those applicable for irregular migrants under Article 17. The Council's position in this respect was storage for 10 years but this is particularly long retention period and justification must be provided for this preference. In addition, in line with Article 19 on the marking of Eurodac records, the personal data of resettled individuals granted international protection will be marked. Finally, it may be worth

79. Interinstitutional Agreement (n 6) 138.

exploring the need for the creation of statistical data to determine the extent to which resettled persons engage in secondary movement and, ultimately, whether it is actually necessary to maintain this additional category in Eurodac. This aspect is also pending in the Interinstitutional Agreement and has not been addressed by either co-legislator.

3.10. Protection-sensitive Collection of Personal Data

With regards to the collection of biometric data, the European Parliament has added in Article 10(1), 13(1) and 14(1) that this should take place in a “protection-sensitive’ manner.” This is a welcome provision, considering that the collection of personal data may have significant implications for individuals in terms of their fundamental rights, including because of forced fingerprinting and placement in detention. However, regrettably its meaning is somewhat unclear.

4. MOVING FORWARD WITH THE TRILOGUES

The analysis in Sections 2 and 3 above demonstrates that there are a series of issues on which the co-legislators already converge: detecting unauthorised movements by counting individual applicants, leading to multiple registrations under different categories; the removal of references to screening and processing certain additional categories of personal data; boosting statistical data and consequential amendments relating to the forthcoming interoperability of large-scale IT systems.

As regards Eurodac's goals, the European Parliament could insist on including the protection of children in the system's objectives as this is in line with previous justifications provided regarding the lowering of the age threshold for processing personal data in Eurodac. The amendments regarding Eurodac's objectives in connection with ETIAS and VIS could be dropped. Otherwise, these amendments must be accompanied by similar amendments to the legal instruments of all the other information systems which include supporting the objectives of other systems in their own goals.

With regards to the amendments on statistical data, they are of different nature and are based on different rationales. Those proposed by the European Parliament are more focused on fundamental rights, including additional safeguards on the use of such statistical data. These safeguards could be refined, but they are essential for preventing misuse and abuse of the information they provide to inform deflection policies that will violate or further hinder the exercising of the fundamental rights of refugees and migrants, including their right to leave and their right to seek international protection.

Importantly, many amendments proposed by the Council depend on whether Eurodac's personal scope will be expanded to include beneficiaries of temporary protection and persons disembarked following a SAR operation. Therefore, the scope of the system and classification of the individuals falling within its scope are likely to preoccupy the trilogues. With regards to the former, the analysis above has demonstrated that expanding the scope to beneficiaries of temporary protection is inaccurately rooted in the relationship between Eurodac and the Temporary Protection Directive, even though the two legal instruments were never meant to interact. The necessity and proportionality of this amendment are contested. There is no evidence to suggest risks of individuals benefiting from international protection moving to other member states, something which, in any case, is in itself not a sufficient reason for expanding Eurodac's scope.

Distinguishing between maritime rescuees and other refugees is primarily intended to provide a better picture of migratory flows and enable better evidence-based policymaking. However, the differentiation of such persons is disproportionate to the objective pursued as it may result in different treatment in violation of the Refugee Convention. Moreover, not all member states wished to retain the differentiation of SAR rescuees. Only the Med 5, and particularly Italy, is in favour of this provision. For example, the Austrian delegation has stated that "it is not expedient to introduce special rules for this form of entry since this would lead to an imbalance and could also result in calls for special rules for every form of entry."⁸⁰ Therefore, there is arguably no consensus among member states on this matter and this category has remained in the General Approach as a compromise. As a result, this aspect could arguably be further pushed by the European Parliament as one of its red lines so that a separate data category for SAR rescuees does not feature in the final text. Depending on whether this category remains in the final text, the European Parliament will also have to consider whether to agree on extending the deadline for collecting and transmitting personal data, and under which circumstances and safeguards.

With regards to the additional fundamental rights safeguards and the safeguards on the interlinking of records introduced by the European Parliament, these are important but arguably the one relating to law enforcement access to children's data could be interpreted as not falling within the Interinstitutional Agreement. Therefore, it is possible that this amendment will not make the cut. However, it is essential that the European Parliament insist on the addition of as many safeguards as possible. Perhaps the amendment for protection-sensitive collection of personal data could be further refined as it is arguably unclear.

As for the amendment regarding access by the EBCG Agency and the EUAA, this must be revisited in order to ensure consistency with the provisions of the Interinstitutional Agreement and, at the same time, ensure that those agencies are liable in cases of unlawful personal data processing, e.g. insertion of unlawful data, use of inappropriate means of collection such as 'phone cameras. The need for specialised training must also be ensured.

80. Council, Document 13358/21 (10 November 2021) 3. See Council, Document 15066/21 (22 December 2021).

At the same time, the Eurodac dossier is interconnected with other dossiers and it is therefore important to examine how the negotiations, and the possible adoption of revised Eurodac rules, will affect other legislative proposals and, in turn, how Eurodac is affected by other legislative proposals.

Eurodac's relationship with the screening process is quite challenging because both co-legislators wish to decouple the Eurodac dossier from the screening process, as laid down in the Proposal for a Screening Regulation. However, the Council has retained the obligation to collect and store information on the fact that a person could pose a threat to internal security. The European Parliament has also included this information in what is processed for international protection applicants and has two compromise options as to whether this information should be included for irregular border-crossers and irregular migrants. This may make the European Parliament's position on this matter somewhat weak and it will not be surprising if this becomes an issue on which the Council insists. In essence, the way in which any screening or security checks are to be performed affects the operation of Eurodac. This creates a series of issues on how these security checks will be conducted in the absence of legislation because Eurodac may be deemed to be essentially creating an obligation for a security check and determining what specific information national competent authorities should include in Eurodac, e.g., a free text system, what the criteria for this assessment will be and how safeguards to mitigate the impact for individuals of this piece of information on their application should be incorporated, the procedure to be followed and the prospect of relocation. It is unclear whether these matters will be regulated in the Eurodac dossier, although some of them at least should be to ensure legal certainty and because they have an impact on the new design of the database, particularly the information to be stored. In any case, it is imperative that, during negotiations on the performance of screening, the co-legislators resolve these matters in a way that avoids turning Eurodac into an investigative law enforcement tool and individuals being subject to potentially arbitrary and unlawful assessments.

Moreover, disconnecting the Eurodac dossier from the CEAS package approach signifies that there is a disparity in the approach on relocation. On the one hand, the Council does not refer to this aspect at all and therefore such information is not to be included. On the other hand, the European Parliament continues to include references to relocation as a category of personal data to be included⁸¹ and has proposed no amendments on Article 14b, thus raising questions as to how this matter can be resolved. One way forward would be to completely remove references to relocation as per the Council approach. Then, once RAMM is negotiated in trilogue, a section on amendments to Eurodac is introduced in its negotiations, dealing with the relationship between the two legal instruments. This has a benefit and a flaw: the benefit is potentially a swifter adoption of Eurodac which will allow for speedier technical adaptations to the system in line with developments on the remaining information systems. The disadvantage is that the Eurodac legislation will be further fragmented with amendments from many different legal instruments which may obscure foreseeability of the rules. Another way forward is to maintain these references. Therefore, references to relocation will pre-empt the need for the inclusion of rules on relocation in RAMM, but without calling for anything further in terms of how such relocation schemes will be organised (mandatory or voluntary etc.).

In addition, following the agreement on the EU framework on resettlement, there is a need to go back to the pending matters in the Eurodac dossier and reach an agreement on those matters. As a result, the agreed text will not be affected by Eurodac rules, but rather the other way round. Consistency between the two legal instruments must be ensured so that information is processed in line with the principle of data minimisation under data protection law and the principles of necessity and proportionality. This involves aspects relating to the categories of data processed, their retention period and their marking. The locus for collecting and processing the personal data of these individuals is also a significant matter to be resolved.

81. European Parliament Negotiating Position, Arts 13(2)(p) (in both options); 14(2)(p) (in both options).

5. RECOMMENDATIONS FOR THE TRILOGUES

In light of the above, this policy paper recommends the following:

- » The separate category of persons disembarked following a SAR operation should be removed (Article 14a);
- » There is no necessity and proportionality for including beneficiaries of temporary protection as a separate category within the scope of Eurodac (Article 14c);
- » Given the impact on the fundamental rights of privacy, data protection and asylum for the persons concerned and the lack of relevant safeguards in terms of categorising individuals as posing threat to internal security, this category of personal data should be removed (Articles 12(v), 13(r), 14(s), 14a(r));
- » If inclusion is agreed in line with the second compromise option of the European Parliament's negotiating position:
 - The rules on what information is included, the criteria to be implemented for inclusion and safeguards on the treatment of persons with an internal security flag should be included;
 - Consideration of the addition of statistical data on individuals in respect of whom information on whether the person may pose a threat to internal security;
- » Inclusion in Eurodac's objectives of the protection of child victims of human trafficking and the identification and protection of missing children (Article 1);
- » Inclusion of additional safeguards, particularly on law enforcement access to children's data (Article 1 paras 2a-2d);
- » Clarification of which categories of personal data on resettled persons will be collected in a clear, exhaustive and proportionate manner, and the modalities for processing such data (retention and marking) (Articles 12a, 17 and 19);
- » Introduction of clearer rules on access to Eurodac by the EBCG Agency and EUAA for the purposes of collecting and transmitting Eurodac data (Article 8c(a));
- » Addition of safeguards regarding the drawing up of statistical data in line with the European Parliament mandate (Article 9);
- » Consideration as to whether references to relocation should be maintained. In light of the Joint Agreement, the RAMM negotiations will be completed by February 2024 (Article 14b).

6. EURODAC: QUO VADIS? RECOMMENDATIONS ON FORTHCOMING IMPLEMENTATION

Reform of Eurodac rules has been in the making for almost seven years and will be extremely wideranging, taking into account the recast Eurodac proposal following the Interinstitutional Agreement, the revised Eurodac proposal and its amendments proposed by the co-legislators. The system will be completely transformed from a database containing relatively little information (primarily fingerprints) to a multipurpose tool for assisting with effecting returns, resettlements, combating irregular migration, administering asylum and supporting law enforcement.

In light of the above, the lives and fundamental rights of applicants for international protection, resettled persons or irregular border-crossers/migrants will be significantly affected. Eurodac is to be transformed into a system which is primarily aimed at tracking the secondary movements of such individuals and therefore enforcing significant limitations on their movement. Processing personal data will have significant implications, not only on their privacy and data protection but on other rights such as the right to asylum, the right to human dignity, the rights of the child, the right to liberty and the right to an effective remedy, as the safeguards, particularly in respect of children and how personal data will be processed, are insufficient.⁸²

Furthermore, the forthcoming interoperability of information systems will mean that individuals falling within Eurodac's scope will be identified on the basis of the European Search Portal (ESP) through access to the CIR which is designed to be an index of all information systems. Biometric data will be used in this respect, the templates of which will be stored in the shared Biometric Matching Service (BMS). Considering persisting data quality issues and the millions of records that will be stored in BMS and CIR, it is expected that a high level of false positive hits will occur. This will have significant implications for individuals who may be wrongly identified, thus creating uncertainty as to their identity. This will have significant implications for individuals who may be detained until they have been identified, treated as security threats, experience delays in having access to the asylum system, and be subject to transfers or, even worse, to expedited returns. Overall, the transformation of Eurodac severely perpetuates the imbalance of power between asylum seekers and migrants and the EU by creating a system of surveillance of movement based on highly intrusive technologies which significantly impact an array of the fundamental rights enjoyed by these persons. These technologies are premised on an intertwining of foreigners as posing risks to irregular migration and security in a highly securitised approach. This goes against the EU values of human dignity, rule of law and human rights. Considering that law enforcement access to Eurodac data will become streamlined and simplified, individuals' lives may be particularly affected by being subject to criminal investigations, questioning and detention. At the same time, given that law enforcement access is also meant to assist in the prevention, detection and investigation of terrorist offences and serious crimes when there are reasonable grounds to believe that the victims of such offences are individuals falling within Eurodac's scope, it is likely that the system will also have a positive impact on the identification of such victims.

Therefore, this final section of the policy paper is aimed at providing a series of recommendations addressed at various actors (civil society, national supervisory authorities, the EDPS and EU agencies) involved in implementing Eurodac rules from different perspectives:

a. Civil society

Civil society actors, such as NGOs operating on the ground, are entrusted with safeguarding tasks to ensure that the Eurodac rules are not abused by national authorities and EU agencies. They must assist individuals falling within the scope of the system and bring to light any potential violations of the fundamental rights of asylum seekers and migrants.

- » Training for NGO staff working on the ground with asylum seekers and migrants in the registration process and throughout the asylum procedure must be ensured. At the moment, the number of civil society actors acquainted with the systems and their fundamental rights challenges is growing but the forthcoming operationalisation of Eurodac will require additional training. The EU Fundamental Rights Agency is currently in the process of developing an e-learning module which civil society members should be encouraged to follow.

82. For a detailed analysis, Vavoula, *Immigration and Privacy in the Law of the European Union* (No. 44).

- » Civil society actors must assist with ensuring that individuals are properly informed about the purposes and uses of Eurodac data. Information requires comprehension in order for individuals to exercise other individual rights (right of access, correction and deletion).
- » If individuals have not been properly informed, this constitutes a violation of the Eurodac rules and should be referred to the national data protection authority of the member state collecting the personal data.
- » Considering the low data quality risks posed by the expansion of Eurodac, individuals must be assisted with exercising individual rights before the national data protection authorities so that they have the possibility for their personal data to be accessed, amended or deleted.
- » Civil society actors are particularly invited to monitor how the (somewhat increased but still insufficient) safeguards on processing biometric data in respect of children are implemented at national level.
- » Civil society actors are also invited to monitor the extent to which individuals awaiting collection of their personal data are subject to coercive measures (detention, forced collection of biometric data etc).
- » In the event of violations of fundamental rights, mobilise all relevant actors at national and EU level (Ombudspersons, data protection authorities, members of the European Parliament) and consider both extrajudicial and judicial remedies, as well as strategic litigation.
- » In the event that there is suspicion that Eurodac has stored information that the individual poses a threat to internal security, follow up with individuals to encourage them to exercise their right of access to their personal data in the system to receive confirmation that this is the case, and consider exercising remedies.
- » Monitor the extent to which AI tools will be introduced for verification of documents that are then stored in Eurodac;

b. National data protection authorities and EDPS

National data protection authorities and the EDPS are entrusted with significant tasks regarding monitoring from a data protection perspective and therefore:

- » The collection and transmission of personal data to the Eurodac Central System and the forthcoming CIR must be monitored through coordinated supervision to ensure that data transmitted both by national competent authorities and the EU agencies that may be involved in this process are of sufficient quality and accuracy.
- » The exercising of individual rights at national level must be monitored to draw conclusions as to whether individuals comprehend how their personal data will be used in connection with Eurodac and interoperability, and whether and how individuals exercise their individual rights to access and seek correction or deletion of their personal data.
- » In the event of information on whether an individual may pose a threat to internal security, monitor implementation of this provision by the national authorities in terms of what information is included in Eurodac and how it has affected the individual concerned. This can only be monitored if relevant statistical data are being compiled in the system.
- » Monitor how a facial image as an additional biometric identifier will be used for identification purposes.
- » Monitor the prompt deletion of Eurodac records.
- » Monitor how law enforcement access to Eurodac data has been exercised, by both national designated authorities and Europol, as there is scarce statistical data on this front.
- » Monitor how transfers of Eurodac data will take place for the purposes of returns without jeopardising non-refoulement and violations of fundamental rights.
- » Monitor implementation of interoperability that will connect Eurodac to the other information systems.
- » If there is agreement on separate maritime rescuees in Eurodac, monitoring the impact of such differentiation on the treatment of those individuals is essential.
- » The EDPS must ensure monitoring of the processing of personal data by EU agencies in line with data protection requirements.

c. EU agencies

EU agencies are entrusted with tasks relating to collecting and transmitting personal data to the Eurodac Central System and CIR. Furthermore, Europol is allowed to conduct searches in Eurodac for law enforcement purposes. Therefore, it is essential that EU agencies comply fully with Eurodac rules and safeguards regarding the processing of personal data in full compliance with fundamental rights, particularly in relation to children and other vulnerable groups of individuals within the scope of the system.



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