EUROPEAN
COMMISSION

Brussels, 27.5.2015
SWD(2015) 150 final

COMMISSION STAFF WORKING DOCUMENT

on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints

CONTEXT

The Commission's European Agenda on Migration (EAM) adopted on 13 May 2015 highlights the need to ensure that all Member States comply with their legal obligation to fingerprint under Articles 4(1) and 8(1) of the Eurodac Regulation (Council Regulation (EC) No 2725/2000 of 11 December 2000)[1]. In doing so, the Commission emphasised the need to provide guidance to Member States to facilitate systematic fingerprinting in full respect of fundamental rights and more specifically of the right to data protection. It should be noted that this guidance is based on existing EU law as indicated in the EAM. The Commission will also explore in the future how more biometric identifiers can be used through the Eurodac system to assist with identification.

Over the past year, it has become apparent that irregular migrants and asylum seekers from certain countries of origin, notably Eritreans and Syrians, have been refusing to cooperate in being fingerprinted by Member State authorities. Consequently, a large number of asylum applications appear then to be made in Member States in circumstances where it was thought likely that the applicant had entered the EU via another Member State (often after being rescued at sea) and after having been in contact with the authorities of that Member State.

In order to establish existing practices the European Commission carried out an EMN (European Migration Network) enquiry[2] to find out how Member States were dealing with this situation. The results of this enquiry show that some Member States permit the use of detention for the purpose of ensuring that migrants are fingerprinted, some permit the use of a proportionate degree of coercion for this purpose, while others neither use detention nor coercion.

This paper presents possible best practices for Member States to follow in order to ensure that their obligations under the Eurodac Regulation are fulfilled. The content of these possible best practices is based on the feedback of Member States to the EMN enquiry. A preliminary discussion was held on the content of this paper at SCIFA on 13 November 2014 as a follow-up to the conclusions agreed by the Justice and Home Affairs Council on 9 October 2014[3] which include the following commitment: 'Member States, while ensuring the full and coherent implementation of the Common European Asylum System, should work in particular on systematic identification, registration and fingerprinting by, among others: (1) ensuring that fingerprints are taken on land, immediately upon apprehension in connection with

[1] The recast Eurodac Regulation (EU) No. 603/2013 will operate as of 20 July 2015. Until then, the current Regulation shall apply.

[2] Ad hoc query on EURODAC Fingerprinting, requested by the Commission on 10 July 2014, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/588_emn_ahq_eurodac_fingerprinting_en.pdf

[3] JHA Council conclusions on 'Taking action to better manage migratory flows', Luxembourg, 10 October 2014.

irregular crossing of the borders, in full compliance with the EURODAC Regulation; (2) taking restrictive measures to prevent absconding in case migrants refuse fingerprinting, ensuring respect of fundamental rights; (3) inform migrants in a timely manner of their rights and obligations and consequences of noncompliance with rules on identification.'

The purpose of this paper is to provide guidance to facilitate systematic fingerprinting, in full respect of fundamental rights. The Commission services recommend the following best practices, which are in line with the provisions of the EU Charter of Fundamental Rights. They should serve as a basis for discussions with Member States to agree on a coherent common approach. Depending on the outcome of these discussions, the Commission will reflect on the need to propose additional steps.

POSSIBLE COMMON APPROACH

In cases where a Eurodac data-subject does not initially cooperate in the process of being fingerprinted, for the purpose of applying Articles 4(1) and 8(1) of the current Eurodac Regulation (2725/2000) or, from 20 July 2015, Articles 9(1) and 14(1) of the recast Eurodac Regulation (603/2013), it is suggested that all reasonable and proportionate steps should be taken to compel such cooperation. To that end, and in order to ensure that EU law is respected, it is suggested that Member States consider following the approach set out below:

1. The Member State should inform the data-subject of the obligation to be fingerprinted under EU law, and can explain to him/her that it is in his/her interests to fully and immediately cooperate and provide his/her fingerprints. In particular, it can be explained to the data-subject that, if he/she applies for asylum in another Member State, according to the Dublin Regulation it is possible to use either fingerprints or other circumstantial evidence as a basis for effecting his/her transfer to the Member State that is responsible for his/her asylum application. The Member State can also explain to the data-subject that, if he/she subsequently applies for asylum, there will likewise be an obligation to be fingerprinted.

2. If a data-subject who has not applied for asylum continues to refuse to cooperate in being fingerprinted, he/she can be considered to be an irregular migrant and Member States may consider, where other less coercive alternatives to detention cannot be applied effectively, detaining him/her according to the provisions of Article 15 of the Return Directive (2008/115). 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 by applied effectively, resorting to detention under the terms of the Return Directive.

3. In cases where the data-subject has applied for asylum and refuses to cooperate in being fingerprinted, Member States may consider detaining him/her in order to determine or verify his or her identity or nationality, including by the taking of his/her fingerprints as

required by EU law, on the basis of Article 7(3) of the current Reception Conditions Directive (2003/9) or Article 8(3) (a) of the recast Reception Conditions Directive (2013/33) that is to be transposed by 20 July 2015.

4. If the Member State concerned has provided for the possibility of accelerated and/or border procedures in its national legal framework, the Member States can inform the asylum applicant that, under Article 23(4)(m) of the current Asylum Procedures Directive (2005/85) or under Article 31(8)(i) of the recast Asylum Procedures Directive (to be transposed by 20 July 2015), their request for international protection may be subject to an accelerated and/or border procedure if they refuse to cooperate in being fingerprinted. The Member State can further explain that the consequence of their asylum application being dealt with via such an accelerated and/or border procedure could be that the application, following an adequate and complete examination of its merits, may be considered as manifestly unfounded. Such a finding could, if provided for in the national law of the Member State and in line with EU and international law, result in a significant limitation of the rejected applicant's right to remain on the territory pending an appeal against the rejection, and may result in him/her being returned before the appeal has been decided Furthermore, Member States can explain that, in such circumstances, an order to return may be accompanied by an EU-wide entry ban of up to five years.

5. The data-subject should only be detained for as short a time as possible and necessary, as stipulated by EU law.

6. Irrespective of whether or not it is decided to detain the data-subject, Member States should provide information and counselling to explain to the data-subject his/her rights and obligations (including the right to an effective remedy) either as an irregular migrant or as an asylum seeker. This should include an explanation of the Dublin Regulation and could include use of the common leaflets under Annex X to XII of the Dublin Implementing Regulation (118/2014). It is suggested that the explanation of the Dublin Regulation includes elements that might be relevant should the data-subject apply for asylum, such as the rules on family reunification.

7. It is suggested that if the initial counselling does not succeed, the Member State may consider resorting, in full respect of the principle of proportionality and the EU Charter of Fundamental Rights, to coercion as a last resort. If a Member States chooses to do this the data-subject should be informed that coercion may be used in order to take his/her fingerprints. If the data-subject still refuses to cooperate it is suggested that officials trained in the proportionate use of coercion may apply the minimum level of coercion required, while ensuring respect of the dignity and physical integrity of the data-subject, as specified in an approved procedure for taking fingerprints. This procedure should include a clear explanation to the data-subject of the steps the official intends to take in order to compel cooperation. The official should demonstrate that there was no other practicable alternative measure to using reasonable coercion. A case-by-case assessment should always be made of whether there is no such alternative,

taking into account the specific circumstances and vulnerabilities of the person concerned. Member States may consider that it is never appropriate to use coercion to compel the fingerprinting of certain vulnerable persons, such as minors or pregnant women. If some degree of coercion is used for vulnerable persons it should be ensured that the procedure used is specifically adapted to such persons. It is suggested that the use of coercion should always be recorded and that a record of the procedure be retained for as long as necessary in order to enable the person concerned to legally challenge the actions of the authority.

8. It is suggested that Member States make an effort to avoid fingerprinting migrants twice. Therefore, Member States may consider carrying out identification for Asylum/Dublin purposes and identification of irregular migrants under national law for return and other lawful purposes, which are not incompatible with the Asylum/Dublin ones, within one act ("*uno actu*"), thereby limiting the burden for both the administration and the migrants. Member States should have systems in place in order to be able to use the same set of fingerprints both for storage in their national AFIS and for transmitting to the Eurodac Central System. The identification and fingerprinting should take place as early as possible in the procedure.

9. In cases where an applicant has damaged his/her fingertips or otherwise made it impossible to take the fingerprints (such as via the use of glue), 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 consider that is it necessary that he/she be kept in detention until such time as his/her fingerprints can be taken. Attempts to re-fingerprint data-subjects should take place at regular intervals.

10. Following the successful taking of fingerprints, the data-subject should be released from detention unless there is a specific reason as specified in the Return Directive or under the EU asylum legislation to detain them further.