

EDPS formal comments on a draft Commission Implementing Regulation on the monitoring and reporting of data relating to CO2 emissions from passenger cars and light commercial vehicles pursuant to Regulation (EU) 2019/631 of the European Parliament and of the Council and repealing Implementing Regulations (EU) No 1014/2010, (EU) No 293/2012, (EU) 2017/1152 and (EU) 2017/1153

1. Introduction and background

- The **draft Commission Implementing Regulation on the monitoring and reporting of data relating to CO2 emissions from passenger cars and light commercial vehicles** pursuant to Regulation (EU) 2019/631 of the European Parliament and of the Council and repealing Implementing Regulations (EU) No 1014/2010, (EU) No 293/2012, (EU) 2017/1152 and (EU) 2017/1153 (the ‘draft Implementing Regulation’) **aims to set out the procedures for the monitoring and reporting of data relating to new passenger cars and light commercial vehicles that are to be followed by the competent authorities of the Member States, the manufacturers, as well as the Commission and the European Environment Agency (‘EEA’)**.
- According to Article 7 of Regulation (EU) 2019/631¹, the monitoring and reporting cycle consists of three main steps: 1) the annual reporting by Member States’ authorities to the Commission of the provisional data based on registrations of new vehicles in the preceding calendar year; 2) the transmission of that provisional data by the Commission, with the support of the EEA, to the manufacturers concerned; 3) the verification of that data by the manufacturers and, where necessary, the notification to the Commission of corrections to that data.
- Article 12 of Regulation (EU) 2019/631 requires the Commission to collect, starting from 2021, **data on the real-world fuel or energy consumption of passenger cars and light commercial vehicles that are recorded by on-board fuel and/or energy consumption monitoring devices** as provided for in Article 4a of Commission Regulation (EU) 2017/1151². Such data should be collected as soon as available, to identify how the difference between the real-world emissions and fuel or energy consumption and the corresponding type-approval values evolves over time, in order to monitor the effectiveness of the CO2 emission standards in reducing vehicle CO2 emissions, and for informing the public. Moreover, **real-world fuel and energy consumption data should be collected together with the vehicle’s identification number (‘VIN’)**, which according to the draft Implementing Regulation is considered personal data within the meaning of the General Data Protection

¹ OJ L 111, 25.4.2019, p. 13.

² Commission Regulation (EU) 2017/1154 of 7 June 2017 amending Regulation (EU) 2017/1151 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Regulation (EC) No 692/2008 and Directive 2007/46/EC of the European Parliament and of the Council as regards real-driving emissions from light passenger and commercial vehicles (Euro 6), OJ L 175/708, 7.7.2017.

Regulation ('GDPR')³. In addition to the VIN, the Article also lists among the data to be collected: the fuel and/or electric energy consumed; the total distance travelled; for externally chargeable hybrid electric vehicles, the fuel and electric energy consumed and the distance travelled distributed over the different driving modes; and other parameters (...). Annex II to the Regulation (EU) 2019/631, additionally, lists the data to be recorded by Member States, for each calendar year and for each new passenger car, while Annex III lists the data to be recorded by Member States, for each calendar year and for each new light commercial vehicles the first time they are registered in the territory.

- According to the preamble of the draft Implementing Regulation, in order to ensure the possibility to access real-world fuel and energy consumption data as early as possible, **manufacturers should be required to collect such data from new passenger cars and light commercial vehicles registered from 1 January 2021**. Such data may be collected **either through direct data transfers from vehicles to the manufacturers, or through their authorised dealers or repairers when vehicles are brought in for service or maintenance**. Moreover, the draft Implementing Regulation adds that, where such data is made available to a manufacturer, it should be reported to the Commission, starting with data relating to new vehicles registered in the Union for the first time in 2021.
- In line with the draft Implementing Regulation, **real-world fuel and energy consumption data should be collected by Member States as part of the roadworthiness tests** performed in accordance with Directive 2014/45/EU⁴. Such data collection should start from the first roadworthiness tests and not before 20 May 2023, the date from which the bodies and establishments performing those tests are to be equipped with the necessary devices, such as scan tools, pursuant to that Directive.
- As for the reporting, the draft Implementing Regulation provides that manufacturers and Member States should report real-world data collected during a calendar year to the Commission and the EEA, using the data transmission procedures provided by the EEA. The data to be published in accordance with Article 12(1) of Regulation (EU) 2019/631 should not allow the identification of individual vehicles or drivers, but should only be published as an anonymised aggregated dataset without any reference to the VINs.
- The present comments are issued pursuant to Article 42(1) Regulation (EU) 2018/1725⁵ ('EUDPR'), following a request for consultation from the European Commission of 24 November 2020.

³ 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.

⁴ Directive 2014/45/EU of the European Parliament and of the Council of 3 April 2014 on periodic roadworthiness tests for motor vehicles and their trailers and repealing Directive 2009/40/EC (OJ L 127, 29.4.2014, p. 51).

⁵ 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 L 295, 21.11.2018.

2. The EDPS Comments

2.1. General comments and legal basis of the processing of personal data

- The EDPS welcomes the provisions on the processing of personal data under the GDPR in Article 11 (and Recital 11) on the obligations relating to the protection of personal data.
- On a general note, we consider that, while the draft Implementing Regulation is meant to set out the procedures for the monitoring and reporting of data relating to new passenger cars and light commercial vehicles that are to be followed by the competent authorities of the Member States, the manufacturers, as well as the Commission and the EEA, **the procedures to be followed by the actors involved in the process do not seem to be entirely clear** in the draft Implementing Regulation. In particular, we note a lack of clarity as to the modalities for the direct transfer from vehicles to the manufacturers, or through authorised dealers or repairers when vehicles are brought in for service or maintenance.
- As to the **legal basis for the processing of personal data**, recital 11 of the draft Implementing Regulation clarifies that “(...) The processing of the VINs for the purposes of Regulation (EU) 2019/631 should be considered lawful pursuant to Article 6(1)(c) of Regulation (EU) 2016/679.” However, recital 13 states that “[T]he collection and reporting of real-world fuel and energy consumption data should be fully transparent, and the vehicle owners should therefore have the possibility to refuse to make that data available to the manufacturers or during the roadworthiness tests.” It is clear that data controllers have a legal obligation to collect the abovementioned data and subsequently transmit it to their respective Member States pursuant to Article 7 of Regulation 2019/631 and Article 9 of the draft Implementing Regulation. In this regard, **we underline that the right to object provided by Article 21 GDPR is not applicable in the context of a processing operation based on Article 6(c) GDPR. If data subjects were to be granted such a right to object, an explicit substantive provision should be included to that effect.**
- If such a substantive provision is not added in the draft Implementing Regulation, we suggest the deletion of recital 13 from the draft Implementing Regulation in order to avoid any misunderstanding on the applicable legal basis for the processing of personal data.

2.2. The VIN as personal data

- In line with the draft Implementing Regulation (Recital 11), real-world fuel and energy consumption data should be collected together with the **VIN that is considered as personal data within the meaning of data protection law**. The EDPS notes that Annex I to the **draft Implementing Regulation** provides for a detailed list of data to be collected under Articles 9 and 10 of the draft Implementing Regulation. We also understand that **the VINs will be processed by a variety of different entities, starting with manufacturers and vehicle dealers and repairers**. Moreover, according to Article 12(2) of Regulation (EU) 2019/631, **the Commission shall process data to create anonymised aggregated datasets, also including a similar process for the manufacturer**. The VIN, in fact, shall be used only for the purpose of that data processing and shall not be retained longer than needed for that purpose.

- In this regard, **the EDPS considers that the draft Implementing Regulation should clarify whether the VIN is to be considered as personal data throughout the entire process of the collection and processing of such data.**
- In particular, **we invite the Commission to clarify**, in the draft Implementing Regulation, **to what extent VINs will be considered as personal data vis-a-vis the Commission and the EEA.** Should VINs be considered personal data throughout the entire process (thus also when part of anonymised and aggregated datasets), the EDPS notes that both the Commission and the EEA need to be acknowledged as data controllers within the meaning of data protection law, thus triggering the applicability of the EUDPR.
- Finally, the EDPS notes that Article 5(c) of the draft Implementing Regulation would provide for manufacturers placing passenger cars or light commercial vehicles falling within the scope of Regulation (EU) 2019/631 on the market of the Union, to notify the information or any change of information on “(...) the name and address of the contact person to whom the notification of the provisional calculations and data is to be addressed”. In this regard, **we recommend clarifying the exact nature of the contact persons (e.g. a representative of the manufacturer), and highlight that the name and address of the contact persons are to be considered as personal data within the meaning of data protection legislation.**

2.3. The role of the EEA and the European Commission

- Pursuant to Article 3 of the draft Implementing Regulation, “Member States shall ensure the maintenance, collection, control, verification and timely transmission of the aggregated and detailed monitoring data to the Commission and the European Environment Agency (EEA)”, and shall also notify the Commission when the data is transmitted to the EEA.
- In this regard, we note that Article 4(3) of the draft Implementing Regulation clarifies that “[T]he processing by the Commission and the EEA of the vehicle identification numbers (VINs) shall not include the processing of any personal data that could be linked to those numbers, or any other data that could permit the linking of VINs with personal data”. On the other hand, the same Article provides that “[T]he VINs shall be retained by the EEA for a period of 20 years from the date on which they were first uploaded to the CDR or the Business Data Repository of the EEA (BDR)”. We note a possible contradiction between the two statements, **as from the latter we understand that the EEA would indeed be having access to the VINs, considered by the draft Implementing Regulation as personal data within the meaning of data protection law** (see recital 11). Moreover, Article 11(2) lists the EEA as a data controller, which compounds the lack of clarity as to its effective role.
- As explained above, the EDPS notes that, **should VINs be considered to constitute personal data** throughout the entire process of the collection and processing of such data and in respect of all stakeholders involved, **then both the Commission and the EEA would in principle qualify as controllers of personal data within the meaning of data protection law.**

2.4. The controllers of the processing of personal data

- In line with Article 11(1) of the draft Implementing Regulation, a) manufacturers in the case of direct data transfers from the vehicles to the manufacturer, b) authorised dealers or repairers and c) bodies or establishments responsible for roadworthiness testing, are considered as the controllers of the processing of personal data within the meaning of Article 4(7) GDPR.
- The EDPS notes that Article 9(2) of the draft Implementing Regulation states that “[W]here the real-world data and the VINs are not collected via direct data transfer from the vehicle to the manufacturer, the manufacturer shall ensure that the data is collected and transmitted to it by its authorised dealer or repairer each time the vehicle is brought in for service (...)”. In this regard, and as mentioned in the general comments above, we consider that the draft Implementing Regulation **should provide more clarity as to the situations in which the data would be collected directly from the vehicle to the manufacturer and when this would be collected from the dealer or repairer.**
- We also note that, in line with Article 3 of the draft Implementing Regulation, **Member States shall ensure the maintenance, collection, control, verification and timely transmission of the aggregated and detailed monitoring data to the Commission and the EEA.** These will transmit the aggregated and detailed monitoring data via electronic data transfer to the CDR managed by the EEA. In this regard, we note that, while Article 11(1) does not list Member States as possible controllers within the meaning of data protection law, Article 11(2) provides that “[W]here the VINs together with the real-world data have been obtained indirectly from the vehicle owner, the EEA, the Member States, and, where applicable, the manufacturers shall, in their capacity as data controllers, ensure that they meet the obligation to provide information to the vehicle owners as set out in Article 14 of Regulation (EU) 2016/679.” **Therefore, we recommend to clearly define the role of the Member States as data controllers within the meaning of data protection law, and to reflect their role in Article 11(1) of the draft Implementing Regulation.**

2.5. The data retention of the personal data collected

- As already mentioned above, Article 4(3) of the draft Implementing Regulation specifies that the “(...) VINs shall be retained by the EEA for a period of 20 years from the date on which they were first uploaded to the CDR or the Business Data Repository of the EEA (BDR)”. **The EDPS notes that, should VINs be considered as personal data throughout the entire process of the collection and processing of such data, no justification has been provided for such a long retention period. Therefore, the maximum data retention period provided for in the draft Implementing Regulation should either be shortened or a compelling justification for the 20 years retention period should be provided.**
- Lastly, in this regard, we also note a potential contradiction between Article 12(2) of Regulation (EU) 2019/631 providing for the VIN to be used “(...) only for the purpose of that data processing and shall not be retained longer than needed for that purpose.” and Article 4(3) of the draft Implementing Regulation.

2.6. The security of the transmission of personal data

- For the processing of aggregated and detailed monitoring data, the controllers and the processors shall implement appropriate technical and organisational measures to

ensure a level of security appropriate to the risk. **Therefore, we recommend to clearly add an obligation for all stakeholders to apply appropriate security measures.**

- Specifically on the transmission of the data between the different stakeholders, the EDPS considers that the application of encryption (when applicable) appears to be an adequate measure for the protection of the confidentiality of information, in particular to protect the information from any personal data breaches. **Therefore we recommend to clearly stipulate in the draft Implementing Regulation the obligation for the stakeholders transferring detailed monitoring data to use sufficiently secure means of communications, e.g. protected by encryption.**

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(*e-signed*)