ARTICLE 29 Data Protection Working Party

WP134

Opinion N° 3/2007 on the Proposal for a Regulation of the European Parliament and of the Council amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics, including provisions on the organisation of the reception and processing of visa applications (COM(2006)269 final)

Adopted on 1 March 2007

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THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA,

Set up under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995,[1]

Having regard to Articles 29, 30(1)(c) and 30(3) of the above Directive,

Having regard to its rules of procedure, and in particular Articles 12 and 14 thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Background

The current proposal for an amendment to the CCI is designed to create the legal basis for the mandatory collection of biometric identifiers from visa applicants and to establish provisions on the organisation of Members States' consular offices – in the light of the common visa policy and the enhanced integration between consular offices.

The adoption of a Regulation amending the Common Consular Instructions on visas in relation to the introduction of biometrics is a "precondition" for the implementation of the Visa Information System (VIS)[2] since it provides "a legal framework for the collection of the required biometric identifiers".

The Visa Information System will be set up and regulated upon entry into force of the Regulation of the European Parliament and the Council concerning the VIS and the exchange of data between Member States on short-stay visas, which is under discussion.

The establishment of a centralised database containing data on visa applicants, including fingerprints and digitised facial images, together with data on group travellers and people providing hospitality in the applicants' countries of destination, is said to be one of the keys to implementing a common visa policy and to achieving the objectives set out in Article 61 of the Treaty on the European Community (TEC), namely the free movement of persons in an area of liberty, security and justice.

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1 Official Journal L 281 of 23/11/1995, p. 31, available at: http://europa.eu.int/comm/internal_market/en/media/dataprot/index.htm.

2 Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (COM(2004)835 final) presented by the Commission on 28 December 2004

The Working Party has already issued two opinions, in 2004 and 2005,[3] in which it raised several concerns and put forward a number of suggestions; these have been taken into consideration in the following analysis.

An opinion on the draft Regulation has also been issued by the European Data Protection Supervisor.[4]

The Working Party has been requested to give its Opinion on the current draft Regulation, in accordance with Recital 9.

2. Introduction

The Common Consular Instructions (CCI) establish the minimum practices to be met by the consular representations of Member States when issuing uniform visas. They constitute the basic instrument governing the procedures and conditions of delivery of short-stay, transit and airport transit visas.

The CCI were developed in the context of Schengen intergovernmental cooperation.

The Schengen provisions relating to visa policy have been given a legal basis and thus form an integral part of Community legislation. Council Decision 1999/436/EC establishes Article 62(2)(b) of the EC Treaty as the legal basis for the main provisions of the CCI. However, that Decision did not directly integrate the CCI into the EC Treaty, and nor did it provide a legal basis for the CCI as a whole.

A general recast of the existing text of the CCI is being conducted, where the provisions of the current proposal will be integrated, together with the reorganisation of the visa rules. The new proposal will also take the form of a regulation and will be aim to clarify and make transparent a set of provisions that have been developed over a considerable time span and contain, for the most part, operational instructions applying to consular offices.

The new text is expected to make a clearer distinction between legal principles and administrative provisions, and thus give rise to a veritable Community Code on Visas, which should be modelled on the recently adopted Community Code on Borders. The ultimate objective is to adjust the provisions of the Schengen Convention concerning the creation of a borderless area to the Community's legal framework.

The Commission intends this general recast also to apply to the reconfiguration of the forms to be completed for visa applications; these should be simplified and the categories and data to be provided at the time of lodging such applications reduced.

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[3] Doc. WP 96 http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2004/wp96_en.pdf
Doc WP 110 http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2005/wp110_en.pdf
Letter of 27 July 2006 to the Chairman of the Strategic Committee on Immigration, Frontiers and Asylum.
http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/others/2006_24_07_vis_en.pdf

[4] Opinion of 27 October 2006.
http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2006/06-10-27_CCI_EN.pdf

3. Preliminary Assessment and General Precondition

The reference regulatory framework applying to the establishment of the VIS has not yet been fully established.

This gives the Working Party the opportunity to have its voice heard once more and to contribute its experience in the protection of fundamental human rights (in particular, the right to protection of personal data as enshrined in Article 8 of the Charter of Fundamental Rights of the EU) to the law-making process that is currently pending before the competent Community institutions.

The common visa policy falls entirely within the scope of Community law. The reference harmonised framework, as regards the issues impacting on human rights and personal data protection, is therefore provided by Directive 95/46/EC, which contains the principles to be observed in order for the processing of data to be lawful.

The Working Party recalls that Article 6 of Directive 95/46/EC lays down the principle that personal data may be legitimately processed only if they are adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.

In its previous Opinions on VIS[5]the Working Party had raised the question of the need for and proportionality of such a large EU database and had warned of the risks involved, in particular with regard to the collection and insertion into the system of several million items of biometric data.

Assessment of the principle of proportionality in these issues of visas and free movement of persons inevitably, therefore, raises the question of the fundamental legitimacy of collecting biometric identifiers; it does not only concern the processing procedures and the technicalities of collecting these data.

Ethical and reliability problems emerge from the insertion and storage of the data in the central VIS database, both in terms of access and in terms of false-positive and/or false-negative findings.

The WP takes the view that careful consideration needs to be given to the categories of data to be included in the centralised database (C-VIS), and that the possibility of adding wording directly to the VIS Regulation should be looked at to ensure the required flexibility.

Account should also be taken of the human dignity and fundamental rights implications arising out of the inclusion of biometric data and the possibility of using fingerprints – irrespective of the file created following the visa application – when it comes to performing searches in the system as a whole. Such biometric data might well be used in future as a search key for SIS and Eurodac, as proposed with regard to system interoperability.

Furthermore, the impact of the various proposals being discussed and/or drafted should be considered. These proposals are expected to allow the authorities responsible for national security to access the VIS – in addition to Eurodac. This is likely to increase the risk of misuse and facilitate the use of the C-VIS for purposes other than those for which the data were collected and made available within the system.[6]

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[5] WP 110 http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2005/wp110_en.pdf

[6] The Working Party reminds its comments and concers on this issue, expressed in its former opinions of 2004 and 2005 WP 110 http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2005/wp110_en.pdf Letter of 27 July 2006 to

Therefore, any decisions on the categories of data to be collected via standard visa application forms should be made together with decisions concerning the data to be included in the C-VIS. Account should also be taken of the proportionality and data minimisation principles in order to prevent system misuse.

It is essential that the decision-making process in this area, which impacts considerably on individuals' rights, should not be too restricted. Democratic oversight needs to be ensured in respect of the relevant procedures, and the data protection authorities must be enabled to effectively discharge the tasks assigned to them in this sector.

4. Processing of Biometric Data

The current proposal provides that "Member States shall collect biometric identifiers comprising the facial image and ten fingerprints from the applicant… ", thus creating, as explained by the European Commission, the legal basis needed for the Member States to process the obligatory biometric identifiers of visa applicants.

Given the potentially harmful consequences for the persons concerned, the use of biometric data for identification purposes should be limited and these data included in the VIS, as per the objectives of the VIS, only where absolutely necessary and subject to the relevant principles and guarantees. This is all the more important in the case of groups especially at risk, such as children and the elderly.

a) The choice of legal instruments

For the sake of clarity and transparency, the general principles and conditions applying to the obligation to collect fingerprint data should be set out in the VIS Regulation, while the draft Regulation in question should focus more on establishing the arrangements for applying those principles and specifying the practicalities for processing biometric data.

As already stated, the draft Regulation contains a number of amendments to the consolidated text of the CCI designed to legitimise the procedure of acquiring biometric data (fingerprints and facial image) from visa applicants. This procedure is to be carried out at consulates and diplomatic offices outside of the countries participating in the system. Once approved, the draft will have to be seen in the context of existing provisions adopted in respect of the CCI, which are addressed mainly to "practitioners" and are regarded as a rule of conduct applying to the actions to be taken.

The legal instrument is unquestionably a Regulation, as in the case of the VIS, and as such it is subject to the co-decision procedure involving the European Parliament. However, the Working Party has certain reservations as to the possibility of considering it on a par with a set of merely administrative instructions.

For the sake of clarity and transparency, in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court on Human Rights on Article 8 of the Convention, the Working Party believes that any interference with the right of privacy must be adequately grounded and provided for in a clear and generally comprehensible way – given that the draft Regulation in question introduces binding rules that place restrictions on certain rights.

Hence, all the provisions concerning quality of data, proportionality of measures and safeguards for individuals should be laid down directly in the VIS Regulation. This applies in particular to the

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the Chairman of the Strategic Committee on Immigration, Frontiers and Asylum.
http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/others/2006_24_07_vis_en.pdf

provisions on the categories of personal data to be included in the C-VIS, the categories of individual that are subject to and exempted from fingerprinting obligations and the maximum and minimum ages of visa applicants; specific fallback procedures; misused identity and inaccurate identification due to technological failure; data retention; and the safeguards afforded to individuals that are unable to comply with fingerprinting requests.

Moreover the taking of fingerprints must be done in a transparent way and the person concerned must receive all the necessary information in order to allow his/her to exercise the right of access.

b) Obligation to provide fingerprints: the enrolment phase

The Working Party would like to draw attention to the need to create a strong and safe environment for the reception of applications and the enrolment of biometric identifiers.

This is especially important if, as envisaged in the proposal, the procedure in question is carried out in co-location or else by means of cooperation with external service providers (outsourcing). At all events, the quality of identification in respect of any individual that appears in a consular office must be ensured prior to collecting that individual's fingerprints and matching them with the individual's identification data.

In this connection, it should be pointed out that Article 1(1) only refers in general to "respecting the relevant data protection and security rules" – whereas it is essential that the circumstances under which fingerprints are collected guarantee perfect reliability.

Account should be taken of the possible consequences where identification data and fingerprints are matched erroneously when collecting fingerprint data – which might be deliberate if an individual whose digital fingerprints have been collected does not otherwise reveal his or her real identity. In those cases the hijacked identity would then be permanently associated with the digital fingerprints in question.

Thus, it is fundamental that only adequately trained and completely reliable staff should be in charge of carrying out the operations referred to above, which must be performed in any case under the supervision and responsibility of the diplomatic staff of the Member State receiving the visa application.

c) Exemption from the obligation

c1) Age of visa applicants

The age under which children will be exempted from the obligation to provide fingerprints is set at 6, with no maximum age set for elderly people. These important provisions are set out in the CCI regulation and dealt with as a purely technical issue whereas they should form the basis of a broader policy debate. The inclusion of a reference to the Convention on the Rights of the Child must be regarded as a precondition for assessing respect for children's dignity in connection with the said obligation – i.e. it should not be regarded as a merely administrative reference standard in the enrolment procedure.

The WP takes the view that – for the sake of the person's dignity and to ensure reliability of the procedure – the collection and processing of fingerprints should be restricted for children and for elderly people and that the age limit should be consistent with the age limits in place for other large EU biometric databases (Eurodac, in particular).

It must be taken into account that there is no scientific literature giving conclusive evidence that the fingerprinting technology is sufficiently reliable when it concerns either children or the elderly.

The error range that can be guaranteed by manufacturers with regard to the fingerprints stored in the system (for 5 years) and the controls (hit/no hit) to be carried out in the five years (or 48 months) during which those fingerprints are kept should also be established. This applies, in particular, to children under a given age and to other individuals with specific diseases and/or progressively deteriorating conditions – as the likelihood of a mismatch increases with time in such cases. The procedures to ensure respect for human dignity and fundamental freedoms should be also specified in these cases.

Given the lack of studies on this point and of explicit certification by manufacturers concerning the stability and quality levels that can ensure reliable matches with C-VIS fingerprints related to children under and/or elderly people over a given age, the WP considers that laying down new, different age limits for exemption from fingerprinting is not justified, that it impinges on the data subject's dignity, and that it is unnecessary in view of the low risk associated with the above categories and the purposes for which the VIS was set up.

Since the draft provides for fingerprints to be taken for the ten fingers of the applicant's hands, which unquestionably ensures high quality in terms of identification, it is worth recalling that – under the criterion in place with regard to entering fingerprint data in Eurodac - Eurodac only stores fingerprints of persons at least 14 years old and no older than 80.

The fragility of fingerprints makes it preferable to collect them exclusively for the purposes of verifying a person's identity, without prejudice to the possibility of collecting such data (in accordance with the mechanisms and safeguards set out under domestic law) wherever this is necessary, for instance, to prevent identity theft. In particular, the unreliable fingerprint data of children under the age of 14 cannot be used for identification purposes, and therefore access to data provided for identification purposes under Article 17 of the VIS proposal for a Regulation cannot be authorised; this must be explicitly stated.

c2) Impossibility of enrolment

Another major issue is to determine which categories of persons will be exempted from the obligation to provide fingerprints and the respective legal provisions.

As already mentioned both by the European Parliament in its 2005 report and by the EDPS in its opinion, where fingerprinting is physically impossible on an applicant, various studies have shown that up to 5% of the population are estimated not to be able to enrol (because they have no readable fingerprints or because are otherwise disabled in a way making it impossible for them to enrol. Since about 20 million visa applicants are expected each year, this means that up to 1 million people will not be able to pursue the normal enrolment process.

The WP considers that due attention should be paid to such a large population.

It is also of the opinion that these individuals should not be the victims of a defaulting technical system and be stigmatised because of their unreadable fingerprints - thereby running the risk of having their visa applications refused.

As appropriate fallback procedures, collecting such individuals' surnames, surnames at birth (previously used surname(s)) and first names together with information on their sex and dates,

places and countries of birth should be sufficient to meet these requirements. Therefore, ad hoc provisions should be added, preferably to the VIS Regulation, as already pointed out.

The WP would suggest that specific statistics on VIS denials because of the impossibility of enrolment should be provided for and the number of denials for this reason compared with the general level of refusals of visas for other reasons. This might be done by way of the two-yearly report to be submitted by the Commission.

5. Other Specific Safeguards

The CCI proposal must meet the requirements of the EU Data Protection Directive (95/46/EC), including transparency, control and evaluation.

Specific provisions are included in the CCI proposal and in the VIS Regulation.

Recital 14 of the CCI proposal provides that "the Commission should present a report on the implementation of this Regulation two years after its entry into force, covering the implementation of the enrolment of biometric identifiers, the principle of the "first application" and the organisation of the reception and the processing of visa applications."

The above provision would appear to provide for a merely technical evaluation, whereas the current draft VIS Regulation provides (under Article 34) that national DPAs "shall …. assist each other in carrying out audits and inspections, examine difficulties of interpretation or application of this Regulation ... draw up harmonised proposals for joint solutions to any problems and promote awareness of data protection rights, as may be needed" within the framework of the supervisory powers conferred upon them, together with the EDPS (Article 35a).

Therefore, the WP would emphasise the need for consistency and, in any case, suggests that the following wording should be added to the CCI proposal:

- Recital 14a: The control, supervision and evaluation of the collection of biometric identifiers should be carried out in compliance with Articles 34 and 35a of the VIS Regulation relating to the supervision activities of national and European data protection supervisory authorities;

- Article 1(2) -1.2.a): at the end of this paragraph, reference should be made to the role played by national supervisory authorities as per Article 28 of the EC Directive and Article 34 of the VIS Regulation, and in pursuance of the coordinated supervision assigned jointly to national supervisory authorities and the EDPS, with regard to monitoring the lawfulness of the processing of personal data in relation to the collection and use of biometric identifiers in the form of audits, inspections and the assessment of any problems in the exercise of the data subjects' rights and data protection rights.

The Working Party reiterates that the regulatory framework applying to the reception and processing of visa applications should be laid down clearly, in particular where the processing of biometric data is involved. The principles of Directive 95/46/EC should also be observed in full as regards data processing liability – in particular where inter-State cooperation is sought and/or private entities established in third countries are employed for the performance of such sensitive activities.

Article 23(2) of the draft Regulation provides that the "data shall be processed by the VIS on behalf of the Member States" and Article 23(3) that the Member States "shall designate the authority which is to be considered as controller in accordance with Article 2(d) of Directive 95/46/EC". The

current proposal states that "Each Member State shall be responsible for organising the reception and processing of visa applications".

The current proposal aims to that end to provide a legal framework – for activities that are partly already performed in practice - for the organisation of Member States' consular offices for the purposes of implementation of the Visa Information System.

Three possibilities are envisaged: co-location, CAC, and cooperation with external service providers. The WP would like to provide guidance, in particular, concerning the last two options.

a) Cooperation with external service providers

The Working Party fully shares the position of the EDPS, who strongly advised against the possibility of outsourcing to external service providers and set out the limited acceptable options.

This possibility should be considered as the option of last resort, depending on the organisation of diplomatic missions, but it is likely to present too many risks if it is not placed under the protection of diplomatic status and the full responsibility of the requesting Member State.

There is a need for clarification as to which entity acts as the controller and what legal constraints can be put on the outsourcer(s) – insofar as the latter is in charge of the processing and established in a third country. Specific safeguards must be in place with regard to identification of the applicants and fingerprinting, which may only be performed in the presence of duly qualified staff from the relevant visa authorities.

To that end, there should be a legal prohibition to ensure that any data collected is not copied, downloaded stored or otherwise kept by the service provider. Also, arrangements should be laid down to return data collected in paper format to the respective authorities.

The proposal to amend the CCI should furthermore provide for the rights of visa applicants as against outsourced service providers, and include provisions on information to be provided to applicants by service providers and consular authorities.

A record of the applications submitted by each outsourced service provider should be kept, to provide objective information on the reliability of service providers

b) Common application centres

Again, clear-cut procedures should be laid down to identify the controller; ensure that the data, once collected, do not stay with the centre and are immediately returned to the competent national authorities; strengthen the procedure for enrolment and identification of visa applicants – so as to ensure that the appropriate identification data are matched with the fingerprints; provide effective safeguards where measures are to be adopted; and allow any applicant whose identity has been misused to readily obtain rectification and amendment of both his/her data and the match between his/her alphanumeric data and the biometric information.

Appropriate data security measures should also be established to prevent unauthorised access, duplication and other unlawful data processing operations.

6. Conclusions

The WP would draw attention to the following recommendations:

1. As a general principle, the categories of data that must be included in the central database (C-VIS) should be evaluated carefully. When the Community Code on visas enters into force, it will be necessary to determine which data need to be included in the C-VIS, since many of them will no longer be strictly necessary. The VIS Regulation must therefore be reviewed and the processing of personal data limited to those data that are strictly necessary for the purpose for which VIS was established. This applies especially to the principles and conditions regulating the collection of fingerprint data, given the sensitivity of this information. The Working Party considers that the relevant provisions in the VIS Regulation (Art. 6) should be amended to prescribe limits on the personal data that are collected and entered into the C- VIS. In this regard providing that "*No more than the following data would be included in the C-VIS….* " would avoid further change to VIS once the new Community Code on visas would be applicable

2. The draft Regulation should establish the arrangements to be complied with for the proper application of those principles and specify the practicalities for the processing of biometric data.

3. With regard to the inclusion of biometric data and the possible use of fingerprints in connection with visa applications, account should be taken of human dignity and fundamental rights implications.

4. Any decisions on the categories of data to be collected via standard visa application forms should be made together with decisions concerning the data to be included in the C-VIS.

5. The use of biometric data for identification purposes should be limited selectively by way of data minimisation and proportionality in order to prevent system misuse.

6. A strong and safe environment should be created for the reception of applications and the enrolment of biometric identifiers.

7. As regards children and the elderly, the collection and processing of fingerprints should be restricted and the age limits made consistent with the age limits in place for other large EU biometric databases (such as Eurodac).

8. Specific statistics on VIS denials due to the impossibility of enrolment should be provided for and monitored regularly by the Commission.

9. Appropriate supervision and control should be ensured in accordance with the provisions laid down in the VIS Regulation, in particular by means of amendments to Recital 14a and Article 1(2) of the draft Regulation.

10. Outsourcing the processing of visa applications to private entities should in principle be avoided, except for call centre functions. Specific safeguards must be in place to ensure where enrolment functions are outsourced that liability remains with the competent visa authorities in the Member States and that processing is performed under strict supervision.

The Working Party is confident that due account will be taken of the considerations set out its Opinion and that these will be incorporated into the legislative process so as to ensure that the safeguards mentioned are put in place prior to the adoption of the relevant acts.

An appropriate information campaign should be waged in order to raise public awareness of the issues in question. The Working Party is ready to contribute to this exercise in the manner considered most suitable.

Done at Brussels, on 1 March 2007

For the Working Party
The Chairman
Peter SCHAAR