# Regulation (EC) No 390/2009 of the European Parliament and of the Council of 23 April 2009 amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications

## REGULATION (EC) No 390/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 62(2)(b)(ii) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Data Protection Supervisor[(1)],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(2)],

Whereas:

(1) To ensure the reliable verification and identification of applicants, it is necessary to process biometric data in the Visa Information System (VIS) established by Council Decision 2004/512/EC[(3)] and to provide for a legal framework for the collection of these biometric identifiers. Furthermore, the implementation of the VIS requires new forms of organisation for the reception of visa applications.

(2) The integration of biometric identifiers in the VIS is an important step towards the use of new elements, which establish a more reliable link between the visa holder and the passport in order to avoid the use of false identities. Therefore, the personal appearance of the applicant — at least for the first application — should be one of the basic requirements for issuing a visa with the registration of biometric identifiers in the VIS.

(3) The choice of the biometric identifiers is made in 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)[(4)].

(4) This Regulation defines the standards for the collection of these biometric identifiers by referring to the relevant provisions set out by the International Civil Aviation Organisation (ICAO). No further technical specifications are required in order to ensure interoperability.

(5) Any document, data or biometric identifier received by a Member State in the course of a visa application shall be considered a consular document under the Vienna Convention on Consular Relations of 24 April 1963 and shall be treated in an appropriate manner.

(6) In order to facilitate the registration of applicants and to reduce the costs for Member States, new organisational possibilities need to be envisaged in addition to the existing framework of representation. Firstly, a specific type of representation limited to the collection of applications and enrolment of biometric identifiers should be added to the Common Consular Instructions on visas for the diplomatic missions and consular posts[(5)].

(7) Other options such as co-location, common application centres, honorary consuls and cooperation with external service providers should be introduced. An appropriate legal framework for these options should be established, taking into account, in particular, data protection issues. Member States should, in accordance with the conditions laid down in this legal framework, determine the type of organisational structure which they will use in each third country. Details of those structures should be published by the Commission.

(8) When organising cooperation, Member States should ensure that applicants are directed to the Member State responsible for the processing of their applications.

(9) It is necessary to make provision for situations in which Member States decide, in order to facilitate the procedure, to cooperate with an external service provider for the collection of applications. Such a decision may be taken if, in particular circumstances or for reasons relating to the local situation, cooperation with other Member States in the form of limited representation, co-location or a Common Application Centre proves not to be appropriate for the Member State concerned. Such arrangements should be established in compliance with the general principles for issuing visas, respecting the data protection requirements set out in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[(6)]. In addition, the need to avoid visa-shopping should be taken into consideration when establishing and implementing such arrangements.

(10) Member States should cooperate with external service providers on the basis of a legal instrument which should contain provisions on their exact responsibilities, on direct and total access to their premises, information for applicants, confidentiality and on the circumstances, conditions and procedures for suspending or terminating the cooperation.

(11) This Regulation, by allowing Member States to cooperate with an external service provider for the collection of applications while establishing the ‘one stop’ principle for the presentation of applications, creates a derogation from the general rule of the personal appearance, as provided for in Part III, point 4, of the Common Consular Instructions. This is without prejudice to the possibility of calling the applicant for a personal interview and is also without prejudice to future legal instruments regulating these issues.

(12) To ensure compliance with data protection requirements, the Working Party set up by Article 29 of Directive 95/46/EC has been consulted.

(13) Directive 95/46/EC applies to the Member States with regard to the processing of personal data pursuant to this Regulation.

(14) Member States should maintain the possibility for all applicants to lodge applications directly at their diplomatic missions or consular posts.

(15) In order to facilitate the procedure of any subsequent application, it should be possible to copy fingerprints from the first entry into the VIS within a period of 59 months. Once this period of time has elapsed, the fingerprints should be collected again.

(16) Due to the requirement to collect biometric identifiers, commercial intermediaries such as travel agencies should no longer be used for the first application but only for subsequent ones.

(17) The Common Consular Instructions should therefore be amended accordingly.

(18) The Commission should present a report on the implementation of this Regulation three years after the VIS is brought into operation and every four years thereafter.

(19) Since the objectives of this Regulation, namely the organisation of the reception and the processing of applications in respect of the entry of biometric data into the VIS and the introduction of common standards and interoperable biometric identifiers and of common rules for all Member States participating in the Community's common policy on visas, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(20) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen *acquis* under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of that Protocol, decide within a period of six months after the date of adoption of this Regulation, whether it will implement it in its national law.

(21) As regards Iceland and Norway, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*[(7)] which fall within the area referred to in Article 1, point B, of Council Decision 1999/437/EC[(8)] on certain arrangements for the application of that Agreement.

(22) This Regulation constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*[9]. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

(23) This Regulation constitutes a development of provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*[10]. Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.

(24) As regards Switzerland, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*[11], which fall within the area referred to in Article 1, point B, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC[12].

(25) As regards Liechtenstein, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Protocol signed between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement concluded between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point B, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/261/EC[13].

(26) As regards Cyprus, this Regulation constitutes an act building upon the Schengen *acquis* or otherwise related to it within the meaning of Article 3(2) of the 2003 Act of Accession.

(27) This Regulation constitutes an act building upon the Schengen *acquis* or otherwise related to it within the meaning of Article 4(2) of the 2005 Act of Accession,

HAVE ADOPTED THIS REGULATION:

*Article 1*

**Amendments to the Common Consular Instructions**

The Common Consular Instructions on visas for diplomatic missions and consular posts are hereby amended as follows:

1. Part II shall be amended as follows:

(a) In point 1.2(b) the following paragraphs shall be added:

A Member State may also represent one or more other Member States in a limited manner solely for the collection of applications and the enrolment of biometric identifiers. The relevant provisions of 1.2(c) and (e) shall apply. The collection and transmission of files and data to the represented Member State shall be carried out respecting the relevant data protection and security rules.

The represented Member State(s) shall ensure that the data are fully encrypted, whether electronically transferred or physically transferred on an electronic storage medium from the authorities of the representing Member State to the authorities of the represented Member State.

In third countries which prohibit encryption of data to be electronically transferred from the authorities of the representing Member State to the authorities of the represented Member State(s), the represented Members State(s) shall not allow the representing Member State to transfer data electronically.

In this case, the represented Member State(s) concerned shall ensure that the electronic data are transferred physically in fully encrypted form on an electronic storage medium from the authorities of the representing Member State to the authorities of the represented Member State(s) by a consular officer of a Member State or, where such a transfer would require disproportionate or unreasonable measures to be taken, in another safe and secure way, for example by using established operators experienced in transporting sensitive documents and data in the third country concerned.

In all cases the level of security for the transfer shall be adapted to the sensitive nature of the data.

The Member States or the Community shall endeavour to reach an agreement with the third countries concerned with the aim of lifting the prohibition against encryption of data to be electronically transferred between the authorities of the Member States concerned..

(b) Point (d) shall be replaced by the following:

(d) When uniform visas are issued pursuant to (a) and (b), the representation and limited representation shall be reflected in the table of representation for the issuing of uniform visas set out in Annex 18..

2. Part III shall be amended as follows:

(a) Point 1 shall be replaced by the following:

1. **Visa applications**

1.1. *Visa application forms — number of application forms*

Applicants shall also be required to fill in the uniform visa application form. Applications for a uniform visa must be made using the harmonised form, a specimen of which is given in Annex 16.

At least one copy of the application form shall be filled in so that it may be used during consultation with the central authorities. Member States may,