



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

1. Introduction and background

The European Travel Information and Authorisation System (ETIAS) has been established by Regulation (EU) 2018/1240¹ 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.

Applications for authorisation are to be subject to screening rules that enable data recorded in the application to be analysed by reference to specific risk indicators corresponding to previously identified security, illegal immigration or high epidemic risks.

In order to establish the specific risk indicators used as part of the screening process, it is necessary to define risks related to security or illegal immigration or epidemic outbreaks, through the collection and analysis of statistics, information and reports referred to in Article 33(2), points (a) to (f) of Regulation (EU) 2018/1240. This analysis is to result in sets of characteristics corresponding to specific groups of travelers associated with security or illegal immigration or high epidemic risks.

Pursuant to Articles 33(2) of Regulation (EU) 2018/1240, the Commission is delegated the task of further defining the risks related to security or illegal immigration or high epidemic risks on the basis of statistics and information referred to in the same paragraph, points (a) to (f).

The present formal comments of the EDPS are issued in response to the legislative 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 16 of the draft Delegated Decision.

The EDPS wishes to stress that these formal comments 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

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 (EU) 2018/1725).



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.

2. Comments

The EDPS takes note of the fact that no personal data would be processed directly on the basis of the draft Delegated Decision, pursuant to Article 8. However, by further defining the risks that will form part of the ETIAS screening process, the practical application of the profiling into which these risks will feed will impact on the protection of individuals' personal data and wider fundamental rights.

The EDPS recalls that the EDPS Opinion 3/2017³ on the Commission's proposal for ETIAS underlined a number of concerns as regards the use of risk indicators and screening rules for the purposes of profiling applicants and, in particular, highlighted the overly broad definition of risks in the proposed Regulation. While the ETIAS Regulation now provides for a definition of security risk and illegal immigration risk⁴, Article 33(2) of the ETIAS Regulation also states that the Commission shall adopt a delegated act "to further define the risks related to security or illegal immigration or a high epidemic risk" based on statistics, information and reports referred to in Article 33(2), points (a) to (f) of Regulation (EU) 2018/1240. In this respect, the EDPS is of the opinion that the draft Delegated Decision does not go far enough in terms of specifying the elements that should inform the determination of such risks. For instance, with regard to the risks associated with overstaying, refusal of entry and refusal of travel authorisation, the gravity of the infringement is different whether third country nationals have entered into a Member State using false documents, or they have overstayed for a couple of days. However, the draft Delegated Decision does not make any differentiation in this respect. Therefore, the EDPS recommends the Commission to define further such risks by including a mechanism that would enable Member States to weigh the degree of gravity of a given infringement. Such elements should, in turn, form the basis for the development of specific risk indicators defined in 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]", subject to a parallel consultation.

With regard to security risks, the EDPS notes that pursuant to Article 4 of the draft Delegated Decision, the Member States responsible for providing the data referred to in Article 33(2), point (d) of Regulation (EU) 2018/1240 via their ETIAS National Units, are requested to provide sets of characteristics corresponding to specific groups of travelers **potentially posing or being particularly exposed to** risks identified (emphasis added). Such formulation would enable risk indicators to be construed in a broad manner, potentially leading to a high number of people denied automated authorisation due to a hit based on the screening rules, even though these persons do not actually present a risk. The EDPS underlines that the risk indicators should be defined in a manner which keeps to a minimum the number of innocent people wrongly identified by the system. Therefore, the EDPS invites

³ EDPS Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System, para. 36.

⁴ Regulation (EU) 2018/1240 Article 3(1)(6) and Article 3(1)(7)

the Commission to ensure that the identification of security risks is substantiated by evidence-based elements as requested by Regulation (EU) 2018/1240 and, from this perspective, recommends removing the reference to “potentially” and “being particularly exposed to” risks identified.

Furthermore, regarding the analysis of security risks to be provided by Member States to the ETIAS Central Unit under Article 4 of the draft Delegated Decision, and with a view to ensuring that the specific risk indicators be targeted and proportionate, as required by Article 33(5) of Regulation 2018/1240, the EDPS suggests to define more precisely the specification of security risks and threats. More specifically, it should be limited to those categorised as terrorist offences and serious criminal offences, as defined respectively in Article 3(1) (15) and (16) of Regulation (EU) 2018/1240.

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(e-signed)