

EDPS Formal comments on the draft Commission Decision laying down detailed rules for the application of Regulation (EC) No 767/2008 of the European Parliament and of the Council, as regards model contingency plans regarding fall-back procedures for the cases of technical impossibility to access data at the external borders referred to in Article 18e(1) and (2) of that Regulation, including the procedures to be followed by border authorities, in accordance with Article 18e of that Regulation

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

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

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 27 February 2026, the European Commission consulted the EDPS on the draft Commission Decision laying down detailed rules for the application of Regulation (EC) No 767/2008 of the European Parliament and of the Council, as regards model contingency plans regarding fall-back procedures for the cases of technical impossibility to access data at the external borders referred to in Article 18e(1) and (2) of that Regulation, including the procedures to be followed by border authorities, in accordance with Article 18e of that Regulation ('the draft Decision').
2. The objective of the draft Decision is to ensure that, in the event of a technical impossibility to consult the Visa Information System (VIS), the checks at the external borders are carried out as far as technically possible². To that end, several fall-back procedures are envisaged so that the border authority is able to remedy the specific circumstance with which it is confronted that makes it impossible to proceed with the consultation of the VIS³. In addition, the draft Decision aims to leverage the appropriate technical means provided for in the legal framework governing the digitalisation of the visa procedure, in particular the web service referred to in Article

¹ OJ L 295, 21.11.2018, p. 39.

² Recital 5 of the draft Decision.

³ *Ibid.*

7h(3) of Regulation (EC) No 767/2008 ('VIS Regulation')⁴ and the 2D barcode referred to in Article 1(2), point (a), of Regulation (EC) No 1683/95^{5,6}.

3. The draft Decision is adopted pursuant to Article 45(2)(o) of the VIS Regulation.
4. The EDPS previously issued his Opinion 13/2022 on the Proposal for a Regulation on the digitalisation of the visa procedure⁷, amending the VIS Regulation. The EDPS has also issued Formal comments on the draft Commission Implementing Decision laying down model contingency measures for cases of technical impossibility to access data at the external borders, including fall-back procedures to be followed by border authorities pursuant to Article 48(4) of Regulation (EU) 2018/1240^{8,9} (the ETIAS Regulation).
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 20 of the draft Decision.
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 acts¹⁰.
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 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, pp. 60–81.

⁵ Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164, 14.7.1995.

⁶ Recital 5 of the draft Decision.

⁷ [EDPS Opinion 13/2022 on the Proposal for a Regulation on the digitalisation of the visa procedure, issued on 21 June 2022.](#)

⁸ 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, pp. 1–71.

⁹ [EDPS Formal comments on the draft Commission Implementing Decision laying down model contingency measures for cases of technical impossibility to access data at the external borders](#), including fall - back procedures to be followed by border authorities pursuant to Article 48(4) of Regulation (EU) 2018/1240, issued on 17 February 2022.

¹⁰ 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

8. The EDPS notes that the draft Commission Decision aims to ensure that, where it is technically impossible to consult the VIS at the external borders, border checks may nevertheless be carried out as far as technically possible by means of a harmonised sequence of fall-back procedures. The EDPS understands the operational need for such contingency arrangements and welcomes the fact that the draft seeks to establish a common order of fall-back measures across Member States. A common order of fall-back procedures is particularly useful as the available alternatives do not offer the same degree of reliability or intrusiveness and should therefore not be used interchangeably without a clear order of priority¹¹.
9. At the same time, the EDPS considers that the use of several fall-back channels with different assurance levels should be more clearly reflected in the legal text. The draft Decision moves progressively from a border-authority query of the web service combined with the reading of the 2D barcode, to information displayed by the third-country national via the web service or the verification tool, and ultimately to reliance on the 2D barcode alone. While this graduated approach is understandable, the EDPS notes that these fall-back procedures do not present the same guarantees in terms of integrity, reliability and control by the competent authority. The EDPS therefore invites the Commission to clarify explicitly, in the recitals or the operative provisions, that these fallback procedures correspond to distinct assurance regimes and are to be applied only in the order and under the conditions set out in the draft Decision.
10. As regards Article 3(2) of the draft Decision, the EDPS notes that, where the border authority cannot itself query the web service, the draft Decision provides that third-country nationals may be requested to provide the status and period of validity of their visa via the web service or the verification tool. The EDPS understands the rationale of this solution in a degraded technical environment. However, where the border authority relies on information displayed by the traveller, the draft Decision should more clearly address the practical safeguards applicable to that situation. In particular, it would be useful to clarify whether the proof is expected to be shown through the traveller's own device or by means of equipment available at the border crossing point, and to ensure that any such connections are secure and compliant¹².
11. The EDPS also notes that Article 3(2) appears to contain an incorrect cross-reference. It refers to the situation where it is technically impossible to conduct the query referred to in paragraph 1, point (b), whereas the query itself is described in paragraph 1, point (a) (while paragraph 1, point (b), concerns the reading and validation of the 2D barcode). The EDPS invites the Commission to correct this reference, in order to avoid uncertainty as to the exact trigger for moving from the first fall-back layer to the second.

¹¹ See also the EDPS's previous comments in the ETIAS context, where the EDPS invited the Commission to ensure that means made available to travellers for consulting a verification tool are secure and compliant ([EDPS Formal comments on the draft Commission Implementing Decision laying down model contingency measures for cases of technical impossibility to access data at the external borders](#), including fall - back procedures to be followed by border authorities pursuant to Article 48(4) of Regulation (EU) 2018/1240, issued on 17 February 2022, point 2.1).

¹² *Ibid.*, point 2.2.1.

12. As regards Article 3(4), the EDPS welcomes the fact that the draft limits the categories of data to be collected and stored locally to surname, first name, date of birth, nationality or nationalities, and type and number of the travel document, and that it provides that such storage may continue only for as long as the technical impossibility persists and no longer than necessary for the subsequent verification. Nevertheless, the EDPS considers that additional safeguards should be included in the provision. In this respect, the present draft raises concerns similar to those identified by the EDPS in its 2022 comments on the ETIAS contingency measures, where the EDPS invited the Commission to provide further guidance on local storage, such as retention periods, access rights and the handling of subsequent action¹³. The EDPS therefore recommends the Commission to develop model contingency measures, providing common safeguards. In addition to access restrictions, such model contingency measures should also provide for secure storage, logging of consultation and deletion, and practical arrangements for the destruction of the locally stored data once subsequent verification has been completed.
13. The EDPS welcomes that the purpose of the local storage under Article 3(4) is clearly circumscribed in the draft Decision, i.e. enabling subsequent verification of the status of the visa of third-country nationals who entered during the period of technical impossibility. More generally, the EDPS notes that fall-back procedures are exceptional by nature and may have significant effects on individuals, including in the context of decisions to grant or refuse entry. The EDPS therefore considers that the draft should ensure sufficient traceability of the use of those procedures. It would be appropriate to provide, either in the Decision itself or through the minimum elements to be included in national contingency plans, that border authorities keep records enabling the reconstruction of the fall-back path used, the authority involved, the date and time of the measure, and the subsequent outcome of the verification where local storage has taken place. Such clarification would also strengthen accountability.
14. Finally, the EDPS welcomes the notification obligations laid down in Article 3(5), which contribute to the restoration of availability and facilitate operational awareness. In line with the reasoning already expressed in the ETIAS context, the EDPS considers that timely notification is an important element of resilience and accountability. The EDPS therefore invites the Commission to consider whether further precision could be provided, either here or in the related national operational frameworks, as to the timeliness of such notifications and the follow-up where the period of technical impossibility is prolonged.

Brussels, 24 April 2026

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

¹³ *Ibid.*, point 2.2.2, first paragraph.