



Formal comments of the EDPS on a Proposal for a Commission Implementing Decision amending Implementing Decision (EU) 2017/253 as regards alerts triggered by serious cross-border threats to health and for the contact tracing of passengers identified through Passenger Locator Forms

1. Introduction and background

- The following comments concern the **draft Commission Implementing Decision amending Implementing Decision (EU) 2017/253 as regards alerts triggered by serious cross-border threats to health and for the contact tracing of passengers identified through Passenger Locator Forms** together with its three Annexes ('the Proposal').
- **The aim of the Proposal is to set up a Passenger Locator Form ('PLF') exchange platform for the purpose of enabling secure, timely and effective exchange of data between the Early Warning and Response System ('EWRS') competent authorities of the Member States, by allowing to transmit information from their existing national PLF databases to other EWRS competent authorities in an interoperable and automatic manner.**
- The Proposal explains that, by imposing the completion of national PLFs of various formats, Member States collect PLF data from cross-border passengers entering their territory and that, if a person who has completed a PLF is identified as a COVID-19 positive case, the data collected by the PLF are used to establish the journey of that person and transmit relevant information to the Member States that need to perform contact tracing procedures in relation to persons that might have been exposed to the infected passenger.
- The Proposal also explains that the public health authorities of some Member States **have already been exchanging personal data collected through national PLFs between themselves for purposes of contact tracing in the context of the COVID-19 pandemic, through the already existing technical infrastructure of the EWRS.** However, according to recital 5 of the Proposal, **the technical infrastructure currently provided under the EWRS is not yet designed to handle the volume of PLF data generated by the systematic and large-scale use of PLFs** (such as cross-border travelling by collective transportation means with pre-assigned seats such as aircrafts, certain trains, ferries and cruises).
- Therefore, in accordance with recital 6, the Proposal aims to **set up a PLF exchange platform** to enable the secure, timely and effective **exchange of data between the EWRS Member States competent authorities, by allowing them to transmit information from their existing national PLF databases to other EWRS competent authorities in an interoperable and automatic manner.** The PLF

exchange platform shall also enable the exchange of other epidemiological data, necessary for the purpose of contact tracing.

- The EDPS also notes that recital 6 of the Proposal explains that, in order to avoid an overlap of activities or conflicting actions with existing structures and mechanisms for monitoring, early warning and combating serious cross-border threats to health, **the PLF exchange platform should be developed under the EWRS as a complement of the selective messaging functionality existing within that system.**
- Moreover, recital 6 of the Proposal further provides that **the proposed PLF exchange platform should build on the exchange platform already developed by the European Union Aviation Safety Agency ('EASA')**. According to recital 7 of the Proposal, the PLF exchange platform will be operated by the European Centre for Disease Prevention and Control ('ECDC'). Lastly, recital 11 of the Proposal provides that *"the use of the PLF exchange platform should, for the time being, be voluntary and Member States should be free to notify alerts under the currently existing technical infrastructure of the EWRS, on a temporary basis and provided they do not compromise the purpose of contact tracing"*.
- The Proposal does not regulate the establishment of the national PLFs, which is under the responsibility of each Member State.
- Following informal comments on the draft Proposal issued on 24 March 2021, these comments are provided in reply to the formal request by the Commission of 16 April 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')¹ on the Proposal. We limited our comments below to the provisions of the Proposal that are relevant from a data protection perspective.
- 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. 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 General comments

- The EDPS wishes to recall that compliance with data protection rules does not constitute an obstacle for fighting the COVID-19 pandemic. At the same time, the

¹ 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 (Text with EEA relevance), OJ L 295, 21.11.2018, p. 39–98.

general principles of effectiveness, necessity, and proportionality must guide any measure adopted by Member States or EU institutions that involve processing of personal data to fight COVID-19².

- The EDPS welcomes recital 16 of the Proposal, which confirms that the processing of personal data of cross-border passengers, exchanged through the PLF exchange platform, is to be carried out by the EWRS competent authorities in accordance with Regulation (EU) 2016/679 ('GDPR')³, while the processing of personal data under the responsibility of the ECDC for purposes of contact tracing has to comply with Regulation (EU) 2018/1725 ('EUDPR')⁴.
- Moreover, the EDPS also welcomes recital 17 of the Proposal, which, in addition to identifying the legal basis for the processing of personal data of infected passengers (Article 6(1)(c) and Article 9(2)(i) GDPR), also recognises that the Implementing Decision should lay down suitable and specific measures to safeguard the rights and freedoms for the data subject, including measures relating to the definition of the necessary data sets to be exchanged; the EWRS competent authorities with which the data should be exchanged in the various cases; the appropriate security measures, including encryption; and the modalities for the processing of data between the national competent authorities through the PLF exchange platform within the EU.
- The EDPS also welcomes that Article 2c(1) and recital 18 of the Proposal clearly provide that the EWRS competent authorities participating in the PLF exchange platform shall act as joint controllers within the meaning of data protection law for the entry and transmission, until receipt, of those data through the PLF exchange platform. In this regard, the EDPS also welcomes Annex II to the Proposal, which clearly allocates the respective responsibilities of the joint controllers, including as regards the exercise of data subject's rights.
- Lastly, the EDPS notes that recital 19 and Article 2c(2) of the Proposal provide that the ECDC will act as a processor of data exchanged through the PLF exchange platform, in particular by providing the PLF exchange platform and ensuring the security of processing, including the transmission of data exchanged through the PLF exchange platform. In this regard, we also welcome Annex III to the Proposal, which clearly lays down the processor's obligations, in line with Article 29 EUDPR.

² See [EDPB_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf \(europa.eu\)](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf) para. 4; see also https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

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 L 295, 21.11.2018, p. 39).

2.2 Specific comments

2.2.1 Purpose of the processing of personal data

- The EDPS takes note of recital 23 of the Proposal, which provides that “[t]he purpose of the amendments to this Decision should at the moment be limited to the control of the COVID-19 pandemic. However, the operation of the PLF platform could in the future be extended to such epidemics that may require Member States to exchange PLF data for contact tracing purposes, in line with the criteria set out in Article 9(1) and the conditions set out in Article 9(3) of Decision 1082/2013/EU.”
- In this regard, while not precluding any future developments, **the EDPS recommends that the use of the PLF platform be clearly limited in the Proposal to the control of the COVID-19 pandemic**, and that any further needs to possibly extend the operation of the PLF platform to other epidemics should be assessed and introduced, if necessary, through a separate implementing decision.

2.2.2 Data subjects whose personal data will be processed in the PLF exchange platform

- The EDPS notes that, while recital 16 of the Proposal refers to the processing of personal data of ‘cross-border passengers’, recital 17 of the Proposal states that the processing of personal data will concern ‘infected passengers’.
- From the Proposal (and in particular from its Annex I), the EDPS understands that all cross-border passengers’ personal data will be processed through the national PLFs and that infected travellers’ personal data would be processed and transmitted within the PLF exchange platform covered by the Proposal, where this is necessary in order to perform effective contact tracing between Member States.
- To ensure clarity and enhance legal certainty, **the EDPS recommends explicitly clarifying in the aforementioned recitals whether the categories of data subjects whose personal data would be processed by the PLF exchange platform are limited to infected passengers only or might also concern other cross-border passengers** for the purpose of SARS-CoV-2 contact tracing.

2.2.3 Categories of personal data processed

- The EDPS notes that Article 2b and Annex I of the Proposal provides for the categories of personal data to be processed for the purpose of SARS-CoV-2 contact tracing.
- Recital 9 of the Proposal makes reference to a common European Union digital Passenger Locator Form System (‘EUdPLF’), with the view of harmonising the system (including a common PLF) and creating a single entry point and database for the collection of PLFs. The current Proposal, however, does not cover the establishment

of the EUdPLF, nor does it regulate the processing of personal data relating to it. In this regard, the EDPS reminds that it will need to be consulted prior to the establishment of the EUdPLF. In the meantime, and in order to ensure that data minimisation is fully applied, the EDPS recommends to supplement the Proposal with an additional annex providing for a **common PLF template**, which could be used to by the EWRS competent authorities using a PLF system. Alternatively, such a common PLF template could also be provided, for example, by the eHealth network.

2.2.4 The identification of joint controllers, processors and sub-processors

- As mentioned above, **the EWRS competent authorities participating in the PLF exchange platform are designated as joint controllers** within the meaning of data protection law for the entry and transmission, until receipt, of those data through the PLF exchange platform, **whereas the ECDC will act as a processor of data exchanged through the PLF exchange platform.**
- The EDPS understands that, although the PLF exchange platform will be developed under the EWRS, it will be a complement of the selective messaging functionality existing within that system. Therefore, **we also understand that the ECDC's role in the operation of the PLF exchange platform will be more limited in comparison to its role within the EWRS⁵.**
- The EDPS also notes that, in accordance with Annex III of the Proposal, the role of the ECDC as a processor for the PLF exchange platform entails the following: “ (...) *(a) define the minimum set of technical requirements to allow a smooth and secure on-boarding and off-boarding of national PLF databases; (b) ensure interoperability of national PLF databases in a secure and automated fashion; (c) design and implement new requirements to the Exchange Platform provided by Union Law*”. **With regard to point c), the EDPS considers that the design and implementation of new requirements to the exchange platform should be understood as referring to already adopted acts of Union law**, which should be explicitly stated in the Proposal, including precise references. In case point c) of Annex III of the Proposal refers to any new act of Union law, the EDPS recommends deleting the aforementioned point from Annex III.
- Concerning the instructions given by the Member States as joint controllers to the ECDC as processor, the EDPS notes that section 1 of Annex II provides that “(...) *Instructions to the processor shall be sent by any of the joint controllers' contact point, in agreement with the other joint controllers.*” In this regard, for the sake of clarity, the EDPS suggests to further clarify how the instructions provided to the processor would

⁵ With regard to the ECDC's role in the EWRS within the meaning of data protection law, see [EDPS Formal comments on the Proposal for a Regulation of the European Parliament and of the Council on establishing a European Centre for Disease Prevention and Control amending Regulation \(EC\) No 851/2004](#), dated 8 March 2021.

be decided (agreed) among the joint controllers in practice and to clarify the practical modalities as to how such instructions would be communicated.

- The EDPS also notes that Article 2a(7) of the Proposal provides that “[t]he Commission shall cooperate with the ECDC in the fulfilment of the tasks entrusted to it under this Decision, in particular as regards technical and organisational measures relating to the deployment, implementation, operation, maintenance and further development of the PLF exchange platform.” and that Article 2c(4) provides that “[t]he ECDC shall engage the Commission as a sub-processor and shall ensure that the same data protection obligations set out in this Decision apply to the Commission.” Moreover, Annex III states that “[t]o fulfil its obligations as data processor of the PLF exchange platform, the ECDC shall engage the Commission as a sub-processor and shall ensure that the same data protection obligations set out in this Decision apply to the Commission.”
- In this regard, in relation to the Commission’s role as a sub-processor, the EDPS also suggests to mention the Commission in recital 16 of the Proposal in relation to the applicability of the EUDPR to the processing of personal data.
- Lastly, the EDPS notes that, in line with recital 6 of the Proposal, the PLF exchange platform “should build on the exchange platform already developed by EASA”. In this context, **the EDPS recommends to clarify what this would mean in practice, and in particular whether EASA would play any role in the context of the processing of personal data through the PLF exchange platform.**

2.2.5 Data retention period

- The EDPS welcomes Article 2a(6) of the Proposal which provides that “[t]he EWRS competent authorities shall not retain the PLF and epidemiological data received through the PLF exchange platform for longer than the retention period applicable in the context of their national SARS-CoV-2 contact tracing activities”.
- In this regard, the **EDPS considers that the Proposal should explicitly state that it does not provide for a legal basis for retaining personal data obtained through the PLF for the purpose of SARS-CoV-2 contact tracing.** Such a legal basis must in any event be provided for in Member State law.

2.2.6 Storage of personal data

- The EDPS understands that **no personal data shall be stored in the PLF exchange platform.** In this regard, the EDPS welcomes recital 8 and Article 2a(5) of the Proposal, clearly stating that “[t]he PLF exchange platform shall not store the PLF and the epidemiological data. (...)”.
- At the same time, pursuant to Article 2a(5) of the Proposal, the ECDC shall only access the data for ensuring the good functioning of the PLF exchange platform. In

this regard, the EDPS understands that such specific requirement would not require any storage of data but rather refer to the case in which the ECDC would need to access data transiting through the PLF exchange platform in case of a technical intervention to ensure the good functioning of the platform.

- The EDPS also notes that, in case the PLF exchange platform were to store any of the exchanged data, further detailed rules on the storage limitation should be provided for.

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(*e-signed*)