



EDPS response to the Commission public consultation on lowering the fingerprinting age for children in the visa procedure from 12 years to 6 years

Context

On 17 August 2017, the European Commission launched a public consultation¹ on lowering the fingerprinting age for children in the visa procedure from twelve years to six years old.

Following an evaluation² of the functioning of the Visa Information System (hereinafter “VIS”) carried out in 2016, the Commission considers that a number of areas of the VIS could be improved and envisages revising the VIS Regulation³. The Commission thus made several suggestions for amending the VIS Regulation, including reducing the minimum age for fingerprinting visa applicants to six years old. To propose such a change, the Commission draws on a Technical Report⁴ from the Joint Research Centre (“JRC”) on Fingerprint Recognition for Children.

The Commission already proposed⁵ a similar change in 2016 for the Eurodac information system by providing for a new minimum age of six years old for processing biometric data (instead of fourteen years old originally), by considering that six years old is “*the age at which research shows that fingerprint recognition of children can be achieved with a satisfactory level of accuracy*”⁶. The EDPS provided comments in this regard in his Opinion⁷ on the proposal.

This public consultation on lowering the fingerprinting age for children in the visa procedure will feed into a specific study on the necessity and proportionality of lowering the fingerprinting age for children whose data are in the VIS, and will also underpin the impact assessment of the proposal to revise the VIS Regulation that will be tabled by the Commission in 2018.

Aim and scope of these comments

One of the EDPS’ mission is to advise the Commission services in the drafting of new proposals with data protection implications. The EDPS welcomes that, contrary to the 2016 Eurodac proposal, the future proposal to revise the VIS Regulation will be accompanied by an impact assessment.

Reducing the age limit for collecting and processing fingerprint data of children from the age of twelve years old to the age of six will impact their right to data protection laid down in Article 8 of the EU Charter of Fundamental Right (hereinafter “the Charter”). The EDPS has long been concerned not only with the processing of biometric data but also with the processing of personal data relating to children⁸. This public consultation is therefore relevant for the EDPS activities.

Moreover, the EDPS is listed as one of the target group of this public consultation.

Therefore, the EDPS has answered below the questions of the Commission consultation that are relevant from a data protection perspective⁹, not limiting himself to the alternative answers suggested by the Commission.

Answers to the questions

Question 1. Do you consider, as a matter of principle that children should be submitted to the same procedures when applying for a short-stay (“Schengen”) visa as adults?

Children in general are more vulnerable than adults as they are less aware not only of the consequences of the processing of their personal data, but also of existing safeguards and of their data protection rights.

In the specific context of migration and border control, the Fundamental Rights Agency rightly pointed out¹⁰ that the collection of children’s data might affect their lives, while they have no say in their parent’s decision to travel.

For these reasons, the EDPS considers that children should benefit from a higher level of protection and specific safeguards¹¹ in relation to the processing of their personal data in the visa procedure, especially since some of the data collected from them are as highly sensitive as biometric information.

Question 2. Is there any particular age from where fingerprinting should start being applied?

The EDPS recalls the **necessity and proportionality requirements** in Article 52(1) of the EU Charter in case a limitation is brought on a fundamental right. Article 8 of the Charter provides for the fundamental right to the protection of individuals’ personal data. The right to protection of one’s personal data is not an absolute right; it can be limited on the condition that such limitation complies with all requirements of Article 52(1) of the Charter, including passing the necessity and proportionality test.

The EDPS considers that for now the question remains whether or not processing fingerprint data of children as from a younger age is necessary and proportionate to achieve objectives of general interest. The EDPS takes note of the fact that the Technical Report from the JRC on Fingerprint Recognition for Children finds that *“Size (in terms of the dimensions of the relevant fingerprint characteristics) - and implicitly age - does not constitute any theoretical barrier for automated fingerprint recognition”*. However, the EDPS emphasises that what is technically feasible is nor *per se* necessarily desirable, nor necessary and proportionate in accordance with Article 52(1).

The EDPS recommends that the necessity and proportionality of collecting fingerprint data of children as from a younger age should be the focus of an additional prior reflection and evaluation, as part of the impact assessment that is carried out to accompany the future Commission proposal to revise the VIS Regulation. Fixing the particular minimum age for fingerprinting children should be part of this reflection.

In this regard, the EDPS invites the Commission to read the Necessity Toolkit¹² that has been released in April this year and is addressed to the legislator to help in assessing the necessity of new legislative measures.

Question 3. To what extent do you consider that fingerprinting children applying for a short stay visa, by helping with identification, is necessary or useful to address or prevent a) trafficking, b) child abduction, c) children going missing, d) irregular migration, e) visa fraud and f) identity fraud?

The EDPS first stresses the importance of defining clear purposes for the processing of fingerprint data of children, and **recalls the purpose limitation and purpose specification principles**¹³ according to which personal data must be collected for specified, explicit and legitimate purposes and not be further processed in a manner which is incompatible with those purposes.

In addition, the EDPS considers that identifying clear purposes is also a pre-requisite to assess the necessity and proportionality of collecting fingerprint data of children. In particular, the specific objectives that would be pursued in this case, which could not be achieved without storing fingerprint of children as from a younger age, should be clarified.

Furthermore, the EDPS considers that a clear difference should be made between the use of fingerprint data in the interest of children (e.g. to prevent child abduction or child trafficking) or to their possible detriment (e.g. with a view to identify a child as irregular migrant). He emphasises that Europol and national law enforcement authorities can request - and under certain conditions obtain - access to all VIS data without distinction for pursuing the prevention, detection and investigation of terrorist offences and other serious criminal offences¹⁴. Therefore fingerprint data of children from a younger age kept in the VIS would potentially also be available to Europol and national law enforcement authorities.

In this regard, the EDPS recalls that the European Court of Human Rights (“ECtHR”) in the case of *S. and Marper v. United-Kingdom*¹⁵ ruled against the blanket retention of biometric data of persons who are not suspected of unlawful conduct or otherwise under investigation for law enforcement purposes, and found that it “*constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society*”¹⁶. The Court further considered that this may be especially harmful in the case of children given their special situation and the importance of their development and integration in society¹⁷.

Therefore, when defining the purposes for the processing of fingerprint data of children in the visa procedure, the EDPS **recommends that fingerprints of children should not be considered as serving to incriminate them, since below a certain age they could not represent any meaningful threat**. In principle, the processing of a child’s fingerprint data by law enforcement authorities should mainly take place in the child’s sole interests, for instance in order to protect or retrieve missing children or children who are victims of crimes.

Question 4. In your view, can any of the purposes mentioned above (prevention of and/or responses to trafficking or children going missing, child abduction, irregular migration, visa fraud, identity fraud) be achieved through other means?

As part of the assessment of the necessity of lowering the age for fingerprinting, the EDPS stresses that the legislator should indeed assess whether or not each of these objectives could not be achieved as efficiently by using less intrusive means. In this case, the question of whether one or several alternative legislative measures could achieve the same objectives without collecting additional data from children as of six years old, for instance by using the data already available in other systems in a different way, remains and should be answered.

In addition, restricting specific aspects of the measure of lowering the fingerprinting age to six years old could also be envisaged to make it less intrusive, such as for instance by providing for a reduced data retention period for fingerprint data of children or limiting the access and use of such data to specific authorities.

The EDPS invites the Commission to get acquainted with “Step 4: Choose option that is effective and least intrusive” of his Necessity Toolkit.

Question 5. To what extent do you agree with the following statement: "Fingerprinting of minors/children is an intrusive measure"?

Fingerprinting children constitutes a limitation to their fundamental rights to privacy and data protection enshrined in Articles 7 and 8 of the EU Charter.

The EDPS considers that the processing of fingerprint data from children as from six years old in the visa procedure is a significantly intrusive measure, especially taking into consideration:

- the number of data subjects concerned - which given the lowering of the minimum age from twelve to six years old would greatly increase;
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- the category of persons concerned - in this case children who are particularly vulnerable persons and require special care and attention;
- the type of additional personal data collected and processed - in this case biometric data, which are considered special categories of personal data according to the General Data Protection Regulation¹⁸ and the Data Protection Directive for the police and justice sectors¹⁹ and as such can only be processed where strictly necessary, subject to appropriate safeguards for the rights and freedoms of the data subject;
- the automated means used to process such information - namely the Eurodac database;
- the different purposes that are pursued for processing such data - which still need to be precisely identified.

Question 6. Which authorities should, in your view, have access to the personal data of children (including fingerprints) collected in the visa procedure, for the purposes mentioned in question 4 above:

- visa authorities only, when processing the visa application, to combat identity and visa fraud;
- border authorities, to identify cases of visa fraud;
- authorities competent in the field of irregular migration;
- anti-trafficking authorities, if the child is suspected to be or identified as a victim of trafficking;
- child protection authorities for all situations where there are child protection concerns relating to the child.

The EDPS recalls that, depending on the objectives set by the legislator for fingerprinting children, the categories of authorities entitled to access and use fingerprint data of children

should be limited to what is strictly necessary for the purposes of such processing. **The distinction should notably be made between authorities involved in processing personal data of children in their interest, and those processing such data for instance in order to potentially incriminate a child or identify a child as an irregular migrant.**

The EDPS also **recommends that the number of staff members within authorities entitled to access such data should also be limited, and that such staff members should follow specific training on data protection.**

Moreover, since the proper enrolment of fingerprint data in the VIS is key to ensure a high level of data quality and reduce the risk of errors in matching fingerprints of children, the EDPS also **recommends that staff members of diplomatic missions and consular posts in charge of collecting fingerprint data in the visa application process follow specific training for collecting such data of children.**

Question 7. Do you consider that specific or additional protection safeguards need to be in place when collecting biometric/fingerprint data of third country national children?

Should the necessity of processing fingerprint data of children from a younger age be demonstrated for specific purposes, the EDPS **recommends to include additional safeguards for the processing of children's data in the future proposal to revise the VIS Regulation.**

First, any **information provided to children** in accordance with Article 37 of the VIS Regulation should be conveyed in a manner appropriate to their specific age, knowing that a child of six years old does not have the same level of understanding than a child of thirteen years old.

The proposal for the 2016 Eurodac Recast provided that fingerprints of children should be taken in a "*child-sensitive and child-friendly manner*"²⁰ without further indications of what these words means in practice. **The EDPS suggests creating a common European standard for taking biometric data of children and informing them in a clear and plain language that they can easily understand.** Such standard should be developed in cooperation with organisations specialised in child protection and with data protection authorities.

The EDPS stresses the importance of ensuring a high level of **data quality** of fingerprint taken from children. Any error of the VIS in matching biometrics could result in serious consequences for the children concerned, such as for instance a refusal to access the EU territory or the rejection of the visa application. The EDPS recalls that the Report of the JRC concluded that "*fingerprint recognition of children aged between 6 and 12 years is achievable with a satisfactory level of accuracy*" on the condition that "*appropriate best practice guidelines are developed and achievable within certain constraints of technical and organisational nature*".

Furthermore, as a rule personal data should be retained for no longer than necessary for the purposes of processing. The **retention period** of data in the VIS is of maximum five years²¹ and the same applies accordingly to personal data, including fingerprints, of children from 14 years old and above whose data are already stored in the VIS. As regards the fingerprint of children below 14 years old, the EDPS **recommends evaluating in the impact assessment if a shorter data retention period would be more suitable, since the level of quality of such data cannot be ensured during the same length of time.**

Question 10. Could technological developments, including on the collection and use of biometrics, contribute to and should be used to enhance the protection of children?

The EDPS recognised on several occasions the advantages provided by the use of biometrics, such as the high assurance of the identity of the individual. However, the EDPS always stressed that, given their very nature and their sensitive character, the necessity to use these data should be strictly demonstrated, and these benefits would be also dependent on the application of more stringent safeguards²².

In this regard, the EDPS **recommends the implementation of the principle of data protection by design**, which is now provided for by law and referred to in Article 25 of the General Data Protection Regulation and Article 20 of the Data Protection Directive for the police and justice sectors. This principle obliges organisations to integrate data protection from the very design of a new system or a new functionality of a system, and implement technical and organisational measures that will guarantee the protection of personal data processed.

Brussels, 9 November 2017

Giovanni BUTTARELLI

A handwritten signature in blue ink, appearing to read 'Giovanni Buttarelli', is written below the printed name.

¹ https://ec.europa.eu/home-affairs/content/consultation-lowering-fingerprinting-age-children-visa-procedure-12-years-6-years_en

² Report to the European Parliament and the Council on the implementation of Regulation (EC) No 767/2008 of the European Parliament and of the Council establishing the Visa Information System (VIS), the use of fingerprints at external borders and the use of biometrics in the visa application procedure/REFIT Evaluation, COM(2016) 655 final.

³ 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 L 218, 13.8.2008, p. 60.

⁴ Joint Research Centre Technical Report of 2013 on Fingerprint Recognition for Children, Report EUR 26193, available at: <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC85145/fingerprint%20recognition%20for%20children%20final%20report%20%28pdf%29.pdf>

⁵ Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 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 a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 272 final (hereinafter "2016 Eurodac Recast").

⁶ Explanatory Memorandum to the 2016 Eurodac Recast, p. 4.

⁷ EDPS Opinion 07/2016 on the First reform package on the Common European Asylum System, par. 24-27.

⁸ https://edps.europa.eu/sites/edp/files/publication/08-06-23_children_internet_en.pdf

⁹ Questions 8 and 9 of the public consultation were not considered relevant from a data protection perspective.

¹⁰ FRA Opinion 2/2017 on the impact on fundamental rights of the proposed Regulation on the European Travel Information and Authorisation System (ETIAS), p. 18.

¹¹ See *infra* the EDPS answer to question 7 as regards specific safeguards for the processing of children's data.

¹² Available at: https://edps.europa.eu/sites/edp/files/publication/17-06-01_necessity_toolkit_final_en_0.pdf

¹³ See also Article 29 Working Party Opinion 03/2013 of 2 April 2013 on purpose limitation.

¹⁴ Article 3 of the VIS Regulation; Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by the designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13.8.2008, p. 129.

¹⁵ ECtHR, *S. and Marper v. United-Kingdom*, 4 December 2008, applications no. 30562/04 and 30566/04.

¹⁶ *Case S. and Marper v. United-Kingdom*, par. 125.

¹⁷ *Case S. and Marper v. United-Kingdom*, par. 124.

¹⁸ Regulations 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, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88, specifically Article 10.

¹⁹ 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 the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131, specifically Article 9.

²⁰ Article 2(2) of the 2016 Eurodac Recast.

²¹ Article 23 of the VIS Regulation.

²² See *inter alia* Opinion 07/2016 on the First reform package on the Common European Asylum System (Eurodac, EASO and Dublin regulations); Opinion 06/2016 on the Second EU Smart Borders Package Recommendations on the revised Proposal to establish an Entry/Exit System; Opinion 3/2016 on the exchange of information on third country nationals as regards the European Criminal Records Information System (ECRIS); Opinion 7/2017 on the new legal basis of the Schengen Information System.