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From:	Ms Caroline Gloor Scheidegger, Chair of the VIS Supervision Coordination Group
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To:	President of the Council of the European Union
Subject:	VIS SCG comments on the proposal for updating the VIS Regulation and other Union legal acts

Delegations will find attached the VIS Supervision Coordination Group comments on the proposal for updating the VIS Regulation and other Union legal acts.

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VIS SCG

VISA INFORMATION SYSTEM SUPERVISION COORDINATION GROUP

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Brussels, 19 December 2018
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Subject: VIS SCG comments on the proposal for updating the VIS Regulation and other Union legal acts

Dear Mr President,

The Visa Information System Supervision Coordination Group (VIS SCG), set up under Article 43 of Regulation 767/2008 ("VIS Regulation")[1], is the forum in which the national data protection authorities (DPAs) of the countries using the VIS and the EDPS cooperate. In the VIS SCG, we exchange relevant information, assist each other in carrying out audits and inspections, examine difficulties of interpretation or application of the VIS Regulation, study problems with the exercise of independent supervision or with the exercise of the rights of data subjects, draw up harmonised proposals for joint solutions to any problems and promote awareness of data protection rights.

In this role, the VIS SCG would have some comments on the changes to the VIS proposed by the European Commission with the proposal COM/2018/302 final, currently under discussion by the co-legislators (2018/0152/COD).

The VIS SCG will not embark on a full analysis of the proposal and all the changes it introduces, but focuses on four main aspects: (1) fingerprinting children, (2) law-enforcement access, (3) the extension of the scope to also cover long-stay visas and residence permits, and (4) the supervision architecture.

1 Fingerprinting children

The Proposal amends Article 13(7)(a) of the Visa Code to lower the minimum age for fingerprinting children in the visa application procedure to 6 years instead of 12.

1 OJ L218, 13.8.2008, p. 60–81.

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The VIS SCG recalls that children are a particularly vulnerable group and that collecting special categories of data, such as fingerprints, from them requires a solid justification demonstrating necessity and proportionality.

The Explanatory Memorandum and the Impact assessment justify this change with improved verification of children's identity in the visa application procedure, enabling checks at external borders, and strengthening the prevention and fight against children right's abuse, such as trafficking. Articles 7(3) and 37 of the proposal make specific reference to the well-being of children and their specific needs, e.g. by informing them in an age-appropriate manner. However, this link to the best interests of the child should be strengthened.

The VIS SCG takes the view that the European Commission did not sufficiently substantiate the necessity and proportionality of its proposal to allow for fingerprinting children, in the visa application procedure, from 6 years instead of 12. Neither the Explanatory Memorandum and the Impact assessment, nor the response provided as part of the public consultation carried out in 2017, did provide sufficient objective elements able to demonstrate that such measure would indeed benefit to the objective pursued and serve the best interest of the child.

Article 24 of the Charter emphasises that the best interests of the child must be a primary consideration in all actions public authorities and private actors take concerning children. This also applies to fingerprinting. Should the co-legislators decide to lower the minimum age for fingerprinting children in the visa application procedure to 6 years instead of 12, the VIS SCG recommends introducing a stronger purpose limitation for the possible use of children's fingerprints. They should only be used where it is in the child's best interest for verifying their identity, either at the border or in other situations where this would contribute to the prevention and fight against children's right abuse, such as trafficking. This is especially relevant for access by law enforcement authorities, which should be limited to cases where his is necessary for the prevention, detection or investigation of a child trafficking case. Before searching in the VIS, law enforcement authorities should search in the other relevant national and in European databases, show that they have reasonable grounds to consider that consulting the VIS will substantially contribute to the prevention, detection or investigation of the child trafficking case in question and that the identification is in the best interest of the child.

Furthermore, the VIS SCG recalls that, in accordance with EU data protection law, any information addressed specifically to a child should be adapted to be easily accessible, using clear and plain language.

2 Access for law-enforcement authorities

European data protection authorities have repeatedly questioned the trend of providing routine access for law-enforcement authorities to systems that were initially established for other purposes. In the case at hand, this is all the more important given the proposed inclusion of long-stay visas and residence permits in the VIS, which will substantially increase the amount of information stored in the system (and thus at the disposal of law-enforcement authorities).

As an interference with fundamental rights, law-enforcement access has to be necessary and proportionate (see Article 52(1) of the EU Charter of Fundamental Rights). This is especially the case where the information is re-used for a different purpose than for the one it has

initially been collected for.[2] While law-enforcement access may certainly be useful, it is not automatically necessary and/or proportionate. The VIS SCG considers that the necessity and proportionality of law-enforcement access to data related to long stay visas and residence permits has not been sufficiently demonstrated and substantiated to comply with EU primary and secondary data protection law.

Finally, when law-enforcement authorities access the VIS, it is in the first place their own task (in line with the principle of accountability) to ensure that they fulfil the access conditions. The wording of the proposed new Article 22q(3) of the VIS Regulation gives the – wrong – impression that responsibility for this check is with the national DPAs. While DPAs form a further line of defence against unlawful use, first-line responsibility lies with the designated competent authorities. To avoid any risks of misunderstandings, the VIS SCG suggests **deleting the wording 'checking the admissibility of the request' in the proposed new Article 22q(3).**

3 Extension of scope to also cover long-stay visas and residence permits

The proposal also widens the scope of the VIS in order to also include long-stay visas and residence permits (new chapter IIIa). The purposes of the processing of the personal data of these third country nationals (TCN) are of 6 types:

- assess the threat to security posed by the TCN;
- enhance effectiveness of the (border) checks of the TCN;
- contribute to law enforcement;
- ensure the correct identification of the TCN;
- facilitate the application of asylum EU legislation;
- support the objectives of the SIS II.

The Commission justified this proposal with the lack of full harmonisation between such documents issued by the Member States and the lack of access to and exchange of information between Member States.[3]

This would change the VIS from being a tool for dealing with applications for short-stay visas, to covering almost all third-country nationals who come to the EU for a longer stay or who permanently reside there, including third-country nationals born in the Union and having their centre of life here. The SCG notes that the foreseen processing has no *own* specific purpose, unlike the existing processing of the personal data of short visa applicants. The main purpose of processing of the personal data of applicants for short stay visas in the VIS is to help Member States in the granting of a Schengen visa to a TCN who must meet certain conditions. For the holders of long-stay visas and residence permits, the main purpose – as referred to above – is to check the TCN against law enforcement databases such as Europol, SIS II etc. within the future and disputed interconnection / interoperability framework to assess their threat, regardless of the residence status granted to them by the Member States. **The SCG can only point out that this purpose could also be achieved by checking the correct database during a (border) control.**

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2 This echoes the concerns raised by the SISII, VIS, and Eurodac SCGs in their joint letter on the interoperability proposals, available here: https://edps.europa.eu/sites/edp/files/publication/18-06-22_letter_on_interoperability_scgs_ep_en.pdf

3 Impact assessment for the proposal, SWD(218) 195 final p. 16 to 21.

The other purpose pursued by the extension is to identify properly the TCN. However, the identity of the holder of an EU residence permit can already be ascertained by the existing means, since the residence permit holds the biometric data of the TCN, i.e. facial image and fingerprints, in accordance with EU law[4]. The SCG is surprised that this aspect is not even mentioned.

Additionally, unlike applicants for short-term visas, whose stay in and connection to the Union may be short-lived, long-term residents may stay in the Union more or less permanently. Unless they obtain citizenship of a Member State, their data may practically be kept for an open-ended duration. This would also result in open-ended retention of their data in the VIS. As a general rule, **retention should be limited in time**, both under ECtHR case law[5] and the main principles of the GDPR[6].

If the main problem is assessing the authenticity of long-stay visas and residence permit and ascertaining the link between the bearer and the document, then improving information exchange between Member States and improving the one-to-one verification between document and bearer would appear to be less intrusive approaches.

The SCG must therefore conclude that the data minimisation principle laid down in the GDPR and where applicable in the LED is not met by the processing of the data of - at least - EU residence permit holders and advises to remove their data from the scope of the VIS.

For this aspect, please see also the Opinion of the European Union Fundamental Rights Agency on the proposal.[7]

4 Architecture of data protection supervision

Regulation 767/2008 currently divides the responsibility for data protection supervision between the national DPAs and the EDPS. National DPAs monitor the lawfulness of the processing of personal data by the Member States (Article 41 of the VIS Regulation), while the EDPS checks that the processing of personal data by eu-LISA is in compliance with the Regulation (Article 42 of the VIS Regulation). They all cooperate with each other in the VIS SCG (Article 43 of the VIS Regulation), each acting within the scope of their respective competences.

Article 43(1) of the Commission proposal provides for the application of the new model established in Article 62 of the new data protection regulation for EU institutions, recently adopted as Regulation (EU) 2018/1725.[8]

The VIS SCG considers that the model of Article 62 of the new data protection regulation for EU institutions indeed corresponds better to the division of responsibilities between the different authorities involved and welcomes the reference to Article 62 of the new data protection regulation for EU institutions, which should be streamlined through all revised or newly established legal basis for EU information systems.

These are a number of elements of the proposal that gave rise to comments from the VIS SCG. For further comments on the proposal, please also refer to EDPS opinion 9/2018, which provides an analysis of additional aspects of the proposal as well.

4 Article 4b of the Council Regulation (EC) n° 1030/2002 of 13 June 2002 *laying down a uniform format for residence permits for third country-nationals*, OJ L 157, 15.6.2002, p. 1.

5 See also ECtHR, S. and Marper v. the United Kingdom, Nos. 30562/04 and 30566/04, judgment of 4 December 2008.

6 Article 5(1)(e), as further explained by recital 39 of Regulation (EU) 2016/679, OJ L 119, 4.5.2016, p.1.

7 FRA Opinion – 2/2018 [VIS]

8 Regulation (EU) 2018/1725, OJ L 295, 21.11.2018, p. 39–98.

Yours sincerely,

C. Gloor Scheidegger

Caroline Gloor Scheidegger

Chair of the VIS Supervision Coordination Group

Cc: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General
Mr Nikolaus MARSCHIK, Permanent Representative of Austria
Mr Ralph KAESSNER, Secretariat General of the Council

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