

EDPS Formal comments on the draft Commission Implementing Decision adopting measures for the application of Regulation (EU) 2018/1240 of the European Parliament and of the Council as regards accessing, amending, erasing and advance erasing of data in the ETIAS Central System and repealing Commission Implementing Decision C(2021) 3300

1. Introduction and background

The European Travel Information and Authorisation System (ETIAS) has been established by Regulation (EU) 2018/1240 (the ETIAS Regulation). Once operational, it will require all visa-exempt third country nationals to apply online for travel authorisation prior to the date of their departure to the Schengen area. Moreover, the ETIAS will enable the consideration by the competent authorities whether the presence of the visa exempt third-country nationals in the territory of the Member States will pose a security, illegal immigration or high epidemic risk.

The ETIAS Regulation empowers the European Commission to adopt a number of implementing and delegated acts in order to further define and specify various elements of the system.

On 17 December 2020, the European Commission consulted the EDPS in accordance with Article 42(1) of Regulation (EU) 2018/1725 ('EUDPR')¹ on a draft Implementing Decision spelling out the way the competent authorities would access, amend and erase data in the ETIAS Central System, pursuant to Article 73(3)(b), sub points (i) and (ii), of Regulation (EU) 2018/1240. On 22 January 2021, the EDPS issued formal comments² on this draft Implementing Decision.

On 21 June 2021, the Commission adopted the Implementing Decision C(2021) 3300, adopting measures for the application of Regulation (EU) 2018/1240 of the European Parliament and of the Council as regards accessing, amending, erasing and advance erasing of data in the ETIAS Central System. On 22 June 2021, the Commission replied to the EDPS's comments.

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 L 295, 21.11.2018, p. 39–98.

² European Data Protection Supervisor (EDPS), [Formal comments on measures for accessing, amending, erasing and advance erasing of data in the ETIAS Central System](https://edps.europa.eu/data-protection/our-work/publications/comments/formal-comments-measures-accessing-amending-erasing_en), 22 January 2021, available at https://edps.europa.eu/data-protection/our-work/publications/comments/formal-comments-measures-accessing-amending-erasing_en

On 7 July 2021, the European Parliament and the Council adopted Regulations (EU) 2021/1150, (EU) 2021/1151 and (EU) 2021/1152, establishing the conditions for accessing other EU information systems for the purpose of the European Travel Information and Authorisation System. Following the adoption of those three Regulations, the Commission has drafted a new Implementing Decision repealing Commission Implementing Decision C(2021) 3300.

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 (EU) 2018/1725. In this regard, the EDPS welcomes the reference to this consultation in Recital 24 of the draft Implementing Decision, and understands that the date of issuing of his present comments will be modified accordingly.

The following 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 Regulation (EU) 2018/1725.

2. Comments

2.1 General Comments

The amendments introduced in the Implementing Regulation C(2021) 3300 provide for additional rules concerning access to the status of a travel authorisation by border authorities at the external borders via the Entry/Exit System, as well as the addition of a “unique reference number” to data that can be extracted in certain situations. There is also a correction of one reference to Article 47 paragraph 4 of the ETIAS Regulation, in Article 9 of the Implementing Decision. Those amendments do not change the general structure of the Implementing Regulation.

Against this background, the EDPS welcomes the changes made by the Commission along the lines of his previous comments, as regards the wording of Article 4 paragraph 1 (e) in order to bring it in line with the provision of Article 55 of the ETIAS Regulation³, and the conditions of access to data in the ETIAS Central System by central access points in Article 8 paragraphs 3 and 4⁴. The EDPS also welcomes the redrafting of Article 7 of the Implementing Decision concerning the access to data stored in the ETIAS Central System by

³ See EDPS [Formal comments on measures for accessing, amending, erasing and advance erasing of data in the ETIAS Central System](#), point 2.2

⁴ Ibid, point 2.4

Europol, even though his suggestion to remove the last sentence of paragraph 4 has not been followed⁵.

2.2. Specific comments

2.2.1 Extraction of data from the application file in cases of manual processing

In his comments issued on 22 January 2021, the EDPS noted that one of the specific software functionalities foreseen in Article 4 paragraph 1 (g), (h), (i) and (l) of the draft Implementing Decision allowed extraction of certain data from the application file. He considered that such a functionality should not lead to additional interference or risks for the protection of personal data of the applicants. He recommended that the file with the extracted data should remain in the ETIAS Central System and should not be copied or replicated outside of it without a proper legal ground (e.g. to be presented as evidence in court). The EDPS added that it should be ensured that the files with the extracted data are deleted in an automated manner, in line with the rules on data retention, laid down in Article 54 of Regulation (EU) 2018/1240.

Based on the information and clarification provided by the Commission following his previous comments, the EDPS notes that instead of manually introducing the data into EU information systems or national databases, a file ready for extraction would be created upon request, based on a pre-defined and limited set of data. While such an approach could indeed limit the processing of personal data, it would not prevent the copy or replication of at least a part of the initial application file. Therefore, the EDPS still considers that copying or replicating files outside the ETIAS Central System should be assessed very carefully, on the basis of proper legal grounds which should be identified beforehand.

As regards the recommendation of the EDPS for the extracted data to be deleted in an automated manner in line with the rules on data retention laid down in Article 54 of Regulation (EU) 2018/1240, the Commission indicated that the actual data retention of the extracted files would be far shorter, since there would be an automatic deletion of these extracted data for the purpose of assessment of risks at the end of that said assessment, in line with the deadlines for the decision on the application set out in the ETIAS Regulation.

The EDPS welcomes the explanation given by the Commission, but for the sake of legal clarity and certainty, suggests including in the text of the Implementing Decision a provision on the automatic deletion of the extracted data at the end of the assessment of risks.

⁵ EDPS [Formal comments on measures for accessing, amending, erasing and advance erasing of data in the ETIAS Central System](#), point 2.3

2.2.2 Requests from data subjects in accordance with Article 64 of Regulation (EU) 2018/1240

In the draft Implementing Decision which was subject to the formal comments issued on the 22nd of January 2021, a whole article was dedicated to the requests from data subjects, in accordance with Article 64 of Regulation (EU) 2018/1240, on the “*right of access to, of rectification, of completion, of erasure of personal data and of restriction of processing*”. This article has been removed in the Implementing Decision C(2021) 3300, and replaced by additional provisions in Article 4, paragraph 1 (j) and (k). For a sake of clarity, the EDPS recommends to reintroduce in the Implementing Decision the content of the whole article, which provided for specific rules in relation to the implementation of Article 64 of Regulation (EU) 2018/1240.

2.2.3 Deletion of temporary notes

Article 4, paragraph 1 (f) of the initial draft Commission Implementing Decision, which was subject to the EDPS formal comments issued of 22 of January 2021, allowed for a specific functionality of the software enabling the ETIAS Central Unit and ETIAS National Unit(s) to delete temporary notes on the application file. The provision specified that “*remaining notes shall be automatically deleted at the time of completion of the manual processing by the ETIAS Central Unit and ETIAS National Unit(s). Temporary notes shall be only visible to users of the same Unit*”.

Such specifications have been removed in the Implementing Decision C(2021) 3300, and replaced by a provision, in Article 5 paragraph 1 (f), providing for a “*functionality enabling the ETIAS Central Unit and ETIAS National Unit(s) to (...) delete temporary notes on the application file*”.

The EDPS regrets the removal of the reference to the time of the deletion, and of the conditions of use of the temporary notes. Therefore, he recommends the reintroduction of these elements in the new draft Implementing Decision.

2.2.4 Introduction of a unique reference number

The EDPS notes that Article 5, paragraph 1 (g)(i) of the current draft Commission Implementing Decision introduces a new element, namely the “unique reference number of the record in the queried EU information systems”. At the same time, Regulation (EU) 2018/1240 uses the same term (‘unique reference number’) in Article 19 (3)(e) but in the context of payments and not in relation to queries in the other EU information systems pursuant to Article 20(2) of the same Regulation. Therefore, the EDPS invites the Commission to further clarify and explain the meaning and the use of the term ‘unique reference number’ in the present draft Commission Implementing Decision.

2.2.5 Procedure to follow in case of inability to access ETIAS by border authorities

Article 9 of the current draft Commission Implementing Decision defines the mechanisms by which border authorities shall have access to the ETIAS Central System - whether through the Entry/Exit System (EES), for Member States operating that system at their external borders, or through the European Search Portal (ESP), for Member States not operating EES at their external borders. Paragraphs (a) and (b) of Article 9(3) state that "*before the European Search Portal is ready, the searches shall be carried out directly in the ETIAS Central System*".

However, Article 9 does not clarify if it will be possible for border authorities to make searches directly in the ETIAS Central System after the ESP is operational. The draft Commission Implementing Decision should clarify if direct access to ETIAS Central System will still be possible for border authorities after the ESP is operational.

On the subject of inability to access the ETIAS system, on 22 December 2021, the Commission consulted the EDPS on the Implementing Decision "*on 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 of the European Parliament and the Council*". Article 2 (1) of that Implementing Decision described the measures to proceed when technically impossible to proceed with the consultation or the search referred to in Article 48(1) and (2) of Regulation (EU) 2018/1240.

The EDPS considers that the current draft Commission Implementing Decision should also consider similar fall-back procedures when border authorities are unable to search ETIAS through the European Search Portal.

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(e-signed)

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