



EDPS response to the Commission public consultation on extending the scope of the Visa Information System (VIS) to include data on long stay visas and residence documents

Context

On 17 November 2017, the European Commission launched a public consultation¹ on extending the scope of the Visa Information System ('VIS') to include data on long stay visas and residence documents in the system.

The High-Level Expert Group on Information Systems and Interoperability considered in its Final Report² of May 2017 that there is an information gap at EU level regarding documents issued at national level that allow third-country nationals to remain in the Schengen area for a longer duration than short stay visas³, namely long-stay visas, residence permits and residence cards. In June 2017, the Council invited the Commission to carry out a feasibility study on the establishment of a central EU repository to store such documents⁴. Subsequently, the Commission ordered a Feasibility Study⁵ that was finalised in September 2017 and concluded that the best option would be to build a repository for such documents as part of the VIS.

This public consultation will feed into a specific study on the necessity and proportionality of extending the scope of the VIS to include long stay visas and residence documents, 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. Extending the scope of the VIS will have an impact on the right to data protection laid down in Article 8 of the EU Charter of Fundamental Right ('the Charter') of an important number of third-country nationals who stay in the Schengen Area on the basis of long-stay visas, residence permits and residence cards. This public consultation is thus relevant for our activities. In addition, the EDPS is listed as one of the target group of this public consultation. Therefore, we have answered below the questions of the Commission consultation that we considered relevant from a data protection perspective⁶, not limiting ourselves to the alternative answers suggested by the Commission.

We first point out that it is up to the legislator to determine the problems that need to be addressed by an extension of the scope of the VIS, how these problems will be addressed by this measure, and why existing or less intrusive measures cannot sufficiently address it. In our role of advisor to the legislator, we will focus on the question to what extent the choice made by the legislator is constrained by - and if so in accordance with - the principles of data protection.

Answers to the questions

2. In your view, is it necessary to share the data contained in the following documents among Member States authorities in order to allow their verification at the border and within the territory of the Member States with a view to preventing identity and document fraud and to tackling the issue of irregular migration?

- a) Long-stay visas
- b) Residence permits
- c) Residence cards (issued to family members of EU nationals or nationals of Schengen Associated Countries enjoying the right to free movement)

We recall the **necessity and proportionality requirements** in Article 52(1) of the Charter in case a limitation is brought to 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.

According to the information currently available to us, compelling evidence has not yet been provided that a new scheme for collecting, storing and using data contained in long-stay visas and residence documents is necessary and proportionate in order to achieve the stated objectives of preventing identity and document fraud and tackling the issue of irregular migration. We invite the Commission to provide such verifiable evidence for the necessity of any proposed legislative measure. The existence of an information gap identified by the Commission regarding the holders of such documents may not in itself be sufficient to justify the need for collecting, storing and sharing personal data on such a potentially large scale. **We recommend that the necessity and proportionality of collecting, storing and sharing data contained in long-stay visas and residence documents be the focus of an additional prior reflection and evaluation** as part of an impact assessment.

In this regard, we invite the Commission to consider the Necessity Toolkit⁷ that has been released in April 2017 and is addressed to the legislator to help in assessing the necessity of new legislative measures.

3. What do you consider to be the most appropriate means to address the identified information gap in order to allow Member States to perform checks at the border or in the territory on whether the conditions for entry to, stay or residence in the EU territory are fulfilled?

We acknowledge that Europe is currently facing a number of threats and the EU legislator feels compelled to take meaningful action. Nevertheless, given the requirements of the Charter, we invite the Commission to reflect which objectives of general interest recognised by EU law the envisaged initiative is meant to pursue and to sufficiently detail these objectives since they provide the background against which the necessity of the measure may be assessed. In particular, "preventing the identified information gap" would appear to be a solution or a mean to an end, rather than an objective of general interest under EU law. Similarly, "tackling the issue of irregular migration" might lack specificity to be truly helpful to perform the required assessment of necessity and proportionality.

Moreover, as part of the assessment of the necessity of collecting, storing and sharing data contained in long-stay visas and residence documents, we stress that the legislator should evaluate several alternative legislative measures to achieve the policy objectives pursued and, if several measures can achieve these objectives, choose the least intrusive one.

In this respect, we would refer to “Step 4: Choose option that is effective and least intrusive” of the EDPS Necessity Toolkit.

4. If you consider that an EU solution should be given to address the identified information gap, which of the following options seems the most appropriate solution?

- A new large scale IT instrument devoted exclusively to storing these documents, without interconnectivity to other EU systems.
- A repository of long stay visas and residence documents as part of the already existing Visa Information System, while respecting the principle of separation of data and access rights by the various authorities.
- Storing long stay visas in the VIS, together with short stay visas and creating a separate new instrument to store residence documents.
- Other.

We do not at present have at our disposal verifiable objective information that would allow such assessment to be made. To the extent the stated objectives can be specified and expressed in terms of general interest to be pursued by the legislator, the EDPS, as an EU independent supervisory institution, is not *a priori* in favour or against any measure, in full respect for the role of the legislator in assessing the necessity and the proportionality of any proposed measures.

We note that all the measures listed above are centralised ones and that decentralised solutions are not envisaged. Whatever the measure chosen, we consider that it should be accompanied by a proper impact assessment and objective and verifiable evidence that there is a need for such large-scale measure, that other measures would not be equally effective and that the envisaged measure is the least intrusive one available. In particular, de-centralised solutions should be assessed among the options.

If additional data relating to holders of both long-stay visas and residence documents or solely to long-stay visas were to be stored in the VIS, we point out that the new Regulation establishing the Entry/Exit System⁸ creates interoperability between the VIS and the future Entry/Exit System, and thus provide for further processing of data stored in the VIS. Furthermore, the two proposals establishing a framework for interoperability of information systems for security, border and migration management⁹ tabled by the Commission in December 2017 also provide for important changes to be brought to the VIS, which would become interoperable with other information systems existing in these areas. **We recommend that all these legislative developments, the changes that they will require for the VIS and their impact on the right to data protection of holders of long-stay visas or residence documents if their data were to be stored in the VIS should also be part of the above-mentioned impact assessment.**

5. If you agree that information on these categories of documents should be shared among Member States authorities, which authorities should have access to check those documents?

- Authorities competent to carry out checks at the external border, for the purpose of verifying the authenticity and validity of the document and whether the conditions for entry to the territory of the Member States are fulfilled.
- Authorities competent to carry out checks within the territory of the Member States as to whether the conditions for entry to, stay or residence on the territory of the Member States are fulfilled.
- Migration authorities for the purpose of return of third country nationals.
- Law enforcement authorities for the purpose of prevention, detection and investigation of terrorist offences and other serious criminal offences.

We recall that, depending on the objectives set by the legislator (see comments above) for collecting, storing and accessing personal data of holders of long-stay visas and residence documents, **the categories of authorities entitled to access and use such data should be limited to what is strictly necessary for the purposes of such processing.**

Furthermore, we **recommend 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.**

6. Do you consider that a shared EU repository containing data of short stay, long stay visa holders and of residence documents' holders is necessary for the following purposes?

- a) Reducing identity and document fraud
- b) Combatting irregular migration
- c) Better informing visa and migration authorities as to the history of previous documents for an authorisation to enter EU territory by a third-country national
- d) Preventing, detecting and investigating terrorist offences and other serious criminal offences

We stress the importance of defining clear purposes for the processing of personal data contained in long-stay visas and residence documents. We **recall the purpose limitation and purpose specification principles**¹⁰ that derive from Article 5(1)(b) of the General Data Protection Regulation¹¹ ('GDPR') and Article 4(1)(b) of Regulation (EC) No 45/2001¹², which provide that 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, we consider that identifying clear purposes is also a pre-requisite to assess the necessity and proportionality of collecting and storing such data.

7. If you consider that data on any of the above documents should be stored in an EU system and shared among national authorities, which categories of data should be stored?

- Biographical data of the document holder.
- Data related to the issued document, including on its status (issued, withdrawn).
- Data related to applications to obtain any of these documents, including where it did not necessarily lead to a positive decision.

- Any links between various applications by the same person.

We **recall the data minimisation principle** that derives from Article 5(1)(c) of the GDPR and Article 4(1)(c) of Regulation (EC) No 45/2001, which provides that personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. Therefore, when determining the categories of data of holders of long-stay visas and residence documents that should be stored, the collection and storage of personal information should be limited to what is directly relevant and necessary to accomplish the purposes specified for each processing operation envisaged.

We recognised on several occasions the advantages provided by the use of biometrics, such as the high assurance of the identity of the individual. However, we stress once again 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 safeguards**, notably to ensure the quality of such data¹³.

8. Should other data protection, privacy or other fundamental rights issues be addressed, apart from the ones mentioned above?

We recommend 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 GDPR and Article 20 of the Data Protection Directive for the police and justice sectors¹⁴. 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.

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¹https://ec.europa.eu/home-affairs/content/consultation-extending-scope-visa-information-system-vis-include-data-long-stay-visas-and_en

² High-level expert group on information systems and interoperability - Final Report of May 2017.

³ Short-stay visas are delivered for intended stays of no more than 90 days in any 180 days period.

⁴ <http://data.consilium.europa.eu/doc/document/ST-10151-2017-INIT/en/pdf>

⁵ Feasibility Study to include in a repository documents for Long-Stay visas, Residence and Local Border Traffic Permits - Final Report of September 2017.

⁶ Question 1 of the public consultation was not considered relevant from a data protection perspective.

⁷ Available at: https://edps.europa.eu/sites/edp/files/publication/17-06-01_necessity_toolkit_final_en_0.pdf

⁸ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 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 and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, OJ L 327, 9.12.2017, p. 20.

⁹ Proposal for a Regulation establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration), COM(2017) 794 final; Proposal for a Regulation establishing a framework for interoperability between EU information systems (borders and visa), COM(2017) 793 final.

¹⁰ See also Article 29 Working Party Opinion 03/2013 of 2 April 2013 on purpose limitation.

¹¹ 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.

¹² Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

¹³ 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.

¹⁴ 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.