

EDPS Formal comments on the Commission Implementing Decision on laying down the technical specifications for data retention

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 28 July 2022 the European Commission issued the draft Commission Implementing Decision on laying down the technical specifications for data retention ('the draft Implementing Decision').
2. The objective of the draft Implementing Decision is to lay down the technical specifications for the implementation of the conditions of data retention provided for in point (b) of Article 54(1) and point (c)(ii) of Article 24(6) of Regulation (EU) 2018/1240², to enable automated verifications relying on the European Search Portal ('ESP').
3. The draft Proposal is adopted pursuant to Article 11(10) of 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.

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. 1–71.

4. The EDPS previously issued Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System (ETIAS)³.
5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 28 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 12 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. General comments

8. Recitals (4) and (5) of the draft Implementing Decision recall that each application file shall be stored in the ETIAS Central System for five years from the last decision to refuse, annul or revoke the travel authorisation. If the data present in a record, file or alert registered in one of the EU information systems, Europol data, the Interpol SLTD or TDAWN databases, the ETIAS watchlist, or the ETIAS screening rules giving rise to such a decision are deleted before the end of that five-year period, the application file shall be deleted within seven days from the date of the deletion of the data in that record, file or alert.

³ European Data Protection Supervisor, Opinion 3/2017 Proposal for a European Travel Information and Authorisation System (ETIAS), https://edps.europa.eu/sites/edp/files/publication/17-03-070_etias_opinion_en.pdf.

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.

9. To comply with the legislative requirements described above, the draft Implementing Decision lays down the mechanisms and procedures under Article 2, which reads as follows:
- “1. For the purposes of Articles 24(6)(c) point (ii) and 54(1)(b) of Regulation (EU) 2018/1240, the ETIAS Central System shall verify the conditions of data retention referred to in those articles at least every three days.*
- 2. The ETIAS Central System shall communicate with the systems referred to in Article 54(1)(b) of that Regulation to verify whether the unique reference numbers, referred to in Article 11(8) of that Regulation, or the identity or travel document data, are still present in the respective system.*
- 3. Where the ETIAS Central System determines that the conditions of retention have elapsed, the ETIAS Central System shall delete the relevant application file:*
- (a) immediately, where the five-year retention period of the ETIAS travel authorisation which has been refused, annulled or revoked has elapsed;*
- (b) where the five-year retention period referred to in point (a) has not elapsed, within 7 days from the deletion of the data present in a record, file or alert registered in one of the systems referred to in Article 54(1) point (b) giving rise to the decision to refuse, annul or revoke the travel authorisation.”*
10. The EDPS recalls that the processing of personal data in the context of ETIAS is liable to have a significant impact on the lives of the individuals concerned, especially in light of the envisaged use of algorithms to carry out risk assessments and profiling of third country nationals. To mitigate the risk derived from such processing, it is crucial that data retention requirements set out by Union law are complied with and - in this regard - technical specifications play a crucial role. However, the EDPS notes that the draft Implementing Decision provides for very limited level of details. For example, Article 2(2) introduces the obligation for the ETIAS Central System to communicate with the EU information systems referred to in Article 54(1)(b), but does not specify how and when.
11. Similarly, the draft Implementing Decision fails to specify the modality for verifying the conditions of retention vis-a-vis the ETIAS screening rules. The EDPS notes that Article 2(3) of the draft Implementing Decision refers to the obligation to delete the relevant application file within 7 days from the deletion of the data present in a record, file or alert registered in one of the systems referred to in Article 54(1) point (b) of the ETIAS Regulation. This provision should be read in conjunction with recital 2, which explains that the automated verification of the fulfilment of the conditions for the retention of application files would rely on the European Search Portal (ESP). The ETIAS screening rules are an algorithm enabling the comparison of the data recorded in an application file with specific risk indicators (as outlined in Article 33 of Regulation (EU) 2018/1240). Against this background, it is unclear how the ESP would determine whether an application file must be deleted (or not) by checking the

ETIAS screening rules (instead of, for instance, the risk indicators). Thus, the EDPS asks the Commission to provide further specifications on the verification of retention conditions as regards the ETIAS screening rules.

12. More generally, the EDPS has doubts as to whether the draft Implementing Decision will be able to fulfil effectively the purpose of the delegation foreseen by the ETIAS Regulation, due to the lack of specifications, as explained above. Besides this general remark, the EDPS wishes to raise a number of recommendations, as outlined in the remainder of this document.

2.2. Automated checks for data retention compliance

13. First, the EDPS notes that contrary to Articles 24(6)(c) point (ii) and 54(1)(b) of Regulation (EU) 2018/1240, Article 2(1) of the draft Implementing Decision does not specify that the ETIAS Central System must verify **automatically** that the conditions of data retention are met. The reference to the automated nature of such check is already included in recitals 2 and 3 of the draft Implementing Decision and therefore, the EDPS invites the Commission to align the enacting terms of the draft Implementing Decision.

2.3. Frequency of the automated checks for data retention compliance

14. Furthermore, according to Article 2(1) of the draft Implementing Decision the ETIAS Central System must verify the conditions of data retention referred above **at least** every three days (*emphasis added*). It is thus the EDPS' understanding that, based on this provision, there might be cases where an application file is not deleted when the data retention period set by Regulation (EU) 2018/1240 elapses and, instead, could still be stored for up to three extra days. The EDPS is of the view that, by introducing a procedure that would enable checks at least every three days, the draft Implementing Decision risks introducing a potential discrepancy with the requirements set by EU law. In fact, Regulation (EU) 2018/1240 imposes the deletion of the application files immediately after the five years retention period has elapsed or, at the latest seven days after the date of deletion of the data in the relevant EU information System (if the five years period has not elapsed yet).
15. In addition, the EDPS highlights that data retention is not a stand-alone measure and must be considered together with the question of access to the stored data. In this regard, application files stored for longer than is necessary carry additional risk. First, there is a risk that personnel of authorities responsible for issuing a travel authorisation, carriers, border authorities and law enforcement authorities of the Member States and Europol would be able to access application file for longer than what is necessary and prescribed by law, although only for a limited period. Keeping personal data for longer than what is necessary would go against the principle of

storage limitation as laid down in EU law, notably in Article 4(1)(e) of the EUDPR, which requires that personal data must be ‘*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed*’. Second, there is a risk of undermining the accuracy of the personal data stored in the ETIAS Central System, which in turn could lead to incorrect processing and false hit, with potentially significant consequences for third country nationals.

16. Against this background, the EDPS questions the choice by the Commission to put in place a system that verifies the conditions of data retention at least every three days. To comply with the legal requirements set out by law, application files must be erased automatically from the ETIAS Central System upon expiry of the retention period as outlined by Regulation (EU) 2018/1240. To do so, the EDPS is of the view that it is necessary to check that the conditions for the retention of application files are still fulfilled on a daily basis. Since the checks will take place in an automated manner, as highlighted in paragraph 11 above, there should be no obstacles in complying with such requirement from a technical point of view. Therefore, the EDPS invites the Commission to modify the draft Implementing Decision accordingly.

2.3. Other comments

17. The EDPS notes that while Article 2(1) of the draft Implementing Decision refers to both Articles 24(6)(c) point (ii) and 54(1)(b) of Regulation (EU) 2018/1240, the paragraphs that follow only refer to Article 54(1)(b). Article 54 lays down the general rules of data retention of application files stored in the ETIAS Central System while Article 24(6)(c) point (ii) recalls the same rules in the specific case of application files concerning family members of Union citizens or of other third-country nationals enjoying the right of free movement under Union law. Therefore, to avoid any misunderstanding as regards the application of the implementing rules laid down by the draft Implementing Decision, the EDPS suggests referring exclusively to Article 54 (1) (b) of Regulation (EU) 2018/1240 under Article 2 and adding an additional provision specifying that the same implementing rules apply *mutatis mutandis* to Article 24 (6) (c) (ii).

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[e-signed]

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