



EDPS Formal comments on the draft Commission Implementing Decision on measures for accessing, amending, erasing and advance erasing of data in the ETIAS Central System

1. Introduction and background

The European Travel Information and Authorisation System (ETIAS) has been established by Regulation (EU) 2018/1240¹ (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. Based on the Regulation and the legal measures, adopted by the Commission, the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) should develop the design of the physical architecture of ETIAS, including its communication infrastructure, as well as the technical specifications of the system.

The objective of the draft Implementing Decision is to spell 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.

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) 2018/1725.² In this regard, the EDPS welcomes the reference to this consultation in Recital 22 of the draft Implementing Decision.

2. Comments

2.1. Extraction of data from the application file in cases of manual processing

According to Article 4(1)(g),(h), (i) and (l) of the draft Implementing Decision, the specific software for the purpose of manual processing of applications and for accessing and amending data in case of appeals would provide a functionality allowing extraction of certain data from the application file. The EDPS understands that the purpose of this functionality is to support ETIAS National Units and Europol when manually processing the application file,

¹ 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.

² 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 (Regulation 2018/1725).

e.g. in case of a hit. However, it should not lead to additional interference or risks for the protection of the personal data of the applicants. Therefore, the EDPS recommends 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). Furthermore, 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.

2.2. Data inaccuracy and processing in contravention of the ETIAS Regulation

Article 3(1)(e) of the draft Implementing Decision envisages that the software supporting the users for the purpose of accessing, amending and erasing data should offer an “*option to mark and justify, at any time, a possible data inaccuracy or processing contravention of Regulation (EU) 2108/1240 [...]*”. (emphasis added). The EDPS notes that this functionality is related to the procedures for dealing with “factually inaccurate or [...] data [...] processed in the ETIAS Central System in contravention of [the] Regulation”, laid down in Article 55, paragraphs 2, 3 and 4 of Regulation (EU) 2018/1240. In such cases, the ETIAS Central Unit or the ETIAS National Unit have to check the accuracy of the data and the lawfulness of its processing and, if necessary, amend or erase the data from the ETIAS Central System without delay. In this context, the EDPS considers that the use of the verb “justify” may imply that the inaccuracy or the unlawfulness could be acceptable in some cases. However, Regulation (EU) 2018/1240 does not provide for such a situation. Therefore, the EDPS recommends modifying the wording of Article 3(1)(e) of the draft Implementing Decision so as to remove the reference to “justifying” and thus bring it in line with the provision of Article 55 of the ETIAS Regulation.

2.3. Accessing of data stored in the ETIAS Central System by Europol

Article 7 of the draft Implementing Decision lays down the conditions for accessing of data stored in the ETIAS Central System by Europol. In particular, paragraph 3 defines the procedure for prior verification of the requests by a specialised unit of Europol, pursuant to Article 53(3) of Regulation (EU) 2018/1240. In this regard, the last sentence of paragraph 4 “Europol shall indicate in the request that the necessary verifications have been done” actually repeats the requirement from paragraph 3. The EDPS recommends reconsidering the need for the last sentence of paragraph 4 to avoid ambiguity.

2.4. Accessing of data stored in the ETIAS Central System by central access points

Article 8 of the draft Implementing Decision lays down the conditions for accessing of data stored in the ETIAS Central System by central access points. According to paragraph 5, “[t]he ETIAS Central System shall only retrieve the data referred to in Article 17(2)(i) and Article 17(4) points (a) to (c) of that Regulation where **the conditions of paragraphs 3** have been fulfilled.” (emphasis added) However, paragraph 4 also introduces an obligation for the central access point to verify and confirm whether the access to the data referred to in Article 17(2)(i) and Article 17(4) points (a) to (c) of the Regulation is justified, in accordance with Article 51 of the Regulation. Therefore, the EDPS recommends that paragraph 5 should refer both to the conditions in paragraph 3 and 4.

2.5. Access to data stored in the ETIAS Central System by immigration authorities

In accordance with Article 49(2) and Article 65(3) of Regulation (EU) 2018/1240, one of the conditions for the immigration authorities' access to ETIAS is a prior consultation of EES, indicating that the EES does not contain an entry record corresponding to the presence of the person in the EU. The EDPS notes that there is no reference to this condition in the draft Implementing Decision. Therefore, the EDPS invites the Commission to consider the possibility of developing an additional functionality to this regard, which would, at least, remind the users about their obligation to consult first the EES.

2.6. Activity logs

The draft Implementing Decision makes no reference to the registry of activity logs. For the system to be auditable, the access to personal data must be registered, in line with Article 69 of the Regulation (EU) 2018/1240. The EDPS recommends the inclusion of a reference regarding the creation of logs, which should have mechanisms in place to ensure the confidentiality, integrity and availability of the records.

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(*e-signed*)