

EDPS Formal comments on the draft Implementing Decision amending Implementing Decision C(2021) 4980 final on specifying risks related to security, illegal immigration or high epidemic risk as defined in Regulation (EU) 2018/1240 of the European Parliament and of the Council

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 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 ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 22 July 2024, the European Commission consulted the EDPS on the draft Implementing Decision ('the draft implementing decision'), amending Implementing Decision C(2021) 4980 on specifying risks related to security, illegal immigration or high epidemic risk as defined in Regulation (EU) 2018/1240² (ETIAS Regulation).
2. The objective of the draft Implementing Decision is to ensure a correct implementation of the ETIAS Regulation and maintain consistency and alignment with the closely related Implementing Decision concerning the specification of risks related to security, illegal immigration or high epidemic risk provided for under Article 9j(3) of Regulation (EC) No 767/2008³ concerning the Visa Information System and the exchange of information between Member States on short-stay visas, long-stay visas and residence permits⁴ (VIS 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. 1–71.

³ As amended by Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 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.

⁴ Recitals 4 to 6 of the draft implementing decision.

3. The draft Implementing Decision is adopted pursuant to Article 33(3) of Regulation (EU) 2018/1240.
4. The EDPS previously issued an opinion⁵ on the Commission proposal for the ETIAS Regulation, as well as formal comments on the draft Commission Delegated Decision⁶ related to this proposal, on further defining the risks related to security, illegal immigration or high epidemic risk. The EDPS also issued formal comments⁷ on the draft Commission Implementing Decision which was adopted under the reference C(2021) 4980, and which is amended by the draft Implementing Decision, subject of the present comments.
5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of EUDPR.
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 acts⁸.
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 Implementing Decision that are relevant from a data protection perspective.

2. Comments

2.1. General comments

8. The EDPS notes that the aim of the draft Implementing Decision is, in particular, to maintain consistency and alignment with the Implementing Decision concerning the specification of risks related to security, illegal immigration or epidemic risk provided for under Article 9j(3) of the VIS Regulation. The EDPS issued formal comments⁹ on a draft version of that Implementing Decision on specifying the risks related to security, illegal immigration or high epidemic risks in the context of the VIS

⁵ EDPS Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System, 6 March 2017.

⁶ Formal comments of the EDPS on the draft Commission Delegated Decision on further defining the risks related to security or illegal immigration or high epidemic risk, 7 June 2021.

⁷ [Formal comments of the EDPS on the draft Commission implementing decision on specifying the risks as defined in Regulation \(EU\) 2018/1240 as well as in the Commission Delegated Decision XXX/XXX \[Delegated Act\]](#), 2 June 2021.

⁸ 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 [EDPS Formal comments on the draft Commission Implementing Decision on specifying the risks related to security, illegal immigration or high epidemic risk](#), 29 June 2022.

Regulation. The draft Implementing Decision submitted to him was then very similar to the Implementing Decision C(2021) 4980. However, a finalised version of the Implementing Decision related to Article 9j(3) of the VIS Regulation is not publicly available and has not been transmitted to the EDPS. Therefore, the EDPS is not in position to assess whether the consistency between the two acts would be now achieved.

9. The EDPS also takes note that the draft Implementing Decision has not amended Article 6 of the Implementing Decision C(2021) 4980, according to which the '*analysis, specification, evaluation and review of risks referred to in this Decision shall not contain any personal data*'. Even so, the draft Implementing Decision aims to specify the risks that will form the basis of specific risk indicators and, according to Article 33 (1) of the ETIAS Regulation, such indicators shall be used in the context of '*an algorithm enabling profiling as defined in point (4) of Article 4 of Regulation (EU) 2016/679*'. Therefore, the draft Implementing Decision is part of a broader legal scheme, whose purpose is the practical application of the profiling in the analysis of applications for travel authorisation. The EDPS recalls that such profiling will have a direct impact on the protection of individuals' personal data and wider fundamental rights¹⁰.

2.2. Analysis and specification of risks

10. The EDPS notes that all requirements for the specification of the risks which were included in Articles 2 and 3 the Commission Implementing Decision C(2021) 4980 would be removed and replaced by an annex including a 'list of risks'. The EDPS understands that the list, in principle, should be considered as a way for the Commission to specify the risks themselves in accordance with Article 33(3) of the ETIAS Regulation - and not only to determine the modalities by which risks should be defined by the ETIAS Central Unit.
11. Article 33 (2, 3, and 4) of the ETIAS Regulation provides a cascading, top-down methodology of defining risks, starting from the Regulation itself, down to a delegated act on defining the risks (paragraph 2), to an implementing act containing already 'higher-level' risks (paragraph 3) for which specific risk indicators could finally be created by the Central Unit (paragraph 4). All these documents are supposed to frame and guide how the risks are defined, from the broadest to the more specific. As such, at the level of the implementing decision (paragraph 3) – which can be seen as the middle ground between the Regulation and the risk indicators drawn up by the ETIAS Central Unit, there is a need to produce a substantiated and sufficiently detailed list of risks.

¹⁰ See in particular [formal comments of the EDPS on the Draft Commission Delegated Decision on further defining the risks related to security or illegal immigration or high epidemic risk, 7 June 2021](#).

12. The EDPS observes that the current list is in fact almost identical to the list of criminal offences included in the annex of the ETIAS Regulation, with no further specification. Therefore, the EDPS hardly sees the added value of the draft Implementing Decision, in the light of the ETIAS Regulation itself.
13. The EDPS considers that the list included in the draft Implementing Decision cannot constitute the list of ‘specific risks’ that the Implementing Decision (to be reviewed every six months) was supposed to lay out. The amendments introduced by the Commission would lead to delegate all actual decision-making power on the risks to the ETIAS Central Unit, since their specification is still lacking in the draft implementing decision, and the requirements for their specification have been removed.
14. The EDPS recommends to replace the list of criminal activities included in the annex with a list of more concrete risks for which indicators should be constructed. For instance, rather than having the crime category of 'rape' included in the list as a security risk, the EDPS would expect to see 'trafficking of persons to the EU using deception techniques such as the ‘loverboy scheme’'. This risk, while still broad, would allow the ETIAS Central Unit to create actual risk indicators for this criminal activity.
15. In the light of Recitals 6a and 6b of the draft Implementing Decision, the EDPS understands that the list included in the annex shall be reviewed as soon as the analysis and statistics referred to the Commission Delegated Decision C(2021) 4981 will be available. The EDPS does not consider the absence of analysis and statistics to be a sufficient justification for the current list, since the ETIAS Regulation itself requires the specification of risks and, in any event, the list could be amended later if need be. Consequently, the EDPS considers that the current list does not meet the requirements of Article 33(3) of the ETIAS Regulation.

2.3. Review of risks

16. Article 5 of the draft Implementing Decision foresees in particular that the Commission ‘*shall review and where necessary amend the risks list at least every six months*’. However, the explicit obligation to remove from the list risks considered no longer valid, which was included in Article 4 of Commission Implementing Decision C(2021) 4980, has been deleted. The EDPS recommends to reintroduce this requirement in Article 5 of the draft Implementing Decision, in accordance with Article 33(3) of the ETIAS Regulation.

17. The EDPS recalls his comments on Article 4 of the Commission Implementing Decision C(2021) 4980¹¹, concerning the absence of rules for the assessment of the continued validity of the risks. He considered in particular that the evaluation should assess the overall efficacy of the risks indicators and screening rules *‘for instance by comparing the numbers of applicants that elicit a ‘hit’ as a result of having been profile as a risk, versus the final number of applicants that are refused a travel authorisation’*. The EDPS added that the evaluation should also assess whether the risks defined lead to any discriminatory practices, and recommended to add an indicative list of such rules in the operative part of the decision. The EDPS considers, *mutatis mutandis*, that these recommendations are still valid for the present draft Implementing Decision.

2.4. ETIAS Fundamental Rights Guidance Board

18. The draft Implementing Decision provides in the new Recital (7) that the ETIAS Central Unit should cooperate with the ETIAS Screening Board and, in particular, consult it on the results and analysis related to the risk indicators, in accordance with Article 9 of the ETIAS Regulation. The EDPS would like to draw attention to Article 10(2) of the ETIAS Regulation, according to which the ETIAS Fundamental Rights Guidance Board shall also support the ETIAS Screening Board in the execution of its tasks when consulted by the latter on specific issues related to fundamental rights, in particular with regard to privacy, personal data protection and non-discrimination. Given the important implications of the screening rules and risk indicators for privacy, data protection and non-discrimination, the EDPS suggests also explicitly referring in a recital to the ETIAS Fundamental Rights Guidance Board in the context of the implementation of Article 33 of the ETIAS Regulation.

Brussels, 19 August 2024

¹¹ [Formal comments of the EDPS on the draft Commission implementing decision on specifying the risks as defined in Regulation \(EU\) 2018/1240 as well as in the Commission Delegated Decision XXX/XXX \[Delegated Act\], 2 June 2021.](#)