

EDPS Formal comments on the draft Commission Delegated Decision on supplementing Regulation (EC) No 767/2008 of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of information between Member States on short-stay visas, long-stay visas and residence permits with a manual laying down the procedures and rules necessary for queries, verifications and assessments

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

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 22 August 2023, the European Commission consulted the EDPS on the draft Commission Delegated Decision on supplementing Regulation (EC) No 767/2008 of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of information between Member States on short-stay visas, long-stay visas and residence permits with a manual laying down the procedures and rules necessary for queries, verifications and assessments ('the draft delegated decision').
2. The objective of the draft delegated decision is to lay down in a manual the procedures and rules necessary for the automated queries launched by the VIS against VIS and other EU information systems and databases², the list of recognised travel documents and the specific risks indicators related to security, illegal immigration or high epidemic risks. The manual should also lay down the procedures and rules necessary for the verifications and assessments of hits that would result from the above-mentioned queries³.

¹ OJ L 295, 21.11.2018, p. 39.

² These include: other EU information systems as referred to in Article 9a or 22b of the VIS Regulation, Europol data or Interpol databases.

³ Draft Delegated Decision, Recital 3.

3. The draft delegated decision is adopted pursuant to Article 9h, second paragraph and Article 22b, eighteenth paragraph of Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of information between Member States on short-stay visas, long-stay visas and residence permits (VIS Regulation)⁴.
4. The EDPS previously issued formal comments on the draft Commission Delegated Regulation supplementing Regulation (EU) 2019/817 of the European Parliament and of the Council as regards determining cases where identity data are considered as same or similar for the purpose of the multiple identity detection⁵ as well as formal comments on the draft Commission Delegated Decision specifying the conditions for the correspondence between the data present in a record, alert, or file of the other EU information systems consulted and an application file⁶.
5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 12 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 acts⁷.
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 delegated decision that are relevant from a data protection perspective.

⁴ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60–81.

⁵ [EDPS Formal comments on the draft Commission Delegated Regulations supplementing Regulation \(EU\) 2019/817 and Regulation \(EU\) 2019/818 of the European Parliament and Council with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection](#), issued on 27 April 2021.

⁶ [EDPS Formal comments on the draft Commission Delegated Decision specifying the conditions for the correspondence between the data present in a record, alert, or file of the other EU information systems consulted and an application file](#), issued on 22 September 2022.

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.

2. Comments

2.1. Scope of the draft delegated decision

8. The EDPS notes that Article 2 of the draft delegated decision defines the scope of the manual while the manual itself is laid down in the Annex accompanying the draft delegated decision. More specifically, Article 2 explains that when the application file is created in VIS, the VIS must launch a query using the European Search Portal (ESP). Depending on whether an application file is created in VIS in accordance with Article 9 of the VIS Regulation or Article 22a, the query will vary:
 - when it is in accordance with Article 9 (visas), the query must compare “[...] *relevant data referred to in points (4), (5) and (6) of Article 9 of Regulation (EC) No 767/2008 with the data present in the Schengen Information System (SIS), the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS), EURODAC, ECRIS-TCN, Europol database, and against the specific risk indicators and the list of recognised travel documents*”.
 - when it is in accordance with Article 22a (long-stay visas or residence permits), the query must compare “[...] *relevant data referred to in points (d) to (g), and points (i), (j) and (k) of Article 22a(1) of Regulation (EC) No 767/2008 with the data present in the Schengen Information System (SIS), the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS), the Visa Information System (VIS), ECRIS-TCN, Europol database*”.
9. This provision aims to mirror what is prescribed in the VIS Regulation under Articles 9a entitled “Queries of other information systems and databases” and 22b “Queries of information systems and databases” of the VIS Regulation. However the EDPS highlights two important differences.
10. First, Article 9a paragraph 3 and Article 22b(2) of the VIS Regulation specifies that the VIS must launch a query by using the ESP to compare certain data in the VIS application file with the data present in a record, file or alert registered in - among others - the Interpol Stolen and Lost Travel Document database (Interpol SLTD)⁸ and the Interpol Travel Documents Associated with Notices database (Interpol TDAWN)⁹. However, the EDPS notes that the draft delegated decision does not lay down the procedure and rules necessary for queries, verifications and assessments with the above-mentioned Interpol databases.
11. Second, Article 2 of the draft delegated decision refers to ETIAS only, while the VIS Regulation also refers to the ETIAS watchlist¹⁰, referred to in Article 34 of Regulation

⁸ cfr. Article 9a (3) (g) and Article 22b (2) (g) of the VIS Regulation.

⁹ cfr. Article 9a (3) (h) and Article 22b (2) (h) of the VIS Regulation.

¹⁰ cfr. Article 9a (3) (c) and Article 22b (2)(c) of the VIS Regulation.

(EU) 2018/1240¹¹. At the same time, the EDPS notes that the Annex accompanying the draft delegated decision explicitly addresses questions related to the ETIAS watchlist, most notably in sections 2.5, 5.6 and 8.

12. The EDPS underlines the importance of ensuring coherence between the terminology used in the underlying basic act and related implementing and delegated acts. Furthermore, the EDPS is of the view that the wording of the VIS Regulation to “lay down” should be regarded as conferring a delegated power within the meaning of Article 290(1) TFEU to supplement, and not to amend, the VIS Regulation. Against this background, the EDPS makes a number of recommendations with regard to the Interpol SLTD and TDWAN databases and the ETIAS watchlist.

2.1.1. Interpol SLTD and TDAWN databases

13. With regard to the Interpol SLTD and TDAWN databases, the EDPS recommends, in line with the VIS Regulation, to bring them within the scope of the draft delegated decision. This would entail laying down the procedures and rules necessary for queries, verifications and assessment related to the above-mentioned Interpol databases as well as including a reference to these databases both in Article 2 of the draft delegated decision and Recital 2.

2.1.2. ETIAS watchlist

14. With regard to the ETIAS watchlist, the EDPS recommends amending Article 2 and Recital 2 of the draft delegated decision by not only referring to ETIAS but also to the ETIAS watchlist.

2.2. Europol data

15. The EDPS notes that as regards the persons of whom personal data will be compared against Europol data, the Annex accompanying the draft delegated decision includes not only the visa or residence permit applicant but also the “*details of the person issuing an invitation and/or liable to pay the applicant’s subsistence costs during stay*”¹². However, while the amount of personal data that will be available on this contact person differs from the applicant, this divergence is not followed up on further in the following section 9.1. This section summarises whether a hit is returned or not based on the data of the *applicant* in the context of the VIS automated query, depending on how these assessments combine for three data categories when identity, travel document and biometric data are compared during automated queries for the purposes of returning a hit.

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).

¹² In the case of a natural person, the surname and first name and address of the person. In the case of a company or other organisation, the name and address of the company/ other organisation, surname and first name of the contact person in that company/ organisation (Article 9(4)(f) of the VIS Regulation).

16. The EDPS points out that the available data for the persons issuing an invitation and/or are liable to pay the applicant's subsistence would not include biometric data nor travel document data. Furthermore, the available identity data would be more limited than those provided by the applicant. It thus appears that the matching threshold to carry out the correspondence checks would need to be specifically defined for these data subjects for whom no biometric data nor travel document information and only limited identity data compared to those of the applicants would be available.
17. Therefore the EDPS recommends that the correspondence table with Europol data as defined in section 9.1 of the Annex accompanying the draft delegated decision should further define the correspondence with the personal data of the person issuing an invitation and/or liable to pay the applicant's subsistence costs during stay.

2.3. Obligation to define partial correspondence, including a degree of probability to limit the number of false hits stemming from Article 9b(8) of the VIS Regulation

18. The EDPS highlights that according to Article 9b(8) of the VIS Regulation, "The manual referred to in Article 9h(2) shall define partial correspondence, including a degree of probability to limit the number of false hits". The EDPS takes note that sections 7.1, 7.2 and 9.1 do not provide a degree of probability but only binary 'yes-no' statements. In fact, the EDPS notes that the Annex accompanying the draft delegated decision states on page 38 that: "Where necessary, in order to limit the number of hits triggered and to reduce the burden of manual processing, the Commission, assisted and advised by the Expert Group, shall request eu-LISA to adjust the algorithm by prioritising the hits created between identity data that are considered *more similar* [emphasis added], in compliance with the rules in Section 3 of Commission Delegated Regulation C(2022) 4775." A similar provision is laid down on page 44 with regard to Europol. It would seem that this algorithm adjustment to prioritise hits above a certain threshold would be the degree of probability required by the VIS Regulation.
19. With regard to the first aspect, i.e. the need to define partial correspondence, the EDPS notes that the chosen approach is similar to the one followed for the other EU large-scale information systems, such as ETIAS and wishes to recall the recommendation already made in his "Formal comments on the draft Commission Delegated Decision specifying the conditions for the correspondence between the data present in a record, alert, or file of the other EU information systems consulted and an application file"¹³.
20. More specifically, while the EDPS recognises the need to prioritise the order of the hits, he also considers necessary to spell out in the enacting terms of the draft

¹³ [EDPS Formal comments on the draft Commission Delegated Decision specifying the conditions for the correspondence between the data present in a record, alert, or file of the other EU information systems consulted and an application file](#), issued on 22 September 2022.

delegated decision the criteria (or at the very least provide the essential elements of such criteria) to be used to determine when it would be considered necessary to adjust the algorithm. In the same vein, the draft delegated decision should provide more explanation as to what would be considered to be “more similar”. In addition, on a more general note, the EDPS considers that the draft delegated decision should provide for a procedure to review regularly the algorithm put in place.

21. With regard to the second aspect, i.e. the need to define a degree of probability to limit the number of false hits, the EDPS notes that such degree of probability is not defined in the Annex accompanying the draft delegated decision. For instance, the EDPS notes that when comparing rows 19 and 20 of the table in section 9.1, there is a clear lower probability that the person would be the same for the row 20. However, both are given a binary yes with no probability score. The EDPS understands that the implementation carried out by eu-LISA will have a numerical threshold that has to be reached for a hit to be considered a match. This is also clear from the last sentence of page 38 and page 44, which states that the Commission will request respectively eu-LISA and Europol to adjust the algorithm by prioritising the hits created between the identity data that are considered more similar. However, instead of defining such numerical threshold in the manual as prescribed by the VIS Regulation under Article 9b (8), the draft delegated decision only instructs eu-LISA to define it at a later stage.
22. Therefore, the EDPS is of the view that Article 9b(8) of the VIS Regulation is not correctly implemented by the draft delegated decision and recommends improving it by defining the relevant degree of probability in the appropriate sections of the Annex accompany the draft delegated decision. Furthermore, the EDPS recommends including a recital explicitly referring to Article 9b(8) of the VIS Regulation.

2.4. Algorithm correction mechanisms

23. With regard to the algorithm that would apply the correspondence rules defined in sections 7.2 and 9.2, the EDPS recalls the recommendations made in his Formal comments on the draft Commission Delegated Regulations supplementing Regulation (EU) 2019/817 and Regulation (EU) 2019/818 of the European Parliament and Council with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection.¹⁴ More specifically, the EDPS points out the potential risks raised by the use of the envisaged algorithm to determine in an automated manner whether an identity can be considered similar, due to, for instance, problems with the design of the algorithm or with the training data. To mitigate such risks and ensure that the algorithm provides the right conclusions, the EDPS reiterates the need to put in place appropriate correction mechanisms and setting up a formal procedure whereby Member States inform eu-LISA of cases where wrong conclusions are made by the algorithm so that the Agency

¹⁴ [EDPS Formal comments on the draft Commission Delegated Regulations supplementing Regulation \(EU\) 2019/817 and Regulation \(EU\) 2019/818 of the European Parliament and Council with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection](#), issued on 27 April 2021.

can address the issues identified by re-testing and re-training the algorithm before deployment¹⁵.

24. Finally, the EDPS notes that according to the Annex accompanying the draft delegated decision, eu-LISA¹⁶ and Europol¹⁷ would have to report on a regular basis to the VIS subgroup of the Expert Group on Information Systems for Borders and Security ('Expert Group') on the impact of the application of the above-mentioned algorithm. Taking into account the potential impact that the implementation of such algorithm would have on the fundamental rights of individuals, including the fundamental rights to privacy and to the protection of personal data, the EDPS recommends including an obligation to report on the application of such algorithm also to the European Data Protection Supervisor and the national data protection supervisory authorities as relevant. More specifically, the EDPS recommends including an obligation for eu-LISA to report within the framework of the single model of coordinated supervision laid down in Article 62 EUDPR and an obligation for Europol to report to the European Data Protection Supervisor.

Brussels, 13 September 2023

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

¹⁵ [EDPS Formal comments on the draft Commission Delegated Regulations supplementing Regulation \(EU\) 2019/817 and Regulation \(EU\) 2019/818 of the European Parliament and Council with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection](#), issued on 27 April 2021.

¹⁶ Annex accompanying the draft delegated decision, p 38.

¹⁷ Annex accompanying the draft delegated decision, p. 44.