



Formal comments of the EDPS on the draft Commission Implementing Decision laying down standard form for refusal, annulment or revocation of a travel authorisation pursuant to Article 38(3) of Regulation (EU) 2018/1240

1. Introduction and background

The European Travel Information and Authorisation System (ETIAS) has been established by Regulation (EU) 2018/1240¹ and requires all visa-exempt third country nationals to apply online for travel authorisation prior to the date of their departure to the Schengen area.

Following manual processing by an ETIAS National Unit, where an application for an ETIAS authorisation is refused, annulled or revoked, the applicant should be immediately notified of that decision. Standard forms containing the minimum information laid down in Article 38(2) of Regulation (EU) 2018/1240, should be used by the ETIAS National Units in order to notify the applicant. These standard forms should also cover the case of self-revocation where the applicant decided to revoke the ETIAS authorisation.

Pursuant to Article 38(3) of the Regulation (EU) 2018/1240 the European Commission has been empowered to adopt a standard form for refusal, annulment or revocation of a travel authorisation by means of implementing acts.

The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission of 15 April 2021, pursuant to Article 42(1) of Regulation 2018/1725². In this regard, the EDPS welcomes the reference to this consultation in Recital 9 of the draft Implementing Decision.

The EDPS wishes to stress that these formal comments do not preclude any future additional comments by the EDPS, 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 acts, pursuant to Regulation (EU) 2018/1240. 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 Regulation (EU) 2018/1725.

2. Comments

2.1. Statement of relevant facts and additional reasoning underlying the decision

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, L295, p.39 (Regulation (EU) 2018/1725).

Article 1 concerns the automatic generation of the standard forms and provides for the forms to be pre-filled with data in line with Article 1(4), and subsequently confirmed by the ETIAS National Unit in accordance with Article 1(5). The draft standard forms set out in the three annexes accompanying the draft Implementing Decision include a box for the inclusion of a 'Statement of relevant facts and additional reasoning underlying the decision.' It is unclear whether this box will include pre-filled information or information to be added manually by the ETIAS National Unit. Given the value of such reasoning for purposes of transparency and for facilitating the right of appeal of applicants, the EDPS considers that this step (filling the statement of relevant facts and additional reasoning underlying the decision) should be mandatory and it should be referred to and further guidance for its completion should be provided under Article 1.

In the context of this clarification, the EDPS considers it imperative to specify that where an ETIAS authorisation is refused due to a hit with another IT system, such system(s) is/are explicitly indicated in the form. Such a requirement would be best fulfilled by including a box to be ticked for each IT system. This information is necessary in order to allow the applicant to know which system (s) he should exercise his or her rights of access, and possibly rectification and deletion in case of error or unlawful processing.

2.2. Access and authentication for the purpose of self-revocation

The EDPS considers that the procedure described in Article 2 of the proposal ("Access and authentication for the purpose of self-revocation") does not provide sufficient guarantees regarding the security of the revocation process and that it could allow the submission of false revocation requests. For example, an attacker with access to both the travel authorisation and the travel document of the victim could submit a revocation request and indicate a second email for the delivery of the unique code. The ETIAS system would then send a warning to the original email address indicating the revocation process, however, if the victim would not react within the given time period (e.g., because the email had been flagged as unsolicited email and going unnoticed), the revocation would, ultimately, be sent for the ETIAS National Unit for processing, with possible consequences to the free movement of the victim. This is particularly salient as, in accordance with Article 41(8) of Regulation (EU) 2018/1240, there is no possibility to appeal a self-revocation.

For greater security of the process, the EDPS recommends an individual verification of the authenticity of any revocation requests made using a second email address, for instance contacting the applicant through a different channel.

2.3. Confidentiality of persona data

Article 1 (6) and (7) of the draft Implementing Decision state that, once the applicant confirms the information on the standard form, "[...] the software shall generate the standard form in a PDF format", and transmit it "[...] to the applicant via the email service referred to in point (f) of Article 6(2) of Regulation (EU) 2018/1240". Depending on the technical implementation of the software, the process for generating PDF files might rely on the creation of auxiliary files containing information from the standard form, including personal

data. Consequently, the generation of the standard form in PDF format might result in the duplication of personal data and in their storage in different repositories, without adequate security measures. Therefore, the EDPS recommends ensuring that the electronic process responsible for the creation of the PDF standard form does not store auxiliary files containing personal data or, if it does, that all auxiliary files used for the creation of the PDF are safely and promptly deleted, once the creation of the file is complete.

2.4. Legal grounds set out in the draft standard forms

With regard to the draft standard forms set out in the three annexes accompanying the draft Implementing Decision, the EDPS notes that the legal grounds enlisted therein omit some of the legal grounds provided in Article 37 of Regulation (EU) 2018/1240. To ensure that the standard forms adequately reflect the intention of the legislator and to promote clarity for the recipient, the EDPS recommends the Commission to complement the text of the legal grounds provided in the standard forms with the elements provided by Regulation (EU) 2018/1240 as follows:

- The legal ground “travel document used reported as lost, stolen, misappropriated or invalidated”, shall read “used a travel document which is reported as lost, stolen, misappropriated or invalidated **in the Schengen Information System (SIS)**”, in line with Article 37(1)(a) of Regulation (EU) 2018/1240.
- The legal ground “immigration risk”, shall read “**illegal** immigration risk”, in line with Article 37(1)(c) of Regulation (EU) 2018/1240.
- The legal ground “epidemic risk”, shall read “**high** epidemic risk”, in line with Article 37(1)(d) of Regulation (EU) 2018/1240.
- The legal ground “alert for refusal of entry and stay”, shall read “**an alert has been entered in SIS for the purpose of refusing entry and stay**”, in line with Article 37(1)(e) of Regulation (EU) 2018/1240.
- The legal ground “failure to reply within the deadline to a request for additional information or documentation by the ETIAS National Unit” shall read “failure to reply to a request for additional information or documentation by the ETIAS National Unit **within the deadline of 10 days from receipt of the request**”, in line with Article 37(1)(f) of Regulation (EU) 2018/1240.

The EDPS also notes that the draft standard form set out in the Annex I of the draft Implementing Decision lists as the eighth and last legal ground for refusing a travel authorisation “reasonable and serious doubts concerning the data/statements and/or supporting documents you provided for your application”. While this option summarises the legal grounds as described in Article 37(2) of Regulation (EU) 2018/1240, it is the EDPS opinion that for the purpose of informing the data subject in the most accurate manner possible, the form should list in a more specific manner the legal ground(s) that led to the refusal of the travel authorisation. The EDPS therefore recommends amending the draft form

by distinguishing whether the refusal is due to reasonable and serious doubts concerning one or more of the following legal grounds:

- 1) the authenticity of the data;
- 2) the reliability of the statement made by the applicant;
- 3) the supporting documents provided by the applicant;
- 4) the veracity of the content of the documents provided by the applicant.

2.5. Standard forms - Section on right of appeal

With regard to the section of the form entitled ‘Right of Appeal’, the EDPS notes the inclusion of placeholders in which to insert the name of the ETIAS National Unit of the Member States responsible, information on the relevant national appeal procedures and a reference to the applicable national law. This information should be complemented with the contact details of the relevant national body responsible for handling appeals and clarified as such in the text.

2.6. Standard forms - Section on individuals’ rights with regard to the processing of personal data

Finally, the EDPS considers that the section entitled “Your rights with regard to the processing of personal data” is not sufficiently transparent within the meaning of that term under Article 5(1)(a) of Regulation (EU) 2016/679 and Article 4(1)(a) of Regulation (EU) 2018/1725. In line with Article 12 of Regulation (EU) 2016/679 and Article 14 of Regulation (EU) 2018/1725, controllers must take appropriate measures to inform third-country nationals about the relevant aspects of their personal data being processed in a transparent, intelligible and easily accessible form. However, currently, the draft standard form does not provide any information concerning the rights of individuals to access, rectify, erase, restrict the processing of personal data and the procedure on how to exercise them. Instead, it redirects the data subjects to the relevant web page of the website referred to in Article 6(e) of Regulation (EU) 2018/1240. To improve the effectiveness of the information provided and comply with the transparency requirements laid down in Regulation (EU) 2016/679 and Regulation (EU) 2018/1725, besides providing the link to the relevant web page, the EDPS recommends including in the standard forms themselves a paragraph recalling the rights individuals have to access, rectify, erase and restrict the processing of personal data stored in ETIAS and the procedure on how to exercise them in line with Article 38(2)(e) of Regulation (EU) 2018/1240 in case of refusal, and Article 42(f) of Regulation (EU) 2018/1240 in case of annulment or revocation. By the same token, the EDPS also recommends to precisely state which body should be contacted under which circumstances, instead of only identifying as “useful contact information” the DPO of European Border and Coast Guard Agency, the EDPS and the National supervisory authority of the Member State responsible for the application.

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(e-signed)