

EDPS Formal comments on the draft Commission Delegated Decision specifying the conditions for the correspondence between the data present in a record, alert, or file of the other EU information systems consulted and an application file

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

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 8 September 2022 the European Commission consulted the EDPS on the draft Commission Delegated Decision specifying the conditions for the correspondence between the data present in a record, alert, or file of the other EU information systems consulted and ETIAS application file ('the draft Delegated Decision').
2. The objective of the draft Delegated Decision is to specify the conditions for the correspondence between the data in an application file stored in the ETIAS Central System and the data present in a record, alert or file of the following EU information systems: ETIAS, VIS, SIS, EES, ECRIS-TCN.
3. The draft Proposal will be adopted pursuant to Article 11(9) of Regulation (EU) 2018/1240².
4. The EDPS recalls the previously issued Opinion 3/2017 on the Proposal for a European Travel Information and Authorisation System (ETIAS)³ as well as Formal comments on the Delegated Regulations with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection⁴,

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.

⁴ EDPS Formal comments on the draft Commission Delegated Regulations supplementing Regulation (EU) 2019/817 and Regulation (EU) 2019/818 of the European Parliament and Council with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection, available

which provides the rules to determine when identity data shall be considered as the same or similar.

5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 8 September 2022, pursuant to Article 42(1) of Regulation 2018/1725⁵ ('EUDPR'). In this regard, the EDPS welcomes the reference to this consultation in Recital 11 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 acts⁶.
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 notes that recital 3 of the draft Delegated Decision specifies that the Annex includes only **the relevant subset of data for the purpose of comparison**, and according to the Explanatory Memorandum "[t]he Decision conforms to the principle of proportionality, as it is limited to the minimum required to determine cases where identity data can be considered the same or similar in order to identify correctly the persons concerned"⁷. The EDPS recognises the need to compare a subset of the personal data in the ETIAS application file against the data present in a record, file or alert stored in other EU information systems, in line with Regulation (EU) 2018/1240. At the same time he recommends explaining why the subset selected in the draft Delegated Decision is considered to be the minimum necessary and proportionate.

at: https://edps.europa.eu/data-protection/our-work/publications/comments/cases-where-identity-data-may-be-considered-same-or_en.

⁵ 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.

⁶ 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.

⁷ Draft Commission Delegated Decision, p.1.

2.2. Prioritisation of hit results

9. The Annex of the draft Delegated Decision states on page 6 that *“Where necessary, in order to limit the number of hits triggered and to reduce the burden of manual processing, the Commission, assisted and advised by the Expert Group [ETIAS Subgroup of the Expert Group on Information Systems for Borders and Security], shall request eu-LISA to adjust the algorithm by prioritising the hits created between identity data that are considered more similar.”*
10. While the EDPS recognises the need to prioritise the order of the hits, he also considers necessary to spell out in the enacting terms of the draft Delegated Decision the criteria (or at the very least provide the essential elements of such criteria) to be used to determine when it would be considered necessary to adjust the algorithm. In the same vein, the draft Delegated Decision should provide more explanation as to what would be considered to be “more similar”.
11. On a more general note, the EDPS considers that the draft Delegated Decision should provide for a procedure to review regularly the algorithm put in place.

2.3. Additional comments

12. According to the Annex to the draft Delegated Decision, identity data must be considered as the same when the rules on similarity set out in Annex 1 to Commission Delegated Regulation C(2021)5056 are fulfilled⁸. The EDPS notes that following the objection of the European Parliament to the initial delegated act, the initial Delegated Regulation C(2021)5056 was revised by Commission Delegated Regulation C(2022) 4775. Therefore recommends updating the reference to the appropriate delegated act.
13. Finally, with regard to the definitions provided under Article 1 of the draft Delegated Decision, the EDPS notes that a definition of ‘transliteration’ is included, although it is not used in the enacting terms of the act. At the same time the term transliteration is defined in Article 3(3) of Commission Delegated Regulation C(2022)4775, which determines cases where identity data are considered as same or similar for the purpose of the multiple identity detection. Since the draft Delegated Decision ought to refer to this act under Section 2 of the Annex entitled “Similarity” (see paragraph 12 above), the EDPS recommends removing the definition of “transliteration” from the draft Delegated Decision.

Brussels, 22 September 2022

(e-signed)
Wojciech Rafał WIEWIÓROWSKI

⁸ Annex to the Commission Delegated Regulation, p.5