



EDPS Formal comments on the draft Commission Delegated Decision on further defining the risks related to security or illegal immigration or a 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 14 September 2022, the European Commission consulted the EDPS on the draft Delegated Decision on further defining the risks related to security or illegal immigration or a high epidemic risk ('the draft Proposal').
2. The objective of the draft Proposal is to further define the security, illegal immigration or high epidemic risks on the basis of detailed statistical data and information referred to in Article 9j(2) 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-stay and long-stay visas, as well as residence permits, was amended by Regulation (EU) 2021/1134 of 7 July 2021².
3. Article 9j (2) of Regulation (EC) 767/2008 (as amended by Regulation (EU) 2021/1134) foresees that the risks related to security or illegal immigration or a high epidemic risk shall be defined on the basis of:
 - "(a) statistics generated by the EES indicating abnormal rates of overstaying and refusals of entry for a specific group of visa holders;*
 - (b) statistics generated by the VIS in accordance with Article 45a indicating abnormal rates of refusals of visa applications due to a security, illegal immigration or high epidemic risk associated with a specific group of visa holders;*

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.



(c) statistics generated by the VIS in accordance with Article 45a and the EES indicating correlations between information collected through the application form and overstaying by visa holders or refusals of entry;

(d) information substantiated by factual and evidence-based elements provided by Member States concerning specific security risk indicators or threats identified by a Member State;

(e) information substantiated by factual and evidence-based elements provided by Member States concerning abnormal rates of overstaying and refusals of entry for a specific group of visa holders for a Member State;

(f) information concerning specific high epidemic risks provided by Member States as well as epidemiological surveillance information and risk assessments provided by the European Centre for Disease Prevention and Control and disease outbreaks reported by the World Health Organization”.

4. The draft Proposal is to be adopted pursuant to Article 9j(2) of the VIS Regulation (as amended by Regulation (EU) 2021/1134) .
5. The EDPS had previously issued Opinion 9/2018 on the Proposal for a new Regulation on the Visa Information System³. However, the legal provisions providing for algorithmic profiling of visa applicants based on specific risk indicators were not included in the Commission Proposal for revised VIS Regulation, but were introduced at a later stage during the legislative negotiations. Thus, the EDPS did not have the opportunity to assess them and provide possible comments and recommendations before the adoption.
6. Furthermore, on 29 June 2022 the EDPS issued formal comments on the draft Commission Implementing Decision on specifying the risks related to security, illegal immigration or high epidemic risk⁴. The draft Implementing Decision is intrinsically linked to the present draft Proposal, since it aims at specifying the risks defined in the VIS Regulation and in the draft Proposal, as the basis for the specific risks indicators that will be used in the screening process of applications for short-stay visas⁵. The EDPS regrets that these two related proposals were not handled in a coordinated fashion and encourages the Commission to take into account substantive links between various implementing acts in its planning and consultation requests. The present formal comments should be read in conjunction with those

³ EDPS Opinion 9/2018 on the Proposal for a new Regulation on the Visa Information System, issued on 12 December 2018, paragraph 88, available at https://edps.europa.eu/sites/default/files/publication/18-12-13_opinion_vis_en.pdf

⁴ EDPS Formal comments on the draft Commission Implementing Decision on specifying the risks related to security, illegal immigration or high epidemic risk, 29 June 2022, https://edps.europa.eu/system/files/2022-07/22-06-29_formal-comments-illegal-immigration-or-epidemic-risk_en.pdf

⁵ Article 9j (3) of the VIS Regulation (as amended by Regulation (EU) 2021/1134).

issued on 29 June 2022 on the draft Commission Implementing Decision on specifying the risks related to security, illegal immigration or high epidemic risk.

7. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 14 September 2022, pursuant to Article 42(1) of Regulation 2018/1725⁶ ('EUDPR'). In this regard, the EDPS welcomes the reference to this consultation in Recital 16 of the Proposal.
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 acts⁷.
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 Proposal that are relevant from a data protection perspective.

2. Comments

2.1. General comments

10. According to the draft Proposal, the different analyses conducted both by the ETIAS Central Unit and Member States to further define and specify the risks related to security, illegal immigration or high epidemic risk "*shall not contain any personal data*"⁸. The EDPS would like to recall his formal comments on the draft Implementing Decision mentioned above⁹: both texts are part of a broader legal scheme, whose purpose is the practical application of the profiling in the analysis of applications for short-stay visas. Such algorithmic profiling will have a direct impact on the

⁶ 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.

⁷ 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.

⁸ Article 6 of the draft Commission Implementing decision on specifying the risks related to security, illegal immigration or high epidemic risk, and Article 8 of the draft Proposal.

⁹ Formal Comments issued on 29 June 2022, paragraph 9.

protection of individuals' personal data and wider fundamental rights¹⁰. Therefore the EDPS deeply regrets that his opinion has not been sought before introducing legal provisions of such importance for the protection of individuals' rights and freedoms (i.e. Article 9j of the revised VIS Regulation) into the Union legislation.

11. Furthermore, the EDPS considers that the draft Proposal should clarify how the absence of personal data as laid down in Article 8 will be ensured in practice and who will be responsible. Such clarification is particularly necessary for the data provided by Member States, as regards the *"list of known facts and evidence related to the security risk or threat identified"*, mentioned in Article 4(1)(b) of the draft Proposal. In this context, the EDPS would like also to recall that a proper anonymisation of a data set requires much more than simply removing obvious identifiers such as names. In particular, any possibility of re-identification should be excluded, given that even an anonymous dataset may be combined with other data in such a way that one or more individuals could be identified. Accordingly, the EDPS draws attention to the need to evaluate regularly the anonymisation techniques used, to exclude any possibility of re-identification.
12. Article 9j(2) of the VIS Regulation requires that the Draft Proposal *"further define the risks related to security or illegal immigration or a high epidemic risk on the basis of"* the elements provided in provisions (a) to (f) of that article. The EDPS observes that the draft Proposal does not fulfil that requirement as such, but instead sets out in further detail the modalities by which risks will be defined by the ETIAS Central Unit, in conjunction with the Member States. The EDPS considers that the absence of defined risks in the Draft Proposal is not consistent with Article 9j(2) of the VIS Regulation and consequently invites the Commission to reformulate the relevant provisions of the draft Proposal (see further below). Moreover, the EDPS wishes to underscore the need for the definition of a precise methodology, clear criteria, and the presence of strong safeguards to be included in the process of compiling risks and risk profiles. The EDPS' comments below are therefore formulated towards this objective.

2.2 Analysis and specification of risks

13. The EDPS considers that the concerns he expressed as regards the use of risk indicators and screening rules for the purposes of profiling applicants in the context

¹⁰ 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 2 June 2021.

of the ETIAS Regulation¹¹ are equally relevant here¹². In particular, the draft Proposal does not go far enough in terms of specifying the determination of security, illegal immigration or high epidemic risks. For instance, with regard to the risks associated with overstaying, refusal of entry and refusal of visa application, the gravity of the infringement is different whether third country nationals have entered into a Member State using false documents, or they have overstayed for a couple of days. However, the draft Proposal does not make any differentiation in this respect.

14. On 25 January 2022, the Commission replied to the EDPS' formal comments on the draft Commission Implementing and Delegated Decisions on specifying the risks as defined in the ETIAS Regulation (EU) 2018/1240 as well as in the Commission Delegated Decision XXX/XXX [Delegated Act] and on the draft Commission Delegated Decision on further defining the risks related to security or illegal immigration or high epidemic risk. In particular, the Commission pointed out that the draft Implementing Decision on risks provides that the ETIAS Central Unit "*shall specify the risks by laying down information about each risk identified in a standard format*". **According to the Commission**, "*this information includes guidance to Member State National Units to consider when assessing a hit related to the risk. This will help Member States in each specific case to weigh the "gravity of a given infringement"*". A similar provision is included in Article 3 of the draft Implementing Decision linked to this draft Proposal, and which refers explicitly to Articles 3 to 6 of the draft Proposal. However, the EDPS reiterates that what should be addressed in the present draft Proposal is the further definition of risks, which will be the basis for the establishment of risk indicators. The guidance to the Member States will become relevant only after the definition of risk indicators.
15. Moreover, the EDPS underlines the risks of discrimination resulting from the **establishment, by Member States, of "sets of characteristics of specific groups"** of travellers associated with the security risk or threat identified, and of visa holders associated with overstaying or refusal of entry, if the risks are not sufficiently defined. The definition in Article 2 of the draft Proposal lays down that "*sets of characteristics means distinguishing sets of observable qualities or properties identified based on statistics and information referred to in Article 9j(2) of Regulation (EC) No 767/2008 and taking into account the data referred to in Article 9j(4)(a) to (f) of that Regulation*". **According to this latter article**, the data encompass, among others, current nationality, country and city of residence of an applicant, as well as sex and

¹¹ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 OJ L 236, 19.9.2018, p. 1–71.

¹² EDPS Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System, par. 36, and EDPS formal comments on the draft Commission Delegated Decision on further defining the risks related to security or illegal immigration or high epidemic risk, paragraph 2.

current occupation. The EDPS has previously pointed out that information such as nationality and a place of residence, especially while combined with other data, may **allow for making a reasonable assumption of the applicant's race or ethnic origin**¹³. Therefore, the EDPS considers that the Commission should define further risks and threats in order to prevent Member States from establishing sets of characteristics of specific groups which would be based on discriminatory categorizations of individuals. According to Article 9j(5) of the VIS Regulation the risks indicators “*shall, in no circumstances, be based solely on a person's sex or age or on information revealing a person's colour, race, ethnic or social origin, genetic features, language, political or any other opinion, religion or philosophical belief, trade union membership, membership of a national minority, property, birth, disability or sexual orientation*”. Such an objective can only be achieved if the specific risks, on the basis of which the risks indicators will be established, are sufficiently defined.

16. Articles 4 and 5 of the draft Proposal require an analysis on the part of Member States identifying the sets of characteristics of specific groups of travellers associated with specific security or immigration risks. The EDPS notes the assessment of the European Court of Justice that pre-determined criteria for the purposes of profiling **must be defined in such a way as to take into consideration both ‘incriminating’ as well as ‘exonerating’ circumstances**, since this may contribute to the reliability of those criteria and, in particular, ensure that they are proportionate.¹⁴ The EDPS strongly recommends incorporating this requirement explicitly into the draft Proposal, by stipulating that Member State analyses include not only characteristics associated with risks or threats but those characteristics which could dis-associate or distance groups of travellers from specific risks or threats.
17. Regarding the analysis of security risks to be provided by Member States to the ETIAS Central Unit under Article 4 of the draft Proposal, and with a view to ensuring that the specific risk indicators are targeted and proportionate, as required by Article 9j(5) of the VIS Regulation, the EDPS suggests limiting security risks and threats to those categorised as terrorist offences and serious criminal offences, as defined respectively in Article 4(22) and (23) of the VIS Regulation (EU) (as amended by Regulation (EU) 2021/1134).
18. Article 4 requires that the analysis provided by the ETIAS National Unit shall include at least: (a) a description of the risk or threat, including the frequency, trends, impacts related to it; (b) a list of known facts and evidence related to the risk or

¹³ EDPS Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System, paragraph 40.

¹⁴ Case C-817/19. Judgment of the Court (Grand Chamber) of 21 June 2022. Ligue des droits humains ASBL v Conseil des Ministres. Request for a preliminary ruling from the Cour constitutionnelle.

threat; and (c) the sets of characteristics of specific groups of travellers associated with the security risk or threat identified. The EDPS notes that the requirement for facts and evidence only pertains to the risk or threat but not the characteristics of travellers linked to it. The European Court of Justice has recently ruled that the application of profiling should rest on a clear link between the pre-defined criteria used and the profile of individuals targeted.¹⁵ There should be sufficiently solid grounds for considering that the risk or threat is genuine and present or foreseeable and that its link to a specific category of visa holders is objectively established and evidence-based. The EDPS recommends strengthening the safeguards contained in Article 4 in order to ensure a proportionate application of risk profiles and to avoid an arbitrary and potentially discriminatory targeting of groups of travellers. This could be achieved for instance through the addition of a fourth required element to accompany the analysis, that could read as follows: “(d) a list of known facts and evidence which substantiate the link between the security risk or threat and the sets of characteristics of the specific groups of travellers identified.”

2.3. The assessment of the information provided by Member States

19. Article 4(4) and Article 5(4) of the draft Proposal foresee an assessment, by the ETIAS Central Unit, of the relevance of the analysis provided by Member States concerning specific security risks or threats, as well as abnormal rates of overstaying and refusals of entry. The EDPS notes that ‘relevance’ in this context is not defined nor does the draft Proposal indicate how this assessment will be done or what criteria will be used to this end. The EDPS therefore recommends that the draft Proposal include an indication of the elements that will be taken into consideration for the assessment of relevance. In light of the considerations outlined in paragraph 18 above, this should include an assessment of the reliability of the information provided, based on the facts and evidence supplied.
20. Such assessments of the relevance of the information for specifying the risks in question should be done “*in consultation with the ETIAS National Unit*”. The EDPS understands that this review of the Member States analyses should be read in conjunction with Article 4 of the draft Implementing Decision linked to the draft Proposal, on “*evaluation and review of risks*”. Therefore, the EDPS suggests including in the draft Proposal a reference to the consultation of the VIS Screening Board, already mentioned in Article 4 of the Implementing Decision, and also to the consultation of the VIS Fundamental Rights Guidance Board. In light of the direct impact that the definition of risks may have on individuals’ personal data and fundamental rights, the EDPS considers of the utmost importance to implement an independent review of the information processed by the ETIAS Central Unit.

¹⁵ Ibid.

21. In order to ensure appropriate oversight and review, it must be possible to examine all the grounds and evidence which form the basis of operation of the specific risk indicators including the facts and evidence upon which they are founded, as well as the assessment of their relevance by the ETIAS Central Unit. The EDPS therefore recommends that the draft Proposal stipulate that statistics and information which will constitute the basis of the specific risk indicators under Article 9(j) of the VIS Regulation as well as the assessments of the ETIAS Central Unit referred to in Articles 4 and 5 of the draft Proposal be documented and stored for purposes of monitoring. This information should also be made available, upon request, to both the VIS Screening Board and the VIS Fundamental Rights Guidance Board in order that those bodies may fulfil their advisory roles, including with regard to assessing the proportionality and fundamental rights impacts of the indicators.

Brussels, 14 October 2022

(e-signed)

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