



ECRE Comments

on the

**European Commission Staff Working Document
“on Implementation of the Eurodac Regulation as
regards the obligation to take fingerprints”**

June 2015

Background*

The obligation of Member States to take fingerprints from asylum seekers and migrants irregularly residing on their territory or crossing their borders is laid down in the Eurodac Regulation,¹ with the aim of providing evidence of the first EU Member State where a person entered or applied for international protection for the purposes of applying the Dublin III Regulation,² as well as for law enforcement purposes.³ However, the obligation of Member States to obtain fingerprints is not mirrored by an explicit corresponding obligation on asylum seekers to give their fingerprints under the EU asylum *acquis*. The Eurodac Regulation is solely addressed to Member States, while the recast Asylum Procedures Directive⁴ and the recast Qualification Directive⁵ do not specify any duty to provide fingerprints as part of asylum seekers' obligations in the procedure, as will be seen below.⁶

The practice of fingerprinting has attracted increased attention since 2014, when a number of Member States reported phenomena of refusal by asylum seekers and other migrants to cooperate with the obligation to have their fingerprints taken. Such resistance to cooperate was witnessed particularly in respect of certain nationalities, "notably Eritreans and Syrians".⁷

Against that backdrop, a European Migration Network (EMN) enquiry was launched in July 2014 to identify best fingerprinting practices across EU Member States.⁸

At the Eurodac Contact Committee meeting of 9 October 2014, the Commission detailed its non-paper on fingerprinting guidance in 3 phases. Member States would firstly provide asylum seekers with information on the obligation to give fingerprints, followed by information on the consequences of non-compliance with that obligation such as the use of the accelerated procedure. As a last resort, Member States could apply detention and proportionate coercive measures to take fingerprints. The Contact Committee did not discuss this issue in detail and the matter was directed for political discussion to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). At the SCIFA meeting of 13-14 November 2014, Member States stressed the importance of the Commission non-paper on fingerprinting.

* ECRE thanks Professor Evelien Brouwer and Professor Elspeth Guild for insightful comments. All errors remain ECRE's own.

¹ Articles 9 and 14 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' [...], *OJ* 2013 L180/1. The Regulation is applicable as of 20 July 2015. Ireland has opted out of the Regulation, while Denmark is not bound by it. See ECRE, *Guidance Note on the transposition and implementation of the EU Asylum Acquis*, February 2014.

² Article 13 Regulation (EU) No 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 stateless person (recast), *OJ* 2013 L180/31.

³ Article 1(2) Eurodac Regulation.

⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* 2013 L180/60.

⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *OJ* 2011 L337/9.

⁶ The only reference is Article 31(8)(i) of the recast Asylum Procedures Directive, which allows the use of accelerated procedures where an applicant "refuses to comply with an obligation to have his or her fingerprints taken". Yet no such obligation is explicitly stated elsewhere in the *acquis*. As will be seen below, the Commission Staff Working Document assumes the existence of such an obligation.

⁷ European Commission, *On the Implementation of the Eurodac Regulation as regards the obligation to take fingerprints* (hereinafter "Eurodac Guidance"), SWD(2015) 150, 27 May 2015.

⁸ See European Commission & European Migration Network, *Ad-Hoc Query on EURODAC Fingerprinting*, 22 September 2014, Annex to European Commission, *Non-paper for SCIFA on Best practices for upholding the obligation in the Eurodac Regulation to take fingerprints*, 13 October 2014, DS 1491/14.

On the basis of these discussions, the Commission issued guidance on “possible best practices” relating to fingerprinting on 27 May 2015, as part of the first package of actions taken under the European Agenda on Migration published on 13 May 2015.⁹

The guidance raises a number of critical questions meriting close consideration. By way of preliminary observation, the scale of the problem relating to refusal among asylum seekers and migrants to give fingerprints is unclear. The Commission has not provided clear explanations on the scope and severity of the phenomenon, as it does not mention whether refusals to give fingerprints have been reported in one or more Member States or whether they concern a large or small fraction of the asylum seeker and migrant population fingerprinted in Europe. Against that backdrop, questions of proportionality must be raised throughout the examination of the various measures presented by the Commission.

ECRE also highlights that establishing asylum seekers and other migrants’ identity or nationality or travel routes is not *necessarily* achieved through fingerprinting, as Member States have other means at their disposal for the determination of an applicant’s identity, nationality and Dublin-related travel routes. This bears significant impact on the permissibility of imposing coercive measures, whether amounting to detention or to the use of force, as an ostensibly necessary and last-resort measure for the purpose of obtaining fingerprints from asylum seekers and irregular migrants.

The Commission’s guidance also makes reference, albeit in the introductory part, to the Justice and Home Affairs Council Conclusions of 9 October 2014 making a link between fingerprinting and the risk of absconding of migrants. On that point, it should be stressed that refusal to be fingerprinted is not necessarily a factor conducive to the likelihood of a person’s absconding from the process. Persons fleeing persecution and potentially oppressive regimes in their country of origin may often be distrustful of official authorities, all the more so if they are called to give fingerprints in a process on which they have no sufficient information. Reluctance, if any, of asylum seekers to cooperate may also stem from lack of information with regard to or understanding of the Dublin procedure.

Moreover, it should be recalled that Recital 50 of the Eurodac Regulation sets out a number of fundamental safeguards by referring in particular to the EU Charter of Fundamental Rights. Beyond the express references to Article 8 on the protection of personal data and Article 18 on the right to asylum, the right to dignity in Article 1 and the right to liberty in Article 6 are also binding on the Eurodac Regulation and its application by Member States.

This note will examine the elements of the Commission’s Staff Working Document in relation to: the detention of asylum seekers and irregular migrants for the purpose of fingerprinting; the use of accelerated and border procedures against applicants who fail to provide fingerprints; the use of force to compel fingerprinting; and data protection concerns stemming from the storage of Eurodac data for asylum or irregular migration purposes in the same act.

Detention for the purpose of fingerprinting

Any measure amounting to deprivation of liberty must be in accordance with Article 6 of the EU Charter and Article 5 ECHR, which only allow Member States to use detention in exhaustive and strictly defined cases. However, in the context of the implementation of the Eurodac Regulation, the Commission focuses on the applicable EU law standards in two possible scenarios: the detention of asylum seekers, on one hand, and that of irregular migrants who have not applied for international protection, on the other.¹⁰

⁹ European Commission, *A European Agenda on Migration*, COM(2015) 240, 13 May 2015.

¹⁰ For the purposes of the present comments, these standards of EU law will be examined. For a discussion of the relevant grounds for detaining asylum seekers or irregular migrants under Article 5 ECHR, see

a. Detention of asylum seekers under the recast Reception Conditions Directive

The guidance suggests that, when a person has applied for asylum in a Member State and refuses to be fingerprinted, that Member State may detain him or her in order to verify his or her identity or nationality.¹¹ The use of detention for the purpose of verifying identity or nationality is a ground for detention listed in Article 8(3)(a) of the recast Reception Conditions Directive.¹²

The Commission also considers that, where an applicant has damaged his or her fingerprints or otherwise made it impossible to obtain them, and where there is a reasonable prospect that within a short period of time it will be possible to take such fingerprints, Member States may deem it necessary to keep him or her in detention until fingerprinting is possible. Attempts to re-fingerprint should be made at regular intervals.¹³ Detention would only be applied for the shortest possible time,¹⁴ and the person would be released after the taking of fingerprints unless there is another reason under the Return Directive or the EU asylum *acquis* to continue detention.¹⁵

However, in ECRE's view the reasoning of the Commission on detaining applicants for international protection for the purpose of fingerprinting relies on a questionable reading of the "identity and nationality" ground for detention in the recast Reception Conditions Directive. Recital 5 of the Eurodac Regulation states that "fingerprints constitute an important element in establishing the exact identity of [applicants]" and that it is thus "necessary to set up a system for the comparison of their fingerprint data."¹⁶ Yet it is crucial to recall that the taking of fingerprints in Eurodac does not *per se* determine the identity or nationality of an applicant. The only information relating to a person's identity that is recorded in the Eurodac Central System concerns his or her fingerprint set and sex.¹⁷

Accordingly, Eurodac is not directly relevant to the establishment or verification of an applicant's identity or nationality. This is echoed in other instruments of the EU asylum *acquis* relating to asylum seekers' duty to cooperate with the authorities regarding the establishment of identity and nationality. Article 13(1) of the recast Asylum Procedures Directive imposes an obligation upon applicants to cooperate with the authorities with a view to establishing their identity and main elements of their claim, as described in Article 4(2) of the recast Qualification Directive. That provision refers to:

"[A]ll the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection."

However, no mention is made in the Qualification Directive of fingerprints as a means of establishing the applicant's identity or nationality. A possible counter-argument could suggest that a person's

ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No 1, June 2015; ECRE, *Information Note on 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)*, Forthcoming.

¹¹ European Commission, *Eurodac Guidance*, para 3.

¹² 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), *OJ* 2013 L180/133.

¹³ European Commission, *Eurodac Guidance*, para 9.

¹⁴ European Commission, *Eurodac Guidance*, para 5.

¹⁵ European Commission, *Eurodac Guidance*, para 10.

¹⁶ The only reference to the identification function of fingerprints is made in Article 29(9) Eurodac Regulation on the rights of the data subject, which states that a request to access data "shall contain all the necessary particulars to identify the data subject, including fingerprints. Such data shall be used exclusively to permit the exercise of the rights referred to in paragraphs 4 and 5 and shall be erased immediately afterwards."

¹⁷ Article 11(a) and (c) Eurodac Regulation.

fingerprints are “documentation at [his or her] disposal” which he or she would be required to provide under the Qualification Directive. However, it seems hard to see any way to reveal a person’s identity or nationality based on fingerprints other than sharing and cross-checking fingerprint data with the country of origin, which would infringe fundamental principles of asylum law, namely Article 30 of the recast Asylum Procedures Directive.¹⁸

Therefore the value of Eurodac as an instrument for the determination or verification of identity or nationality is dispelled by the meaning and content of obligations of Member States under the asylum Directives.

In practice, fingerprints may only provide information on travel routes and enable a Member State to establish that an applicant has applied in or transited through another Member State which may hold information on his or her identity or nationality, if that person has previously been fingerprinted by that Member State.

Accordingly, the relevance of Eurodac data in the verification of identity or nationality necessitates an uneasy distinction based on *when* an applicant’s fingerprints are taken and recorded.

i. Fingerprinting upon first apprehension

On one hand, the first EU Member State apprehending a person could never verify his or her identity or nationality on the basis of fingerprinting, as the storage of fingerprints in the Eurodac database would not lead to a ‘hit’; it would only feed new data into the Eurodac Central System. In such a case, the Member State making the first apprehension of an asylum seeker EU-wide cannot detain him or her for the purposes of taking fingerprints under Article 8(3)(a) RCD, as fingerprinting will have no incidence on the determination of identity or nationality.

ii. Fingerprinting after a person has been apprehended in another country

On the other hand, the situation would differ for a Member State which identifies on the basis of Eurodac data that an applicant has applied in or transited through another Member State. Following a Eurodac ‘hit’, that country is able to request information from the first country that fingerprinted the applicant pursuant to Article 34 of the Dublin III Regulation. Such information may include the applicant’s personal details and nationality, as well as identity and travel documents.¹⁹ In such a case, the act of fingerprinting does not itself determine identity or nationality, but can substantiate an information request to the Member State which first fingerprinted the applicant in order to gather such information. In that light, an argument could be made that a Member State may apply Article 8(3)(a) of the recast Reception Conditions Directive to detain an asylum seeker in order to take his or her fingerprints, where the taking of fingerprints would result in a Eurodac ‘hit’. It would evidently be very difficult, if not impossible, in practice for a Member State to establish beforehand whether the taking of fingerprints will lead to a Eurodac ‘hit’ or not.

Nevertheless, the overly permissive approach to the detention of asylum seekers taken by the Commission guidance assumes that fingerprinting an asylum seeker would in most cases assist a Member State in determining or verifying his or her identity or nationality. Such an application of the “identity and nationality” ground for detention is not consistent with the obligation of Member States to interpret the Article 8(3) of the recast Reception Conditions Directive detention grounds restrictively and to detain asylum seekers only exceptionally, subject to an individualised assessment and a

¹⁸ This provision prohibits Member States from disclosing to the alleged persecutors information on the individual applicant or on the fact that an application was made, as well as from collecting information from these actors which would result in directly informing them that an asylum application has been made.

¹⁹ Article 34(2) Dublin III Regulation.

necessity and proportionality test.²⁰ This is all the more important since there may be valid reasons for an applicant not giving fingerprints. As mentioned above, asylum seekers may find difficulties in trusting the authorities after having faced persecution or serious harm in their country of origin, or may not sufficiently understand the complex and technical process of the Dublin procedure for which their fingerprints are required by the state, all the more so if such fingerprints are demanded by reference to detention or force.

b. Detention of irregular migrants for the purpose of removal

The guidance relating to persons who have *not* applied for international protection raises equally problematic issues. For migrants irregularly staying on the territory of a Member State, the Commission states that:

“For as long as a data-subject refuses to cooperate in the initial identification process, including in the taking of his/her fingerprints as required by EU law and/or national law, it is not normally possible to conclude whether or not there is a realistic prospect of his/her return being carried out and, as such, Member States may consider, where other less coercive alternatives to detention cannot be applied effectively, resorting to detention under the terms of the Return Directive.”²¹

The final text of the guidance differs from the Commission non-paper presented to SCIFA in November 2014, which stated that “as such, detention may be permitted under the terms of the Return Directive.”²² According to the Commission, the person would be released after the taking of fingerprints unless there is another reason under the Return Directive to continue detention.²³

The opacity in the Commission’s assessment seems to create confusion and risks of arbitrariness in practice. The guidance does not spell out the existence of different legal frameworks applicable to procedures for return under the Return Directive, on one hand, and procedures for transfer to another Member State under the Dublin Regulation, on the other. It is crucial to recall that in cases where a Member State issues a request for another country to “take back” a person who is irregularly residing on its territory, the rules in the Return Directive do *not* apply.²⁴ The Return Directive can only apply where a Member State chooses to carry out a “return procedure” with regard to a person whose application for international protection has been rejected by a final decision in one Member State and is on the territory of another Member State without a residence document.

This distinction is important to draw when looking at the purpose of Eurodac fingerprinting. Obtaining an irregular migrant’s fingerprints to store them in Eurodac does not necessarily serve to facilitate his or her return to the country of origin, as the use of fingerprints in that particular database does not *per se* provide Member States with information on that person’s identity or nationality.²⁵ On the other hand, as stated above, Eurodac data gives evidence of a person’s travel route from the first EU country of entry. Recalling that the Eurodac database is aimed at facilitating the application of the

²⁰ It should be noted that the Commission mentions that detention should only be applied for the shortest period necessary: European Commission, *Eurodac Guidance*, para 5.

²¹ European Commission, *Eurodac Guidance*, para 2.

²² Note that Recital 16 of the Return Directive expressly states that detention is only permitted to carry out the removal of a person, subject to proportionality and where less coercive alternatives cannot be applied. European Commission, *Eurodac Guidance*, para 10.

²³ Article 24(4) Dublin III Regulation.

²⁴ It should be noted that neither the Commission’s Communication *On EU Return Policy*, COM(2014) 199, 28 March 2014 nor its *Evaluation on the application of the Return Directive (2008/115/EC)*, 22 October 2013 make any reference to fingerprinting as relevant to return procedures.

Dublin Regulation,²⁶ Member States' obligation to fingerprint irregular migrants on their territory serves a Dublin-specific purpose: to establish a migrant's travel route in order to ascertain whether another Dublin state is responsible to take him or her back. Yet in this case, it is the Dublin III Regulation rather than the Return Directive which regulates the procedures for the person's transfer to the responsible Member State.

Therefore the possibility to detain an irregular migrant for the purposes of obtaining his or her fingerprints and transferring him or her to another country under the Dublin Regulation would only be permissible where there is a "significant risk of absconding" as defined in national legislation and where alternative measures are not applicable.²⁷ In such a case, it is also important to recall that the guarantees listed in Articles 9, 10 and 11 of the recast Reception Conditions Directive would also be applicable.²⁸

Application of accelerated procedures

According to the guidance, Member States may channel the claim of an applicant who refuses to be fingerprinted under the accelerated procedure, pursuant to Article 31(8)(i) of the recast Asylum Procedures Directive. The Commission concedes that the use of accelerated procedures has adverse consequences for an applicant, as it may lead to a rejection of the claim as manifestly unfounded and significantly limit his or her right to remain on the territory of the Member State pending an appeal.²⁹ Yet the guidance seems to encourage Member States to broadly use accelerated procedures almost as a punitive measure against asylum seekers who refuse to be fingerprinted.

The use of accelerated procedures with extremely short time-frames and weaker appeal rights is liable to jeopardise the objective of the Asylum Procedures Directive to ensure adequate and complete examination of asylum applications,³⁰ which is paradoxically acknowledged in Recital 20 of the Directive. On various occasions, the European Court of Human Rights (ECtHR) has sanctioned national practices with regard to accelerated procedures as incompatible with the fundamental right to an effective remedy.³¹ Therefore the Commission's assumption that an application will be rejected as manifestly unfounded "following an adequate and complete examination of its merits" leaves much to be desired.

Promoting the application of accelerated procedures has inevitable consequences on the substantive assessment of an international protection claim, beyond the significantly reduced procedural safeguards applicable in these procedures.³²

It risks encouraging particularly negative practices that may undermine a thorough examination of a person's protection needs, and which have been met critically by national courts. An example can be

²⁶ See Articles 15(1) and 17(3) Eurodac Regulation, clarifying that fingerprints of irregular migrants may be used solely for comparisons against fingerprints of applicants for international protection in other Member States.

²⁷ Article 28(2) Dublin III Regulation.

²⁸ Article 28(4) Dublin III Regulation.

²⁹ European Commission, *Eurodac Guidance*, para 4. This stems from the possibility under Article 46(6) of the Asylum Procedures Directive for Member States not to provide suspensive effect in appeals against decisions rejecting an application as manifestly unfounded, which under Article 32(2) cover claims rejected in the accelerated procedure.

³⁰ ECRE, *Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, December 2014, 39.

³¹ ECtHR, *IM v France* Application No 9152/09, 2 February 2012; *Singh v Belgium* Application No 33210/11, 2 October 2012; *AC v Spain* Application No 6528/11, 22 April 2014.

³² For an overview of the problems associated with accelerated procedures, see M Reneman, 'Time-limits in the asylum procedure' in ECRE & Dutch Refugee Council, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, 85 et seq.

found in the instructions from the French Office for the Protection of Refugees and Stateless Persons (OFPRA) to asylum decision-makers to omit a personal interview and refuse to consider the merits of applications from persons who had altered their fingerprints, which were sanctioned in 2012 by the Council of State.³³ Decisions taken by OFPRA under these instructions, namely in respect of Eritrean applicants, were then annulled by the National Court of the Right to Asylum (CNDA) on the ground that OFPRA had rejected the claims due to the applicants' non-compliance with the obligation to provide fingerprints without conducting an individualised assessment of the merits.³⁴ This case illustrates the risks of undermining adequate and complete examination of asylum claims under the accelerated procedure.

The Commission also recommends Member States to advise non-cooperative asylum seekers that, where their claim is rejected under the accelerated procedure, an order for return may be accompanied by an entry ban.³⁵ It should be stressed that Article 11(1) of the Return Directive grants Member States relatively wide scope with regard to the issuance of entry bans, which however makes no reference to applicants whose claims are rejected under the accelerated or border procedure. It is therefore concerning that guidance encouraging the application of strict entry bans on rejected asylum seekers in addition to expulsion is branded as "best practice".

Use of coercion

Furthermore, the Commission suggests to Member States that they may make use of coercion as a last resort and to a proportionate degree in order to obtain fingerprints, while ensuring the dignity and physical integrity of the data subject under the EU Charter of Fundamental Rights.³⁶ At first reading, there is no reference by the Commission as to what coercive measures could ever be proportionate and respectful of a person's right to dignity in such a context. However, since the Commission seems to distinguish "detention" from "coercion" in its guidance, the reference to coercion is taken as relating to physical force applied with the aim of obtaining fingerprints from the asylum seeker or migrant e.g. forcefully opening a hand to obtain fingerprints.

According to the September 2014 EMN enquiry on Eurodac, the majority of countries prohibit the use of physical force for the purpose of taking fingerprints. This is the case in 15 countries (Belgium, Bulgaria, Croatia, Cyprus, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Sweden).

The use of force for the purpose of taking fingerprints is allowed for all Eurodac categories in 9 countries (Austria, Czech Republic, Germany, Italy,³⁷ Netherlands, Poland, Slovakia, UK, Norway), while Estonia and Greece allow coercive measures in respect of persons irregularly on the territory but not asylum seekers. In Spain, the state of the law is not clear on whether authorities can compel asylum seekers and migrants to give fingerprints.

However, in most cases, the legal basis for using force to obtain fingerprints from a data-subject stems from criminal legislation. With the exception of 4 countries (Estonia, Germany, UK, Norway),³⁸ the majority of countries provide for the possibility of coercion in police legislation or regulations or

³³ Conseil d'Etat, *Cimade et autres*, n. 354907, 11 January 2012. This practice is also mentioned in ECtHR, *MV and MT v France* Application No 17897/09, 4 September 2014, para 20.

³⁴ See e.g. Cour Nationale du Droit d'Asile, n. 11032252, 21 February 2012.

³⁵ European Commission, *Eurodac Guidance*, para 4.

³⁶ European Commission, *Eurodac Guidance*, para 7.

³⁷ While Italian legislation does not provide for such a possibility, the Court of Cassation has interpreted the law as authorising the use of force in respect of resistance to being escorted.

³⁸ See European Commission and EMN, *Ad-Hoc Query on EURODAC Fingerprinting*, 9-24 for a detailed overview. Estonia: Obligation to Leave and Prohibition of Entry Act; Germany: Residence Act and Asylum Procedure Act; UK: Immigration Act; Norway: Immigration Act.

criminal provisions.³⁹ In that respect, extending the concept of coercion in public security and criminal proceedings to the immigration and asylum context conflates the different categories of persons targeted by fingerprinting obligations. Such an application of criminal law standards is particularly problematic in respect of asylum seekers, who are lawfully staying on the territory of Member States during the asylum procedure,⁴⁰ and should not be treated as having committed a criminal offence.⁴¹

Further, the guidance provides that if coercion is to be applied, Member States will have to explain to asylum seekers and migrants the steps taken to compel fingerprinting.⁴² The use of force would require a case-by-case assessment and should only be applied as a last resort, when alternatives would not be effective, and only to a minimum degree by an official trained in the proportionate use of force. Moreover, the use of coercion should be recorded in order to allow the data subject to challenge the decision.

Moreover, the Commission does not pay due consideration to the specific needs of vulnerable persons with regard to the provision of information on the need to collect fingerprints. The guidance therefore does not point Member States to the need for information adapted to children or persons with disabilities in the fingerprinting process.

Yet the necessity of such a use of force is not always established in the case of Eurodac fingerprinting. While the Eurodac Regulation requires Member States to fingerprint all asylum seekers and irregular migrants on their territory,⁴³ taking fingerprints is not *necessarily* a condition for applying the Dublin Regulation, since other circumstantial evidence may also be used to determine the Member State responsible for examining a person's application.⁴⁴ Against that backdrop, the reasoning of necessity with regard to fingerprinting is considerably dubious, given that taking fingerprints is not an objective in itself but only a means to secure one of the forms of evidence that can be relied on for the application of the Dublin Regulation. Under an appropriate reading of the "last resort" principle referred to by the Commission, there would only be very limited cases where the forceful taking of fingerprints would be deemed necessary.

Even in those limited cases, however, the proportionality of using force against an asylum seeker or migrant for the purpose of obtaining his or her fingerprints is highly onerous or even impossible to establish. In any sound balancing process, a human being's physical integrity and dignity – both recognised as core fundamental rights – should never be outweighed by the objective of obtaining fingerprints to facilitate the application of a mechanism allocating responsibility for asylum applications across the EU.

More specifically, as regards vulnerable applicants such as children, the Commission provides that specific vulnerabilities of the person concerned should be taken into account. In that light, it suggests that Member States may rule that some vulnerable persons such as children and pregnant women should never be coerced into giving fingerprints.⁴⁵ This approach is regrettably permissive. It must be recalled that the Eurodac Regulation itself does not allow Member States to fingerprint persons below the age of 14. This age limit was determined in the Regulation on the basis of the minimum age of

³⁹ See European Commission and EMN, *Ad-Hoc Query on EURODAC Fingerprinting*, 9-24 for a detailed overview. Belgium: Law on Police; Czech Republic: Police Act; Italy: Consolidated Act on Public Security and Criminal Code; Netherlands: Police instructions; Spain: Criminal Code; Slovakia: Police Force Act.

⁴⁰ Article 9(1) recast Asylum Procedures Directive.

⁴¹ For a critique of the use of criminal law norms in the immigration context, see S Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64:2 Washington and Lee Law Review 469.

⁴² European Commission, *Eurodac Guidance*, para 7.

⁴³ Articles 9 and 14 Eurodac Regulation.

⁴⁴ Article 13 Dublin III Regulation. See to that effect European Commission, *Eurodac Guidance*, para 1.

⁴⁵ European Commission, *Eurodac Guidance*, para 7.

criminal responsibility, although the Commission had clarified that Member States must ensure that all children are treated in a legal and non-discriminatory manner.⁴⁶

More importantly, Recital 35 of the Eurodac Regulation makes express reference to the best interests of the child principle, which is also binding on Member States in accordance with Article 24(2) of the EU Charter. As ECRE has consistently argued, the “best interests” principle places an onerous burden of proof on Member States with regard to restrictive measures affecting children. In that respect, it seems virtually impossible for Member States to establish that a child’s best interests justify the use of physical coercion in order for that child to be fingerprinted in Eurodac against his or her will.

The inconsistency of coercive fingerprinting with the best interests principle is all the more significant since Eurodac data is not relevant to establishing identity or nationality and not necessarily determinative of travel route of an asylum seeker or irregular migrant under the Dublin Regulation. In that light, there should be at least an unequivocal prohibition on using coercion to fingerprint children rather than a mere guideline to Member States to refrain from doing so.

Data protection and double fingerprinting

The Commission suggests that Member States can fingerprint persons for asylum purposes (as “Category 1” data-subjects) and irregular migration purposes (“Category 2” and “Category 3” data-subjects) within the same act. This would be done in order to avoid fingerprinting twice and to reduce administrative burden on both authorities and the persons concerned.⁴⁷ To that effect, the Commission specifies that the identification for return and other lawful purposes is “not incompatible with the Asylum/Dublin ones”.

The guidance tends to conflate the different forms of identification covered by Eurodac. In practice, given that persons seeking protection may only enter the territory of Member States irregularly, it might be common for third-country nationals to first be apprehended for irregular entry or stay and then express the wish to apply for international protection.

However, despite the Commission’s contention, there is an inherent tension between the purposes of identification for international protection purposes and identification for the purpose of removal. Recalling that asylum seekers have a right to remain on the territory pending the examination of their claim,⁴⁸ their identification relates to the examination of the application. On the other hand, the identification of “Category 2” or “Category 3” persons assumes that they have no legal right to remain on the territory.

In that sense, the guidance encourages Member States to broadly store data in the Eurodac Central System irrespective of whether the data subject is fingerprinted as an applicant for international protection or as an irregular migrant. Recalling that Eurodac may now also be accessed for law enforcement purposes,⁴⁹ this guidance could also incentivise authorities to apply forceful fingerprinting against asylum seekers and migrants for that aim, in clear tension with the principles of proportionality and purpose-limitation in the context of data protection,⁵⁰ which is a “key factor in the successful operation of Eurodac” according to Recital 43 of the Eurodac Regulation. The broad

⁴⁶ European Commission, *Commission Staff Working Document accompanying the Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ [...] – Impact Assessment*, SEC(2009) 936, 10 September 2009, 16.

⁴⁷ European Commission, *Eurodac Guidance*, para 8.

⁴⁸ Article 7(1) Reception Conditions Directive; Article 9(1) Asylum Procedures Directive.

⁴⁹ Recitals 21 and 32 and Articles 20 and 40(7) Eurodac Regulation.

⁵⁰ See CJEU, Case C-291/12 *Schwarz v Bochum*, Judgment of 17 October 2013, para 40. On the Court’s strict interpretation of proportionality, see Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, Judgment of 8 April 2014.

encouragement of fingerprinting risks creating incompatibility not only with the fundamental right to data protection guaranteed by Article 8 of the EU Charter, but also with the right to private life enshrined in Article 7 of the EU Charter and Article 8 ECHR.⁵¹

Conclusion

The guidance offered by the Commission on fingerprinting asylum seekers and migrants is highly alarming. The guidance seems to encourage: wider use of detention in both asylum and irregular migration contexts, under dubious legal bases; broader recording of personal data in the Eurodac database, contrary to data protection safeguards on proportionality and purpose-limitation; expedient asylum procedures against applicants who do not cooperate with the obligation to give fingerprints; as well as a highly objectionable use of force to compel fingerprinting, which in most cases only finds legal basis in national criminal or police legislation. The “possible best practices” presented by the Commission create a significant risk of promoting highly repressive measures across Member States, which raise considerable tensions with fundamental rights and are potentially incompatible with EU Charter rights to dignity,⁵² liberty,⁵³ private life and protection of personal data,⁵⁴ as well as the right to asylum.⁵⁵ Such repressive approaches are also liable to further undermine the already fragile trust of asylum seekers in the asylum process.

At the same time, promoting compliance with the obligation to take fingerprints at any cost has broader consequences for the application of the Dublin III Regulation. The increased emphasis on the importance of fingerprinting seems to overstate the weight of the first country of arrival criterion in the hierarchy of responsibility criteria under that Regulation. It is crucial to recall that the “irregular entry and stay” criterion in Article 13 of the Dublin III Regulation is only one out of several factors determining which Member State is responsible for examining an application, and should only be considered after an assessment of the clauses on family unity and residence documents or visas.⁵⁶ The overwhelming prevalence of the first country of arrival criterion and the limited effect of the family provisions in practice have been widely criticised as a problem in the application of the Dublin Regulation,⁵⁷ not least by the Commission.⁵⁸ Yet, while acknowledging that the Dublin system does not work properly, both the Commission guidance and the Council’s political discussion on Eurodac fingerprinting seem to encourage Member States to secure fingerprints at any cost and to overlook the proper implementation of the Dublin criteria.

⁵¹ On the link between data protection and private life, see CJEU, *Digital Rights Ireland*, para 53.

⁵² Article 1 EU Charter.

⁵³ Article 6 EU Charter.

⁵⁴ Articles 7-8 EU Charter.

⁵⁵ Article 18 EU Charter.

⁵⁶ Articles 8-11 and 12 Dublin III Regulation.

⁵⁷ See ECRE, *ECRE Comments on Regulation (EU) No 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 stateless person (recast)*, March 2015, 17.

⁵⁸ European Commission, *A European Agenda on Migration*, 13.