

Unreadable Papers? Biometrics in Practice

The EU's first experiences with biometrics: Examining EURODAC

By Elspeth Guild¹

Fixing the identity of the individual has become a matter of increasing importance over the past ten years in the EU. A number of factors have led to this interest, among these have been:

- (a) Technological developments which place at the disposal of state authorities (and others) very substantial capacity to collect, store and manipulate data, including personal data of individuals;
- (b) An increasingly important line of argument that free movement of persons in the EU accompanied by the abolition of intra Member State border controls has impaired the ability of the state authorities to know who is on their territories (and the presentation of this lack of knowledge as a source of fear or at least insecurity);
- (c) The increasing arrival of third country nationals into the EU without documents, not least as they are unable to obtain passports and even if they could, these would not be useful without the necessary visa from an EU state to make regular travel possible;
- (d) The breaking of the identity of the refugee into the asylum seeker who is inherently suspect and whose identity is in dispute and the refugee, the same individual once recognised by the state as in need of protection and provided with documents.

As the ability of Member States to control the movement of citizens of the Union who are not their own nationals has diminished, the emphasis on controlling the movement of third country nationals has increased. So while EU directive 2004/38 on the right of movement of citizens of the Union for which the transposition period ended on 30 April 2006 abolished the obligation of citizens of the Union to obtain residence permits, the focus of regulatory attention has fallen more precisely on those others who can still be controlled, third country nationals.

The transformation of visas from instruments of foreign relations to tools of immigration control² has contributed to the perception that control of the identity of the individual is not only necessary but possible. If Member States can only get hold of personal data of third

¹ Professor of European Migration Law, Radboud University Nijmegen, Partner, Kingsley Napley, London.

² See Bigo and Guild *Le Visa Schengen Cultures et Conflits* 2003.

country nationals before they arrive in the EU there is the belief that the authorities will be able to control the movement of those individuals. Most problematic, however, are those third country nationals whose identity is disputed or unknown. Member States seek methods to attach an identity to the individual in which they can have confidence. The individuals of greatest interest in this effort as asylum seekers without documents. One of the most consistent of complaints in Member States regarding asylum seekers is that they destroy their travel documents, lie about how they arrived in the country and worst still, lie about their nationality pretending to be nationals of states in substantial civil war or other armed conflict rather than admitting they are nationals of some other country where there is no current conflict. If the state can prove the latter, then the asylum seeker is abusing the asylum system as he or she is in fact 'only' an economic migrant seeking to stay in the state to better his or her situation.

The question then becomes, how to attach a certain identity to these persons. Already, many if not most of them will arrive in the EU without any identity documents thus their identity, even to the point of their names are uncertain. Additionally, as their nationality is disputed, there is no obvious authority to which to request clarification as to whether the individual is really a citizen of that third country or not (and in any event even when EU countries to make such requests they are often not received with a high degree of priority). Technology offered a tantalising possibility to resolve this conundrum – biometric data on each individual held in a computer which would permit any Member State to be finally and completely certain at least about the identity of the person in front of them and his or her movement within the EU from the time first 'tagged'. The pressure to produce such a database of information about asylum seekers was further enhanced by the political choice to leave them outside of the right of free movement of persons in an EU without intra Member State border controls. There has been substantial discussion in the EU about what sort of biometric data is appropriate for tagging the individual. For some time technical differences in various systems made progress difficult. The use of fingerprints as the main biometric identifier is by no means certain. Although specified as the tool in EURODAC, when the Commission proposed to include biometric data in visas and residence permits, it identified facial images as the primary data (the high resolution electronic portrait) and fingerprints as secondary together with iris recognition.³

³ COM (2003) 558

In this paper I will examine the EU's first experiment with the creation of a biometric data base. How was the decision reached? What are the modalities of the data base and how has it operated? What challenges have there been on the basis of data protection?

It is worth noting, that although EURODAC has been the first EU database to hold biometric data, it is intended that the Visa Information System will also hold such data, again in the form of fingerprints and this information is also intended, in the longer term, to be included in EU identity card and passports as well as residence permits

EURODAC

EURODAC was created by Regulation 2725/2000, adopted in 2000 and began operating on 1 March 2003. Ireland and the UK opted into the measure. EURODAC consists of a Central Unit, established within the European Commission, and a computerized central database in which data are processed for the purpose of comparing the fingerprint data of applicants for asylum and of the categories of third country nationals referred to in the regulation (ie those apprehended irregularly crossing an external frontier). In other words, the debate on whether to include fingerprint data of persons apprehended in connection with the irregular crossing of an external border was resolved in favour of their inclusion. As the EURODAC system has only one objective – determining where asylum seekers belong territorially – the retention of data on non-asylum seekers had to be tied into the asylum procedure. I will return to this later, suffice it here to note that the result is the convergence in policy of the categories of persons irregularly crossing borders and asylum applicants.

The Regulation only covers third country nationals. It defines a 'hit' as the existence of a match or matches established by the Central Unit by comparison between fingerprints recorded in the databank and those transmitted by the Member States with regard to a person (articles 1 & 2).

The data which is recorded in respect of an asylum applicant are limited to:

- (a) Member State of origin, place, and date of application for asylum;
- (b) Fingerprint data;
- (c) Sex;
- (d) Reference number used by the Member State of origin;
- (e) Date on which the finger prints were taken;
- (f) Date on which the data were transmitted to the Central Unit;
- (g) Date on which the data were entered into the central database;

(h) Details in respect of the recipient(s) of the data transmitted and the date(s) of transmission(s). (article 5).

(i)

Thus for EURODAC, the individual becomes no more or less than his or her fingerprints. Of course the exclusion of information on the individual's name and nationality is a protection for the asylum applicant against any possible misuse of the database. The data is stored for ten years after which time it is automatically erased from the central database. It will be erased earlier if the individual acquires citizenship of a Member State in the meantime (article 7). The data which is recorded in respect of a person apprehended in connection with the irregular crossing of an external border are:

- (a) Member State of origin, place and date of apprehension;
- (b) Fingerprint data;
- (c) Sex;
- (d) Reference number used by the Member State of origin;
- (e) Date on which the fingerprints were taken;
- (f) Date on which the data were transmitted to the Central Unit (article 8).

This data may not be compared against the first set of data regarding asylum applicants or any data subsequently transmitted under the heading of irregulars. It can only be stored and compared against fingerprints of persons who subsequently apply for asylum. By this means the objective of the Regulation is respected while the database includes information on irregulars. The problem, however, is the theoretical shift inherent in incorporating irregulars expressly into the category of potential asylum applicants which other third country nationals, such as students, visitors etc, are excluded. This data can be stored for up to two years from the date the fingerprints were taken (article 10). It must be erased if the Member State of origin becomes aware that the individual has been issued a residence permit left the territory of the Union or acquired citizenship of a Member State.

Member States may send to EURODAC fingerprint data on any third country national found illegally present within its territory for the purpose of checking whether the individual has applied for asylum in another Member State (article 11). This data can only be used for the purpose of a comparison and not stored. Nor can such data be compared against the database of those apprehended in connection with irregularly crossing the external frontier. Where an asylum applicant is recognised as a refugee, the fingerprint data must be blocked – but this depends on the Member State informing the Central Unit (article 12). In terms of legal responsibility – this is consistently shifted down to the Member State level – so

responsibility that the fingerprints are lawfully taken and transmitted is a Member State responsibility. They are also responsible for ensuring no unauthorised access to the database and preventing any copying or recording of data. Access and correction of data is also regulated. Member States may always have access to data they have sent but not to data any other Member State has sent.

There are rather limited rights to the data subject in the Regulation contained in article 18. These are to be informed of:

- (a) the identity of the controller (or representative);
- (b) the purposes for which the data will be processed in EURODAC;
- (c) the recipients of the data;
- (d) the obligation to have his or her fingerprints taken;
- (e) the existence of a right of access to and the right to rectify the data concerning him or herself.

A joint supervisory authority is established under the Regulation which monitors the Central Union and EURODAC is required to produce an annual report submitted to the European Parliament and the Council. I will return to the reports shortly to examine what happens to the traces of the bodies of asylum seekers in the system. First, however, I will consider what the key issues were in the negotiation of the regulation and what demands the Member States made in the Council regarding the text before its final adoption.

The Member States and EURODAC: The Negotiations

The Commission's proposal for the regulation stressed heavily the fact that it was no more than the reformulation of the draft protocol which the Member States had already agreed for the purposes of the Dublin Convention. However, in the first minutes of proceedings in the Council it was apparent the Member States were not convinced. Denmark, Ireland and the UK all stated they were considering their positions (in light of their opt out protocols) an indication that they were not convinced. The Spanish delegation was clear about their reservation – they objected that the proposal lacked the clause on territorial scope which had been included in the draft protocol (an oblique reference to the dispute between Spain and the UK over the status of Gibraltar). France and Germany were concerned about giving implementing powers to the Commission which would also be running and managing the database. It is interesting to note that at this early stage, no Member State disputed the decision to place the database within the Commission and at the sole control of the

Commission. This is not the model which was chosen for the Schengen Information System, a database created under treaty law (the Schengen Implementing Agreement 1990) and which is not under the control of one institution. The Swedish delegation did request clarification immediately regarding the relationship of the two databases and was advised by the Commission that EURODAC did not build on the Schengen acquis at all.⁴

Concerns were expressed also at an early stage regarding the rights of the data subject (Germany)⁵ and the powers of implementation (France).⁶ By October 1999, most delegations had had an opportunity to consider in some depth the draft. At this point, worth noting is that the Greek delegation wondered whether the EU data protection directive (95/46) applied; the Spanish delegation was concerned at the narrowness of the purpose of EURODAC; the definition of 'processing of personal data' was the subject of dispute by the German, Spanish and UK delegations which wanted a definition tied more closely to the Data Protection Directive. The definition of aliens apprehended in connection with the irregular crossing of an external border was subject to discussion. Of more substantial interest, a number of Member States (Austria, Germany, Luxembourg) were keen to water down the fairly strict provisions on length of storage of data particularly in article 16 (they did not succeed). The rights of the data subject also excited interest. The Spanish delegation suggested this could be dispensed with as Directive 95/46 applied; the Luxembourg delegation suggested there should be some exceptions; the Finnish delegation wanted to add a right to the data subject to know the identity of the controller and recipients or categories of recipients of data; the German delegation worried about the width of the right to know why the fingerprints were being taken; the UK suggested some cross referencing within the document with which German Spain and France disagreed and the Austrians suggested adding "without excessive delay" to the requirement to correct or erase inaccurate data (they succeeded and this was added to the final text).⁷ By 18 October 1999, the UK had decided to participate in the regulation, an indication that it was in a fairly final form.⁸

By November 1999, the Greek delegation was still concerned whether Directive 95/46 applied to the regulation in full; the rights of the data subject were still under reservation by Spain and Belgium and Germany had proposed an alternative text. At this point substantial interest began to be expressed in article 22 on the committee charged with adoption of the implementing rules. While the French delegation had expressed interest in this provision

⁴ Council Document 10530/99.

⁵ Council Document 11411/99.

⁶ Council Document 11091/99.

⁷ Council Document 11396/99.

⁸ Council Document 11870/1/99.

from the beginning, at this point Germany, Austria, Spain, Belgium, Sweden, Portugal and the Netherlands all expressed views. The main point of contention was whether the committee would be controlled by the Commission or the Council. In the end it was the Council which would adopt the implementing legislation but only by majority.⁹ It is interesting to note in operation one of the techniques for settling arguments in the Council at work – the extension of the preamble to include points some Member States insist upon but others refuse to have in the body of the text.¹⁰

The European Parliament Report on the proposal was published on 11 November 1999 and was largely favourable to the proposal put forward by the Commission though the Legal Affairs Committee was concerned about the relative weakness of the fundamental rights protections.¹¹ An earlier Parliament opinion on the draft protocol had been highly critical of the extension of the EURODAC system from asylum applicants to persons apprehended irregularly crossing an external frontier. However, the Parliament gave its opinion on 18 November 1999 endorsing the 11 November opinion proposing an amendment to the collection of fingerprints from persons apprehended but only to the extent of adding an express reference to the European Convention on Human Rights. The Parliament was consulted on the redrafted proposal and some changes were made on account of opinion, which in any event was favourable in the whole.¹²

By the end of November 1999, even the outstanding issues on the rights of the data subject had been resolved though the committee issue was outstanding and the territorial scope began to cause trouble mainly between Spain and the UK.¹³ The final version of the proposal was sent to the Council to be adopted on the 'A' list in November 2000.¹⁴ It was adopted on 11 December 2000.

The Operation of Eurodac

The justification for EURODAC was to make the Dublin Convention (and later the Regulation) work more efficiently and effectively. The justification for the Dublin Convention and later the Regulation was to prevent refugees being in orbit among the Member States with no Member State taking responsibility and in order to prevent secondary movements of

⁹ Council Document 12582/99.

¹⁰ See Council Document 13052/99 for a good example of this practice.

¹¹ A5-0059/1999, Rapporteur: Hubert Pirker.

¹² Council Documents 13603/99 and 6376/00.

¹³ Council Document 13603/99.

¹⁴ Council Document 12314/00.

asylum seekers around the Member States. Further the spectre of multiple applications was also an underlying concern which justified the establishment of the system: “the Member States realised that they would have difficulties in identifying third country nationals who had already lodged an asylum application in another Member State.”¹⁵ On this issue, at least, EURODAC would, if correctly used be able to provide a definitive answer: how many asylum seekers apply for asylum in more than one Member State? This state anxiety is the result of the abolition of border controls on persons moving among all but two (Ireland and the UK) Member States. The Dublin Regulation requires that asylum seekers be self regulating and not use the right of free movement which all other persons regularly present in the Union have but to remain fixed in the Member State to which they are allocated. It sits uncomfortably with the Geneva Convention duty of all states individually to ensure the protection and provide refuge to a refugee.

The first annual report of EURODAC was published on 5 May 2004.¹⁶ The second report followed just over a year later on 20 June 2005.¹⁷ These two reports provide the statistical information on the use of EURODAC and the hits.

The first annual report identifies three different types of data which are kept by the Central Unit:

- (a) category 1: data of asylum applications;
- (b) category 2: data of aliens apprehended in connection with the irregular crossing of an external border;
- (c) category 3: data relating to aliens found illegally present in a Member State (though this data is not stored).

The annual report provides information on the basis of the three categories giving ‘hit’ for ‘hit’ data on fingerprints which match or do not match. The report contains many pages of information on its establishment and operation focussing heavily on its successful operation through the criteria which it has established to measure success. This primarily involves management and the calculation of successful transactions as information which is readable and not corrupted. It is also concerned with rapid response times by the Central Unit.

¹⁵ SEC(2004) 557 para 1.2.

¹⁶ SEC (2004) 557.

¹⁷ SEC (2005) 839.

In its first year of operation the Central Unit received 271,573 successful transactions – correctly processed data which has not been rejected due to a data validation issue, fingerprint error or insufficient quality. These successful transactions consisted of:

Category 1: 246,902 asylum seekers;

Category 2: 7,857 illegal border crossers (as the report calls them) and

Category 3: 16,814 illegally apprehended persons.

The initial assumptions of numbers in category 2 for the first year had been 400,000 so the actual figure came as something of a surprise.

The number of hits were as follows:

- (a) Category 1 against category 1: this is asylum seekers fingerprints against asylum seekers fingerprints. The figure relates only to those asylum seekers who sought asylum in one Member State and then sought asylum in another Member State: 14,960;
- (b) Category 1 against category 2: this is asylum seekers against persons apprehended in connection with the irregular crossing of an external border: 673;
- (c) Category 3 against category 1: this is fingerprints of persons illegally present in one Member State against the fingerprint data on asylum seekers in another Member State: 1,181.

Thus out of just under 300,000 fingerprints stored over the first year, evidence of third country nationals moving around the internal market without permission or making more than one asylum application in more than one Member State appears to have been in the region of under 17,000. Many would consider this to be rather surprisingly low and indeed that the figures already raise questions about the proportionality of the measure.

The second annual report was published in June 2005. it covers the period 1 January 2004 to 31 December 2004. This period of course includes 1 May 2004 and the enlargement of the EU to the ten new Member States all of which had to prepare for entry into the EURODAC system and, according to the report have done so successfully. Over this period the Central Unit received 287,938 successful transactions:

- (a) category 1: 232,205 asylum seekers;
- (b) category 2: 16,183 illegal border crossers;
- (c) 39,550 illegally residing persons.

It is somewhat surprising that the enlargement of the EU to include 10 new Member States resulted in an increase of fingerprint data in the second year of operation in comparison with the first year of only 16,000. The response time of the Central Unit in the second year was within 4 minutes in 98.50% of cases. According to the report, category 2 persons, where the numbers have doubled in comparison with the first year have so doubled evenly across the Member States. The category 3 persons, where the numbers have risen substantially, are mainly accounted for in the second half of the year after enlargement. The report surmises that enlargement may have stimulated interest in this category but it notes that five Member State have never used it at all.

As regards hits, the 2004 information is also revealing.

The number of hits for year two were as follows:

- (a) Category 1 against category 1: this is asylum seekers fingerprints against asylum seekers fingerprints. The figure relates only to those asylum seekers who sought asylum in one Member State and then sought asylum in another Member State: 28,964;
- (b) Category 1 against category 2: this is asylum seekers against persons apprehended in connection with the irregular crossing of an external border: 1,466;
- (c) Category 3 against category 1: this is fingerprints of persons illegally present in one Member State against the fingerprint data on asylum seekers in another Member State: 5,492.

In table form, taking the two years together the comparison looks like this:

| Category | Year 2003 | Year 2004 |
|----------|-----------|-----------|
| 1 - 1 | 14,960 | 28,964 |
| 1 - 2 | 673 | 1,466 |
| 3 - 1 | 1,181 | 5,492 |

There any many possible explanations for the rise in 1 – 1 hits. The most immediate is that a the databank acquires more and more fingerprints, the likelihood that it will catch repeat applications goes up. The report notes that as regards repeat applications, one applicant appears to have applied eight times for asylum.

The 2004 data includes detailed information about which state sends fingerprints for comparison and against which state there is a positive hit (ie that state has already lodged

the fingerprints of the individual). The country which comes top on hits is Germany with 4,626 while it only comes second as a sender country with 4,325 (France is at the top of the sender list with 4,329). But with a difference of only 300 persons between the hit and sender categories for the same state, Germany, it is difficult to see the sense of seeking to move over 4,000 asylum seekers to other Member States only to get over 4,000 back, albeit different ones. This pattern of relative consistency applies to most Member States though some such as France have substantial differences: as a sender 4,329 while as a hit country 1,451. Norway and Slovakia also have quite substantial differences between the two categories.

As regards category 1 against category 2, asylum seekers against persons apprehended irregularly crossing an external border the differences between hit and sender rates for countries varies with geography as one would expect. France has zero hits against it but 272 hits as a sender of data. Greece, on the other hand has 565 hits against it and three as a data sender. The low level of the overall figure in this category indicates that it is not proving an important tool at least at the moment.

Data Protection: The Report of the European Data Protection Supervisor

On 27 February 2006 the European Data Protection Supervisor, charged with ensuring the compliance of EURODAC with EU data protection standards published its first report. Although a press release announced the publication of the report, the report itself was held confidential. It was only released to the author after a formal request based on EU free of information rules. The report considers the first phase of the operation of EURODAC and follows an inspection by the Protection Supervisor of the database.

The first concern of the report is as regards the technical security of the database. On this ground the EDPS notes that the network communication are secure and hidden from the rest of the European Commission in which it is housed. It is indeed interesting to note the extent to which the report is dominated by technical issues. The first, extensive part of the report deals with critical incidents – technical events which have an impact of the ability of the database to work as envisaged. The report notes that there have been only two serious incidents of this kind both related to power supply problems. The next key issue of concern in the report is the physical security of the unit. Attention is paid to the number of employees with access (seven) and how access is achieved (dedicated cards), and the mechanisms by which an individual is authorised to access the physical space in which the database is held. Perhaps more critically, the EDPS reviews the mechanisms for logical access control – how

are access rights granted and controlled. Here there is a description again of the numbers of persons, the system of controls and passwords used. The only criticism is that the policy on mobile communication is not documented. The training of new staff also receives the thumbs up.

As regards compliance with the regulation, it is interesting that the first issue dealt with in the report is the blocking and erasure of data. It is already clear from the reports of national data protection supervisors, in particular in Germany, that some authorities are woefully lax about blocking or removing personal data held on the Schengen Information System.¹⁸ The EURODAC authorities acknowledged that statistics on blocking and erasure of data are kept but refused to provide this to the EDPS. Following negotiation, it was agreed that in future such information would be made available. Thus for the moment there is no public information about the removal of personal data from the system but this may become available with the next report. Similarly, as regards the destruction of media under by the Member State of origin for transmitting data to the Central Unit, the EDPS was advised that the network is the only mechanism of transfer so there is no other media which the Commission is responsible for destroying. More reassuringly, the EDPS discovered that while the possibility of direct access by a Member State to the database is foreseen in the regulation, in fact this does not happen. All contact is via the Central Unit.

In conclusion, the EDPS made nine minor recommendations regarding improvements which could be made to EURODAC, almost all of which relate to the physical security of the database. The EDPS finishes by expressed general satisfaction with the security level of EURODAC. By the time the reader comes to the end of the report, he or she is much reassured that all is well in EURODAC. The system seems to be well managed and operating properly, there is no need for concern. However, it is exactly this reassurance which hides the real and potentially cataclysmic consequences of the EURODAC system for the individual.

Conclusions

In accordance with the EURODAC system, the body of the asylum seeker becomes the traceable evidence of his or her existence. The existence in law of the asylum seeker as a person seeking a right to reside, access to the labour market or benefits remains allocated to a Member State on the basis of rules which are determined by the EU itself but without regard to the preferences or wishes of the asylum seeker. Any legal claim in respect of these

¹⁸ See E. Brouwer, *The Schengen Information System*, forthcoming.

rights can only be made in the allocated Member State. Whether the asylum seeker is actually or only virtually in the Member State where his or her legal claims may be made does not affect that fact that it is only the law of the allocated Member State which will resolve whether or not he or she is a refugee or entitled to protection and social and economic rights. If the asylum seeker is only virtually in the allocated Member State but actually in another Member State, he or she will of course be subject to the laws in other fields (such as criminal law) of the state where he or she is actually present. But to acquire the right to be present at all, the individual may only use the law of the state allocated. Accordingly the Member States have national rules which make inadmissible an asylum application by an asylum seeker who 'belongs' in another Member State.

In 2005 the matter of a Sudanese asylum seeker came before the High Court in the UK.¹⁹ The UK authorities sent the fingerprints of an asylum seeker to EURODAC and received back a report that there was a hit, the man's fingerprints had already been registered in the database by Italy. The UK authorities advised their Italian counterparts of the hit and that they would be sending the man to Italy. In due course, Mr Ali was put on a plane to Italy notwithstanding his strenuous contention that he had never been in Italy. When he arrived in Italy, the Italian authorities took his fingerprints and found that he was not the same person in respect of whom they had accepted responsibility but someone else, who was registered in the EURODAC database as having applied for asylum in the UK. As he was registered already in the database as an asylum seeker, under Italian law any application for asylum which he might try to make in Italy is inadmissible. As he cannot make an asylum application he is not entitled to any social benefits, food, housing etc. Further he is irregularly present in Italy.

The Italian authorities notified the UK authorities of the error but no action was taken to bring Mr Ali back to the UK. Mr Ali had no resources or family in Italy and was excluded from all entitlements to support. He found his way to the Italian Refugee Council which on a matter of charity gave him some food and notified the Italian authorities that he should be returned to the UK. Nothing happened not least as the UK authorities failed to respond to communications from their Italian counterparts. Finally the Italian Refugee Council contacted its British counterpart which brought legal proceedings against the UK authorities for their action in sending Mr Ali to Italy and failing to bring him back. Finally after many months of delay and a number of hearings before a judge in the UK the UK authorities conceded

¹⁹ *The Queen on the application of Mr Numieri Mohammed Ali v Secretary of State for the Home Department* CO/1472/2005. The UK authorities conceded liability so there is no written judgment.

liability and arranged for Mr Ali's return to the UK. A damages claim for Mr Ali has not yet been settled.

In the EURODAC system the body of the asylum seeker becomes increasingly separated from an essential element of his or her legal personality, the right to be present. The body takes on an identity and is followed via its fingerprint data across borders while that part of the body's legal personality which gives the right to be present remains trapped in one jurisdiction.