



EDPS Formal comments on the draft Commission Implementing Decision on specifying the risks related to security, illegal immigration or high epidemic risk

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')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 2 March 2022, the European Commission adopted the draft Implementing Decision on specifying the risks related to security, illegal immigration or high epidemic risk ('the draft Proposal'), in the context of Regulation (EC) 767/2008 ('VIS Regulation'). This Regulation, which establishes the Visa Information System for the exchange of data between Member States on applications for short-stays and long-stay visas, as well as residence permits, was amended by Regulation (EU) 2021/1134 of 7 July 2021².
2. The objective of the draft Proposal is to provide for the specification of security, illegal immigration or high epidemic risks, as the basis for the specific risks indicators that will be used as part of the screening process of applications for short-stay visas³.
3. The draft Proposal is adopted pursuant to Article 9j(3) of Regulation (EC) 767/2008 (as amended by Regulation (EU) 2021/1134).

¹ OJ L 295, 21.11.2018, p. 39.

² Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System OJ L 248, 13.7.2021, p. 11–87

³ Recitals 2 and 3, and Article 1 of the Proposal



4. The EDPS previously issued an Opinion on the Proposal for a new Regulation on the Visa Information System⁴, but was not consulted on the last amendments laid down in Regulation (EU) 2021/1134.
5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 2 March 2022, pursuant to Article 42(1) of Regulation 2018/1725⁵ ('EUDPR'). In this regard, the EDPS welcomes the reference to this consultation in Recital 16 of the Proposal.
6. 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 acts⁶, in particular the future Commission Delegated Decision (see *infra* paragraph 8).
7. 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 Proposal that are relevant from a data protection perspective.

2. Comments

2.1. General comments

8. The EDPS notes that the draft Proposal aims to specify the security, illegal immigration or high epidemic risks, on the basis of the analysis referred to in a Commission Delegated Decision, which however is not yet issued⁷. Considering the intrinsic links between the draft Proposal and the envisaged Commission Delegated Decision, the EDPS would have wished to be consulted on both acts at once. Unfortunately, since his request to receive the draft Delegated Act could not be met

⁴ EDPS Opinion 9/2018 on the Proposal for a new Regulation on the Visa Information System, issued on 12 December 2018

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, 21.11.2018, L.295, p. 39.

⁶ 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.

⁷ Articles 2 and 3 of the Proposal

in a timely manner, the present EDPS formal comments concern only the draft Implementing Decision.

9. The EDPS also takes note that, pursuant to Article 6 of the draft Proposal, the “*analysis, specification, evaluation and review of risks referred to in this Decision shall not contain any personal data*”. However, the draft Proposal aims to specify the risks that will form the basis of specific risk indicators and, according to Article 9j of the VIS Regulation, such indicators “*shall be applied as an algorithm enabling profiling as defined in point (4) of Article 4 of Regulation (EU) 2016/679*”. Therefore, the draft Proposal is part of a broader legal scheme, whose purpose is the practical application of the profiling in the analysis of applications for short-stay visas. The EDPS recalls that such profiling will have a direct impact on the protection of individuals’ personal data and wider fundamental rights⁸.

2.2. VIS Fundamental Rights Guidance Board

10. The draft Proposal provides that the ETIAS Central Unit should establish a list of risks (‘the VIS list’), review the list every six months and remove from the list risks that are considered no longer valid. The ETIAS Central Unit should transmit new and revised risks and the analysis on which they are based to the VIS Screening Board. The VIS Screening Board should deliver an opinion within the time laid down in its Rules of Procedure and the ETIAS Central Unit should take this opinion into account when deciding whether to add, amend a risk or remove it from the list.
11. The EDPS would like to draw attention to Article 9l of the VIS Regulation (as amended by Regulation (EU) 2021/1134), according to which the VIS Fundamental Rights Guidance Board shall also support the VIS Screening Board in the execution of its tasks when consulted by the latter on specific issues related to fundamental rights, in particular with regard to privacy, personal data protection and non-discrimination. Given the important implications of the screening rules and risk indicators for privacy, data protection and non-discrimination, the EDPS considers necessary to specify in the draft Proposal the involvement of the VIS Fundamental Rights Guidance Board in the process of delivering the opinion of the VIS Screening Board.

⁸ See formal comments of the EDPS on the draft Commission Delegated Decision on further defining the risks related to security or illegal immigration or high epidemic risk, issued on 7 June 2021.

2.3. Analysis of statistics

12. Article 2 of the draft Proposal provides for certain rules to be applied for the purposes of assessing the normal and abnormal rates in accordance with Articles 3 and 5 of the draft Delegated Decision [...]. However, according to Article (1), second subparagraph, the ETIAS Central Unit and Member States “*may apply different rules if it is necessary for reasons related to the risk in question*”. Article 3(1)(e) foresees that, in such cases, the ETIAS Central Unit lays down for each risk the detailed explanation of and objective justification for the application of those different rules.
13. In light of the discretionary nature of such derogation from the general rules, which may have direct impact on the establishment of risks indicators applied in the screening process of applications for short-stay visas, the EDPS considers that both the VIS Screening Board and the VIS Fundamental Rights Guidance Board should provide their opinion on the justification of these different rules.

2.4. Evaluation and review of risks

14. Article 4(1) of the draft Proposal provides that the ETIAS Central Unit shall assess every six months or whenever necessary the continued validity of the risks on the list, review and remove from the list risks considered no longer valid. However, the article does not lay down any rules for this assessment. In particular, the draft Proposal does not specify how the ETIAS Central Unit shall ensure that the risks defined will not lead to any discriminatory practices. According to Article 9j(5) of the VIS Regulation, ‘*the specific risk indicators shall be targeted and proportionate*’. Since those risk indicators are based on the list of risks referred to in the draft Proposal, the way those risks are specified is of utmost importance, and should be carefully assessed. The EDPS suggests adding in the operative part of the draft Proposal the rules to be applied by the ETIAS Central Unit for the evaluation and review of the risks.

Brussels, 29 June 2022

(e-signed)

Wojciech Rafał Wiewiórowski