



Formal comments of the EDPS on the draft Commission implementing decision on specifying the risks as defined in Regulation (EU) 2018/1240 as well as in the Commission Delegated Decision XXX/XXX [Delegated Act]

1. Introduction and background

On 12 September 2018, the European Parliament and the Council adopted Regulation (EU) 2018/1240¹ (ETIAS Regulation) establishing a European Travel Information and Authorisation System (ETIAS) as a system for third-country nationals exempt from the requirement to be in possession of a visa when crossing the external borders, which laid down the conditions and procedures to issue or refuse a travel authorisation. The Regulation entered into force on 9 October 2018.

The European Commission is required to adopt the relevant implementing acts necessary for the design and development of ETIAS. Prior to the development of ETIAS it is necessary to adopt measures for the development and technical implementation of, among others, the ETIAS Central System, and in particular implementing acts for specifying the risks as defined in Regulation (EU) 2018/1240 as well as in the draft Commission Delegated Decision XXX/XXX [Delegated Act], subject to a parallel consultation.

The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 14 April 2021, pursuant to Article 42(1) of Regulation 2018/1725². In this regard, the EDPS welcomes the reference to this consultation in Recital 14 of the draft Decision.

These formal comments are made in addition to the Formal comments of the EDPS on the draft Commission Delegated Decision on further defining the risks related to security or illegal immigration or high epidemic risk and (subject to a parallel consultation) and do not preclude any future additional comments by the EDPS, 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 acts, pursuant to Regulation (EU) 2018/1240. 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 Regulation (EU) 2018/1725.

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).

2. Comments

2.1. ETIAS Fundamental Rights Guidance Board

The draft Implementing Decision provides that the ETIAS Central Unit should establish a list of risks, review the list every six months and remove from the list risks that are considered no longer valid. The ETIAS Central Unit should transmit new or revised risks and the analysis on which they are based to the ETIAS Screening Board. The ETIAS screening board should deliver an opinion without delay and the ETIAS Central Unit should take this opinion into account when deciding whether to add or amend a risk or remove a risk from the list. The EDPS would like to draw attention to Article 10(2) of the ETIAS Regulation, according to which the ETIAS Fundamental Rights Guidance Board shall also support the ETIAS Screening Board in the execution of its tasks when consulted by the latter on specific issues related to fundamental rights, in particular with regard to privacy, personal data protection and non-discrimination. Given the important implications of the screening rules and risk indicators for privacy, data protection and non-discrimination, the EDPS suggests involving also the ETIAS Fundamental Rights Guidance Board in the process of delivering the opinion of the ETIAS screening Board.

2.2. Analysis of statistics

Article 2 of the draft Implementing Decision provides for certain principles to be applied for the purposes of assessing the normal and abnormal rates in accordance with Articles 3 and 5 of the draft Delegated Decision XXXX/XXXX (concerning overstaying, refusal of entry and refusal of travel authorisation). Article 2 (c) further states that: “Where either the rate or the absolute number is above or below the specific thresholds determined in accordance with point (b), the rate or absolute number shall be considered abnormal, representing a heightened risk [...]” (emphasis added). In this regard, the EDPS questions whether the situation where either the rate or the absolute number of overstaying, refusal of entry and refusal of travel authorisation would be below the specific thresholds could ever in practice represent a heightened risk, as indicated in Article 2(c).

2.3. Evaluation and review of risks

Article 4(1) of the draft Implementing Decision provides that the ETIAS Central Unit shall every six months or whenever necessary, assess the continued validity of the risks on the list and review and remove from the list risks that are considered no longer valid. However, the article does not lay down any rules for this assessment. For example, the evaluation should assess the overall efficacy of the risk indicators and screening rules, for instance by **comparing the numbers of applicants that elicit a ‘hit’ as a result of having been profiled as a risk versus the final number of applicants that are refused a travel authorisation**. It should also assess whether the risks defined lead to any discriminatory practices. An indicative list of such rules should be added in the operative part of the draft Implementing Decision.

2.4. Subject matter

Article 1 states: “This Decision provides for the specification of risks in accordance with Article 33(4) of Regulation (EU) 2018/1240 that form the basis for the specific risk indicators referred to in Article 33(4) of that Regulation.” **From the context of this provision it seems that a clerical mistake has been made and that instead of “Art 33(4)”, marked in bold, reference should be made to “Art 33(3)”.**

Brussels, 02 June 2021

Wojciech Rafał WIEWIÓROWSKI
(*e-signed*)