ADiM BLOG
August 2024
ANALYSES & OPINIONS

From Eurodac to interoperability and back: transferring personal data for resettlement and admission purposes[1]

Francesca Tassinari

Juan de la Cierva Researcher 2022
Public Law Department - University of the Basque Country (UPV/EHU)

Key Words

Resettlement – Humanitarian admission – Eurodac – Interoperability – Data protection and transfer

Abstract

This post provides an analysis of the European Union's (EU) resettlement and humanitarian admission policy through the lens of the protection of personal data processed within the European Dactyloscopy Database (Eurodac) and the interoperability framework. Specifically, it discusses how the regime on the transfer of personal data of third country nationals should be respected when implementing a resettlement or humanitarian admission scheme based on the experience of the EU-Turkey Statement. The contribution highlights the legal challenges posed by the lack of a legal definition of the transfer of

[1] This post is elaborated within the framework of the JDC2022-048217-I grant, funded by the MCIN/AEI/10.13039/501100011033 and the European Union "NextGenerationEU"/PRTR, and the Basque University System Research Group on Social and Legal Sciences applied to New Technosciences (GI CISJANT, ref. IT1541-22) funded by the Department of Education of the Basque Government, to which the author is grateful.

personal data in the EU's data protection acquis. *It concludes with a critique of the implementation of interoperable solutions between the new Eurodac and the interoperability components, on the one side, and third parties' databases, on the other.*

Abstract in Italian

Questo post fornisce un'analisi della politica di reinsediamento e di ammissione umanitaria dell'Unione europea (UE) dal punto di vista della protezione dei dati personali trattati all'interno della banca dati di dattiloscopia europea (Eurodac) e del quadro dell'interoperabilità. In particolare, si discute di come il regime in materia di trasferimento di dati personali dei cittadini di paesi terzi debba essere rispettato nell'attuare un programma di reinsediamento o ammissione basato sull'esperienza della dichiarazione UE-Turchia. Lo studio evidenzia le sfide legali poste dalla mancanza di una definizione giuridica della nozione di "trasferimento" nell'*acquis* dell'UE in materia di protezione dei dati personali. Si conclude criticando l'implementazione di soluzioni interoperabili tra il nuovo Eurodac e le componenti dell'interoperabilità, da un lato, e i *databases* di parti terze, dall'altro.

1. Introduction

Negotiations steered under the 2020 Pact on Migration and Asylum have led to the adoption of a new European Dactyloscopy Database (Eurodac) regulation completing the interoperability puzzle with a final, sixth large-scale IT system. The extended scope covered by the new Eurodac regulation suggests that this system will support an enhanced Union external asylum policy through interoperability, that is, the regime on the communication of personal data established by Article 50 of regulation (EU) 2019/818. This paper sheds light on two critical fronts: 1. the contribution of the new Eurodac and interoperability to resettled and admitted third-country nationals (TCNs), and 2. the interaction between the European Union's (EU) personal data transfer regime and resettlement and admission programs.

2. Key notes on Union resettlement and humanitarian admission

The Union Resettlement and Humanitarian Admission Framework regulation (Resettlement Framework regulation) incorporates two main schemes for resettling and admitting asylum seekers from a third country to the territory of the EU Member States. First, resettlement is driven by the United Nations High Commissioner for Refugees (UNHCR) referral (as customary) of displaced TCNs to whom international protection (including refugee status) is granted as a form of "durable solution" when repatriation or integration is not feasible. Second, humanitarian admission leads to the recognition of international protection or humanitarian status, equivalent to subsidiarity protection, in the case of forcibly displaced

TCNs, while counting on the support of a greater number of actors, i.e. Member States, the European Union Asylum Agency (EUAA), and other international bodies besides the UNHCR. The differences between the two schemes become blurred when persons have legal, physical, and medical needs that may allow them to be granted emergency protection.
The Resettlement Framework regulation relies on the UNHCR's projected global resettlement needs to identify regions or countries for resettlement and admission. Later, TCNs are selected based on predefined vulnerability indicators (e.g. gender, minor age, violence, or torture); family ties; or social links. Other criteria follow a case-by-case risk analysis for security, public order, and health concerns, including penalties for those TCNs who have already entered or stayed in a Member State irregularly or who have refused to be resettled in a particular Member State. Thus, the Resettlement Framework regulation plays a pivotal role in systematising the grounds on which TCNs could be resettled or admitted, and in routinely laying down the scope of Member States' obligations through a Union Plan, provided that individuals are not recognised as having a right to resettlement under international and supranational laws.
Nevertheless, the Resettlement Framework regulation has been criticised since its proposal as reflecting Member States' reluctance to accept stringent rules on mandatory distribution (or "quota") and recognition of rights (e.g. residence permits and naturalisation) of displaced asylum seekers. Overall, the provision of two alternative schemes, which correspond to (albeit roughly) different benefits, risks lowering the level of protection guaranteed by international human rights law, the 1951 Refugee Convention and its 1967 Protocol as interpreted by the UNHCR to protect refugees. Indeed, under the Resettlement Framework regulation, Member States retain great discretion on whether and how to guarantee refugee status, international or humanitarian protection. If opting for admission instead of resettlement arbitrarily, Member States could easily frustrate the durable solution safeguard.

3. The new Eurodac and its long-awaited interoperability

3.1 Eurodac supporting the Resettlement Framework regulation

Under the Eurodac regulation, TCNs registered for an admission procedure or admitted under a national resettlement scheme of at least six years of age must have their personal data processed and stored in the homonymous IT system. Specifically, Member States are required to gather information – i.e. name, date of birth, gender, and nationality; type and number of any identity or travel document; the date and place of the registration and the authority making the registration – on TCNs referred to by the UNHCR, the EUAA, or other international bodies for admission purposes. The collection of this first dataset is followed by the transmission of biometric data (ten fingerprints and facial image) to the Eurodac Central-System (C-S) as soon as possible, unless a biometric comparison is not needed since the

applicant has his/her admission refused based on one of the grounds foreseen in Article 6 of the Resettlement Framework regulation. If a hit from the Eurodac C-S is reported, the person is deemed to have already been granted international protection or humanitarian status; to have been refused admission for reasons of security or public order, e.g. if an alert for refusal of entry has been issued in the Schengen Information System (SIS II); or had his/her procedure discontinued for refusing to move to a particular Member State.
Based on such a biometric comparison, the Member State transmitting the data must assess whether to grant, refuse, or discontinue the admission procedure no later than seven months (or one month in the case of an emergency admission) from the date of the first registration. The data referred to in Article 19(1)(c) to (q) of the Eurodac regulation shall be inserted no later than 72 hours after this decision. Indeed, under Article 9(11) of the Resettlement Framework regulation, the admission procedure may be discontinued for predefined reasons. Instead, Member States decide whether to grant or refuse admission before documentary evidence and/or a personal interview. The UNHCR, for its part, is competent to assess whether the person qualifies as a refugee in case of resettlement and (possibly) humanitarian admission as well. Also, the UNHCR is notified of the reason for the discontinuation or of the negative decision taken by the Member State «(…) unless there are overriding reasons of public interest for not doing so». Personal data of resettled or admitted TCNs are stored in the Eurodac for five years if international protection or humanitarian status is granted, or for three years if the admission is refused or the procedure is discontinued.

3.2 Eurodac "migrating" to the interoperability infrastructure

The new Eurodac was eagerly awaited to feed the interoperability framework agreed under regulations 817 and 818 back in 2019 (IO regulations). The interoperability framework established within the area of freedom, security, and justice relies on four new components that will be merged in the new Eurodac infrastructure, as it happens with other four large-scale IT systems namely: the Visa Information System (VIS); the Entry/Exit System (EES); the European Travel Information and Authorisation System (ETIAS); and the European Criminal Records Information System for TCNs (ECRIS-TCN). These four components are a European Search Portal (ESP); a shared Biometric Matching Service (sBMS); a Common Identity Repository (CIR); and a Multiple-Identity Detector (MID). The exclusion of the Eurodac from the interoperability infrastructure (see Article 75 *in fine* of regulation (EU) 2019/818) was justified by the absence of alphanumeric data which are indispensable for performing the processing activities foreseen in Articles 20, 21, and 22 of the IO Regulations. These Articles regulate access to the CIR through 1:1 biometric comparison for three different purposes: the identification of TCNs by police authorities during identity checks; the detection of multiple identities based on the establishment of different colored links between the identity data inserted (or rectified) in an individual file of a large-scale IT system and those already stored

in the CIR; and the prevention, detection, or investigation of terrorist offences or other serious criminal offences by designated authorities and Europol via a two-step approach query.
In addition, the shifting some personal data from the Eurodac to the CIR (cf. Article 17(3) of the Eurodac regulation) implies making this large-scale IT system fall under the interoperability external dimension, that is, the regime on the communication of personal data to third countries, international organisations, and private parties foreseen in Article 50 of the IO regulations. As a general rule, Article 49(1) of the Eurodac regulation prohibits the transfer of personal data from the Eurodac C-S or the corresponding national database, to third parties established inside or outside the Union. However, derogations allow such a processing activity when:

1. Personal data are exchanged between Member States, or with Europol, following a hit for law enforcement purposes if there is no «real risk that, as a result of such a transfer, the data subject might be subjected to torture, inhuman and degrading treatment or punishment or any other violation of his or her fundamental rights»;
2. Personal data are transferred by the Member States to third countries to which the EU regulation on Asylum and Migration Management (AMM regulation) applies in accordance with Chapters V of the General Data Protection Regulation (GDPR) and the Law Enforcement Directive (LED) respectively; and
3. Personal data of TCNs whose data are stored in the Eurodac—e.g., persons registered for conducting an admission procedure or persons admitted through a national resettlement scheme—are transferred for return purposes following a hit and in accordance with the Member State of origin by virtue of Chapter V of the GDPR, the applicable readmission agreement, and national law.

Point 2. builds a bridging clause with the external dimension of the AMM regulation as long as the EU agrees with a third country on the criteria and mechanisms for establishing the State responsible for examining an application for international protection following the EU-Turkey Statement model. As far as point 3. is concerned, the transfer of data is limited to third countries only and the Eurodac regulation states that these third countries should have no «(…) direct access to Eurodac to compare or transmit biometric data or any other personal data of a third-country national or stateless person and shall not be granted access to Eurodac via a Member State's National Access Point».

4. Data transfers for resettlement and admission purposes: The EU-Turkey case

The EU-Turkey Statement of 2016 was an experimental laboratory for implementing the Union's first resettlement scheme anchored (among others) to the Union return policy underpinned by a questionable interpretation of the safe third-country concept. As a matter of fact, Articles 33(2)(c) and 38 of directive 2013/32/EU allow a Member State to reject an asylum application when the person is deemed to come from a safe third-country which means, above

all, respecting the 1951 Refugee Convention and its 1967 Protocol. Yet, the Republic of Turkey has limited its commitment to TCNs coming from Europe only (the so-called geographical limitation of the 1951 Refugee Convention, extendable by virtue of Article 40). In short, for every undocumented Syrian national readmitted from Greece, another Syrian national is resettled from Turkey to the EU in a 1:1 game. According to this Statement, a Voluntary Humanitarian Admission Scheme (VHAS) is activated once irregular crossings have been «substantially and sustainably reduced».

The VHAS with Turkey was recommended by the European Commission in 2015 as part of the first set of soft measures promoting legal pathways to protection in the EU. The Standard Operating Procedure (SOP) agreed within the Council of the EU suggests that Member States, the EUAA, the UNHCR, and the Turkish authorities have been sharing information (including personal data) to execute the VHAS. For example, the EUAA is tasked with communicating to Turkey and the UNHCR the number of candidates to be admitted as well as the priorities within the target group set down by the Member States participating in the Scheme. The Turkish directorate general of migration management, in turn, is requested to share a list of candidates with the UNHCR, including data such as their identity, place or residence, and contact details. Moreover, the UNHCR is responsible for contacting the candidates for a face-to-face interview, where it gathers information, documents, and a picture, which are transmitted to the participating Member States via their National Contact Points (NCPs) and Liaison Officers (LOs). At this stage, the participating Member States conduct identity, medical, and security checks, if needed with the support of other actors (e.g. the International Organisation for Migration or IOM), and decide whether to grant international or humanitarian protection.

As long as personal data are communicated to the Turkish authorities, the UNHCR, or other international bodies, the regime on the transfer of personal data set down in Chapter V of the GDPR and that of the LED, as well as Chapters V and IX of the EU Data Protection Regulation (EUDPR), must be respected. In other words, the transfer must be underpinned by an adequacy decision, appropriate safeguards, or derogation clause in line with the "essentially equivalent" parameter established by the case law of the EU Court of Justice (CJEU). Even if there is no legal definition of "transfer", the European Data Protection Board (EDPB) has clarified that three cumulative criteria apply to qualify a processing operation as a transfer: first, there must be a controller or processor as data exporter subject to EU data protection law, also in case of extraterritorial application (cf. Article 3 of the GDPR); second, the information must be disclosed to another controller or processor known as the importer; and third, the importer must be established "in a third country" irrespective of whether or not it is subject to the EU data protection law or an international organisation. It is therefore crucial to distinguish between two separate parties (the exporter and the importer) to consider a processing activity as a transfer of personal data, provided that remote access from a third country performed by an employee does not qualify as such. This would be the case, for example, of the Member States' NCPs and LOs based in Turkey that could remotely access to

the Eurodac C-S or the CIR. Conversely, the disclosure of personal data to an international organisation (or one of its bodies) is always considered to be a transfer. Notably, Article 30(5) of regulation (EU) 2021/2303 allows the EUAA to transfer personal data «for the sole purpose of conducting a resettlement procedure», e.g., to the UNHCR, with which it has concluded a working arrangement (WA) in 2021. Article 16 of the 2021 WA allows the Parties to exchange information and best practices in the field of resettlement, humanitarian admission and complementary pathways, and community sponsorship schemes. However, the 2021 WA does not envisage the exchange of personal data which is processed «(…) in accordance with rules and provisions applicable to each of the Parties» (cf. Article 23 of the 2021 WA). Therefore, the transfer of personal data from the EUAA to the UNHCR is due to occur in specific situations in light of Article 50 of the EUDPR.

5. Conclusions

Under the new Eurodac regulation, TCNs registered for undergoing an admission procedure or admitted under a national resettlement scheme will have their personal data (including biometric data) processed and stored in the Eurodac. This large-scale IT system will support the Member States' authorities in assessing the admissibility of TCNs and in rejecting other grounds for refusal, such as a refusal of entry alerts in the SIS II or the asylum seeker's refusal of being moved to a specific Member State. Moreover, the integration of the Eurodac into the interoperability infrastructure will extend its scope until reaching the regime on the transfer of personal data for resettlement and admission purposes. Taking the SOP into empirical analysis, this post finds that national authorities and Union bodies have been sharing personal data with Turkey and the UNHCR officials for resettlement and humanitarian admission purposes, a process that falls into the provisions of the GDPR and the EUDPR, Chapter V. In the absence of a legal definition of transfer, it is unclear how these data leaks occur and, specifically, what forms of interoperability between the new (interoperable) Eurodac and third parties' databases could be implemented to support the resettlement and admission procedures.

SELECTED REFERENCES

Doctrine:

- M. FORTI, *Il reinsediamento nell'era dell'Intelligenza Artificiale: potenziali rischi e possibili rimedi nel diritto UE*, in *ADiM Blog, Analisi & Opinioni*, Gennaio 2024.
- M. GATTI, *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)*, in *EJIL: Talk!*, April 2016.

- R. NARANJO SANDALIO, *Sistemas biométricos en contextos de desplazamiento forzoso*, in *GOIA Blog*, May 2024.
- M. RECUERO LINARES, *GDPR Brief: what constitutes an "international data transfer"? Recent developments by the EDPB and implications for genomic and health data sharing*, Global Alliance for Genomics & Health, February 2022.
- M. SAVINO, *Asilo e deterrenza: verso il paradigma della "protezione altrove"*, in *ADiM Blog, Analisi & Opinioni*, Marzo 2021.
- M. SAVINO, *Refashioning Resettlement: From Border Externalization to Legal Pathways for Asylum*, in S. CARRERA, L. LEONHARD DEN HERTOG, M. PANIZZON (eds), *The EU External Policies on Migration, Borders and Asylum in an Era of Large Flows: Policy Transfers or Intersecting Policy Universe?*, Leiden, 2018, pp. 81-104.
- J. SILGA, *The external dimension of the New Pact on Migration and Asylum: The discreet presence of an 'Elephant in the Room'*, Brexit Institute News, May 2024.
- F. TASSINARI, *Data Protection and Interoperability in EU External Relations,* Leiden, 2024 (printing).

Other materials:

- F. BÖHM, I. JERVE RAMSØY, B. SUTER, *Norms and Values in Refugee Resettlement. A Literature Review of Resettlement to the EU*, 2021.
- M. BORAK, *What's next for EU's migration pact: ICMPD analysis*, biometricupdate.com, August 2024.
- EUROPEAN DATA PROTECTION BOARD (EDPB), *Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR*, 2023.
- J. SÁNCHEZ-MONEDERO, *The datafication of borders and management of refugees in the context of Europe*, 2018.
- UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *Projected Global Resettlement Needs*, 2025.

To quote this post: F. TASSINARI, *From Eurodac to interoperability and back: transferring personal data for resettlement and admission purposes,* ADiM Blog, Analyses & Opinions, August 2024.