

EDPS Formal comments on the draft Commission Implementing Decision drawing up the common leaflets pursuant to Article 83(4) of Regulation (EU) 2018/1240

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 19 August 2022 the European Commission issued the draft Commission Implementing Decision drawing up the common leaflets pursuant to Article 83(4) of Regulation (EU) 2018/1240 ('the draft Implementing Decision').
2. The objective of the draft Proposal is to create two common leaflets that will allow Member States and border authorities to inform visa-exempted third-country nationals about the different requirements regarding their valid travel authorisation between the transitional and the grace periods as well as the conditions, criteria and procedure to apply for an ETIAS.
3. The draft Proposal is adopted pursuant to Article Article 83(4) of Regulation (EU) 2018/1240².
4. The EDPS previously issued Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System (ETIAS)³ as well as informal comments on the draft text of the ETIAS public website on 1 June 2022.

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 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



5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 19 August 2022, pursuant to Article 42(1) of Regulation 2018/1725⁴ ('EUDPR'). In this regard, the EDPS welcomes the reference to this consultation in Recital 9 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. The EDPS recalls that the obligation to provide information to the generalpublic about the travel authorisation requirements, as outlined in Articles 71 and 83(4) of Regulation (EU) 2018/1240, addresses one of the foundations of the right of the individual to privacy and data protection, i.e. the right to be informed. Information is a pre-requisite for data subjects to be able to exercise their data subject rights under the applicable legal framework. Therefore, the comments which follow aim to ensure that data subjects are properly and practically informed of the data processing taking place in ETIAS and how to exercise their rights with respect to that processing.

2.2. Structure of the leaflets

9. The draft Implementing Decision sets out two draft leaflets in the Annexes to the draft Implementing Decision. The structure of the two leaflets is currently organised as follows:
 - o *Will there be a transitional period?* (Annex I) Will there be a grace period? (Annex II)

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.

- *How can I submit an application?* (Annex I and Annex II)
- *What else do I need to know?* (Annex I and Annex II)

The information included in the first section differs depending on whether the leaflet provides information on the transitional period (Annex I) or grace period (Annex II). The information provided in the last two section is the same for both leaflets.

10. The EDPS notes that, while the leaflets provide some of the information necessary for third country nationals subject to the travel authorisation requirements, they do not contain all the necessary information. In this context, the title of the last section “*What else do I need to know?*” is potentially misleading as it gives the impression that all the information that an individual needs to have is contained in that paragraph. Therefore, the EDPS recommends modifying the title of the last section from “*What else do I need to know?*” to “*Additional information*”.
11. In addition, the EDPS recommends adding a sentence that explains what the eligibility requirements are in order to apply for the ETIAS travel authorisation. If it would be too much information to include in the leaflet, one alternative option is to link the relevant page of the ETIAS website. For instance, this could be done by adding after the first paragraph a sentence such as “*To find out if you fall within the category of travellers who need to apply for an ETIAS authorisation before travelling to European countries see [public website - relevant sub-page]*”.

2.3. Minimum information to be included in the leaflets according to Article 71 of the ETIAS Regulation

12. Recital 2 of the draft Implementing Decision highlights that according to Article 83(4) of Regulation (EU) 2018/1240, besides providing information about the transitional and grace period, the leaflets must also provide information about the conditions, criteria and procedure to apply for an ETIAS according to Regulation (EU) 2018/1240. In this regard, the same Article stipulates that the leaflets must contain, as a minimum, the information listed in Article 71 of Regulation (EU) 2018/1240.
13. However, by comparing the draft leaflets against Article 71, some of the minimum information that the leaflet must include is missing, in particular:
 - the leaflets fail to explain that, where a travel authorisation is refused, such decisions must state the grounds for the refusal. They also fail to explain that applicants whose applications are refused have a right to appeal, with information regarding the procedure to be followed in such case, including details of the competent authority, as well as the time limit for lodging an appeal.⁶

⁶ The requirement to provide such information is laid down in Article 71(h) of Regulation (EU) 2018/1240.

- the leaflets fail to explain that applicants have the possibility to contact the ETIAS Central Unit indicating that the purpose of their travel is based on humanitarian grounds or is linked to international obligations and the conditions and procedures for doing so.⁷
14. Under the EUDPR and the GDPR, the principles of transparency and fairness require that data subjects are able to understand and, if necessary, challenge the processing of their personal data. In this context, the EDPS takes the opportunity to recall the obligation under Article 83(4) with respect to Article 71 of Regulation (EU) 2018/1240, while acknowledging that the draft leaflet can provide some information through links to the ETIAS public website where this information can be located.
- 2.4. Section entitled “Will there be a transitional period?”**
15. With regard to the section entitled “*Will there be a transitional period?*”, the draft text explains that during the transitional period “[...]if you are not in possession of an ETIAS travel authorisation, border authorities will nevertheless allow you to cross the external borders, if you hold a valid travel document and fulfil all remaining entry conditions.” The EDPS is of the view that the information is presented in such a way that it gives the impression that third country nationals should be in possession of an ETIAS travel authorisation during the transitional period but that nevertheless the border authorities will allow them to cross. However, during the transitional period, the requirement to be in possession of a valid ETIAS travel authorisation does not apply. This is explicitly indicated in Article 83(1) of Regulation (EU) 2018/1240 and therefore the EDPS recommends modifying the text in order to explain that during the transitional period there is no obligation to be in possession of a valid travel authorisation. Similarly, it is unclear on what grounds the Commission bases the sentence “This will facilitate the crossing of borders,” as in principle, during the transitional period the holding of an ETIAS authorisation should not make a practical difference to the travel of a third country national. The EDPS therefore finds this sentence misleading and suggests deleting it.
16. Furthermore, the EDPS notes that, contrary to what is outlined in Article 83(2) of Regulation (EU) 2018/1240, this section does not spell out the obligation to hold a valid travel authorisation, once the six-month period from the date on which ETIAS starts operations has expired (i.e. the end of the transitional period). The EDPS therefore recommends rephrasing the above-mentioned sentence in order to explain that the obligation to hold a valid travel authorisation will start from the expiry of the six months period and indicate the exact date.

⁷ The requirement to provide such information is laid down in Article 71(i) of Regulation (EU) 2018/1240.

17. In general, the EDPS finds that the primary purpose of the leaflet - to warn travellers of the impending requirement to obtain ETIAS and the risk that if they do not do so when the transitional arrangements expire, they risk to be refused entry - could be more clearly communicated by the text and suggests making this message more prominent through use of formatting and layout.

2.5. **Section entitled “Will there be a grace period?”**

18. With regard to the section entitled “*Will there be a grace period?*”, the text explains that during the grace period “[...] *if you are not in possession of an ETIAS travel authorisation and it is the first time that you are crossing the external borders since [date of the end of transitional period]*, border authorities will nevertheless allow you to cross the external borders, *if you hold a valid travel document and fulfil all remaining entry conditions.*” However, the EDPS considers that, in line with Article 83(3) of Regulation (EU) 2018/1240, the leaflet should explain that third-country nationals subject to the travel authorisation requirement must as a rule hold a valid ETIAS travel authorisation during the grace period and that the above-mentioned legal possibility to enter is just a limited exception. Therefore, the EDPS invites the Commission to adapt the text accordingly.

Brussels, 14 October 2022

(e-signed)
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