EDPS Formal comments on the draft 'Commission Implementing Decision laying down model contingency measures for cases of technical impossibility to access data at the external borders, including fall - back procedures to be followed by border authorities pursuant to Article 48(4) of Regulation (EU) 2018/1240'

1. Introduction and background

- On 12 September 2018, the European Parliament and the Council adopted Regulation (EU) 2018/1240 establishing a European Travel Information and Authorisation System (ETIAS)[1] 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. Member States have the obligation to adopt national contingency plans authorising procedures to be followed by the border authorities in case of technical impossibility to consult the ETIAS Central System. They should use model contingency measures as a basis, to be adapted if necessary. To this end, the European Commission is tasked to adopt model contingency measures including fall - back procedures for the cases of technical impossibility to access data at the external borders.

- On 22 December 2021, the European Commission consulted the EDPS on the draft 'Commission Implementing Decision laying down model contingency measures for cases of technical impossibility to access data at the external borders, including fall - back procedures to be followed by border authorities pursuant to Article 48(4) of Regulation (EU) 2018/1240'.

- 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

[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.

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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[2].

2. Comments

2.1. General Comments

The draft Commission Implementing Decision addresses the issue of availability in those cases, where there is no access to travel authorisation data possible. The EDPS recalls that Article 32(1) of Regulation (EU) 2016/679 (hereinafter "GDPR")[3] recognises that incidents that limit or eliminate availability of personal data can occur. At the same time, the GDPR lays down an obligation for the controller and the processor to ensure "(b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services", and "(c) the ability to restore the availability and access to personal data in a timely manner".

- The current draft Commission Implementing Decision stipulates contingency measures if it is technically impossible to access the data. Thereby it provides for two kinds of contingency responses: practical measures at the border to enable the continuation of traveller handling (Article 2 para. 1), which encompasses additional processing of personal data; and information duties among authorities concerned, which do not encompass additional personal data processing, but may be relevant under the requirement of Article 32(1)(c) of GDPR to restore availability "in timely manner".

- The inability to access ETIAS data at the borders may be caused by several causes, such as:

    - unavailability of the central ETIAS infrastructure/communication infrastructure between national interfaces and ETIAS central infrastructure
    - unavailability of the national system which is used to access ETIAS services at the borders
    - general communication infrastructure unavailability at the borders.

[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 L 295, 21.11.2018.

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

The draft Commission Implementing Decision does not explicitly draw a connection between these causes and the measures, nor does it introduce a hierarchy for the contingency measures proposed in the draft (asking the third-country nationals to provide proof of the travel authorization, storing information locally, not checking the travel authorization). These measures are different as to the intensity with which they may have an impact on the traveller's individual rights. From a data protection perspective, it seems desirable to introduce a possible hierarchy of contingency measures, for instance based on whether alternative means of verifying, such as the travellers' verification tool, are available or not.

2.2. Specific comments

2.2.1. Acceptance of proof by the traveller

- According to the draft Commission Implementing Decision, travellers may be asked to provide proof of their prior authorisation. While that is an obvious course of action, its results depend on the preparedness of the traveller. This contingency measure would be accompanied best by information that the traveller receives beforehand, that it is advisory to have a copy or print screen of the authorisation when travelling.

- Depending on the availability of the interface for travellers, the EDPS recommends the draft Commission Implementing Decision to refer more specifically to the "means of equipment installed at the border crossing point enabling the third-country national to consult the verification tool" referred to in Article 47(3) of Regulation (EU) 2018/1240, if existing.

If travellers shall make use of their own devices to establish the required proof, they may depend on the provision of an internet connection to do so. Any connections (e.g. wireless LAN) or devices to be provided to travellers to access the verification tool in order to provide proof of the ETIAS authorization, should be secure and comply with the requirements of the GDPR and the national laws implementing Directive 2002/58/EC[4].

[4] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37–47.

2.2.2. Local storage of travellers' information to enable subsequent checks

- The draft Commission Implementing Decision provides also for the possibility to locally store traveller information and check it subsequently, when the system is available again. As simple as this solution might occur to the traveller, it leads to additional data processing, which is not further regulated in the draft Commission Implementing Decision. The EDPS invites the Commission to develop the model contingency measures by laying down further guidance in the case of storing information locally, such as retention periods or access rights. The model measures should also include any subsequent action if the third-country national is found not to have a travel authorisation or if the authorisation has expired, as well as possible reporting duties in such cases.

- In addition, Article 2(1)(b) of the draft Commission Implementing Decision indicates as purpose of the local storing "enabling subsequent verification of who entered during the period of technical impossibility". However, the EDPS would like to point out that such verifications fall within the scope of the Entry/Exit System (EES), pursuant to Regulation (EU) 2017/2226[5], and not of ETIAS. Therefore, the EDPS recommends a further clarification of the objectives of the local storage of data, in line with the principle of purpose limitation.

2.3. Information on the notifications provided when the ETIAS central unit is unavailable or a national border point has an inability to use the ETIAS services (Article 2(2) and (3))

- The EDPS understands that a notification of technical unavailability is important, also under the requirement of Article 32(1)(c) of GDPR to restore availability "in timely manner". The EDPS invites the Commission to set a deadline for the notification.

Brussels, 17 February 2022

(e-signed)
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[5] Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011