



Privacy and data protection in first instance asylum procedures

The information presented in this fact sheet is extracted from the [Asylum Report 2022](#) and covers developments in 2021 and early 2022.

EU+ countries use automated systems to identify an asylum applicant and to register and process their application for international protection. Some of these systems are shared across countries, for example Eurodac, the Schengen Information System (SIS) and the Visa Information System (VIS), while others are used at the national level by asylum authorities. These systems allow various stakeholders to communicate information in a timely and orderly manner.

Digitalisation has also enabled steps of the asylum procedure to be automated, for example for requesting appointments and submitting documentation. Some authorities have used an applicant's personal devices to establish their identity and nationality.

While digitalisation can make the first instance asylum procedure more efficient and flexible, its implementation requires adequate safeguards to protect fundamental rights. In 2021, issues related to data protection and the right to privacy during the first instance procedure were raised in several EU+ countries and applicants challenged the seizure of their mobile phones and the use of their data.





Key developments extracted from the Asylum Report 2022

- In the second year of the COVID-19 pandemic and related health measures, EU+ countries continued to organise remote interviews with applicants for international protection. In general, remote procedures were no longer exceptional but rather the new normal.
- In Malta, a new data protection section was added to the application form, as part of a general effort to optimise the gathering of information for the examination of the application at the lodging stage.
- Privacy issues were among the few minor deficiencies identified by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in Finland.¹ This related to cameras in specific areas of the Joutseno detention unit.²
- In January 2021, the Federal Council in Switzerland adopted a parliamentary initiative on the obligation to cooperate in the asylum procedure, which includes the possibility of checking an applicant's mobile phone.³ The Swiss Refugee Council criticised this legislative proposal because it would lead to a disproportionate violation of the right to privacy, data protection issues were noted as it lacks an independent control of the data collected, and the procedures for accessing, using and saving data are not clearly defined.⁴ Similar concerns were raised by UNHCR in April 2021.⁵
- Subsequently, on 12 October 2021, the Swiss Federal Assembly adopted amendments to the Asylum Act (LASi) which would add a legal obligation on the asylum applicant to cooperate with the authorities by temporarily handing over any electronic devices when the identity cannot be established based on documents, or the itinerary could not be established by other means.⁶ The Swiss Refugee Council and UNHCR criticised the measure as disproportionate and a violation of privacy rights.⁷
- In Belgium, the Constitutional Court reviewed the Act of 21 November 2017 amending the Residence Act and the Reception Act by interpreting Article 48/6, according to which the CGRS may request information from an asylum applicant's electronic device. The court [stated](#) that the decision for such a request must be communicated in writing or orally to the applicant or the lawyer and that the authorities are not authorised to carry out unlimited searches themselves on the electronic device. Rather, authorities may only consult the elements shown by the applicant from his/her phone.
- The Belgian Constitutional Court also annulled Article 57/7(3) insofar as it does not limit the possibility for the CGRS to keep certain elements confidential to cases where "disclosure of information or sources would endanger national security, the security of the organisations or persons who provided the information or the security of the person(s) to whom the information relates, or where the interests of the investigation would be harmed in connection with the processing of applications for international protection by the competent authorities of the Member States or in the international relations of Member States".

- In a judgment that was not final, the Regional Administrative Court of Berlin [held](#) that BAMF's evaluation of data from the applicant's mobile phone to determine her identity and nationality constitutes an interference with the fundamental right to guarantee the confidentiality and integrity of IT systems.¹ The measure, which is suitable to obtain indications of identity and nationality, is disproportionate due to the encroachment on fundamental rights. The court also noted that measures, such as the evaluation of submitted documents, the implementation of register comparisons, inquiries from other authorities or checking with the interpreter for language issues, constitute milder means that should be used by the authorities.
- The court also held that, in this particular case, the Federal Office was not entitled to read the applicant's data from the mobile phone, evaluate it using software, save the report generated from the evaluation of the applicant's mobile phone, release the report for the applicant's asylum procedure and take a decision on the asylum application based on the respective report. The court did not rule that the evaluation of data from applicants' mobile phones was generally unlawful and the lawfulness of the relevant provision (Asylum Act, Section 15a) was not doubted by the court. However, the court did rule on the unlawfulness of the measures introduced in this specific case and concluded that milder means could have been applied. BAMF lodged an appeal against the decision on points of law. The proceeding was pending at the Federal Administrative Court for a decision on the legal aspects of the case (BVerwG 1 C 19.21) (at the time of drafting the Asylum Report).
- Similarly, the Civil Court of Milan in Italy [held](#) that the confiscation of the mobile phone of an asylum applicant who is in detention had no basis in the Italian Constitution and was a limitation of the applicant's rights. The court noted that the limitation of communication with the outside world, which results from the impossibility of accessing the mobile phone, also constitutes a violation of the detainee's right to access legal safeguards. The court ordered the authorities to allow the applicant to use the mobile phone for a sufficient time (at least 2 hours daily).



To search for more developments by topic, country or year, consult the [National Asylum Developments Database](#).

To read more case law related to asylum, consult the [EUAA Case Law Database](#).

¹ The case has been appealed by BAMF before the Federal Administrative Court and is still pending a decision.
https://www.bfdi.bund.de/SharedDocs/Downloads/EN/Taetigkeitsberichte/30TB_21.pdf?__blob=publicationFile&v=3

Sources

Please see [Sources on Asylum 2022](#) for the full list of over 1,200 references which were consulted for the Asylum Report 2022.

¹ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. (2021, May 5). *Report to the Finnish Government on the visit to Finland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 September to 18 September 2020*. CPT/Inf (2021) 7. <https://rm.coe.int/1680a25b54>

² Parliamentary Ombudsman | Eduskunnan oikeusasiamies. (2021, October 5). *Tarkastus: Joutseno säilöönottoyksikkö 16.6.2021* [Audit: Joutseno detention facility, 16 June 2021]. EOAK/4149/2021. <https://www.oikeusasiamies.fi/r/fi/ratkaisut/-/eoar/4149/2021>

³ Federal Council | Conseil Fédéral. (2021, January 20). *Initiative parlementaire. Obligation de collaborer à la procédure d'asile. Possibilité de contrôler les téléphones mobiles. Rapport du 16 octobre 2020 de la Commission des institutions politiques du Conseil national. Avis du Conseil fédéral, FF 2021137* [Parliamentary initiative. Obligation to collaborate in the asylum procedure. Possibility to screen mobile phones. Report of 16 October 2020 from the Political Institutions Committee of the National Council. Opinion of the Federal Council, FF 2021137]. <https://www.fedlex.admin.ch/eli/fqa/2021/137/fr>

⁴ Swiss Refugee Council | Schweizerische Flüchtlingshilfe | Organisation suisse d'aide aux réfugiés. (2021, September 15). *Le Parlement restreint encore les droits fondamentaux des personnes en quête de protection* [Parliament further restricts the fundamental rights of persons seeking protection]. <https://www.osar.ch/communiqué-de-presse/le-parlement-restr-eint-en-core-les-droits-fondamentaux-des-personnes-en-quete-de-protection>

⁵ United Nations High Commissioner for Refugees. (2021, April 14). *Contrôle des téléphones portables des demandeurs-euses d'asile: le HCR considère que le droit à la vie privée demeure menacé* [Screening asylum seekers' mobile phones: UNHCR says the right to private life remains at risk]. <https://www.unhcr.org/dach/ch-fr/62433-contrôle-des-téléphones-portables-des-demandeurs-euses-d'asile-le-hcr-considère-que-le-droit-à-la-vie-privée-demeure-menacé.html>

⁶ Loi sur l'asile (LAsi), Modification du 1er octobre 2021, FF 2021 2317 [Asylum Act (LAsi, Amendment of 1 October 2021, FF 2021 2317)]. <https://fedlex.data.admin.ch/eli/fqa/2021/2317>

⁷ European Council on Refugees and Exiles. (2022). *Input to the Asylum Report 2022*.

https://euaa.europa.eu/sites/default/files/2022-03/European_Council_on_Refugees_and_Exiles_ECRE.docx