

Formal comments of the EDPS on a Proposal for a Commission Implementing Decision amending Implementing Decision (EU) 2017/253 as regards the establishment of a system of digital Passenger Locator Forms as part of the procedures for the notification of alerts within the early warning and response system established in relation to serious cross-border threats to health

1. Introduction and background

- The following comments concern the draft Commission Implementing Decision amending Implementing Decision (EU) 2017/253 as regards the **establishment of a system of digital Passenger Locator Forms** as part of the procedures for the notification of alerts within the early warning and response system established in relation to serious cross-border threats to health, together with its Annex ('the draft Proposal').
- The draft Proposal aims to create an **obligation for EU Member States to establish a national system** of digital Passenger Locator Form ('PLF') for the sole purpose of SARS-CoV-2 contact tracing in air cross-border travel¹ and **to make use of the PLF exchange platform**, as this is considered the most effective way to fulfil the Member States' obligations under Article 2 of the Decision and Article 9(3) of Decision 1082/2013 for contact tracing purposes².
- As explained in the draft Proposal³, in May 2021, Commission Implementing Decision (EU) 2021/858 of 27 May 2021⁴ amended the Commission Implementing Decision (EU) 2017/253 of 13 February 2017⁵ by establishing a technical infrastructure meant to enable the secure, timely and effective exchange of personal data collected through a PLF between the Early Warning and Response System ('EWRS') competent authorities of the Member States – called the 'PLF exchange platform'. The technical infrastructure allows the transmission of information from the Member States' existing national digital PLF systems to other EWRS competent authorities, in an interoperable and automatic manner⁶.

¹ See recital 7 of the draft Proposal.

² See recital 5 of the draft Proposal.

³ See recital 2 of the draft Proposal.

⁴ Commission Implementing Decision (EU) 2021/858 of 27 May 2021 amending Implementing Decision (EU) 2017/253 as regards alerts triggered by serious cross-border threats to health and for the contact tracing of passengers identified through Passenger Locator Forms (OJ L 188, 28.5.2021, p. 106).

⁵ Commission Implementing Decision (EU) 2017/253 of 13 February 2017 laying down procedures for the notification of alerts as part of the early warning and response system established in relation to serious cross-border threats to health and for the information exchange, consultation and coordination of responses to such threats pursuant to Decision No 1082/2013/EU of the European Parliament and of the Council (OJ L 37, 14.2.2017, p. 23).

⁶ See recital 6 of Commission Implementing Decision (EU) 2021/858 of 27 May 2021.

- Moreover, as outlined in the draft Proposal⁷, Commission Implementing Decision (EU) 2021/1212⁸ further amended Commission Implementing Decision (EU) 2017/253 in order to allow for the exchange of personal data of persons who have completed a PLF and have been in close contact to an infected passenger who has also completed a PLF, in order to ensure an effective contact tracing following the identification of a positive case of COVID-19 required under Article 9(1) of Decision No 1082/2013/EU.
- The EDPS provided formal comments on the Commission Implementing Decision (EU) 2021/858 amending the Commission Implementing Decision (EU) 2017/253 on 6 May 2021⁹ and once again on the Commission Implementing Decision (EU) 2021/1212 further amending Commission Implementing Decision (EU) 2017/253 in order to allow for the exchange of personal data of persons who have completed a PLF and have been in close contact to an infected passenger who has also completed a PLF on 13 July 2021¹⁰.
- These comments are provided in reply to the request by the Commission of 7 December 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')¹¹. We limited our comments below to the provisions of the draft Proposal that are relevant from a data protection perspective.
- 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. 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 the EUDPR.

2. Comments

2.1 General comments

- Recital 3 of the draft Proposal recalls that “[t]he PLF exchange platform allows the EWRS competent authorities of the Member States to exchange well-defined sets of data collected through those Member States’ respective PLFs, for the sole purpose of SARS-CoV-2 contact tracing of exposed persons by those authorities. (...)”, while also allowing for the exchange of other limited epidemiological data necessary for contact tracing.

⁷ See recital 4 of the draft Proposal.

⁸ Commission Implementing Decision (EU) 2021/1212 of 22 July 2021 amending Implementing Decision (EU) 2017/253 as regards alerts triggered by serious cross-border threats to health and for the contact tracing of exposed persons identified in the context of the completion of Passenger Locator Forms (OJ L 263, 23.7.2021, p. 32).

⁹ https://edps.europa.eu/system/files/2021-05/201-0445_d0956_comments_en.pdf.

¹⁰ https://edps.europa.eu/system/files/2021-07/2021-0686_d1541_comments_passenger_locator_form_en.pdf

¹¹ 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 L 295, 21.11.2018.

- As reflected in recital 5 of the draft Proposal, “[t]he use of the **PLF exchange platform was originally envisaged as voluntary**, with the Decision giving the option to the Member States to notify alerts under the currently existing technical infrastructure of the EWRS on a temporary basis and provided it did not compromise the purpose of contact tracing.” However, the draft Proposal **now creates an obligation** for Member States to **establish a national system of digital PLF** for the sole purpose of SARS-CoV-2 contact tracing in air cross-border travel and **to make use of the PLF exchange platform**, the latter obligation meant to fulfil the obligations of Member States’ under Article 2 of the Decision and Article 9(3) of Decision 1082/2013 for contact tracing purposes.
- The EDPS recalls once again that compliance with data protection rules does not constitute an obstacle for fighting the COVID-19 pandemic and that, at the same time, the general principles of effectiveness, necessity, and proportionality must guide any measure adopted by Member States or EU institutions that involve processing of personal data to fight COVID-19¹². In this regard, the EDPS welcomes the explanation provided in recital 5 of the draft Proposal as to the reasons for the envisaged obligations for Member States. A regular assessment on any measures to fight the COVID-19 pandemic should take place, having regard to the relevant scientific evidence and additional measures in place, in order to continuously evaluate which measures remain effective, necessary and proportionate. Moreover, the EDPS considers that the fact that the validity of the Decision would be limited in time would also provide a certain degree of reassurance that such an assessment will be also made in due course in relation to the PLF as such.
- In this regard, the EDPS also welcomes recital 13 of the draft Proposal, which provides that the requirement for Member States to have national digital PLF systems should also be limited to the control of the COVID-19 pandemic and restricted in time, in order to be circumscribed to what is absolutely necessary in order to ensure the performance of effective contact tracing measures, and that its impacts on the freedom of movement are limited to the minimum extent possible.

2.2 Specific comments

2.2.1 Purpose limitation

- The EDPS welcomes Article 1(1)(d) of the draft Proposal, providing that the “[p]rocessing of personal data in the PLF exchange platform for the sole purpose of SARS-CoV-2 contact tracing (...)” and recital 7 of the draft Proposal, which states that “[t]his Decision creates a legal basis for an obligation of the Member States to establish a national system of digital PLF for the sole purpose of SARS-CoV-2 contact tracing in air cross-border travel.”

¹² See [EDPB guidelines 20200420 contact tracing covid with annex en.pdf \(europa.eu\)](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf) para. 4; see also https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf.

- However, the EDPS also takes note that Article 1(1)(b) of the draft Proposal provides that “[i]n order to fulfil their obligations under Article 2 to notify serious cross-border threats to health that are identified in the context of the collection of PLF data, the EWRS competent authorities of the Member States shall exchange a set of PLF data, as detailed in Article 2b, through the PLF exchange platform for the means of transport for which they require PLF.” Article 1(1)(b) of the draft Proposal further specifies that “[f]or that purpose, Member States shall have in place a national system of digital PLF that collects the passengers’ data specified in Annex I, applicable at least for cross-border travel by air, at least until the processing of personal data shall cease in accordance with paragraph 8.”
- In this regard, **the EDPS notes the discrepancy between recital 7 of the draft Proposal**, which clearly highlights that the purpose of the collection and exchange of PLF data is SARS-CoV-2 contact tracing in air cross-border travel, **and Article 1(1)(b)**, where the purpose of the collection and exchange of PLF data refers ‘at least’ to air cross-border travel. The EDPS recommends that the Commission ensure, to the extent possible, that the purpose for the collection and exchange of PLF data is limited to air cross-border contact tracing and is harmonised throughout the draft Proposal. Insofar as the draft Proposal only seeks to create a legal basis for an obligation of the Member States in relation to air cross-border travel, the EDPS recommends clarifying in the draft Proposal the relevant legal bases for the exchange of PLF data concerning other modes of transport.
- Moreover, the EDPS also notes that recital 7 of the draft Proposal provides that “[t]his is without prejudice to other purposes defined under national legislation of Member States”. In this regard, the EDPS highlights that, **should Member States still seek to use the PLF data on the basis of Member State law for any further use than performing SARS-CoV-2 air cross-border contact tracing, these must respect Articles 7 and 8 of the Charter and must be in compliance with the GDPR, including Article 6(4) GDPR¹³**. This implies the need for a proper legal basis in Member State law, complying with the principles of effectiveness, necessity, proportionality and including strong and specific safeguards implemented following a proper impact assessment, in particular to avoid any risk of discrimination. The EDPS also considers that such a legal basis in Member State law should at the very least include specific provisions clearly identifying the scope and extent of the processing, the specific purpose involved, the categories of recipients as well as the relevant safeguards to prevent abuse, taking into account the risks for the rights and freedoms of data subjects¹⁴.

¹³ Article 6(4) GDPR permits processing of personal data for a purpose other than which the data has been collected on the basis of a Union or Member State law, which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1) GDPR.

¹⁴ See in the same vein paragraph 24 of the EDPB-EDPS Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate), Version 1.1, 31 March 2021, available at

2.2.2 Data retention

- The EDPS also welcomes Article 1(1)(b) of the draft Proposal, which provides that “[t]he passengers’ data shall be retained in the national systems of digital PLF for a maximum period of [fifteen] days upon their collection, and shall be deleted automatically afterwards.” In this regard, the EDPS considers that, given that Member States may decide to define additional purposes for the use of PLF data under national legislation, there is a concrete risk that PLF data may risk not always being automatically deleted after 15 days.
- For such reason, the EDPS suggests that the Commission ensures that this provision is applied by Member States in the context of the collection and processing of PLF data for the purpose of air cross-border travel. The EDPS recalls that, should Member States seek to retain PLF data longer than the provided timeline in pursuit of another purpose, the relevant storage duration should be provided by law and must meet the requirements of Articles 7 and 8 of the Charter and the GDPR.

2.2.3 Duration

- Article 1(1)(d) of the draft Proposal provides that the “[p]rocessing of personal data in the PLF exchange platform for the sole purpose of SARS-CoV-2 contact tracing shall be performed until 31 December 2022.”
- The EDPS welcomes the existence of specific provision that seeks to ensure that the collection and exchange of personal data shall be limited in time. At the same time, the EDPS notes that the Article 1(1)(d) of the draft Proposal does not provide for an expiration in case the Director-General of the World Health Organization would declare that the public health emergency of international concern caused by SARS-CoV-2 ended, if that declaration was made earlier than 31 December 2022. Such a possibility is expressly by Article 2a(8) of existing Commission Implementing Decision (2017/253). In line with the principles of data minimisation and purpose limitation, the EDPS recommends maintaining equivalent wording in Article 1(1)(d) of the draft Proposal.

2.2.4 Categories of personal data

- The EDPS takes note that Article 1(2)(a) and recital 18 of the draft Proposal provide for the travel history of the previous 14 days, namely the countries visited and the respective dates of visit (where this is necessary in order to perform effective contact tracing) to be collected by national PLFs and processed throughout the PLF exchange platform in the context of contact tracing.

- Moreover, the EDPS notes that recital 15 and Article 1(2)(b) of the draft Proposal also state that, where this is available, the EWRS national competent authorities shall provide for additional epidemiological data, where this is necessary in order to perform effective contact tracing, namely ‘signs, symptoms and/or immunity status’. While the collection of these additional data will result in additional processing of personal data concerning health, the EDPS understands the rationale to the need for such additional data category, particularly due to the most recent epidemiological developments.

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(e-signed)
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