



**ECRE Comments on the Commission Proposal to  
recast the Eurodac Regulation  
COM(2016) 272**

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## Summary of views

ECRE makes the following observations and recommendations to the co-legislators on the Commission proposal to recast the Eurodac Regulation (EU) No 603/2013:

1. **Article 1(1)(b):** The necessity of an expansion of the purpose of Eurodac to control irregular migration and identify migrants for return is not justified on the basis of evidence provided. As a result, the insertion of an additional purpose to the database is an unlawful interference with the rights to privacy and data protection guaranteed by Articles 7 and 8 of the Charter.
2. **Article 2(3):** Sanctions for non-compliance with the obligation to provide data must be exhaustively prescribed in the Regulation. The list should only provide for the applicability of an accelerated asylum procedure, and detention for the purpose of return in accordance with the Return Directive.
3. **Article 2(3)-(4):** The use of coercion against any individual for the purpose of taking fingerprints or a facial image amounts to a violation of an individual's fundamental rights to dignity, physical integrity and privacy, safeguarded by Articles 1, 3, 4 and 7 of the Charter. Coercion must be expressly prohibited by the Regulation.
4. **Article 38:** The derogation from the prohibition of transfers of data vis-à-vis irregular migrants creates risks of providing information to alleged actors of persecution or serious harm. Individuals should be duly informed of a particular transfer of data and have the right to complain or appeal against it, in accordance with the right to an effective remedy under Article 47 of the Charter.
5. **Articles 12, 13(2) and 14(2):** The storage of additional personal details such as name, date of birth, nationality or documents, constitutes an unnecessary and disproportionate interference with Articles 7 and 8 of the Charter for the purpose of administrative convenience, and creates risks of precariousness which hamper trust-building between individuals and authorities.
6. **Articles 2(2), 10(1), 13(1) and 14(1):** Children should only provide fingerprints or a facial image when the identification process is in their best interests, for example if it is aimed at restoring family links. Any collection of data for aims incompatible with a child's best interests is unlawful.
7. **Article 17(2):** The extension of the retention period of data of irregular migrants from 18 months to 5 years does not meet the requisite threshold of necessity and proportionality to justify interference with Articles 7 and 8 of the Charter.
8. Terminology on notions such as "irregular" / "illegal" migration must be uniform and compliant with best EU and international practices. The proposal must also be adapted to enhance textual coherence.

## Introduction\*

Regulation (EU) No 603/2013 (hereafter “2013 Eurodac Regulation”)<sup>1</sup> governs the establishment and operation of a database containing fingerprints of asylum seekers and irregular migrants, as part of the legislative instruments making up the EU’s Common European Asylum System (CEAS). This legislative act is the recast version of Regulation (EC) No 2725/2000 (hereafter “2000 Eurodac Regulation”),<sup>2</sup> which brought about a wide range of modifications to the purpose and functioning of the database.

The original purpose of Eurodac as per its 2000 Regulation was to assist the application of the Dublin Regulation<sup>3</sup> by enabling Member States to verify whether a person has lodged an asylum application in another Member State. This is done through the recording of fingerprints of asylum seekers and persons apprehended upon irregular border crossing. The 2013 Eurodac Regulation introduced access to the database by law enforcement authorities for the prevention and detection of terrorism and other serious offences, in a move that sparked high controversy and critique for its interference with fundamental rights to privacy and data protection.<sup>4</sup> The latest proposal by the European Commission for a further recast of the Eurodac Regulation predominantly entails another substantial mandate expansion, with the aim of assisting the control of irregular migration, secondary movements and the identification of irregular migrants for return purposes.<sup>5</sup>

Eurodac forms part of a wider complex of centralised information systems established under EU home affairs policies, alongside the Schengen Information System (SIS)<sup>6</sup> and Visa Information System (VIS).<sup>7</sup> Another database, the Entry/Exit System (EES), is to be established with the adoption of the Smart Borders Package.<sup>8</sup> These databases serve a number of overlapping purposes and all have components relating to irregular migration control.<sup>9</sup>

SIS contains alerts *inter alia* on irregular migrants refused entry or stay,<sup>10</sup> stored with a view to assisting Member States in refusing entry into the Schengen area.<sup>11</sup> Data stored in SIS in principle

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\* ECRE would like to thank members of its Asylum Systems Core Group and Ann-Charlotte Nygard at the European Union Agency on Fundamental Rights (FRA) for their input. All errors remain our own.

<sup>1</sup> OJ 2013 L180/1.

<sup>2</sup> OJ 2000 L316/1.

<sup>3</sup> 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.

<sup>4</sup> The Commission tabled four proposals for the recast Eurodac Regulation, in a negotiation process which lasted 5 years. For a critique, see UNHCR, *An efficient and protective Eurodac*, November 2012, available at: <http://goo.gl/RPYieS>; European Data Protection Supervisor (EDPS), *Opinion on the amended proposal to recast the Eurodac Regulation*, September 2012, available at: <https://goo.gl/1PW9fY>.

<sup>5</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ (recast)*, COM(2016) 272, 4 May 2016, Article 1(1)(b).

<sup>6</sup> Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L381/4.

<sup>7</sup> Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ 2008 L218/60.

<sup>8</sup> A first proposal on “Smart Borders” was tabled in 2013, and a new proposal was submitted by the Commission in April 2016: European Commission, *Proposal for a Regulation establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union and determining the conditions for access to the EES for law enforcement purposes*, COM(2016) 194, 6 April 2016.

<sup>9</sup> On the relevance of those databases in the necessity of extending the mandate of Eurodac, see Meijers Committee, *Note on the proposed reforms of the Dublin Regulation, the Eurodac recast proposal and the proposal for an EU Asylum Agency*, CM1609, June 2016, available at: <http://goo.gl/oy5att>, 6.

<sup>10</sup> Article 24 SIS II Regulation.

include: name, physical characteristics; date and place of birth; sex; photographs; fingerprints; nationality; information on arms, violence or escape; reason for the alert; issuing authority; reference to the decision giving the alert; action to be taken; links to other SIS alerts.<sup>12</sup>

VIS enables Member States to exchange data on Schengen short-stay visas in order *inter alia* to assist the application of the Dublin Regulation and to identify irregular migrants in the Schengen area.<sup>13</sup> Data stored in VIS include a wide array of information, including name, nationality, intended transit and destination and purpose of travel; photographs; fingerprints.<sup>14</sup>

EES is to record the date, time and place of entry and exit of the external borders so as to enable Member States to issue alerts when authorised residence periods are expiring, and will also contain data on the date, time and place of refusals of entry to irregular migrants.<sup>15</sup> The aims of the EES are *inter alia* to identify irregular migrants in the EU.<sup>16</sup> Data stored in the EES will include name, date of birth, nationality, visa details if applicable, facial image, fingerprints.<sup>17</sup>

The proposal to recast Eurodac comes not only as part of a broader reform of the CEAS,<sup>18</sup> but also of a broader digitisation agenda for the EU's policies on home affairs.<sup>19</sup> Increased emphasis is placed on more substantial investments in information technologies with a view to promoting interoperability within the complex web of databases and to increasing data storage. Crucially, large-scale collection and storage of personal data is seen as an intersection between migration control and security; the opening up of migration-related databases such as VIS, Eurodac and EES to law enforcement authorities epitomises this connection.

The risks of information technology investments becoming an irreversible trend,<sup>20</sup> or even a self-fulfilling prophecy, liable to render data collection and storage ends in themselves rather than means to more effective migration management tools,<sup>21</sup> relate on one hand to financial questions. For instance, cost of setup and maintenance of Eurodac remains ambiguous to date, and has been excluded from the estimation of costs by the evaluation of the Dublin III Regulation.<sup>22</sup> Annual reports on the operation of Eurodac have also failed to estimate its costs.<sup>23</sup> Nevertheless, the prospective expansion of the database under the proposal is estimated to cost €29.8 million.<sup>24</sup>

More importantly, however, the proliferation of information collection and storage raises fundamental legal problems when human rights forming the bedrock of EU law are violated. Following preliminary comments on the terminology used in the proposal and its relationship with the General Data

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<sup>11</sup> See e.g. European Migration Network (EMN), *Practical measures to reduce irregular migration*, Synthesis Report, October 2012, 7.

<sup>12</sup> Article 20(2) SIS II Regulation.

<sup>13</sup> Articles 2, 20 and 21 VIS Regulation.

<sup>14</sup> Articles 5, 9 et seq. VIS Regulation.

<sup>15</sup> Article 1(1) Proposal for an EES Regulation.

<sup>16</sup> Articles 5(b)-(c) and 25 Proposal for an EES Regulation.

<sup>17</sup> Articles 14-15 Proposal for an EES Regulation.

<sup>18</sup> European Commission, *Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe*, COM(2016) 197, 6 April 2016.

<sup>19</sup> European Commission, *Stronger and Smarter Information Systems for Borders and Security*, COM(2016) 205, 6 April 2016; *EU Action Plan on Return*, COM(2015) 453, 9 September 2015.

<sup>20</sup> See Didier Bigo *et al.*, 'Justice and Home Affairs Databases and a Smart Borders System at EU External Borders', CEPS Paper in Liberty and Security No 52, December 2012.

<sup>21</sup> On the symbolic appeal of identification, see David Lyon, *Identifying Citizens: ID Cards as Surveillance* (CUP 2009); Katja Franko Aas, 'The body does not lie: Identity, risk and trust in technoculture' (2006) 2:2 *Crime Media Culture* 143; Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 21 *Alternatives* 63.

<sup>22</sup> ICF, *Evaluation of the Dublin III Regulation*, December 2015, 13, 26.

<sup>23</sup> See e.g. EU-LISA, *Annual Report on the 2014 activities of the Central System of Eurodac*, June 2015.

<sup>24</sup> Legislative Financial Statement Eurodac Proposal, 101.

Protection Regulation, ECRE's comments focus on a rights-based scrutiny of certain key elements<sup>25</sup> of the Commission proposal and question their compatibility with human rights guaranteed by the EU Charter of Fundamental Rights (hereafter "Charter").<sup>26</sup> This includes first and foremost the rights to private life to data protection, but also rights to dignity and physical integrity, liberty, effective remedy, and freedom from torture, inhuman or degrading treatment.

## Terminology

The proposal uses different terms such as "irregular" and "illegal" interchangeably. The operative part refers to "illegal stay" and "illegal immigration",<sup>27</sup> while the Preamble refers to "irregular migration".<sup>28</sup> The Explanatory Memorandum also uses the term "irregular migration" and "irregular migrant". A different term, "irregular third-country nationals", appears elsewhere in the Preamble.<sup>29</sup>

Another terminological distinction is drawn between stay and border-crossing. The Commission proposal refers to "illegal stay" as opposed to "irregular crossing" of borders.<sup>30</sup> This dichotomy, however, is equally arbitrary. The European Commission and the Fundamental Rights Agency (FRA) have used the term "irregular stay",<sup>31</sup> while Frontex has consistently talked about "illegal border-crossing".<sup>32</sup>

ECRE bears in mind the use of the term "illegal" in the wording of the Treaty and previous legislative acts in the area of asylum and migration.<sup>33</sup> However, there has been ample international support for avoidance of terminology related to illegality in the context of migration,<sup>34</sup> which has also informed the European Commission's shift towards the use of the term "irregular" in policy and legislative instruments.

ECRE recommends removal of the term "illegal" and a consistent use of the term "irregular" to describe migration, crossing of external borders, stay and secondary movements within the Union. References to "illegal" stay should be deleted from the title of the Regulation, Articles 1(1)(b), 3(1)(d), 8, Chapter IV, Article 14(1), Chapter V, Article 19(4)-(5) and Recitals 4, 9, 11, 12, 13 and 24.

In addition, several parts of the proposal make reference to third-country nationals without including stateless persons, presumably on omission.

ECRE recommends the addition of the term "or stateless person(s)" to references to third-country national(s) in Articles 2(3)-(4), 3(1)(c), Chapter V and Article 38(1).

## Reference to data protection *acquis*

<sup>25</sup> Issues relating, among others, to marking of data for persons issued a residence permit, access of European Border and Coastguard and EASO are not examined.

<sup>26</sup> Articles 7 and 8 Charter of Fundamental Rights of the European Union, OJ 2012 C326/391.

<sup>27</sup> Article 1(1)(b) Eurodac Proposal.

<sup>28</sup> Recital 11 Eurodac Proposal.

<sup>29</sup> Recital 30 Eurodac Proposal.

<sup>30</sup> Article 3(1)(d) and Chapters IV and V Eurodac Proposal.

<sup>31</sup> See e.g. European Commission, *On EU Return Policy*, COM(2014) 199, 28 March 2014; FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them*, 2014.

<sup>32</sup> See e.g. Frontex, *Risk Analysis for 2016*, April 2016.

<sup>33</sup> See Article 79(1) Treaty on the Functioning of the European Union (TFEU), OJ 2012 C326/1; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L348/98.

<sup>34</sup> For an intelligible overview, see Platform of International Cooperation on Undocumented Migrants (PICUM), *Terminology Leaflet*, 'Words Matter' Campaign, available at: <http://goo.gl/TFjPXn>.

Furthermore, several provisions in the operative part and Preamble of the proposal make references to the General Data Protection Regulation, which has however excluded the processing of personal data by Member States when carrying out activities relating to asylum, border control and immigration from its scope.<sup>35</sup> References to the General Data Protection Regulation and Data Protection Directive<sup>36</sup> are therefore pertinent only for matters pertaining to law enforcement access to Eurodac. Accordingly, references thereto should be deleted from migration-related provisions of the proposal.

ECRE recommends deleting the references to General Data Protection Regulation in Articles 31(1), 32(1), 38(1) and 47 and Recital 50, and clarifying that the references thereto in Articles 28(4), 36(2)(h), 36(3), 37(4), 40(3) and 47 only concern law enforcement matters as per Article 1(1)(c).

## Analysis of key provisions

### 1. Interference with fundamental rights to privacy and data protection

The overall aim of the Commission proposal is to broaden the objectives of the database, as well as the scope and time-period of personal data stored therein. In essence, compared to the 2013 Eurodac Regulation, more people will be required to provide more data, which will be retained for more time, and may be used for more purposes. Such an expansive mandate for information collection and storage is liable to entail critical interferences with asylum seekers and migrants' human rights to privacy and data protection, as guaranteed by the Charter. The Charter remains the pertinent legal basis of asylum seekers and migrants' data protection rights, given that elements beyond law enforcement access are excluded from the scope of the General Data Protection Regulation, notwithstanding the aforementioned erroneous references thereto throughout the proposal.

More specifically, Article 8(2) of the Charter provides that personal "data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law."

Given that the taking of data for Eurodac is non-consensual, any interference with these fundamental rights must be provided by law, respect their essence, and be justified on the basis of necessity and proportionality to meet objectives of general interest of the Union or to protect rights of others.<sup>37</sup> Necessity means that an objective of general interest does not *per se* justify interference if the use of data is not necessary for it to be met.<sup>38</sup> Proportionality, on the other hand, means that the measure must not exceed what is strictly necessary to meet the objective.<sup>39</sup> In this context, any limitations posed to the rights to privacy and data protection by the different aspects of the expansion of Eurodac must thus be necessary and proportionate to meet the objectives pursued by the EU. These considerations will be discussed in order.

#### a. Irregular migration purpose

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<sup>35</sup> Article 2(2)(b) 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 (General Data Protection Regulation), OJ 2016 L119/1.

<sup>36</sup> Directive (EU) 2016/680 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 by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, OJ 2016 L119/89.

<sup>37</sup> Article 52(1) Charter.

<sup>38</sup> CJEU, Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, Judgment of 8 April 2014, para 51.

<sup>39</sup> *Ibid*, para 46, citing Case C-343/09 *Afton Chemical*, para 45; Case C-101/12 *Schaible*, para 29.

**Article 1(1)(b)** extends the purpose of Eurodac to cover a third objective, besides supporting the application of the Dublin Regulation and law enforcement. Its additional purpose will be to “assist with the control of illegal immigration to and secondary movements within the Union” and “the identification of illegally staying third-country nationals” for the purposes of removal and repatriation.

The control of irregular migration and identification of persons residing without authorisation in the EU have consistently been stated as EU objectives of general interest, as provided in **Recital 11** of the proposal. However, unless the use of Eurodac to that end is necessary and proportionate, the expansion of the database towards a broad purpose of controlling irregular migration and identifying irregular migrants for return confirms risks of an unlawful “function creep”, similar to that warned by the EDPS and UNHCR when the database was expanded for law enforcement purposes by the 2013 Eurodac Regulation.<sup>40</sup>

Under the 2013 Regulation, Member States cannot compare fingerprints of irregularly staying migrants (“CAT3”) with fingerprints of persons apprehended upon irregular border-crossing (“CAT2”). Data of an irregular migrant on the territory can only be compared with fingerprints of an applicant for international protection (“CAT1”). This is presented by the Explanatory Memorandum as a gap, given that Member States cannot use Eurodac to identify persons who may not have applied for asylum anywhere in the EU. Storing and comparing this information would allow “a Member State to re-document a third-country national for return purposes.”<sup>41</sup>

ECRE seriously questions the premise that collecting and storing fingerprints and facial images of irregular migrants in the Eurodac Central Unit is necessary to control irregular migration and identify migrants. The rate of effective returns in the EU remains significantly lower than that of return decisions. In the last two years, over 1 million people were duly identified and issued a return order by Member States,<sup>42</sup> yet only 418,700 returns (41.7%) were effectively carried out.<sup>43</sup> However, there is no convincing evidence that the lack of efficiency of the EU’s return policy to date is predominantly related to questions of biometric identification. Firstly, problems relating to identification of entrants at the external borders over the past year have mainly related to failures and difficulties in implementing the existing Eurodac Regulation.<sup>44</sup> At the same time, existing information databases such as SIS are not currently used by Member States to inform each other of return decisions or entry bans issued to irregular migrants,<sup>45</sup> though they would be more appropriate instruments for that objective.<sup>46</sup>

Secondly, the proposal provides no evidence to demonstrate the scale of the identification and re-documentation issue presented in **Recital 9**, as it does not give any information on the number of persons found irregularly on the territory of Member States without having applied for asylum elsewhere and who “use deceptive means to avoid their identification and to frustrate the procedures for re-documentation in view of their return and readmission”, as assumed by **Recital 12**. Against that backdrop, there is not enough information to substantiate how extensive, if at all, this problem might be across the Union.

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<sup>40</sup> UNHCR, *An efficient and protective Eurodac*, November 2012, available at: <http://goo.gl/RPYieS>; European Data Protection Supervisor (EDPS), *Opinion on the amended proposal to recast the Eurodac Regulation*, September 2012, available at: <https://goo.gl/1PW9fY>.

<sup>41</sup> Explanatory Memorandum Eurodac Proposal, 3.

<sup>42</sup> Eurostat, *Third-country nationals ordered to leave – annual data (rounded)*, migr\_eiord: The EU28 issued 533,395 return decisions in 2015, while 27 Member States (except Austria) issued 470,080 decisions in 2014.

<sup>43</sup> Eurostat, *Third-country nationals returned following an order to leave – annual data (rounded)*, migr\_eirtn: The EU28 returned 224,900 persons in 2015, while 27 Member States (except Austria) returned 193,800 persons in 2014.

<sup>44</sup> Explanatory Memorandum Eurodac Proposal, 3.

<sup>45</sup> European Commission, *EU Action Plan on Return*, COM(2015) 453, 9 September 2015, 6.

<sup>46</sup> See also Meijers Committee, *Note on the proposed reforms of the Dublin Regulation, the Eurodac recast proposal and the proposal for an EU Asylum Agency*, CM1609, June 2016, 6.



Convenience and necessity must not be conflated. It is one thing to suggest that inclusion of data in Eurodac “can help identify irregular migrants and thus facilitate their return”,<sup>47</sup> as well as identifying third countries of transit and reducing identity fraud.<sup>48</sup> It is quite another to claim that it is *necessary* to identify and return those with no right to reside in the EU, as would be required to justify an interference with the individual’s rights under the EU Charter of Fundamental Rights. One issue necessary to be clarified in this regard is whether the purpose of the proposed expansion of Eurodac could not be achieved through SIS II, which already enables Member States to store return decisions.

ECRE opposes the inclusion of the control of irregular migration and return in the purposes pursued by Eurodac, insofar as the collection and storage of data of persons irregularly staying in Member States is not a necessary action to meet the aims of preventing irregular migration and facilitating return. Such an expansion of the database would violate Articles 7 and 8 of the Charter.

*b. Personal, material and temporal scope of data storage*

If the necessity of broadening the purpose of Eurodac to promote the control of irregular migration and return is seriously doubted, the necessity and proportionality of the means proposed for those objectives are even more tenuous. The proposal envisages wholesale expansion of the database, given that it extends the personal, material and temporal scope of storage of personal data. This means that more people will be covered by the Regulation, more data will be stored, and for longer periods of time.

*Personal scope: lower minimum age*

Firstly, **Articles 2(2), 10(1), 13(1) and 14(1)** lower the minimum age of persons obliged to provide data from 14 to 6 years,<sup>49</sup> on the basis of the Commission’s research regarding the appropriate age for their data to be automatically matched.<sup>50</sup> Such a measure would bring considerably more persons within the ambit of the Regulation. By way of example, as many as 256,295 children under the age of 14 who applied for asylum in the EU last year<sup>51</sup> were not fingerprinted given their exemption from the 2013 Regulation. The reasoning provided by the proposal for such an expansion is grounded in child protection and family unity objectives, which are discussed further below. From the outset, however, ECRE stresses that the taking of fingerprints and images from children must be closely scrutinised in light of the best interests of the child principle. As a general reference to family reunification does not provide a sufficient basis for collecting data from children, authorities must demonstrate that the taking of data serves a purpose beneficial to the individual child, for example by facilitating efforts to locate family members or relatives in another country in case of separated families.

An expansion of the personal scope of the database is also proposed through the storage of data of irregular migrants found on the territory (CAT3), whose details are currently taken but not stored in the Central System. The reasoning behind such an expansion relates to the irregular migration and return purpose of Eurodac, discussed above.

*Material scope: more biometrics collected and more details stored*

<sup>47</sup> *Ibid*, 6-7. See also Explanatory Memorandum Eurodac Proposal, 3.

<sup>48</sup> Recital 12 Eurodac Proposal.

<sup>49</sup> Contrast the EES, where the threshold is set at the age of 12: Article 15(2) EES Proposal.

<sup>50</sup> European Commission, *Fingerprint Recognition for Children*, Joint Research Centre Technical Report, 2013.

<sup>51</sup> Eurostat, *Asylum applicants and first time applications Annual aggregated data (rounded)*, migr\_asyappctza. Not all of these children would be fingerprinted under the proposed rules, but only those aged 6 or above.

Secondly, more biometric identifiers will be taken from individuals and more personal details will be stored in the database. **Article 2(1)** requires Member States to collect not only fingerprints but also facial images of asylum seekers and irregular migrants. While the Commission announces that the collection of facial images should pave the way to a facial recognition system software for Eurodac in the future,<sup>52</sup> it does not seem to explain why a stronger interference with the fundamental rights to privacy and data protection is needed in such a context. The introduction of an additional biometric is presented by **Recital 10** as a way of overcoming difficulties in securing fingerprinting and of speeding up the identification process. An ostensible solution is presented through the option for Member States to directly compare facial images without fingerprints as a measure of last resort under **Article 16(1)**.

ECRE finds the Commission's reasoning highly unconvincing. The assumption made in Recital 10 is that, in order to avoid the deadlock of not being able to secure cooperation from asylum seekers and migrants to obtain one biometric – fingerprints – Member States can attempt to obtain another biometric – photographs. Yet the “challenges relating to non-compliance” with the process are more related to the aim and rationale of identification and less with the biometric employed. The necessary prerequisite of trust between those operating the identification process and those affected by it remains unaddressed.<sup>53</sup> In that regard, there seems to be little reason to suggest that Member States will secure more efficient identification of reluctant individuals by increasing the types of biometric data collected from them. Quite to the contrary, in the absence of trust between state authorities and individuals, the process would be rendered more cumbersome and difficult to operate. From the perspective of the individual, the addition of another biometric could lead to greater risks of self-harm than damaging fingertips in order to avoid identification.

At the same time, the proposal expands the types of personal details stored in the database. Whereas the 2013 Regulation only makes reference to fingerprints, country and date of lodging of an application or of apprehension, and sex,<sup>54</sup> **Articles 12, 13(2) and 14(2)** add: facial image; name; nationality; date and place of birth; type and number of identity or travel document; number of asylum application and Member State of allocation where relocation applies. These additional details are to be stored for all three categories of persons – asylum seekers (CAT1), migrants apprehended at the border (CAT2) and irregular migrants found on the territory (CAT3) – for consistency purposes.

Accordingly, Member States may identify all affected individuals more easily through the data retrieved from the Eurodac Central System. Issues around the accuracy of such data become increasingly important in this respect, especially since the individual has no possibility of challenging the accuracy of biometric data collected. From the perspective of trust and safety of those entering the EU, this could also increase risks of sensitive information on those fleeing their countries of origin being misplaced or accessed by those countries. **Article 4(2)** of the proposal purports to enhance the security of the information stored, as it clarifies that Eurodac will use the existing Secure Trans European Services for Telematics between Administrations (TESTA) network, while a separate virtual private network is to be established therein. In addition, data can only be obtained on the basis of a ‘hit’.<sup>55</sup>

From the perspective of privacy and data protection, however, the storage of these personal details cannot be lawful unless it is necessary and proportionate to the objective pursued by the EU. The Commission explains that the availability of personal data in the Central System will enable Member

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<sup>52</sup> Explanatory Memorandum Eurodac Proposal, 5.

<sup>53</sup> For a recent discussion of the role of trust in the CEAS, see Elspeth Guild *et al.*, *Enhancing the Common European Asylum System and Alternatives to Dublin*, European Parliament, PE519.234, July 2015. On perceptions of fingerprinting and Eurodac, see JRS Europe, *Protection Interrupted*, June 2013.

<sup>54</sup> Articles 11 and 14(2) 2013 Eurodac Regulation.

<sup>55</sup> Explanatory Memorandum Eurodac Proposal, 13.

States to directly identify an individual without having to request this information from another Member State.<sup>56</sup> However, ECRE stresses again the need to distinguish administrative convenience from necessity. To comply with the Charter, the proposal must strike a fair balance between the aim of securing the objective of identification and the fundamental rights to privacy and data protection of the individuals affected by the storage of information. If the identification of asylum seekers or irregular migrants is already possible for Member States through information exchange under the 2013 Regulation, expanding the scope of personal data stored cannot be faithful with Articles 7 and 8 of the Charter if its sole rationale is to render this process easier for national authorities.

ECRE opposes the storage of additional personal details proposed under Articles 12, 13(2) and 14(2), as it amounts to an unnecessary and disproportionate interference with Articles 7 and 8 of the Charter for the purpose of administrative convenience, and creates risks of precariousness which hamper trust-building between individuals and authorities.

*Temporal scope: longer retention period and data marking*

Thirdly, the proposal modifies the rules on duration of retention of data in Eurodac. The 2013 Eurodac Regulation provides different rules on storage periods for the different categories of data collected:

- Fingerprints of asylum seekers (CAT1) are stored for 10 years,<sup>57</sup> and are marked when the person is granted international protection;<sup>58</sup>
- Fingerprints of irregular migrants apprehended at the border (CAT2) are stored for 18 months and must be erased if the person is returned or regularises their stay;<sup>59</sup>
- Fingerprints of irregular migrants on the territory (CAT3) are not stored.<sup>60</sup>

**Article 17** of the proposal provides for a 5-year retention period of data taken from an irregular migrant apprehended at the border or found on the territory, thereby extending the current period of 18 months for CAT2 data and laying down a storage rule for CAT3 data. The 5-year period is considered in **Recital 33** as a necessary period “in view of successfully preventing and monitoring unauthorised movements” and enforcing return.

The necessity and length of maximum data retention periods was discussed in the *Digital Rights Ireland* ruling of the CJEU, which led to the annulment of the Data Retention Directive.<sup>61</sup> The Court clarified that the mere existence of a maximum retention period does not suffice to comply with the Charter, because the “period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary.”<sup>62</sup>

The objective pursued by Eurodac is the swift identification of irregular migrants within the EU with a view to facilitating return proceedings. **Recital 12** promotes this objective through the acceleration of return and readmission procedures and the corollary reduction of detention periods for irregular migrants awaiting deportation. The introduction of a 5-year timeframe for the storage of their data in the aim of monitoring their movements is not necessary to achieve the objective of faster removals through an expanded Eurodac and particularly excessive in light of the strict prohibition of detention

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<sup>56</sup> Explanatory Memorandum Eurodac Proposal, 13.

<sup>57</sup> Article 12(1) 2013 Eurodac Regulation.

<sup>58</sup> Article 18 2013 Eurodac Regulation.

<sup>59</sup> Article 16(1)-(2) 2013 Eurodac Regulation.

<sup>60</sup> Article 17(3) 2013 Eurodac Regulation.

<sup>61</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, OJ 2006 L105/54.

<sup>62</sup> CJEU, Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, Judgment of 8 April 2014, paras 64-65.

for the purpose of removal beyond 18 months under EU law.<sup>63</sup> In that respect, the proposal fails to justify the necessity of such a retention period on the basis of objective criteria, as required by the Charter and its interpretation by the CJEU's jurisprudence.

ECRE opposes the extension of the retention period of data of irregular migrants from 18 months to 5 years, as it does not meet the requisite threshold of necessity and proportionality to justify interference with Articles 7 and 8 of the Charter.

## 2. Obligation to provide fingerprints and facial image

**Article 2(1)** introduces a twofold obligation. On one hand, it spells out a duty on Member States – existing for fingerprints under the 2013 Regulation – to take fingerprints and facial images of asylum seekers and irregular migrants at the border or on the territory. On the other hand, it requires states to create a corresponding obligation on the asylum seeker or migrant to provide his or her fingerprints and image; such an obligation is not currently imposed by EU law.<sup>64</sup> The creation of a duty incumbent upon the individual has important implications for human rights, as will be explained below.

### a. Taking data from children

The proposal has a much stronger impact on children than the 2013 Eurodac Regulation since it would extend the applicability of Eurodac to children between the age of 6 and 14 years, as per **Articles 2(2), 10(1), 13(1) and 14(1)**. In that respect, the principle of the best interests of the child enshrined in Article 24(2) of the Charter and recalled by **Recital 26** must truly become a “primary consideration” and cannot be read in isolation from broader legal instruments on the rights of the child.<sup>65</sup> The proposal fails to scrutinise the taking of fingerprints and facial images of children against the obligation to act in their best interests. ECRE deems this safeguard crucial to ensuring that the rights of children are guaranteed throughout the process. While ECRE supports the obligation for Member States to inform minors in an age-appropriate manner of the fingerprinting and facial image taking procedure, for reasons of consistency, this is best ensured through the inclusion of a new **Article 30(4)** on the right of information of the data subject as recommended by ECRE below.

ECRE recommends to amend Article 2(2) as follows:

**Article 2(2):** Taking fingerprints and facial images of minors from the age of six shall **only** be carried out **provided that this is in their best interests, and** in a child-friendly and child-sensitive manner by officials trained specifically to enrol minors' fingerprints and facial images. **[deleted text] Minors** shall be accompanied by a responsible adult, guardian or representative at the time their fingerprints and facial image are taken. At all times Member States **shall** respect the dignity and physical integrity of the minor during the fingerprinting procedure and when capturing a facial image.

The assessment of the best interests of children would have to take into account the purpose of their identification and documentation, for example to assist tracing of family links or a responsible adult, guardian or representative in another Member State, as mentioned by **Recital 25**. Where, however, the action purported by Member States is not in the child's best interests, recording data into Eurodac is not permissible. Accordingly, a compatible reading of Article 2(2) with the Charter does not give

<sup>63</sup> Article 15(5)-(6) Return Directive.

<sup>64</sup> For the impact of this on detainability, see *mutatis mutandis* ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing, June 2015, 9.

<sup>65</sup> For a recent examination of these standards, see UK Upper Tribunal, *MK v Secretary of State for the Home Department*, Judgment of 29 April 2016.

Member States a blanket authorisation to take fingerprints from and capture facial images of children; taking data from children is lawful only when in line with their best interests.

*b. Sanctions for non-compliance*

Alongside the obligation on asylum seekers and irregular migrants to provide fingerprints and a facial image, the proposal provides in its **Article 2(3)** a legal basis for administrative sanctions for failure to provide data for Eurodac purposes. Member States have the possibility to apply “effective, proportionate and dissuasive” sanctions in accordance with their national law against persons who refuse to give fingerprints or a facial image.

The Commission’s guidance on fingerprinting,<sup>66</sup> adopted by the Council last year,<sup>67</sup> provides a non-exhaustive list of possible sanctions to be applied by Member States. These include: the application of the accelerated procedure, as already provided by the recast Asylum Procedures Directive;<sup>68</sup> detention under the Return Directive<sup>69</sup> or the recast Reception Conditions Directive;<sup>70</sup> or even the use of physical coercion. However, the breadth of the proposal leaves undue discretion on Member States to lay down any sanctions they deem appropriate in this context, if they decide to opt for those. In order to ensure fairness and given the direct effect of the obligation to provide data,<sup>71</sup> the Regulation should strictly specify and circumscribe the powers of Member States to sanction non-compliance with the obligation to give data by laying down exhaustive sanctions that may be applied in such situations.

While the concepts of “effective, proportionate and dissuasive” sanctions have been used as standard terms in EU migration legislation without being *per se* defined,<sup>72</sup> the requirement of proportionality is paramount to ensuring that any measures following a refusal to be fingerprinted or to give a facial image do not infringe asylum seekers’ and migrants’ fundamental rights. Article 2(3) therefore needs to be interpreted compatibly with the Charter rights to dignity,<sup>73</sup> physical and mental integrity,<sup>74</sup> freedom from inhuman or degrading treatment,<sup>75</sup> liberty,<sup>76</sup> privacy,<sup>77</sup> as well as the aforementioned best interests of the child.<sup>78</sup>

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<sup>66</sup> European Commission, *Staff Working Document on the implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, SWD(2015) 150, 27 May 2015.

<sup>67</sup> Council of the European Union, *Implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, 11013/15, 17 July 2015.

<sup>68</sup> 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, Article 31(8)(h).

<sup>69</sup> Article 15 Return Directive.

<sup>70</sup> 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 L180/96, Article 8.

<sup>71</sup> This contrasts with Directives which leave the definition of sanctions to Member States: Article 20 recast Reception Conditions Directive; Article 3 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (Facilitation Directive), *OJ* 2002 L328/14; Article 17 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (Seasonal Workers Directive), *OJ* 2014 L94/375; Article 9 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Intra-Corporate Transferees Directive), *OJ* 2014 L157/1. However, the nature of sanctions is specified in Article 5 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (Employer Sanctions Directive), *OJ* 2009 L168/24.

<sup>72</sup> For a discussion, see Christina Tobler, *Remedies and Sanctions in EC Non-Discrimination Law*, European Commission, June 2005; Michael Faure, ‘Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Shipsource Pollution Directives: Questions and Challenges’ (2010) *Eur. Energy & Env. LR* 256.

<sup>73</sup> Article 1 Charter.

<sup>74</sup> Article 3 Charter.

<sup>75</sup> Article 4 Charter.

Despite its questionable basis, the use of the accelerated procedure in case an asylum seeker refuses to be fingerprinted has already been enabled by the recast Asylum Procedures Directive. Detention is not straightforwardly permitted under the current design of the Regulation. As detailed elsewhere,<sup>79</sup> ECRE and FRA oppose the presumption that Member States are always allowed to detain asylum seekers or irregular migrants for the purpose of fingerprinting them. Asylum seekers may be detained for identification purposes,<sup>80</sup> but the current collection of fingerprints from asylum seekers is not aimed at identifying them but at establishing their potential transit or application in another Member State. The data currently contained in Eurodac also provide no information on identity or nationality. On the other hand, irregular migrants may be detained when they hamper the return process,<sup>81</sup> but the 2013 Regulation does not purport to support return policy. The expansion of both the purpose and the types of data stored into Eurodac, as well as the introduction of a clear-cut obligation to give fingerprints and an image,<sup>82</sup> would in principle provide a legal basis in EU law for the use of detention against those who refuse to give their data.

However, in line with the presumption against detention of asylum seekers that is clearly established in international law, ECRE opposes the use of detention of asylum seekers for the purpose of enforcing the obligation to provide fingerprints or a facial image with a view to facilitating the procedure to determine the responsible Member State. Article 8(3)(a) of the recast Reception Conditions Directive allows for the detention of asylum seekers in order to determine or verify identity or nationality. However, verification or determination of nationality or identity for the purpose of examining an asylum application does not require *per se* that asylum authorities dispose of fingerprints or a facial image of the asylum seeker concerned but can be conducted on the basis of available documents. Where it concerns newly arriving asylum seekers, whose data have not been recorded before, fingerprints and facial image cannot serve any meaningful purpose for verifying or determining nationality or identity, since these data may under no circumstances be shared with third countries according to **Article 37(1)-(2)** of the proposal. Moreover, research on asylum seekers effectively refusing to give fingerprints reveals that this is not widespread and a rather marginal phenomenon in most Member States.<sup>83</sup> Less coercive measures, such as the application of accelerated procedures, already exist in EU law and are sufficient to enforce the obligation laid down in the Eurodac Regulation. Allowing the use of detention of asylum seekers as a sanction to obtain their fingerprints or facial image would be disproportionate and constitute an unlawful interference with their right to liberty under Article 6 of the Charter.

The use of physical coercion against *any* individual for the purpose of taking fingerprints or a facial image remains a deplorable violation of fundamental rights and should under no circumstances be permissible.<sup>84</sup> On the prohibition of degrading treatment and right to privacy specifically, relevant analogies can be drawn with jurisprudence from non-criminal proceedings. The European Court of Human Rights has held, in cases of strip-searches of prison visitors even where they were not physically touched, that a debasing and highly invasive search of persons who are not under

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<sup>76</sup> Article 6 Charter.

<sup>77</sup> Article 7 Charter.

<sup>78</sup> Article 24(2) Charter.

<sup>79</sup> ECRE, *Comments on the European Commission guidance on fingerprinting*, June 2015, available at: <http://goo.gl/7WYG3n>. For a detailed, albeit more permissive, discussion, see FRA, *Fundamental rights implications of the obligation to provide fingerprints for Eurodac*, 05/2015, October 2015.

<sup>80</sup> Article 8(3)(a) recast Reception Conditions Directive.

<sup>81</sup> Article 15(1)(b) Return Directive.

<sup>82</sup> Article 6 Charter mirrors Article 5 of the European Convention on Human Rights (ECHR), which permits detention to fulfil an obligation “prescribed by law” in its Article 5(1)(b). This obligation could be deemed sufficiently clear and precise, in accordance with European Court of Human Rights (ECtHR), *Vasileva v Denmark*, Application No 52792/99, Judgment of 25 September 2003.

<sup>83</sup> See European Migration Network, *Ad Hoc Query on Eurodac fingerprinting*, 22 September 2014.

<sup>84</sup> ECRE, *Comments on the European Commission guidance on fingerprinting*, June 2015, 8-10.



suspicion of committing a criminal offence can amount to a disproportionate interference with Article 8 ECHR.<sup>85</sup>

In the framework of EU law, the Charter affords more robust protection than the ECHR against any interference with a person's physical integrity in circumstances which are undignified or degrading, given that its safeguards extend beyond those of the ECHR. In addition to protecting individuals from inhuman or degrading treatment and interferences with their privacy under Articles 4 and 7, the Charter also expressly protects human dignity and physical and mental integrity in Articles 1 and 3.

ECRE proposes the following amendments:

**Article 2(3):** Member States may introduce administrative sanctions, in accordance with their national law, for non-compliance with the fingerprinting process and capturing a facial image in accordance with paragraph 1 of this Article. These sanctions shall be effective, proportionate and dissuasive *[deleted text]* and may only consist of:  
**a. The application of an accelerated procedure for the examination of an application for international protection in accordance with Article 31(8)(h) of Directive 2013/32/EU; or**  
**b. Detention for the purpose of return in accordance with Article 15 of Directive 2008/115/EC.**

**Article 2(4):** *[deleted text]* Member States shall not use sanctions to coerce the taking of fingerprints or a facial image. A Member State may attempt to re-take the fingerprints or facial image of a *[deleted text]* person who refuses to comply, where the reason for non-compliance is not related to the conditions of the fingertips or facial image or the health of the individual and where it is duly justified to do so. Where a minor, in particular an unaccompanied or separated minor refuses to give their fingerprints or a facial image and there are reasonable grounds to suspect that there are child safeguarding or protection risks, the minor shall be referred to the national child protection authorities and /or national referral mechanisms.

### 3. Right to information on data recipients

**Article 30(1)** sets out the format and content of information provided to individuals who are required to provide fingerprints and facial images. The proposal brings about a welcome clarification of the duty to provide such information "in a concise, transparent, intelligible and easily accessible form, using clear and plain language". The same obligation underpins the information provided in the common leaflet under **Article 30(3)**.

However, as regards the content of information provided to asylum seekers and migrants, ECRE is concerned by the low threshold proposed by the Commission in relation to informing individuals of the recipients of their data. Lowering the standard set out in the 2013 Regulation, **Article 30(1)(c)** requires Member States to provide information "on the recipients *or categories of recipients* of the data". This addition is liable to result in asylum seekers and migrants only receiving vague information as to potential authorities in Member States or third countries where their personal data will be transmitted; this is also implied by **Article 38(1)** discussed further below.

ECRE recommends deleting the terms "or categories of recipients" from Article 30(1)(c) and maintaining the wording of the 2013 Eurodac Regulation.

<sup>85</sup> ECtHR, *Wainwright v United Kingdom*, Application No 12350/04, Judgment of 26 September 2006, paras 44-48.

Furthermore, while Article 30 sets out the different elements of the procedure individuals should be informed of, it makes no reference to Member States' obligation to provide child-friendly information to minors. This obligation is only outlined in Article 2(2) on the obligation to take fingerprints.

ECRE recommends to insert a new Article 30(4) and amend Article 2(2) as follows:

**Article 30(4):** *Minors shall be informed in an age-appropriate manner using leaflets and/or infographics and/or demonstrations specifically designed to explain the fingerprinting and facial image procedure to minors and they shall be accompanied by a responsible adult, guardian or representative at the time their fingerprints and facial image are taken.*

**Article 2(2):** Taking fingerprints and facial images of minors from the age of six shall **only** be carried out **provided that this is in their best interests, and** in a child-friendly and child-sensitive manner by officials trained specifically to enrol minors' fingerprints and facial images. ~~Minors~~ **Minors** shall be accompanied by a responsible adult, guardian or representative at the time their fingerprints and facial image are taken. At all times Member States must respect the dignity and physical integrity of the minor during the fingerprinting procedure and when capturing a facial image.

#### 4. Sharing data with third countries

##### a. Scope of the prohibition

The 2013 Regulation lays down an absolute prohibition on transferring data obtained from the Eurodac Central System to third countries, international organisations or private entities, though personal data processed by Member States following a Eurodac 'hit' could be transferred to third countries in some cases. This principle is maintained in **Article 37(1)-(2)**. It should be noted that the inclusion of more categories of personal data in Eurodac, as discussed above, has an important impact on the strictness of this obligation.

Under the current framework, an asylum seeker or migrant's personal details such as name or nationality are not directly obtained from the Eurodac Central System, but only after processing and exchange between Member States. Therefore these elements can be transmitted to third countries, so long as this does not expose the individual to a risk of ill-treatment. However, if such personal data is to become directly retrievable from Eurodac, it will be subject to the absolute prohibition of **Article 37(1)** and should under no circumstance be communicated to a third country.

Further, **Articles 37(3) and 38(2)**, two – perhaps inadvertently – identical provisions, introduce an opaque obligation, prohibiting Member States from disclosing the fact that an application for international protection has been made “to any third country for persons related to Article 10(1), particularly where that country is also the applicant's country of origin.” If this provision is in fact intended to prohibit Member States from communicating the fact that asylum applications have been made to *any* third country, the ambiguous reference “particularly” to countries of origin is redundant. A prohibition applicable to “any third country” would include countries of origin.

Such a prohibition would also have an effect on the prohibition of communicating information on the asylum seeker under the recast Asylum Procedures Directive. The Directive currently precludes information on the fact that an asylum claim has been made to be transmitted to the alleged actor of persecution or serious harm,<sup>86</sup> but not to other countries or entities. **Articles 37(3) and 38(2)** extend

<sup>86</sup> Article 30(1) recast Asylum Procedures Directive.



the scope of this prohibition to any third country in a way that fits uneasily with procedural requirements in the Directive. This would not be permitted by Article 37(3) of the proposal, however, whereas this constitutes an additional safeguard for the individual concerned.

*b. Derogation from the prohibition for return purposes*

**Article 38(1)** sets out a derogation from the principle of prohibition enshrined in its preceding article, which however is also curtailed by the obligation in **Article 38(2)** not to disclose the fact that a person has made an asylum application. This derogation enables Member States to transfer data of asylum seekers or migrants to third countries if this is deemed necessary for the purpose of return i.e. when a travel document is needed, and under the following conditions:

- The third country has expressly agreed to use data for the purposes they were provided for and to secure readmission, and to delete them when their retention is no longer justified;
- The Member State consents to the transfer of data;
- The individual has been informed of the possibility that his or her data may be shared with a third country.

ECRE is alarmed by this provision insofar as it creates real risks that sensitive personal data of persons fleeing persecution or serious harm may be shared with or unlawfully transmitted to countries of origin or other third countries where they may be at risk.<sup>87</sup> These persons' asylum claims may be inferred from the countries receiving such data even if the fact that a person has made an asylum application is not *per se* communicated.<sup>88</sup> Even if the transfer of data is deemed necessary to secure return, the safeguards provided by the proposal are hardly sufficient to mitigate such risks. For instance, the right of the individual to be informed of the transfer of his or her personal data is formulated in a weak and abstract manner, which does not ensure him or her the possibility to know which country will access his or her personal details so as to raise potential risks of harm stemming from the transfer of data. A stronger right to information must be ensured from the outset, similar to that proposed by ECRE in respect of **Article 30(1)(c)** above.

It should be noted that the safeguards of the General Data Protection Regulation vis-à-vis such a transfer of data would not be applicable in such a situation, as the area of return is expressly excluded from the scope of that Regulation. The proposal only clarifies in **Article 38(3)** that third countries will not be allowed access to Eurodac either directly or through Member States' National Access Points. This means that the individual's right to a complaint or appeal against an unlawful transfer of his or her data to a third country is absent from the proposal, in clear contravention of the right to an effective remedy guaranteed by Article 47 of the Charter.<sup>89</sup>

ECRE recommends to amend Article 38(1)(c) and inserting a new Article 38(1a) as follows:

**Article 38(1)(c):** the Member State of origin which entered the data in the Central System has given its consent and the individual concerned has been informed that his or her personal information *will* be shared with the authorities of *that* third-country.

**Article 38(1a):** *In each Member State any person may, in accordance with the laws, regulations and procedures of that State, bring an action or, if appropriate, a complaint*

<sup>87</sup> See also Meijers Committee, *Note on the proposed reforms of the Dublin Regulation, the Eurodac recast proposal and the proposal for an EU Asylum Agency*, CM1609, June 2016, 7.

<sup>88</sup> It is in precisely that spirit that Article 30(1) recast Asylum Procedures Directive also prohibits the disclosure of "information regarding individual applications" to the alleged actor of persecution or serious harm.

<sup>89</sup> Strangely, the only references to the right to an effective remedy are made in the Explanatory Memorandum, 9 and 11.

***before the competent authorities or courts of the State, against a decision to transfer his or her personal data to a third country in accordance with Article 38(1).***

## Conclusion

ECRE expresses deep concern as to the unduly expansive agenda of the Commission proposal to recast the Eurodac Regulation. While the proposal makes it clear that the political impetus on the part of the Commission and the Council largely favours such an approach, another mandate expansion of Eurodac will come not only with substantial financial costs but, crucially, tremendous human costs.

The European Parliament and Council must thoroughly scrutinise the legality of the proposed measures against the Charter and ensure compliance with primary EU law. The implications of the proposal on human rights are numerous and cross-cutting, ranging from rights to privacy and data protection to issues of dignity, physical and mental integrity, freedom from inhuman or degrading treatment, liberty and access to an effective remedy. In ECRE's view, a faithful reading of the Charter not only tests the permissibility of several obligations on Member States and individuals set out in the proposal, but questions the overall legality of the proposed new purpose of Eurodac and the means to achieve it. Co-legislators should only endorse actions that are necessary and proportionate to ensure better migration control, rather than merely convenient or helpful to that end.

Finally, the value of trust between asylum seekers and other migrants and authorities processing their cases is totally neglected in the proposal,<sup>90</sup> and will only make the EU's management of migration less efficient in the future. So long as people seeking refuge from oppressive regimes and dire conflicts are welcomed under suspicion and undignified conditions, more coercion will only generate greater resistance.

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<sup>90</sup> The only reference is made in Recital 11, which states that an effective return system is needed to maintain public trust [of EU citizens] in the Union's policies.