



EDPS Formal comments on the Commission Implementing Decision laying down the specifications for the connection of the central access points to the Visa Information System (VIS) and for a technical solution to facilitate the collection of data by Member States and Europol for the purpose of generating statistics on the access to the VIS data for law enforcement purposes

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 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 ('EUDPR'), and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 16 May 2022 the European Commission issued the draft 'Commission Implementing Decision laying down the specifications for the connection of the central access points to the Visa Information System (VIS) and for a technical solution to facilitate the collection of data by Member States and Europol for the purpose of generating statistics on the access to the VIS data for law enforcement purposes' ('the draft Implementing Decision').
2. The objective of the draft Implementing Decision is twofold:
 - a. to lay down the specifications for the technical solution to be deployed to connect the central access points of the Member States to the National Uniform Interface and to connect the Europol central access point to the VIS;
 - b. to lay down the specifications for a technical solution facilitating the collection of data for the purpose of generating the statistics that Member States and Europol are required to produce on the access to the VIS data for law enforcement purposes.
3. The draft Implementing Decision is adopted following the adoption on 7 July 2021 of two Regulations² which amended Regulation (EC) No 767/2008 concerning the Visa

¹ OJ L 295, 21.11.2018, p. 39.

² Regulation (EU) 2021/1134 for the purpose of reforming the Visa Information System, OJ L 248, 13.7.2021, p. 11–87.



Information System (VIS) and the exchange of information between Member States on short-stay visas, long-stay visas and residence permits ('the revised VIS Regulation').³ These Regulations amended the VIS Regulation to expand further the use of the VIS for new categories and uses of data and to make full use of the interoperability framework⁴ between EU Justice and Home Affairs information systems.

4. The VIS Regulation establishes the conditions of access to data stored in the VIS for law enforcement purposes and, in accordance with the revised VIS Regulation, the European Commission is required to adopt relevant implementing acts.
5. The draft Implementing Decision is adopted pursuant to Article 50(4) of Regulation (EC) No 767/2008 with regard to the technical solution to generate statistics and Article 45(2) (b) of Regulation (EC) No 767/2008 with regard to the solution to connect the central access points to the VIS central system.
6. The EDPS previously issued Opinion 9/2018 on the Proposal for a new Regulation on the Visa Information System⁵ and Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems.⁶
7. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 16 May 2022, pursuant to Article 42(1) of Regulation

Regulation (EU) 2021/1152 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861 and (EU) 2019/817 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, OJ L 249, 14.7.2021, p. 15–37.

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 information between Member States on short-stay visas, long-stay visas and residence permits (VIS Regulation), OJ L 218, 13.8.2008, p. 60–81.

⁴ Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA, OJ L 135, 22.5.2019, p. 27–84.

Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, OJ L 135, 22.5.2019, p. 85–135.

⁵ [EDPS Opinion 9/2018 on the Proposal for a new Regulation on the Visa Information System](#), issued on 12 December 2018.

⁶ [EDPS Opinion 4/2018 Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems](#), issued on 16 April 2018.

2018/1725⁷ ('EUDPR'). In this regard, the EDPS invites the Commission to include an explicit reference to this consultation in one of the Recitals of the draft Implementing Decision.

8. These formal comments do not preclude any additional comments by the EDPS in the future, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of other related implementing or delegated acts⁸.
9. Furthermore, these formal comments are without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR and are limited to the provisions of the draft Implementing Decision that are relevant from a data protection perspective.

2. Comments

2.1. Access to the VIS data by the central access points

10. Article 1(1) of the draft Implementing Decision establishes that the central access points shall have access to the VIS for the purposes of Articles 22n and 22o of Regulation (EC) No 767/2008.

The said Articles however refer to access to VIS **data** (emphasis added), which are stored in the VIS Central System. Given that the VIS is based on a centralised architecture, which consists of a number of components including, among others, the central information system (the 'VIS Central System'), it is recommended to refer explicitly to "VIS data" instead of "VIS".

2.2. Europol dedicated Uniform Interface

11. Article 2(2) of the draft Implementing Decision indicates that "In accordance with Article 22m(1) of Regulation (EC) No 767/2008, Europol shall connect its central access point to a dedicated Uniform Interface."

However, Article 22m(1) of the above-mentioned Regulation does not foresee the connection of the Europol's central access point to a dedicated Uniform Interface. The

⁷ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, 21.11.2018, L295, p. 39.

⁸ In case of other implementing or delegated acts with an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, the EDPS would like to remind that he needs to be consulted on those acts as well. The same applies in case of future amendments that would introduce new or modify existing provisions that directly or indirectly concern the processing of personal data.

establishment of a dedicated Uniform Interface is not envisaged in the architecture of the VIS either. In fact, Article 2a of Regulation (EC) No 767/2008 provides an exhaustive list of the components that shall compose the central architecture of the VIS and such list only refers to national uniform interfaces. Therefore, the EDPS recommends clarifying the reference to a “dedicated Uniform Interface” in order to provide clarity on the applicable legal framework.

2.3. Interoperability and European Search Portal

12. Article 1(1) and Article 2(1) of the draft Implementing Decision establish that the central access points of each Member State and Europol (respectively) shall have access to the VIS. At the same time, Recital 18 of Regulation (EC) No 767/2008 explains that it is appropriate to use the interoperability components for the purpose of carrying out automated queries and when accessing the VIS for law enforcement purposes. In particular, the same Recital explains that “The European search portal (ESP) established by Regulation (EU) 2019/817 should be used to enable fast, seamless, efficient, systematic and controlled access by Member States’ authorities to the EU information systems, the Europol data and the Interpol databases needed to perform their tasks, in accordance with their access rights, and to support the objectives of the VIS.”

It is thus the EDPS’ understanding that the possibility for central access points to search directly the VIS Central System is a temporary solution. As a consequence, the Commission is invited to make an explicit reference to the fact that the possibility for central access points to directly search the VIS Central System is temporary in nature and that it will be used as a solution only until the European Search Portal is operational for use by central access points.

2.4. Technical solution for the collection of data for generating statistics on the access to VIS data for law enforcement purposes

13. According to Article 50(4) of Regulation (EC) No 767/2008, the Commission shall adopt, by means of this Implementing Decision, the specifications of a technical solution that should support Member States and Europol to collect data for generating statistics on the access to VIS data for law enforcement purposes. The use of the provided technical solution for statistics is optional and needs to be deployed by each Member State and Europol. The EDPS wishes to recall that the processing of personal data for statistical purposes should always respect the principles of data protection and be subject to appropriate safeguards for the rights and freedoms of data subjects, in accordance with the applicable data protection legal framework,

notably the Law Enforcement Directive (LED)⁹ for the Member States and EUDPR for Europol. In this respect, the EDPS is of the opinion that the draft Implementing Decision does not set out sufficiently the specifications for such technical solution. For instance, even though Member States and Europol are responsible for the deployment, and operational management of the technical solution, the functionality should be developed in a way that it would only allow authorised users to retrieve the relevant data in VIS for the generation of statistics.

14. In addition and linked to the previous point, the EDPS notes that, according to Article 3(1) of the draft Implementing Decision a technical solution shall be developed “[...] on the basis of the technical solution referred to in Article 72(8) of Regulation (EU) 2017/2226 and Article 92(8), second subparagraph, of Regulation (EU) 2018/1240 and **adapted as necessary**” (emphasis added). This Article should be read together with Recital 6 of the draft Implementing Decision, which states that the technical solution should be capable, where required, “[...] to integrate additional functionalities, to manage bigger number of operations and to store more data.” The EDPS would like to recall that the technical solution has to comply with the principles of data protection by design and by default, for example by making use of already anonymised data and not allowing for additional reporting that is not compatible with the statistical purpose. The functionalities for the generation of statistics should be developed in such a way as to ensure a proper anonymisation of the results, while applying effective data minimisation to prevent the risk of inference of information from the data subjects. In this regard, it should be recalled that proper anonymisation of a dataset requires much more than simply removing obvious identifiers such as names. Best practices should be followed and anonymisation techniques should be regularly evaluated to ensure the proper anonymisation and to exclude any possibility of re-identification.
15. Finally, the fact that the Member States and Europol might decide to develop their own technical solution implies that different technical solutions may be developed for the purpose of generating the required statistics. These solutions need to comply with the EU data protection legal framework and a risk assessment of the technical solution should be carried out prior to the implementation. Additionally, the principles of data protection by design and by default should be embedded in the development of the tool.
16. Against this background, the EDPS recommends the Commission to define further the specifications of the technical solution. Such information should include, for

⁹ 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.

instance, access and security requirements and the fact that, independently from the technical solution chosen, the latter should follow the principles of data protection by design and by default.

17. The EDPS also notes that the draft Implementing Decision defines - to a certain extent- the roles and responsibilities related to the technical solution, namely: eu-LISA shall make available the technical solution to the central access point(s) referred to in Article 22l of Regulation (EC) No 767/2008 (Article 3) while each Member State and Europol shall be responsible for its deployment and technical and operational management (Article 4). The EDPS considers that to ensure an effective allocation of responsibilities, the roles of the various actors involved should be specified further.¹⁰ In particular, the EDPS recommends identifying directly in the operative part of the draft Implementing Decision the respective roles and responsibilities of the controllers as laid down in Article 3(8) of the EUDPR and LED and processors as laid down in Article 3(12) of the EUDPR and Article 3(9) of the LED.
18. Furthermore, while Article 50(4) of Regulation (EC) No 767/2008 mentions only the effectiveness of access as an area of interest, the EDPS is convinced that statistical data could be also very useful for the data protection authorities when exercising their supervisory powers with regard to VIS.

2.6. Logs

19. The EDPS invites the Commission to make an explicit reference to Article 22s Regulation (EC) No 767/2008 concerning the keeping of logs by the Member States and Europol, to ensure that logging requirements are implemented by the Member States' systems to be connected via the National Uniform Interfaces as well as Europol for the purposes of Articles 22o and 22r of Regulation (EC) No 767/2008.

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(e-signed)

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¹⁰https://edps.europa.eu/sites/default/files/publication/19-11-07_edps_guidelines_on_controller_processor_and_jc_reg_2018_1725_en.pdf