

## **EDPS Formal comments on the draft Commission Implementing Regulation laying down the rules and conditions for verification queries by carriers, provisions for data protection and security for the carriers' authentication scheme as well as fall back procedures in case of technical impossibility and repealing Commission Implementing Regulation C(2021) 4902**

### **1. Introduction and background**

1. The European Travel Information and Authorisation System (ETIAS) has been established by Regulation (EU) 2018/1240<sup>1</sup> (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.
2. 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.
3. On 5 March 2021, the European Commission consulted the EDPS in accordance with Article 42 (1) of Regulation (EU) 2018/1725, on a draft Implementing Regulation laying down the rules and conditions for verification queries by carriers, provisions for data protection and security for the carriers' authentication scheme as well as fall back procedures in case of technical impossibility, pursuant to Articles 45 (2), (3) and 46 (4) of Regulation (EU) 2018/1240.
4. On 30 April 2021, the EDPS issued formal comments<sup>2</sup> on this draft Implementing Regulation.
5. On 26 July 2021, the Commission adopted the Implementing Regulation C(2021) 4902<sup>3</sup>, laying down the rules and conditions for verification queries by carriers, provisions for data protection and security for the carriers' authentication scheme as well as fall-back procedures in case of technical impossibility.

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<sup>1</sup> 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

<sup>2</sup> [https://edps.europa.eu/system/files/2021-05/21-04-30\\_2021-0265\\_formal\\_comments\\_etias\\_carriers\\_en.pdf](https://edps.europa.eu/system/files/2021-05/21-04-30_2021-0265_formal_comments_etias_carriers_en.pdf)

<sup>3</sup> Commission Implementing Regulation (EU) 2021/1217 of 26 July 2021, OJ L 267, 27.7.2021, p. 1–11

6. On 7 July 2021, the European Parliament and the Council adopted Regulations (EU) 2021/1150<sup>4</sup>, (EU) 2021/1151<sup>5</sup> and (EU) 2021/1152<sup>6</sup>, establishing the conditions for accessing other EU information systems for the purpose of the European Travel Information and Authorisation System, as well as the Regulation (EU) 2021/1134<sup>7</sup> for the purpose of reforming the Visa Information System.
7. Following the adoption of those Regulations, the Commission has drafted a new Implementing Regulation repealing Commission Implementing Regulation C(2021) 4902.
8. 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 22 of the draft Implementing Regulation, and understands that the date of issuing of his present comments will be modified accordingly.
9. 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.

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<sup>4</sup> Regulation (EU) 2021/1150 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EU) 2018/1862 and (EU) 2019/818 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, OJ L 249, 14.7.2021, p. 1–6

<sup>5</sup> Regulation (EU) 2021/1151 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EU) 2019/816 and (EU) 2019/818 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, OJ L 249, 14.7.2021, p. 7–14

<sup>6</sup> Regulation (EU) 2021/1152 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861 and (EU) 2019/817 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, OJ L 249, 14.7.2021, p. 15–37

<sup>7</sup> Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System, OJ L 248, 13.7.2021, p. 11–87

## 2. Comments

### 2.1 General Comments

10. The amendments introduced in the Implementing Regulation C(2021) 4902 provide for additional provisions only in Recital 14, Article 6 (4) and Article 13 (1) (b) and 3. They do not change the general structure of the Implementing Regulation, which was subject of the formal comments made by the EDPS on 30 April 2021.
11. Against this background, the EDPS welcomes the changes made by the Commission in line with his comments, as regards the web service replies referred to in Article 6, the indication of the data retention period of personal data processed following the deregistration of the carriers in Article 11(8), and the obligations on carriers to put in place a regular review of the access rights of their dedicated staff mentioned in Article 3(3)(d).
12. However, the EDPS takes note that the Commission has decided not to follow some of his recommendations. Moreover, certain changes have been made in the draft Implementing Regulation after the first consultation of the EDPS.

### 2.2 Deregistration from the authentication scheme

13. In his formal comments mentioned above, the EDPS noted that pursuant to Article 11(6), eu-LISA should in particular, where possible, *“provide the opportunity for disconnected carriers to send verification queries by other means than those referred to in Article 4”*. The EDPS pointed out that the usage of these *“other means”* should be limited in time and done under strict conditions, in order for it not to become an alternative channel. Moreover, the disconnected carriers should be motivated to resolve the disconnection issue as soon as possible. In the draft Implementing Regulation, the Commission took into account the recommendation of the EDPS and added in paragraph 6 *“for a limited time and under strict conditions”*. The whole paragraph reads as follows: *“To the extent appropriate, eu-LISA shall assist carriers that have received a notice of deregistration or disconnection to remedy the deficiencies that gave rise to the notice and, where possible, for a limited time and under strict conditions, provide the opportunity for disconnected carriers to send verification queries by other means than those referred to in Article 4.”*
14. While recognising the efforts of the Commission to meet his recommendations, the EDPS considers nevertheless that this addition does not sufficiently address the needs of carriers to be provided with clear rules: the reference to a *“limited time”* should be replaced with an explicit period of time, which may be subject to extension, and the *“strict conditions”* should be defined as precisely as possible.

## 2.3 Data quality

15. In his comments mentioned above, the EDPS noted that Article 45(4) of Regulation (EU) 2018/1240 provides that the database shall be updated on a daily basis, and recommended to explicitly indicate this in the draft Implementing Regulation.
16. Taking note of this comment, the Commission replied that it has ensured that the update will take place “*as frequently as technically possible and much more frequently than daily*”. The Commission added that the Commission’s Legal Service has recommended not to include a reference to a specific frequency in the act.
17. Taking also into account the comments of the Commission’s Legal Service, the EDPS recommends to include a reference to an update of the read-only data base, **as frequently as technically possible and in any event at least once a day** in Article 8(1) of the draft Implementing Regulation.

## 2.4 Abuse of the carrier interface

18. In the draft Implementing Regulation submitted to the EDPS’ consultation on 5 March 2021, Article 11, paragraph 9 provided that, in case of reasoned suspicion that carriers are abusing the carrier interface or do not fulfil the conditions referred to in Article 10(2)(b), eu-LISA may “*ask Member States to confirm the authenticity of official company registrations in the Member State submitted in accordance with Article 10(2)(c) as well as whether one or more carriers registered in the register referred to in paragraph 8 are operating in the Member State in accordance with the information provided by the carrier in accordance with Article 10(2)(a) (iv)*”.
19. In the draft Implementing Regulation subject to the present consultation, Article 11(9) simply states that “*eu-LISA may, in particular where there is reasoned suspicion that one or more carriers are abusing the carrier interface or do not fulfil the conditions referred to in Article 10(4), make inquiries with Member States or third countries*”.
20. The EDPS considers that the use of the expression “*make inquiries with Member States or third countries*” is quite vague and could lead to legal uncertainty. Therefore, he recommends including the former wording in a recital.

## 2.5 Verification of compliance

21. The draft Implementing Regulation submitted to the EDPS’ consultation on 5 March 2021 included an Article dedicated to the “*verification of compliance*”. Article 15 stated that: “*1. The European Commission, Member States, eu-LISA and the ETIAS Central Unit*

*may verify the compliance of carriers with their obligations under this Regulation. 2. eu-LISA may verify the compliance of carriers with their obligations under Article 45(3) of Regulation (EU) 2018/1240”.*

22. The EDPS does not understand the reasons why this Article has been deleted in the new draft Implementing Regulation, since it would have provided for an additional guarantee for the respect by carriers of their obligations under this Implementing Regulation, as well as under Article 45(3) of Regulation (EU) 2018/1240. Accordingly, he invites the Commission to reconsider the deletion.

Brussels, 24 March 2022

*(e-signed)*

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