

EDPS Formal comments on the draft Commission Delegated Decision on specifying the content and format of the questions and laying down the additional set of predetermined questions

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 7 July 2022 the European Commission adopted draft Commission Delegated Decision on specifying the content and format of the questions and laying down the additional set of predetermined questions ('the Proposal', 'the draft Delegated Decision'), in relation to the European Travel Information and Authorisation System (ETIAS).
2. The objective of the draft Delegated Decision is to specify the content and format of the questions and to lay down the content and format of related additional sets of answers and questions, part of the ETIAS application form to be completed by each applicant. These questions relate to criminal offences, stays in specific war or conflict zones and decision(s) to leave the territory or to return.
3. The Proposals are adopted pursuant to Article 17(5) and (6) of Regulation (EU) 2018/1240 of the European Parliament and of the Council² ('ETIAS Regulation').
4. The EDPS previously issued Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System (ETIAS)³, as well as a number of formal comments on the various implementing and delegated acts envisaged in the ETIAS Regulation.

¹ OJ L 295, 21.11.2018, p. 39.

² 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).

³ [EDPS Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System \(ETIAS\)](#), issued on 6 March 2017.

5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 7 July 2022, pursuant to Article 42(1) of Regulation 2018/1725⁴ ('EUDPR'). In this regard, the EDPS welcomes the reference to this consultation in Recital 11 of the Proposal.
6. These formal comments do not preclude any additional comments by the EDPS in the future, 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 acts⁵.
7. 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 and are limited to the provisions of the draft Proposal that are relevant from a data protection perspective.

2. Comments

2.1. Time periods in relation to previous criminal convictions

8. Pursuant to Article 17(4)(a) of the ETIAS Regulation, as part of the application form for travel authorisation, the applicant must provide information about possible previous criminal convictions. To this end, the applicant must reply "whether he or she has been convicted of any criminal offence listed in the Annex over the previous **10 years** and in the case of terrorist offences, over the previous **20 years**, and if so when and in which country" (emphasis added).
9. The EDPS notes, however, that in Article 2(2) of the draft Delegated Decision, the time periods in relation to a possible previous criminal convictions are significantly extended - **15 years** for criminal offence listed in the Annex and **25 years** for a terrorist offence.
10. The EDPS recalls that pursuant to Article 290(1) of the TFEU, a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to **supplement or amend certain non-essential elements** of the legislative act (emphasis added). In this context, Article 17(5) and (6) of the ETIAS

⁴ 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.

⁵ In case of other implementing or delegated acts with an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, the EDPS would like to remind that he needs to be consulted on those acts as well. The same applies in case of future amendments that would introduce new or modify existing provisions that directly or indirectly concern the processing of personal data.

Regulation limits the delegation only to “specifying the content and format of the questions” and not to redefining their substantial elements, such as the maximum period, during which a previous criminal conviction is deemed relevant.

11. In light of the above, the EDPS considers that the provision of Article 2(2) of the Proposal is in contradiction with the legislative delegation in Article 17(5) and (6) of the ETIAS Regulation, as well as with Article 290(1) of the TFEU. Consequently, **the time periods related to a possible previous criminal convictions in Article 2(2) of the Proposal should be aligned with the time periods provided for in the basic act**, i.e. Article 17(4)(a) of the ETIAS Regulation.

2.2. Personal data of family members and friends

12. Pursuant to Article 17(4)(b) of the ETIAS Regulation, the applicant is obliged to provide information about “whether he or she has stayed in a specific war or conflict zone over the previous 10 years and the reasons for the stay”.
13. The EDPS notes that according to Article 3(2)(c), (3), (4) and (6) of Proposal, in case of a positive reply, the applicant must state the reason(s) and sub-reason(s) for the stay. If the applicant indicates as reason ‘Family visit’, he/she must provide the “first name, surname and address of residence of the indicated family member(s)”. Similarly, if the reason is ‘Friend visit’, the applicant must provide the “first name, surname and address of residence of the indicated friend”.
14. The EDPS stresses that the processing of personal data of individuals who are not applicants for travel authorisation has no legal basis in the ETIAS Regulation. The general provision in Article 17(4)(b) of the ETIAS Regulation to provide a “reason for the stay” cannot be considered as sufficient legal ground to process the personal data of entirely new categories of data subjects in the ETIAS system. Furthermore, the purposes and nature of the processing are unclear, e.g. whether the data of family members and friends would be crosschecked against certain security databases, or accessed by law enforcement authorities, etc.
15. The EDPS is additionally concerned that there are no exceptions or limitations in cases when the family member (or the friend) is a minor. Actually, the predetermined list of family members in Article 3(3)(b) of the Proposal, which includes ‘Children’ and even ‘Grandchildren’, implies that no specific distinction is foreseen between minors and adults.
16. At the same time, the EDPS notes that, in accordance with Article 27 of the ETIAS Regulation, on a case by case basis, the competent ETIAS National Unit may request additional information or documentation by the applicant if it deems the information provided in the application form to be insufficient to enable it to decide whether to issue or refuse a travel authorisation.

17. In light of the above, the EDPS considers that **the envisaged obligation of the applicant to provide personal data of family members or friends as part of the application form is excessive and not justified**. Therefore he recommends removing Article 3(4) and (6) from the Proposal.

2.3. Methodology for the establishment of the list of specific war and conflict zones

18. The EDPS notes that Annex I to the Proposal lays down the methodology to establish the list of specific war and conflict zones, as referred in Article 17(4)(b) of the ETIAS Regulation and Article 3(1)(b) of the draft Delegated Decision. This methodology is based on data from the Heidelberg Institute for International Conflict Research (HIK) databases⁶, corresponding to the following cumulative criteria:
- political conflicts corresponding to intensity levels 4 (limited war) and 5 (war), with the exception of conflicts solely between drug cartels or drug trafficking organisations;
 - conflicts having occurred at subnational level outside of the EU;
 - conflicts having occurred in the previous 10 years;
19. As a result, the Commission has compiled in Annex II of the Proposal a list of 45 third countries that are designated, entirely or partially, as ‘war and conflict zones’. The EDPS observes that due to the chosen criteria, the list is very diverse - it includes countries, which are officially linked to foreign terrorist fighters⁷ but also countries that are associated or have partnership agreements with the EU.
20. The EDPS recalls that Article 17(4)(b) of the ETIAS Regulation requires designation of “*specific* war and conflict zones” (emphasis added). The mere existence of an internal conflict in a country should not automatically imply a security threat to the EU. In fact, it could be argued that some of the conflicts which are excluded from the list by default (Cartel wars), pose a more significant threat in terms of security and justice⁸, than many of the conflicts which are on the proposed list.
21. The EDPS underlines that the proposed extensive approach to defining ‘conflict zones’ in the draft Delegated Decision would entail similarly extensive processing of personal data of a significant number of applicants due to their family or other links with the selected countries and zones. At the same time, as indicated above, the EDPS has doubts whether the substantially increased volume of data processing would actually contribute to the purpose of preventing security, illegal immigration or high epidemic risks, which is the objective of ETIAS.

⁶ <https://hiik.de/data-and-maps/datasets/?lang=en>

⁷ See eg EU Counter-Terrorism Agenda 2020, COM(2020) 795 final

⁸ See eg Europol SOCTA 2021, about the significant increase in cocaine trafficking activities into the EU.

22. Therefore, the EDPS recommends reconsidering the methodology for the establishment of the list of specific war and conflict zones, referred to in Article 17(4)(b) of the ETIAS Regulation and Article 3(1)(b) of the draft Delegated Decision, in order to make the selection more targeted and objectively linked to possible security or other risks for the EU⁹.

Brussels, 3 August 2022

[e-signed]

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⁹ For instance, the United States Electronic System for Travel Authorisation (ESTA) includes only few 'risky' countries (Iran, Iraq, Libya, North Korea, Somalia, Sudan, Syria and Yemen), <https://esta.cbp.dhs.gov/eligibilityQs>