

Formal comments of the EDPS on two proposals to establish the conditions for accessing other EU information systems for ETIAS purposes

1. Introduction and background

On 12 September 2018, the European Parliament and the Council of the EU adopted two regulations to establish the future European Travel Information and Authorisation System (ETIAS): Regulation (EU) 2018/1240¹ establishing a European Travel Information and Authorisation system (ETIAS Regulation) and Regulation (EU) 2018/1241² amending the Europol Regulation for the purpose of establishing this new system.

The ETIAS system aims to identify security, illegal immigration and high epidemic risks associated with visa-exempt third country nationals travelling to the Schengen Area prior to their travel. To assess such risks, all visa-exempt third country nationals will have to file an online travel authorisation application prior to their date of departure. The ETIAS system will automatically compare the personal data in those applications with the data present in records, files or alerts registered in the following other EU information systems: the ETIAS Central System, the Schengen Information System (SIS), the Visa Information System (VIS), the Entry/Exit System (EES) and Eurodac. The personal data in ETIAS applications will also be automatically compared with Europol data and several Interpol databases and crosschecked against a dedicated ETIAS watchlist and specific risk indicators.

The EU Agency responsible for management of large-scale IT systems in the area of freedom, security and justice (eu-LISA) is in charge of developing the ETIAS system with the aim of having this new information system operational by 2020.

On 7 January 2019, the Commission published a package of two proposals (“the Proposals”) to establish interoperability between the ETIAS information system and other EU information systems:

- a) Proposal³ (“the Proposal on police and judicial cooperation”) for a Regulation establishing the conditions for accessing other EU information systems and amending:
 - Regulation (EU) 2018/1862⁴ (SIS Regulation on police and judicial cooperation), and
 - the proposed Regulation on ECRIS-TCN⁵ on which the co-legislators recently reached an agreement⁶.

- b) Proposal⁷ (“the Proposal on borders and visa”) for a Regulation establishing the conditions for accessing other EU information systems for ETIAS purposes and amending:
 - the ETIAS Regulation,
 - Regulation (EC) No 767/20088 (VIS Regulation),
 - Regulation (EU) 2017/22269 (EES Regulation), and
 - Regulation (EU) 2018/186110 (SIS Regulation for border checks).

The Proposals follow from Article 11(2) of ETIAS Regulation, which provides that *“amendments to the legal acts establishing the EU information systems that are necessary for establishing their interoperability with ETIAS as well as the addition of corresponding provisions [to the ETIAS Regulation] shall be the subject of a separate legal instrument”*. According to their Explanatory Memorandum, the Proposals only introduce limited technical changes, mirroring provisions that are already established in the ETIAS Regulation¹¹.

The present formal comments are issued in response to the consultation of the EDPS on the Proposals by the European Commission. The EDPS welcomes the references to this consultation pursuant to Article 42(1) of Regulation (EU) 2018/1725¹² in Recital 23 of the Proposal on police and judicial cooperation and in Recital 22 of the Proposal on borders and visa.

2. Comments

2.1. Preliminary remarks

The EDPS notes that the Proposals seek to interconnect five EU information systems in total: ECRIS-TCN, EES, ETIAS, SIS and VIS. Three of these five EU information systems, i.e. ECRIS-TCN, EES and ETIAS, do not exist at this time. EES and ETIAS are expected to start operating in 2021-2022, while co-legislators have reached a final political agreement¹³ in December 2018 on the proposal to establish ECRIS-TCN. The SIS legal framework has also recently been revised and will require important changes to the existing SIS. As regard VIS, the Commission tabled a proposal¹⁴ to revise the VIS Regulation in May last year. Although the Proposal on borders and visa also amends the current VIS Regulation, it does not take into account the changes introduced by the proposal of May 2018. Therefore, in the coming years, the five EU information systems concerned by the Proposals will either have to be wholly developed by eu-LISA, or will require important further developments by eu-LISA.

In addition, in January 2019, the co-legislators also reached a final political agreement on the two proposals¹⁵ to establish a framework for interoperability between EU information systems for borders and visa, and a framework for interoperability between EU information systems for police and judicial cooperation, asylum and migration, which also imply further important changes to the five EU information systems concerned by the Proposals.

As preliminary remarks, the EDPS would like to stress once more¹⁶ that, by interconnecting five EU information systems, the Proposals add both in legal and technical terms another layer of complexity to existing and future systems, with precise implications for fundamental rights of individuals, including the rights to privacy and data protection, that are difficult to fully assess at this stage. This complexity will have implications not only for data protection but also for the governance and supervision of these five systems. The present comments are therefore without prejudice to any future comments or opinions in relation to this subject matter that the EDPS might choose to make once more complete information allowing for a fuller assessment of legal and societal impacts becomes available.

2.2. Interoperability with the ECRIS-TCN for the purposes of ETIAS

In June 2017, the Commission tabled a proposal¹⁷ to establish a centralised European Criminal Records Information System to identify Member States that hold conviction

information on third country nationals and stateless persons, i.e. the ECRIS-TCN. In December 2018, the co-legislators reached a final political agreement on this proposal with a view to adoption by the Council and the European Parliament scheduled for March 2019.

The Proposal on police and judicial cooperation would modify this final political agreement to establish interoperability between ETIAS and ECRIS-TCN for the purposes of border management in accordance with the ETIAS Regulation. The Explanatory Memorandum explains that *“in line with the intention expressed by co-legislators in the ETIAS Regulation, it is now possible to include in ETIAS the necessary provisions on the relationship between ETIAS and ECRIS-TCN and to amend ECRIS-TCN accordingly”*.

In practice, the use of the ECRIS-TCN for border management purposes would inevitably imply further processing of data stored in ECRIS-TCN for purposes different than those initially laid down in the ECRIS-TCN political agreement. Namely, the ETIAS Central System would be able to query the ECRIS-TCN data to verify whether an ETIAS applicant corresponds to a person whose data is recorded in the ECRIS-TCN for terrorist offences and other serious criminal offences. It would also grant access to personal data in ECRIS-TCN to a new category of authorities competent for border management, i.e. to the ETIAS Central Unit for the verification in accordance with Article 22 ETIAS Regulation and to the ETIAS National Units for the manual processing in accordance with Article 26 ETIAS Regulation.

The EDPS would like to stress that, contrary to what is stated in the explanatory memorandum of the Proposal, the extension of the scope of ECRIS-TCN, a centralised database that will contain very sensitive information about individuals is far from being *“limited technical adjustments”*.

Neither the ETIAS Regulation nor the political agreement on the ECRIS-TCN Regulation (as agreed) provide for the use of the ECRIS-TCN for border management purposes. Article 20 of the ETIAS Regulation specifically - and exhaustively - lists the systems that ETIAS will query and for what reasons. This list does not include the ECRIS-TCN. Only Recital 58 of the ETIAS Regulation states that *“If a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons is established at Union level, ETIAS should be able to query it”*. The EDPS recommends the legislators to verify to which extent this brief statement included in a recital can be considered sufficient to justify by itself the extension of the scope of the ECRIS-TCN.

The EDPS notes that the Proposal on police and judicial cooperation would introduce two new definitions of “terrorist offence” and “serious criminal offence” in the ECRIS-TCN Regulation, and would add a flag in the list of data to be entered in the ECRIS-TCN to indicate such terrorist offences or other serious criminal offences. It would then limit the access to ECRIS-TCN by the ETIAS Central Unit to such flags. Despite such limitation, adding a new purpose of border management to the ECRIS-TCN system would constitute a major change to the system and should therefore be properly assessed in full transparency.

The EDPS recalls that the ECRIS-TCN aims at enhancing judicial cooperation in criminal matters by improving the exchange of information on criminal records throughout the EU. Using the data stored in the ECRIS-TCN for border management purposes would go far beyond the purposes of the ECRIS-TCN defined in its constitutive legal instrument (as currently agreed). Instead, this would be an example of what is often described as “function creep”, namely, a gradual widening of the use of a system or database beyond the purpose for which it was originally intended.

The EDPS has concerns regarding this trend which have been expressed previously. It should not be easily accepted that since the data is already stored in an IT system, it could just as well be regularly used for other purposes than those for which it was initially collected, without explicit justification or transparent debate, and with potentially a bigger impact on the life of individuals. Moreover, this broadening of the use of an existing system would be difficult to reconcile with the purpose limitation principle, which is one of the key principles of data protection law. Exceptions to the purpose limitation principle are possible, but only under strict conditions, including that the processing of the data for the other purpose should be necessary and proportionate¹⁸.

The EDPS stresses that the processing of data, even if regarded as proportionate for a specific purpose, may become inadequate or excessive when the same data is further processed for additional purposes. In addition, it is important to keep in mind that personal data on criminal convictions are considered more sensitive and subject to special safeguards under data protection law.

The EDPS thus considers that some of the amendments brought by the Proposal on police and judicial cooperation would substantially amend the final political agreement on ECRIS-TCN and not merely mirror provisions already established in the ETIAS Regulation, contrary to what the Explanatory Memorandum to the Proposal states¹⁹. Therefore, the substantial changes brought by the Proposal on police and cooperation require a careful analysis of their necessity and proportionality in view of their impact on the fundamental right to data protection.

In addition, as already stressed in previous opinions²⁰, the EDPS would like to draw attention to the current trend of increasingly conflating the distinct purposes of migration and border management, internal security and judicial cooperation in criminal matters). While there might be synergies between these areas, they are different areas of public policy with distinct objectives and key actors involved. The above-mentioned analysis of necessity and proportionality should therefore also take into account the policy areas in which the proposed measures would apply and the respective role and mandate of the key actors involved in those areas.

2.3. Information security

According to Recital 4 of the Proposals, the objective is to lay down “*how [the interoperability referred to in Article 11 of the ETIAS Regulation] and the conditions for the consultation of data stored in other EU information systems and Europol data by the ETIAS automated process for the purposes of identifying hits are to be implemented*”. This interoperability implies new interconnections between information systems. From an information security perspective, this changes the risk profile of ETIAS and all systems foreseen to be interconnected. Thus, the main consequence is that risks assessments need to be performed or reviewed for all systems that will be interconnected to ensure that the new risk profile is taken into account. This will lead to define or redefine security controls that are required to mitigate all old and new risks to a level acceptable by all stakeholders.

2.4. The obligation to perform Data Protection Impact Assessments

The EDPS points out that, under Article 39 of Regulation 2018/1725, the controller must carry out a Data Protection Impact Assessment for all processing operations likely to result in a high risk to the rights and freedoms of data subjects before the start of the processing. The

ETIAS information system and the ECRIS-TCN will imply such processing operations likely to result in a high risk and thus will require performing DPIAs before their start.

Article 39(9) Regulation 2018/1725 creates an exemption from the requirement to carry out a DPIA on the cumulative conditions that (1) a specific legal basis regulates the specific processing operation or set of operations in question, and (2) a DPIA was already carried out as part of a general impact assessment for the proposed legal basis. However, the Commission did not carry out such a general impact assessment before issuing the proposal of the ETIAS Regulation. As regard the proposal to establish ECRIS-TCN, the Commission did not issue a specific impact assessment for this proposal but relied upon the previous Impact Assessment²¹ carried out for the proposal for a Directive establishing ECRIS²² tabled in 2016. The EDPS considers that this Impact Assessment carried out at the stage of the proposal for a Directive establishing ECRIS does not qualify as a DPIA for the ECRIS-TCN system under Article 39 Regulation 2018/1725 as a DPIA would need to take into account the changes brought to the proposal, be substantially more detailed and contain at least the information listed in Article 39(7).

Furthermore, in line with the principles of data protection by design and by default, existing DPIAs should also be revised for each other system that will be interconnected with ETIAS. This should lead to the definition of additional controls to be implemented or existing controls to be modified.

Brussels, 13 March 2019

(signed)

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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, p. 1–71.

² Regulation (EU) 2018/1241 of the European Parliament and of the Council of 12 September 2018 amending Regulation (EU) 2016/794 for the purpose of establishing a European Travel Information and Authorisation System (ETIAS), OJ L 236, p. 72–73.

³ Proposal for a Regulation of the European Parliament and of the Council establishing the conditions for accessing the other EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU) yyyy/xxx [ECRIS-TCN], COM(2019) 3 final.

⁴ Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ L 312, 7.12.2018, p. 56–106.

⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRIS-TCN system) and amending Regulation (EU) No 1077/2011, COM(2017)0344 final.

⁶ <https://www.consilium.europa.eu/en/press/press-releases/2018/12/11/exchanging-criminal-records-eu-agrees-a-reformed-ecris-system/>

⁷ Proposal for a Regulation of the European Parliament and of the Council establishing the conditions for accessing other EU information systems for ETIAS purposes and amending Regulation (EU) 2018/1240, Regulation (EC) No 767/2008, Regulation (EU) 2017/2226 and Regulation (EU) 2018/1861, COM(2019) 4 final.

⁸ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60–81.

⁹ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, OJ L 327, 9.12.2017, p. 20–82.

¹⁰ Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ L 312, 7.12.2018, p. 14–55.

¹¹ Explanatory Memorandum to COM(2019) 3 final, p. 6 and Explanatory Memorandum to COM(2019) 4 final, p. 6.

¹² 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. 39–98.

¹³ <http://data.consilium.europa.eu/doc/document/ST-15701-2018-INIT/en/pdf>

¹⁴ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA, COM(2018) 302 final.

¹⁵ Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, COM(2017) 793 final; Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration), COM(2017) 794 final.

¹⁶ EDPS Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, par. 22-23.

¹⁷ Proposal for a Regulation of the European Parliament and of the Council establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European criminal records information system (ECRIS-TCN system) and amending Regulation (EU) No. 1077/2011, COM(2017)344 final.

¹⁸ See the EDPS toolkit on assessing the necessity of measures that limit the fundamental right to the protection of personal data, available at:

https://edps.europa.eu/sites/edp/files/publication/17-04-11_necessity_toolkit_en_0.pdf and the EDPS draft guidelines on proportionality submitted to public consultation until 4 April 2019, available at https://edps.europa.eu/data-protection/our-work/publications/guidelines/edps-guidelines-assessing-proportionality-measures_en

¹⁹ Explanatory Memorandum to COM(2019) 3 final, p. 6.

²⁰ EDPS Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, available at :

https://edps.europa.eu/sites/edp/files/publication/2018-04-16_interoperability_opinion_en.pdf and [EDPS opinion 3/2017](https://edps.europa.eu/sites/edp/files/publication/17-03-070_etias_opinion_en.pdf) on the Proposal for a European Travel Information and Authorisation System (ETIAS) available at: https://edps.europa.eu/sites/edp/files/publication/17-03-070_etias_opinion_en.pdf

²¹ Commission Staff Working Document - Impact Assessment Accompanying the proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA, SWD(2016) 4 final.

²² Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA, COM(2016) 7 final.