



EDPS Formal comments on the draft Commission Implementing Regulation on reporting of abuses pursuant to Article 15(5) of Regulation (EU) 2018/1240

1. Introduction and background

The European Travel Information and Authorisation System (ETIAS) has been established by Regulation (EU) 2018/1240¹ (ETIAS Regulation) and requires all visa-exempt third country nationals to apply online for travel authorisation prior to the date of their departure to the Schengen area.

Online applications may be lodged by the applicant or by third parties, including commercial intermediaries, authorised by the applicant to submit an application in his or her behalf. Applicants that rely on commercial intermediaries to lodge an application, may report on abuses by these intermediaries.

To report an abuse by commercial intermediaries applicants should fill in a form available at the dedicated ETIAS public website or via the app for mobile devices. Once submitted, the form is sent to the ETIAS Central Unit, which shall take appropriate action, including by regularly reporting to the Commission.

Pursuant to Article 15(5) of Regulation (EU) 2018/1240, the European Commission has been empowered to adopt the above-mentioned form. The draft Implementing Regulation contains nine Articles which lays down provisions on additional documentation that may accompany the form, the procedure, the roles of the ETIAS Central Unit and the European Commission as well as specific security measures. Article 2 refers to the Annex, which includes the form to report abuses by commercial intermediaries and the data protection notice.

The present formal comments are issued in response to the legislative consultation by the European Commission pursuant to Article 42 (1) of Regulation 2018/1725.² In this regard the EDPS welcomes the reference to this consultation under Recital 13 of the draft Implementing Regulation.

2. Comments

¹ 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.

² 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 (Regulation 2018/1725).

The below comments refer to both the draft Implementing Regulation and its Annex (“the Annex”). In terms of legislative technique, the EDPS wonders why the second paragraph of the data protection notice refers to Article 15(2)(b) instead of Articles 15 to 24 of Regulation (EU) 2018/1725.

Purpose

The EDPS notes that the purpose of the abuse report is not clearly defined. Different parts of the draft Implementing Regulation provide for different descriptions of the purpose. For instance:

- Recital 4 of the draft Implementing Regulation explains that “*Abuses by the commercial intermediaries should be reported by applicants in order to assess whether further abuses may be prevented*”;
- Article 6(1)(a) tasks the ETIAS Central Unit to “*follow-up*” on reports of abuses;
- The draft protection notice mentions that “*personal data submitted via the form will be stored in a database of the ETIAS Central Unit for the sole purpose of handling the report of abuse*”.

Furthermore, from the current draft data protection notice one may infer that the ETIAS Central Unit will deal with each complaint individually (especially since the data protection notice mentions that the information submitted via the abuse report form will be shared with the commercial intermediary the individual is complaining about). The fact that disputes between the applicant and the intermediary will be handled by national law is provided only in the notification,³ i.e. after the applicant has already submitted the form for reporting an abuse.

The EDPS understands that the processing of personal data contained in the form will be based on consent⁴, which must be specific and informed. Therefore, the EDPS recommends clarifying and further specifying the purpose(s) of such processing both in the draft Implementing Regulation and data protection notice. In particular, the European Commission shall provide detailed information about the processing of the personal data submitted via the abuse form by the ETIAS Central Unit and the European Commission.

Recipients of personal data

The EDPS notes that the data protection notice provided in the Annex enlists the ETIAS Central Unit as the only recipient of personal data. This information appears to be at odds with Article 7(3) of the draft Implementing Regulation, which indicates that: “*The Commission may not communicate personal data included in the forms to any third country or any organisation outside the Commission*”. This provision implies that the European Commission will be one of the recipients of the personal data included in the abuse report forms. The purpose and necessity to include the European Commission among the recipients of personal data contained in the report abuse forms should be further clarified and justified. Also, the contents of the reports to be provided by the ETIAS Central Unit to the European Commission (Article 6(2) of the draft Implementing Regulation) should be adjusted accordingly and explicitly declare whether personal data will be shared or not with the European Commission. If this is the case, the data protection notice should include the European Commission among the recipients of personal data.

³ Article 5(2) (b) of the draft Implementing Regulation.

⁴ Article 4(1) of the draft Implementing Regulation.

Data minimisation

According to Article 3(1) of the draft Implementing Regulation, the abuse report form may be accompanied by any relevant documentation. To reduce the risk of collecting irrelevant information, the EDPS suggests including in the data protection notice an explicit reference to the fact that complainants should provide only information which is relevant to the subject-matter of the abuse report and to avoid unnecessary and irrelevant detail, especially if it includes third parties' personal data.

Information to be provided where personal data have not been obtained from the data subject

Among the data fields that the applicant is prompted to provide via the abuse report form, there is a list of personal data of the commercial intermediary who is being accused of wrongdoing. This means that the controller will obtain personal data of the person(s) against whom the allegation has been made from another individual, i.e. the applicant submitting the abuse report. As a consequence, the EDPS would like to recall that the data controller shall provide all data subjects with the information as outlined not only in Article 15 but also Article 16 of Regulation (EU) 2018/1725.

Furthermore, while the provision of such information on the ETIAS public website as per Article 71 of Regulation (EU) 2018/1240 is welcome, it is not sufficient. Therefore, it is recommended to provide the person(s) against whom the allegations has been made with the relevant information, in line with Article 16 of Regulation (EU) 2018/1725.

Data retention

The EDPS notes that, according to the data protection notice, personal data shall be kept for a maximum period of three years. At the same time, Article 6(1) (c) of the draft Implementing Regulation, establishes that the ETIAS Central Unit will report to the Commission on reported abuses by commercial intermediaries at least once a year. The EDPS invites the Commission to justify the necessity for the foreseen three years retention period. In the absence of a reasoned justification that supports the envisaged retention period, the EDPS recommends to revise the retention period limiting it to the timeframe necessary for reporting purposes.

Furthermore, to promote legal certainty and to ensure fair and transparent processing, it is suggested to include a reference to the retention period in the draft Implementing Regulation itself, instead of limiting such reference to the data protection notice only.

Data protection notice

The EDPS recommends replacing “*privacy statements*” in Article 4 of the draft Implementing Regulation by “*data protection notice*” in order to align the wording with the title in the Annex.

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[e-signed]
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