



EDPS formal comments on the draft Commission Implementing Decision on the specifications and conditions for the website, pursuant to Article 50(5) of Regulation (EU) 2017/2226 of the European Parliament and of the Council

1. Introduction and background

The Entry/Exit System (EES) has been established by Regulation (EU) 2017/2226 and will register entry and exit data and refusal of entry data of third country nationals who are admitted for a short stay into the Schengen area.

Third country nationals should be notified of the purpose of EES, how their personal data will be handled and how they can access them. To make third country nationals aware of their rights regarding their personal data, the Commission should set-up a website containing this information. In addition, the website should enable third country nationals to access the web service of the EES in order to verify the remaining authorised stay.

Pursuant to Article 50(5) of Regulation (EU) 2017/2226, the Commission has been empowered to adopt implementing acts concerning the specifications and conditions for the website referred to in paragraph 3 of Article 50.

The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission, pursuant to Article 42(1) of Regulation 2018/1725.¹ In this regard, the EDPS welcomes the reference to this consultation in Recital 9 of the draft Implementing Decision.

2. Comments

2.1. Stakeholders and Responsibilities

The EDPS notes that the stakeholders and responsibilities for the website are introduced in Article 1 of the draft Implementing Decision and proposes the explicit definition of controller and processor, in line with the role and responsibilities laid down by Regulation (EU) 2017/2226.

The EDPS further observes that, besides providing information about EES and the processing of personal data therein, the website will also enable third country nationals to access the web service of the EES to verify the remaining authorised stay (as described in Article 13 of Regulation (EU) 2017/2226). If the data controller of the website differs from the one of the web service, such distinction should be explicitly made. In addition, the Commission already adopted the Implementing Decision laying down the specifications and conditions for the web service of the EES and therefore the informal comments the EDPS provided in that occasion are still relevant, in particular with regard to the principle of data protection by design.

¹ 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).

2.2. Security and confidentiality of electronic communications

Article 6 of the draft Implementing Decision should clearly provide that any information transmitted to, stored in, related to, processed by and collected from the terminal equipment of users accessing the website and/or the web service shall be protected, in accordance with Articles 36 and 37 of Regulation (EU) 2018/1725. Therefore, the EDPS recommends to add a reference to Articles 36 and 37 of Regulation (EU) 2018/1725 at the end of paragraph 3 of Article 6 of the draft Implementing Decision.

2.3. App for mobile devices

The EDPS notes that paragraphs 1 and 7 of Article 7 of the draft Implementing Decision refer to an app for mobile devices, in addition to the website. However, Regulation (EU) 2017/2226 does not foresee the development of an app for mobile devices, unlike Regulation (EU) 2018/1240 on ETIAS that explicitly mentions it in Article 6(2)(e).

Therefore, the EDPS invites the Commission to clarify whether it actually intends to develop an app for mobile devices, in addition to the website referred to in Article 50(3) of Regulation (EU) 2017/2226 and if so, on which legal basis.

2.4. Logs

The EDPS notes that the website will log the access by users for monitoring the usage of the website in order to prevent any misuse and for statistical purposes (with regard to the latter, only on a subset of the logs). The EDPS recommends clearly defining the roles and purpose(s) for access to the logs of the website.

In addition, paragraph 11 of Article 6 states that *“The information logged in accordance with paragraphs 1 and 3 shall be kept for maximum of two years.”* However, paragraph 1 should be read together with paragraphs 2 to 5. Besides, it is also necessary to define the retention period for the logs related to the data listed in paragraphs 8 and 9. Therefore, paragraph 11 should be updated accordingly.

Finally, in line with the access restrictions to EES data, outlined in Article 4(2) of the draft Implementing Decision, it should be clarified that the logs for the web service will not be part of the logs of the EES website and that the European Commission will not have access to them.

2.5. Cookies and other tracking technology

The EDPS notes that Article 7(10) of the draft Implementing Decision envisages the possibility to use “additional tracking technology” to ensure the consistency of a session during the utilisation of the public website or app for mobile devices, besides what is foreseen in Article 7. The EDPS would like to draw attention to the fact that such tracking technologies usually relate to identifiers of the user’s browser/device etc and thus can be considered as ‘personal data’, triggering the application of the EU data protection rules. Furthermore, information relating to the terminal equipment of users is additionally protected by Directive 2002/58/EC (ePrivacy Directive) and Articles 36 and 37 of Regulation (EU) 2018/1725. Consequently, the EDPS strongly suggests to either clearly define what exactly such “additional tracking technology” could consist of, or delete this reference.

The EDPS further suggests aligning the implementation of the website with the “Guidelines on the protection of personal data processed through web services provided by EU institutions”².

In addition, the EDPS notes the commitment to implementing tracking technology that would not imply the processing of personal data. However, according to the draft Annex, cookies will be used. In addition, the precise details of the tracking technology are unknown at this stage. Therefore, the EDPS would like to insist on including references to the applicability of Regulation (EU) 2018/1725 as well as Regulation (EU) 2016/679 and Directive 2002/58/EC (ePrivacy Directive).

The EDPS also observes that the wording of the draft Implementing Decision is not in line with the draft Annex. In fact, points (k) to (n) of the said Annex refers to “cookies”, which are a specific example of tracking technology. Therefore, the EDPS invites the Commission to align the text of the Implementing Decision to that of the Annex, taking into account the above-mentioned remarks.

2.6. Data protection notice

Finally, with regard to the privacy notice (i.e. data protection notice) referred in the Annex of the draft Implementing Decision, the EDPS reiterates the need to designate explicitly the relevant controller(s) and competent supervisory authorities for the website and web service, respectively. Such distinction is necessary to enable the data subjects to exercise effectively their rights.

Brussels, 01 October 2020

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² https://edps.europa.eu/sites/edp/files/publication/16-11-07_guidelines_web_services_en.pdf