FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

FRA Opinion – 2/2017
[ETIAS]

Vienna, 30 June 2017

The impact on fundamental rights of the proposed Regulation on the European Travel Information and Authorisation System (ETIAS)

Opinion of
the European Union Agency for Fundamental Rights

Contents

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (FRA), in particular Article 2 with the objective of FRA "*to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights*",

Having regard to Article 4 (1) (d) of Council Regulation (EC) No. 168/2007, with the task of FRA to "*formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission*",

Having regard to previous opinions of FRA on related issues, in particular the FRA opinion relating to the proposal for a revised Eurodac Regulation[1] and the FRA opinion on the future European Criminal Records Information System for third-country nationals,[2]

Having regard to the request of the European Parliament of 21 June 2017 to FRA for an opinion "*on the fundamental rights and personal data protection implications*" of the proposed Regulation for the creation of a European Travel Information and Authorisation System (ETIAS), including "*an assessment of the fundamental rights aspects of the access by law enforcement authorities and Europol*",

SUBMITS THE FOLLOWING OPINION:

[1] European Union Agency for Fundamental Rights (FRA) (2016), *Opinion of the European Union Agency for Fundamental Rights on the impact on fundamental rights of the proposal for a revised Eurodac Regulation*, FRA Opinion – 6/2016 [Eurodac], Vienna, 22 December 2016.

[2] FRA (2015), *Opinion of the European Union Agency for Fundamental Rights concerning the exchange of information on third-country nationals under a possible future system complementing the European Criminal Records Information System*, FRA Opinion – 1/2015 [ECRIS], Vienna, 4 December 2015.

Opinions

1. Fundamental rights compliance

1.1 Fundamental rights impact assessment

ETIAS affects fundamental rights, as the proposal itself acknowledges. Nonetheless, an assessment of the proposal's impact on data protection and other fundamental rights is absent.

FRA Opinion 1

In line with EU better regulation guidelines, the EU legislator should identify ways to compensate for the absence of a comprehensive impact assessment of the proposal, including on fundamental rights issues, such as protection of personal data.

1.2 Practical guidance on fundamental rights

In the absence of a full impact assessment, it is particularly important to ensure that the impact on fundamental rights is monitored and that fundamental rights considerations are embedded into its practical implementation.

FRA Opinion 2

The mechanisms to monitor, guide and evaluate the implementation of ETIAS – envisaged in Articles 7, 9, 53 and 81 – should cover fundamental rights implications and, in particular, the protection of personal data. For example, the ETIAS Screening Board established under Article 9 could include a member with fundamental rights expertise (particularly on personal data protection and non-discrimination).

The terms of references of the Practical Handbook, suggested by the general approach of the Council (document No. 10017/17, 13 June 2017), should specifically also cover fundamental rights. This would enable FRA to support the drafting with its research findings, similarly to the contribution FRA made to the Eurosur Handbook.

1.3 Best interests of the child

Article 24 of the Charter requires that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Unlike other proposals on large-scale EU information systems, such as the Entry-Exit System or Eurodac, the ETIAS proposal does not reflect the principle of the best interests of the child.

FRA Opinion 3

The EU legislator should explicitly refer to the principle of the best interests of the child in the ETIAS Regulation, to remind all those entrusted with its implementation to always pay the necessary attention to this principle in practice.

2. Protection of personal data

2.1. Processing of health data

Information on public health risks provided by applicants may soon become outdated and may not be reliable, as it is based on self-declarations. Therefore, processing sensitive health information would not meet the necessity and proportionality threshold required by EU law.

FRA Opinion 4

The EU legislator should remove the question on health in Article 15 (4) (a) of the ETIAS proposal. Public health risks should be assessed at the border when border guards carry out entry checks, as is currently the case.

2.2. Other data that may reveal sensitive information

Some of the data that applicants are required to provide may reveal sensitive information (either alone or in combination with other data) or may lead to severe consequences for the individual for unjustified reasons. Their processing does not appear to be necessary and/or proportionate to achieve the purpose of ETIAS and raises issues under the principles of data minimisation and purpose limitation.

FRA Opinion 5

To honour the rights to respect for private life (Article 7 of the Charter) and protection of personal data (Article 8 of the Charter), and in light of the principles of data minimisation and purpose, the EU legislator should:

- ***limit the questions on education and occupation in Article 15 (3) to broad categories as necessary for risk analysis purposes or second-line checks, avoiding the collection of job title or other detailed information until the necessity of collecting such information is better demonstrated;***
- ***re-formulate the question on presence in conflict zones in Article 15 (4) (c) so that it only captures information relevant for ETIAS;***
- ***replace the reference to criminal offences in Article 15 (4) (b) with a more specific and exhaustive list, as suggested in the general approach of the Council;***
- ***consider removing Article 15 (4) (d), as information on past return decisions should be retrieved from SIS;***
- ***introduce a provision on issuing guidelines for applicants, to avoid having them misunderstand questions and unintentionally provide inaccurate information.***

2.3. Automated processing and interoperability

Article 22 (1) of the General Data Protection Regulation and Article 19 of Regulation (EU) 45/2013 prohibit any "decision based solely on automated processing, including profiling" which "significantly affects" a data subject. Although exceptions may be made where authorised by EU or Member State law, data controllers must provide appropriate safeguards.

FRA Opinion 6

To promote compliance of the automatic checks envisaged by the proposed ETIAS Regulation with fundamental rights, the EU legislator should:

- ***limit interoperability only to those other IT-systems and databases that have the purpose of supporting border checks of visa-free nationals, thus excluding interoperability with Eurodac, ECRIS and VIS;***
- ***underline the need for operational guidance to ensure that the different data protection frameworks applicable to Europol data and data in the eu-LISA managed IT-systems are adhered to;***
- ***replace the reference to criminal offences in proposed Article 29 with an explicit list, as suggested in the general approach adopted by the Council in June 2017.***

2.4. Data retention

ETIAS data will be retained for five years, aligning it to the proposed EES. The large amount of personal data to be stored in ETIAS and the planned interoperability with other information systems heightens the risk of unlawful access and use, in addition to other data security breaches.

FRA Opinion 7

The necessity and proportionality of retaining the personal data for five years following the last entry record of the authorisation, or its annulment, refusal or revocation, would need to be better justified in light of the purposes of ETIAS.

3. Equality and discriminatory profiling

3.1. Equality in treatment

Options available under ETIAS for persons who justifiably have difficulties in complying with the application requirements should not be more limited than those available to persons who are required to hold a visa. Article 35 of the Visa Code contains a fall-back option for issuing, in exceptional cases, a visa at border-crossing points.

FRA Opinion 8

To operationalise the non-discrimination safeguards in Article 12 of the ETIAS proposal – which requires that particular attention be paid to children, older persons and persons with disabilities – the EU legislator should envisage an effective fall-back option, particularly to avoid hardship where the travel is justified by urgent reasons. This could be done by introducing into ETIAS a rule for obtaining the travel authorisation directly at the border, similar to Article 35 of the Visa Code.

Provision could also be made to ensure that such applications are assisted at border-crossing points.

3.2. Preventing risks of discriminatory profiling

That only limited research is available on the feasibility of using risk indicators without engaging in discriminatory profiling weighs in favour of postponing to a later stage the possible use of risk indicators.

FRA Opinion 9

Personal data processed in ETIAS should not be checked against risk indicators until a test phase demonstrates that the screening rules are necessary, proportionate and do not result in discriminatory profiling, given the significant risk of inadvertently

discriminating against certain categories of travellers based on prohibited grounds listed in Article 21 of the Charter.

Therefore, the EU legislator should remove the relevant provisions on screening rules – such as those in recital (40), Article 7, Article 18 (5), the last sentence of Article 21 (3), Article 22 (7), and Article 28 – from the proposed ETIAS Regulation.

An amendment of the regulation to introduce such rules could be considered following a test phase demonstrating that the screening rules are necessary and proportionate and do not result in discriminatory profiling. In that case, the regulation should define the screening rules in more detail, limiting the discretion of implementing rules.

4. Access by law enforcement and fundamental rights

The absence of an impact assessment and the limited availability of comparable evidence make it difficult to justify the interference with the right to respect for private life (Article 7 of the Charter) and the right to protection of personal data (Article 8 of the Charter) that access to ETIAS by law enforcement authorities would entail.

FRA Opinion 10

The EU legislator should postpone the decision of granting law enforcement authorities access to ETIAS until the functioning of the system has been tested in practice and more solid conclusions can be drawn on the proportionality and necessity of accessing personal data beyond what would be included in the EES.

Should law enforcement access nevertheless be granted from the outset, the EU legislator should:

- ***allow law enforcement access to children's data, particularly those below the age of criminal responsibility, only to protect missing children or children who are victims of serious crimes (e.g. trafficking in human beings);***
- ***align the conditions for access by law enforcement authorities in Article 45 (1) of the proposed ETIAS Regulation to the wording of Article 21 (1) of the proposed Eurodac Regulation;***
- ***identify an independent entity other than EDPS to verify Europol requests for access to ETIAS data.***

5. The right to asylum

5.1. Respecting the principle of non-*refoulement* and access to international protection

The ETIAS proposal does not refer to the right to asylum, or to the principle of non-*refoulement*. However, asylum applicants from visa-free third countries continue to arrive in the EU – for example, Venezuelans to Spain and Ukrainians to Malta, Slovakia and Spain. The absence of a safeguard clause for persons in need of international protection may result in serious interferences with the Charter rights to asylum and non-*refoulement* (Articles 18 and 19).

FRA Opinion 11

The EU legislator should underline that the implementation of ETIAS must not affect Member States' obligations resulting from the Geneva Convention relating to the

Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, as well as EU and international obligations relating to access to international protection.

5.2. Retaining the rules on issuing authorisation to enter with limited territorial validity

Article 38 of the ETIAS proposal envisages a special procedure allowing ETIAS National Units to issue travel authorisations with limited territorial and temporal validity, when this is justified by humanitarian reasons, reasons of national interest or because of international obligations.

FRA Opinion 12

The EU legislator should ensure that Article 38 of the proposal continues to provide for travel authorisations with limited territorial validity to offer persons in need of international protection a legal channel at national level through which they can seek safety.

5.3 Preventing political opponents from leaving their countries of origin

Persons in need of international protection face a number of difficulties when seeking safety through legal channels. Applying carriers' liability in the context of ETIAS will aggravate this situation. It will be more difficult for visa-free third-country nationals to reach EU Member States' territory to seek international protection.

Third countries wishing to limit the possibilities of persons in need of international protection, such as political opponents, may report their travel documents in Interpol databases to prevent them from leaving.

FRA Opinion 13

The European Commission's future evaluation of ETIAS, provided for under Article 81 (5) of the proposal, should especially examine how obligatory travel authorisation checks carried out by carriers pursuant to Article 39 affect the right to seek asylum. Based on the results of such an evaluation, the European Commission should propose the necessary legislative changes.

Interpol information on travel documents originating from third countries should be subject to the verification procedure within the automated processing (Article 20 of the proposal), given that oppressive regimes may include information about opponents to prevent them from leaving the country.

5.4. Managing data transfers to third countries without exposing people in need of international protection to risks

Personal information that allows the country of origin to deduce – directly or indirectly – that a person has applied for asylum in another country is extremely sensitive, as it can expose to retaliation measures the person concerned and/or his or her family members remaining in the country of origin.

FRA Opinion 14

The EU legislator should not provide for the option of sharing personal data stored in ETIAS with third parties, in light of possible severe risks for applicants and their families and the fact that information on the individuals would already be available in other systems governed by strict sharing rules.

6. The right to an effective remedy

6.1. Appeals against a refusal, annulment, or revocation of an authorisation to enter

The ECtHR has consistently held that remedies must be effective both in law and in practice. The appeal scheme as currently framed in the ETIAS proposal raises serious issues from the perspective of effectiveness of the legal remedy by virtue of Article 47 of the Charter, as interpreted by the CJEU and ECtHR.

FRA Opinion 15

The EU legislator should introduce, in Articles 32 and 36 of the proposal, minimum standards concerning the appeals procedure in the Member States. Amongst others, a judicial body should be responsible for supervision by virtue of Article 47 of the Charter; and sufficient information should be given about the reasons for refusal, annulment or revocation to allow affected individuals to formulate meaningful appeals. To this end, the EU legislator should also change the term "right to appeal" to "right to an effective remedy" throughout the proposal to better align it with the requirements flowing from Article 47 of the Charter.

6.2. Establishing administrative complaints mechanism

The proposal does not designate a competent body within Frontex or at the Member State level with which applicants can lodge complaints in cases of delay or irregularities in the processing. Creating an easily accessible administrative complaints mechanism could reduce the need for applicants to resort to judicial remedies.

FRA Opinion 16

The proposal should include a provision for a complaints mechanism, comparable to the one set up by Frontex in accordance with Article 72 of Regulation (EU) 2016/1624. However, the ETIAS Regulation would also need to impose on National ETIAS Units the duty to provide sufficiently reasoned replies to requests by the complaint mechanism within a short deadline.

6.3. Accuracy of data, right of access, correction and erasure

Article 54 of the ETIAS proposal regulates the right of access, correction and erasure of data, which are essential data protection safeguards.

FRA Opinion 17

Due to the planned interoperability between ETIAS and other large-scale EU information systems, including a common repository with EES, the EU legislator should

add a provision informing applicants how to exercise their right of access, correction and erasure, including where the information originates from other systems.

Member States' embassies and consulates in visa-free third countries should support applicants in exercising effectively their right of access, correction and erasure of data. Their role could be reflected in the proposal.

As inaccurate data included in interoperable databases can cause false hits, due weight should be given to applicants' statements during the manual processing phase.

Introduction

On 16 November 2016, the European Commission proposed a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No. 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624.[3] At its 3546th meeting held on 8-9 June 2017, the Council of the European Union agreed on a general approach relating to the proposal.[4] The articles referred to in this opinion are those included in the proposal of the European Commission, unless otherwise indicated in the text. FRA welcomes that the proposal uses the term "irregular migration", which is non-criminalising language, and therefore preferred over the term "illegal immigration", proposed in the general approach document of the Council.

What is ETIAS?

As proposed by the European Commission, the European Travel Information and Authorisation System (ETIAS) is a new large-scale information system to be set up at EU level. It will apply to all EU Member States that are part of the Schengen area, as well as to Iceland, Liechtenstein, Norway and Switzerland.[5]

In essence, it will screen nationals from visa-free third countries to establish whether or not they should be allowed to enter the EU. In future, a visa-free traveller who, for whatever reason, has not been able to submit an application in advance will not be granted entry into the Schengen area.

ETIAS will collect personal data on visa-free third-country nationals prior to their arrival at the EU's external borders. The European Border and Coast Guard Agency (Frontex) and the relevant EU Member State(s) will crosscheck such data. If the checks conclude that the person does not pose a security, irregular migration or public health risk, he or she will receive authorisation to travel to the EU. Such authorisation does not in itself entitle the holder to enter the EU – in other words, he or she will still be checked at the border-crossing point and could be refused entry – but it will significantly simplify the border crossing procedure. The travel authorisation will be valid for five years (though the Council suggests reducing the period of validity to three years). Apart from a few exceptions, all persons from visa-free third countries must hold advance travel authorisation if they want to enter the EU.

The proposal explains that ETIAS would facilitate travel by providing early indication of admissibility into the Schengen area. The risk that a person comes all the way to the external border and is then refused entry would be reduced. At the same time, the information provided by the traveller in advance enables EU Member States to better examine if the traveller is likely to overstay or pose a security risk, a task that currently

---

[3] European Commission (2016), *Proposal of a Regulation of the European parliament and of the Council establishing a European Travel Information and Authorization System (ETIAS) and amending Regulations (EU) No. 515/2014,(EU)2016/399, (EU)2016/794 and (EU) 2016/1624* , COM(2016) 731 final, Brussels, 16 November 2016.

[4] See Council of the European Union (2017), *Annex to Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulation (EU) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624 – General approach*, No. 10017/17, Brussels, 13 June 2017.

[5] Denmark will decide six months after the Council has decided on this regulation whether it will implement it in national law, according to Article 4 of Protocol (no. 22) on the position of Denmark annexed to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Croatia, Cyprus, Bulgaria and Romania will have to apply these conditions when becoming implementing Schengen members, see Explanatory Memorandum to the Proposal, p. 22.

has to be completed by border guards within a few seconds.[6] The idea to establish a system for advanced checks is not new. ETIAS can be compared with the ESTA set up in the United States,[7] the eTA in Canada[8] and the ETA in Australia.[9] In terms of information collected, only US ESTA collects more or less the same amount of information as ETIAS. ETIAS also includes a more comprehensive profiling mechanism compared to the other systems.

Recital (20) of the proposal – according to which ETIAS will examine whether a traveller fulfils the entry conditions under Article 6 of the Schengen Borders Code (Regulation (EU) 2016/399) – presents ETIAS as a system to anticipate the border check before the person travels. This is, however, a simplified description of ETIAS, as the content of checks carried out at the border and of the advance checks proposed under ETIAS are different. Under the proposed ETIAS, third-country nationals will have to provide information about themselves – for example, on their level of education, occupation, or health status – which they would normally not give when checked at the border or only give if they travel for specific purposes. In this way, ETIAS is comparable with a simplified visa procedure. Particularly for third countries who were subject to a visa liberalisation process, through a pre-border check ETIAS also compensates for the absence of a vetting procedure of individual travellers within the visa application process. Table 1 illustrates the relationship between border checks under the Schengen Borders Code (unless referred to a more thorough second-line check), ETIAS and the assessments under the Visa Code.

Table 1: Content of checks everyone is subjected to at the border, in the proposed ETIAS and when requesting a visa

Purpose	Schengen Border Checks	Schengen Visa Procedure	ETIAS
Security Risks	Alerts in IT systems		
			• Risk indicators: age, sex, nationality, residence, education, occupation
Irregular Migration Risks	Alerts in IT systems		
	• Supporting documents verifying intention of return	• Proof of employment • Letter issued by educational institution • "Profiles" of applicants presenting an irregular migration risk	• Risk indicators: age, sex, nationality, residence, education, occupation
Public Health Risks	External Sources		
			• Risk indicators: age, sex, nationality, residence, education, occupation

Source: FRA, 2017

ETIAS will be a new large-scale EU information system complementing those already existing – in particular the Schengen Information System (SIS), the Visa Information

6 See Frontex (2014), *Twelve Seconds to Decide*, Luxembourg, Publications Office of the European Union (Publications Office).
7 U.S. Customs and Border Protection, Electronic System for Travel Authorization.
8 Government of Canada, Electronic travel authorization.
9 Australian Government, Electronic Travel Authority.

System (VIS), and Eurodac[10] – as well as the planned EU Entry-Exit System (EES), which will record any time when a third-country national crosses the external border.[11] ETIAS' impact on fundamental rights must be examined considering this broader context.

ETIAS will both fall under EU level as well as national-level responsibility. Frontex, as the ETIAS Central Unit, will carry out the automated processing of the applications submitted on-line. ETIAS National Units within EU Member States will be required to review the applications of those travellers deemed to pose a risk by the automated check. The European Agency for the operational management of large-scale IT-systems in the area of freedom, security and justice (eu-LISA) would maintain the Central IT-System for ETIAS.

The automated processing in ETIAS as proposed in Article 18 includes:

- checking whether the applicant has provided information leading to a refusal of the application;
- checks against other information systems: the EES, SIS II, VIS, Eurodac, the European Criminal Records Information System (ECRIS), Europol data, as well as relevant Interpol databases, namely the Stolen and Lost Travel Documents (SLTD) and Travel Documents Associated with Notices (TDAWN);
- checks against ETIAS itself;
- checks against the Europol-managed ETIAS watch list on persons having committed crimes or against whom there are factual indications or reasonable grounds to believe that they will commit criminal offences; and
- screening the personal data collected against specific indicators to identify immigration, security and public health risks through the ETIAS screening rules as proposed in Article 28.

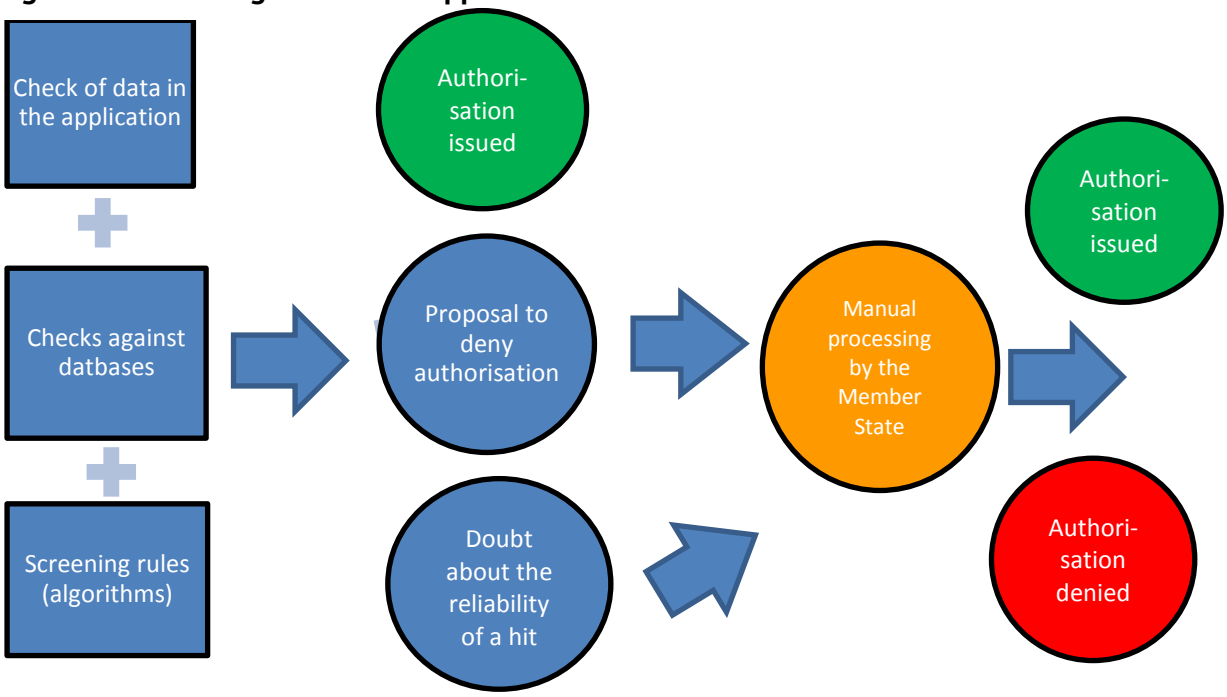
If the automated checks do not flag any risks, the system immediately sends a travel authorisation to the applicant. If there are doubts concerning the reliability of a positive

[10] Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381, pp. 4-23 (SIS II Regulation); 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, OJ 2008 L 218, pp. 60-81 (VIS Regulation); Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (Eurodac Regulation). See also: European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast)*, COM(2016) 272 final, Brussels, 4 May 2016.

[11] European Commission (2016), *Proposal for a regulation of the European Parliament and of the Council 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 of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No. 767/2008 and Regulation (EU) No 1077/2011*, COM (2016) 194 final, Brussels, 6 April 2016.

match, Frontex verifies manually the reliability of the "hit" (Article 20). If the automated checks point to a security, irregular migration or public health risk based upon information in the application form, one or several hits in databases, or profiling done through the screening rules, the application is reviewed by the ETIAS National Unit in the Member State through which the traveller plans to enter the EU (Article 22). Frontex is not entitled to reject an application. The concerned Member State may, if necessary, request additional information or, in exceptional circumstances, require the applicant to go to the embassy for an interview (Article 23). Figure 1 illustrates the flow of the processing.

Figure 1: Processing of an ETIAS application



Note: Checks by Frontex in blue; checks by the EU Member States in orange.

Source: FRA, 2017

ETIAS and fundamental rights

The Explanatory Memorandum to the ETIAS proposal explains that ETIAS facilitates travel as well as checks at the border. It also acknowledges that ETIAS has an impact on various fundamental rights.

In its opinion on ETIAS, the European Data Protection Supervisor (EDPS) concluded that it has not been possible to assess the necessity and proportionality of the proposed ETIAS, due to the lack of an impact assessment.[12] The dangers of converging immigration and security is a central concern articulated in the opinion of the EDPS.

This FRA opinion touches in particular on the following rights of the Charter of Fundamental Rights of the European Union (Charter):

- respect for private and family life (Article 7);
- the right to protection of personal data (Article 8);
- right to asylum (Article 18) and protection in the event of removal, expulsion or extradition (Article 19 (2));
- right to non-discrimination (Article 21);

[12] European Data Protection Supervisor (EDPS) (2017), *EDPS Opinion on the Proposal for a European Travel Information and Authorisation System (ETIAS)*, Opinion 3/2017, 6 March 2017, p. 7.

- the protection of the rights of the child (Article 24);
- the right to an effective remedy (Article 47).

These rights must be read together with Article 1 of the Charter on human dignity. The dignity of the human person is part of the substance of the rights laid down in the Charter.[13] None of the rights laid down in the Charter may be used to harm the dignity of another person.[14]

As explained in Chapter 1, this FRA opinion does not replace a full-fledged fundamental rights impact assessment and some fundamental rights issues would require further analysis.

[13] EU network of independent experts on fundamental rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, Article 1, Human Dignity.

[14] Explanations relating to the EU Charter of Fundamental Rights (2007/C 303/02); Explanation *on Article 1 — Human dignity*.

1. Fundamental rights compliance

The EU Charter of Fundamental Rights binds Member States and EU agencies when they implement ETIAS. According to Article 12 of the proposal, processing of data within ETIAS must not lead to discrimination.

1.1. Fundamental rights impact assessment

ETIAS affects fundamental rights, as the proposal also acknowledges. Nonetheless, there is no impact assessment of the proposal on data protection and other fundamental rights, as EU better regulation guidelines would require.[15]

Whereas this FRA opinion draws attention to a number of fundamental rights issues, it cannot replace a fully-fledged fundamental rights impact assessment. Due to time constraints, this opinion does not address all fundamental rights questions. For example, it does not examine the proposal's impact on the rights of third-country nationals who are family members of nationals of the EU, the European Economic Area (EEA) and Switzerland, or the impact of the provisions relating to carriers on the freedom to conduct a business (Article 16 of the Charter). Similarly, it does not review if the proposed system is compatible with the rights of certain categories of Turkish nationals deriving from the 1970 Ankara Protocol[16] and its "standstill clause" as interpreted by the Court of Justice of the EU (CJEU),[17] or the applicability of ETIAS to persons having to cross the EU's external borders in unforeseen emergency situations under Article 5 (2) (b) of the Schengen Borders Code (Regulation (EU) 2016/399). Nor does this opinion cover the issues of legality and conformity with principles of EU law-making[18] in light of delegating considerable powers to the European Commission to adopt implementing rules and more detailed regulation (by "delegated acts" under Article 290 TFEU) on a number of significant matters that have a tangible impact on fundamental rights. Examples are the adoption of a pre-determined list of answers concerning the questions on education, occupation and job titles or specifying further the security, irregular migration or public health risks for the establishment of the risk indicators.[19]

FRA Opinion 1

In line with EU better regulation guidelines, the EU legislator should identify ways to compensate for the absence of a comprehensive impact assessment of the proposal, including on fundamental rights issues, such as protection of personal data.

---

[15] European Commission (2015), *Commission Staff Working Document: Better Regulation Guidelines*, SWD (2015) 111 final, Strasbourg, 19 May 2015.

[16] Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the *Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force - Final Act - Declarations*, OJ L 293, 29 December 1972, pp. 3-56.

[17] See CJEU, C-228/06, *Soysal and Savatli v. Germany*, 19 February 2009.

[18] See similarly Alegre, S., Jeandesboz, J., Vavoula, N. (2017), *European Travel Information and Authorisation System (ETIAS): Border management, fundamental rights and data protection*, Study commissioned by the Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, European Parliament, April 2017, pp. 42- 43.

[19] See recital (50) as well as Article 15 (3) and (5)-(6), Article 16 (4), Article 28 (3), and Article 72 (1) and (5) of the proposal.

1.2. Practical guidance on fundamental rights

The absence of a fundamental rights impact assessment makes it even more important to monitor the impact on fundamental rights and to embed fundamental rights considerations into its practical implementation.

The proposed ETIAS Regulation envisages a number of mechanisms to monitor or guide its implementation. These include:

- regular audits of the use of the screening rules by the Central Unit, including how they impact on fundamental rights, particularly privacy and protection of personal data (Article 7);
- opinions, guidelines, recommendations and best practices on the risk assessment by the ETIAS Screening Board composed of Member States representatives, Europol and Frontex (Article 9);
- self-monitoring by Frontex, Europol and the Member States (Article 53);
- procedures for monitoring the development and functioning of ETIAS by eu-LISA relating to technical output, cost-effectiveness, security and quality of service (Article 81); and
- regular evaluations of the functioning of ETIAS by the European Commission, including its impact on fundamental rights (Article 81).

The Practical Handbook suggested by the general approach of the Council in proposed Article 81a offers a good opportunity to provide guidance on how to reduce risks of unlawful access. More generally, such a handbook could provide good practices on how to promote a fundamental rights sensitive implementation of the ETIAS Regulation.

FRA Opinion 2

The mechanisms to monitor, guide and evaluate the implementation of ETIAS – envisaged in Articles 7, 9, 53 and 81 – should cover fundamental rights implications and, in particular, the protection of personal data. For example, the ETIAS Screening Board established under Article 9 could include a member with fundamental rights expertise (particularly on personal data protection and non-discrimination).

The terms of references of the Practical Handbook, suggested by the general approach of the Council (document No. 10017/17, 13 June 2017), should specifically also cover fundamental rights. This would enable FRA to support the drafting with its research findings, similarly to the contribution FRA made to the Eurosur Handbook.

1.3. Best interests of the child

The best interests of the child is one of the four core principles of the UN Convention on the Rights of the Child (Article 3). Article 24 of the Charter protects the rights of the child and emphasises the best interests of the child as a key principle of all actions taken in relation to children by public authorities and private actors. Whenever acting within the scope of EU law, Member States must provide to the child such protection and care as is necessary for the child's well-being and development.

The best interest of the child is also reflected in the legal instruments establishing the individual large-scale EU information systems. Article 9 (2) of the proposed EES Regulation, for example, stipulates that the best interests of the child must be a primary

consideration when retaining a child's data. Recital (26) of the proposed recast Eurodac Regulation also reiterates the principle of the best interests of the child.[20]

The proposed ETIAS Regulation, in contrast, merely asserts that when processing personal data within the ETIAS Information System, particular attention must be paid to children (Article 12). EU data protection rules provide special protection to children's personal data. The ECtHR imposes clear limits, prohibiting the blanket retention of children's biometric data by law enforcement authorities.[21] Children's data is also particularly sensitive because the retention of their data may affect their lives even where they had no say in their parents' decision to travel.

FRA Opinion 3

The EU legislator should explicitly refer to the principle of the best interests of the child in the ETIAS Regulation, to remind all those entrusted with its implementation to always pay the necessary attention to this principle in practice.

[20] European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast)*, COM(2016) 272 final, Brussels, 4 May 2016.

[21] ECtHR, *S. and Marper v. United Kingdom*, Nos. 30562/04 and 30566/04, 4 December 2008, paras. 124-125.

2. Protection of personal data

Article 7 of the Charter stipulates the right to respect for private life. According to Article 8 (1) of the Charter, everyone has the right to the protection of their personal data. The right to protection of personal data is not an absolute right. Interferences with this right can be justified, but they have to respect the requirements of the Charter and of the European Convention on Human Rights (ECHR). Under EU law, any limitation on fundamental rights guaranteed by the Charter must be in line with the requirements of Article 52 (1) of the Charter, namely: limitations must be provided for by law, must genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, respect the essence of the right, and be proportionate. The aim of any such limitation, therefore, needs to be carefully considered.

The right to protection of personal data is detailed in secondary EU law, which is different for EU institutions, bodies and agencies, and EU Member States. Until the European Commission proposal on the processing of data of EU institutions and agencies is adopted,[22] Frontex and eu-LISA are bound by Regulation (EC) No. 45/2001, which applies to EU institutions, agencies and bodies. As of May 2018, EU Member States will be bound by Regulation (EU) 2016/679 (General Data Protection Regulation)[23] and Directive (EU) 2016/680.[24]

The proposed ETIAS Regulation envisages the **processing of sensitive data**. Proposed Article 15 lists the data that applicants must provide in the application form. By combining information on name, aliases, residence, country of origin, education, occupation and email address, information on race, ethnic origin or religion may become evident. The question about occupation in the application form may reveal trade union membership (see Section 3.2). In addition, broad information about health (see section 2.1) is collected.

Article 9 of the General Data Protection Regulation significantly limits the processing of such special categories of data (sensitive data). It may only be allowed for reasons of, for instance, substantial public interest, on the basis of Union or Member State law, provided certain safeguards are applied. The processing needs to be proportionate to the aim pursued, respect the essence of the right to data protection, and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

ETIAS would carry out pre-border checks to identify irregular immigration, security and public health risks. This appears to satisfy the pursuit of a legitimate aim, but the necessity and proportionality of processing some of the information requested is not sufficiently demonstrated.

The processing of data in ETIAS needs to respect the principles of purpose limitation and data minimisation. The **purpose limitation** is mirrored in Article 8 (2) of the Charter, as well as in Article 5 (1) (b) of the General Data Protection Regulation. According to the regulation,

---

[22] European Commission (2017), *Proposal for a Regulation of the European Parliament and of the Council on the protection of individual 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*, COM(2017) 8 final, Brussels, 10 January 2017.

[23] 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, pp. 1-88.

[24] Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, pp. 89-131.

personal data may only be collected for specified, explicit and legitimate purposes and must not be further processed in a manner that is incompatible with those purposes. The person concerned should be able to foresee the purpose for which his or her data will be processed.

Article 5 of the General Data Protection Regulation spells out the **principle of data minimisation**, whereby personal data must be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed". Data minimisation refers to both the amount of data collected and the data processed.

2.1. Processing of health data

The first question to examine is whether the processing of personal data on health – proposed Article 15 (4) (a) – respects the principles of purpose limitation and data minimisation.

According to Article 6 (1) (e) of the Schengen Borders Code, a person is allowed entry at the external border if not considered to be a threat to public health. Article 15 (4) (a) of the proposed ETIAS Regulation intends to capture the threat to public health included in the Schengen Borders Code into a question on the applicant's health condition. The question is broadly formulated based on the provision in the Schengen Borders Code. The applicant needs to declare if he or she is subject to a list of diseases drawn up by the World Health Organization (WHO) and whether he or she is affected by "other infectious or contagious parasitic diseases".

The information provided will serve to issue a travel authorisation for a period of five years (or three years in the views of the Council). During this time, the applicant's health situation may change and the information provided may easily become outdated. Moreover, the reliability of the information can be questioned as the information builds upon a self-declaration.

By contrast, third-country nationals who request a Schengen short-stay visa do not need to provide information on their health status. Unlike some third countries, EU Member States also do not require "embarkation cards", on which travellers need to provide information for the border check. It seems difficult to justify requiring nationals from visa-free third-countries to provide such self-declarations on health when those subject to a visa requirement are not obligated to do this.

Information on public health risks provided by applicants is soon outdated and may not be reliable, as it is based on self-declaration. Therefore, processing sensitive health information would not meet the necessity and proportionality threshold required by EU law.

FRA Opinion 4

The EU legislator should remove the question on health in Article 15 (4) (a) of the ETIAS proposal. Public health risks should be assessed at the border when border guards carry out entry checks, as is currently the case.

2.2. Other data that may reveal sensitive information

The second question to examine is whether the processing of personal data on education, occupation, presence in war zones and return – proposed Article 15 (3) and (4) – respects the principles of purpose limitation and data minimisation. The proposed ETIAS Regulation formulates questions on these matters in very general terms and delegates the further definition of a pre-determined list of questions (Article 15 (5)) to the European Commission.

Moreover, to provide the intended information, the questions would need to be formulated in a clear, transparent and unambiguous manner.

A general principle of data processing laid down in Article 5 of Regulation (EU) 2016/679 is that personal data must be processed lawfully, fairly and in a transparent manner.

Information on occupation and education

Such information is primarily relevant for the development of screening rules to assess the presence of a security or irregular migration risk. As further described in Section 3.2, the screening rules proposed by ETIAS create a significant risk of discriminatory profiling. At the same time, replies to questions on education and occupation could still be useful for second-line border checks.

Challenges may also emerge in the categorisation of replies. Article 15 (3) of the proposed ETIAS Regulation would task the European Commission with establishing a pre-determined list of levels and fields of occupation as well as education categories. In the absence of agreed-on and commonly accepted categories, significant practical challenges may emerge in standardising occupational groups, affecting the quality and reliability of the category selected from a drop-down list by ETIAS applicants.

Moreover, the need for any additional information in relation to occupation or education – such as the job title currently envisaged under proposed Article 15 (3) – must be clearly demonstrated.

Criminal offences and presence in conflict zones

Proposed Article 15 (4) formulates the questions to the applicants on criminal offences or presence in war or conflict zones in a rather broad manner. This raises fundamental rights concerns.

Applicants would need to indicate if they have been convicted of a criminal offence in any country. Third countries may criminalise behaviour that is protected by EU law. For example, some countries criminalise homosexuality or participation in certain political groups.

The Explanatory Memorandum to the proposal does not sufficiently demonstrate the necessity and proportionality of asking applicants to indicate any period of stay in a conflict zone during the past ten years. First, large parts of territories in some visa-free third countries have been hit by armed conflicts (e.g. Western Balkans, Eastern Ukraine). Second, there may be different interpretations as to whether or not an area qualifies as a conflict zone (e.g. Abkhazia, South Ossetia, Transnistria). Third, most people would have visited a conflict zone for justified purposes (e.g. family or humanitarian reasons). If kept, the question would have to be formulated in a more targeted manner and the pre-determined question defined in way that avoids affecting negatively victims of conflict and war or aid workers, for instance.

Return

The question on whether the applicant has been subject to a return decision – in proposed Article 15 (4) (d) – does not appear to be necessary for ETIAS. In future, the plan is to record information on the existence of a return decision as well as on entry bans in SIS, according to the SIS II proposal on return.[25] Requesting the applicant to provide information of

[25] European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council on the use of the Schengen Information System for the return of illegally staying third country nationals*, COM (2016) 881 final, Brussels, 21 December 2016.

previous return decisions would need to be better justified to be in line with the principle of purpose limitation.

In conclusion, some of the data that applicants are required to provide may reveal sensitive information (either alone or in combination with other data) or may lead to severe consequences for the individual for unjustified reasons. Their processing does not appear to be necessary and/or proportionate to achieve the purpose of ETIAS and raises issues under the principles of data minimisation and purpose limitation.

FRA Opinion 5

To honour the rights to respect for private life (Article 7 of the Charter) and protection of personal data (Article 8 of the Charter), and in light of the principles of data minimisation and purpose, the EU legislator should:

- ***limit the questions on education and occupation in Article 15 (3) to broad categories as necessary for risk analysis purposes or second-line checks, avoiding the collection of job titles or other detailed information until the necessity of collecting such information is better demonstrated;***
- ***re-formulate the question on presence in conflict zones in Article 15 (4) (c) so that it only captures information relevant for ETIAS;***
- ***replace the reference to criminal offences in Article 15 (4) (b) with a more specific and exhaustive list, as suggested in the general approach of the Council;***
- ***consider removing Article 15 (4) (d), as information on past return decisions should be retrieved from SIS;***
- ***introduce a provision on issuing guidelines for applicants, to avoid having them misunderstand questions and unintentionally provide inaccurate information.***

2.3. Automated processing and interoperability

Article 22 (1) of the General Data Protection Regulation and Article 19 of Regulation (EC) No. 45/2001[26] prohibit any "decision based solely on automated processing, including profiling" which "significantly affects" a data subject. Although exceptions may be made where authorised by EU or Member State law, data controllers must provide appropriate safeguards to data subjects, including "the right to obtain human intervention […], to express his or her point of view and to contest the decision". The nature of other safeguards is not specified, but Articles 13 and 14 of the General Data Protection Regulation state that in case of profiling, a data subject has the right to "meaningful information about the logic involved".

Pursuant to Article 17 (3) of the proposal, ETIAS will create its own database consisting of names, nationality, contact information, education, occupation, information on health, presence in conflict or war zones, and return decisions.

The automated processing envisages checks against the ETIAS Central System itself and a number of other databases, namely SIS II, Eurodac, ECRIS, EES, VIS, Europol databases, as well as the Interpol databases SLTD and TDAWN. To aid the automated processing, Article 10 of the proposed ETIAS Regulation introduces interoperability among the EU information systems.

[26] See also Article 24 of COM(2017) 8 final proposed to replace Regulation (EC) No. 45/2001.

People will be increasingly surrounded by different systems of control and surveillance, a situation that requires additional safeguards. FRA's paper on interoperability analyses the fundamental rights challenges interoperability entails.[27]

The purpose of ETIAS is to undertake a pre-border check. For checks carried out at the external borders, the Schengen Borders Code envisages only checks against SIS,[28] VIS (only for visa holders),[29] the EES (proposed)[30] and relevant databases holding information on stolen, misappropriated, lost and invalidated documents. The Schengen Borders Code does not envisage that ECRIS[31] and Eurodac be checked at first-line controls and VIS checks are only expected for visa holders (Article 8 (3) (b)). Particularly for children, checks against ECRIS but also databases where irregular stay have recorded, such as SIS II and Eurodac, might result in disproportionate consequences, as FRA pointed out in its opinions on ECRIS and Eurodac.[32]

The respective purposes of the databases remain unchanged in spite of the fact that they are interoperable with ETIAS. Extending interoperability beyond databases having the purpose of supporting border checks of visa-free travellers would raises issues of purpose limitation. Table 2 shows which IT systems and databases border guards are required to consult upon entry when checking visa-free travellers.

Table 2: Systems consulted during border checks for visa-free travellers

Database	***SIS***	***VIS***	***EES***	***Europol***	***Eurodac***	***ECRIS***	***SLTD***	***TDAWN***
	Yes	*No*	*Yes*	*Yes*	*No*	*No*	*Yes*	*Yes*

Source: FRA, 2017

[27] FRA (2017), *Fundamental rights and the interoperability of EU information systems: borders and security*, Luxembourg, Publications Office [forthcoming on 7 July 2017].

[28] Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381, pp. 4-23 (SIS II Regulation); and Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2007 L 205, pp. 63-84 (SIS II Decision).

[29] 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, OJ 2008 L 218, pp. 60-81 (VIS Regulation).

[30] European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council 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 of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011*, COM(2016) 194 final, Brussels, 6 April 2016.

[31] European Commission (2017), *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, Brussels, 29 June 2017.

[32] FRA (2015), *Opinion of the European Union Agency for Fundamental Rights concerning the exchange of information on third-country nationals under a possible future system complementing the European Criminal Records Information System*, FRA Opinion – 1/2015 [ECRIS], Vienna, 4 December 2015.
FRA (2016), *The impact of the proposal for a revised Eurodac Regulation on fundamental rights. Opinion of the European Union Agency for Fundamental Rights*, FRA Opinion – 6/2016 [Eurodac], 22 December 2016, p. 36.

The automated processing compares the information in the application forms with data contained in other information systems or databases. These systems are governed by similar but not identical rules on access rights, transfer of data, erasure of data, etc. Such rules are contained in the system-specific regulations, whereas for Europol databases, they are laid down in Regulation (EU) 2016/794 (Europol Regulation). In particular, according to Article 19 of the Europol Regulation, Member States may restrict access, use, or the right to transfer the information they provided to Europol. These limitations will have to be considered in the development of operational solutions for checking Europol data within the automated processing (Article 18 of the proposed ETIAS Regulation) and the consultations of Europol data by ETIAS National Units (Article 25 of the proposed ETIAS Regulation).

Besides checking the application against the above-mentioned information systems and databases, every applicant is also checked against an ETIAS watch list established and managed by Europol. The watch list is broadly defined by Article 29 of the proposed ETIAS Regulation to cover any persons "who are suspected of having committed or taken part in a criminal offence or persons regarding whom there are factual indications or reasonable grounds to believe that they will commit criminal offences". This provision does not require the criminal offence to be serious, thus going beyond offences for which Europol is competent, as Europol is responsible for preventing and combating serious crimes, terrorism and forms of crime which affect a common interest covered by a Union policy[33] and related criminal offences, according to Article 3 (2) of the Europol Regulation. Article 9 of the proposed ETIAS Regulation establishes an ETIAS Screening Board, composed of Member State representatives, Europol and Frontex, which should be consulted on the implementation of the ETIAS watch list.

FRA Opinion 6

To promote compliance of the automatic checks envisaged by the proposed ETIAS Regulation with fundamental rights, the EU legislator should:

- ***limit interoperability only to those other IT-systems and databases that have the purpose of supporting border checks of visa-free travellers, thus excluding interoperability with Eurodac, ECRIS and VIS;***
- ***underline the need for operational guidance to ensure that the different data protection frameworks applicable to Europol data and data in the eu-LISA managed IT-systems are adhered to;***
- ***replace the reference to criminal offences in proposed Article 29 with an explicit list, as suggested in the general approach adopted by the Council in June 2017.***

2.4. Data retention

ETIAS data will be retained for five years (proposed Article 47), aligning it to the proposed EES, mainly due to the envisaged interoperability with EES. ETIAS and EES would share a common repository of personal data of third-country nationals. Data in Articles 15 (2) and (4) are included in the common repository. ETIAS will contain an extensive set of personal data (including sensitive data) and travel document details of all visa-free third country nationals intending to travel to the EU. The retention period in ETIAS of five years applies equally to children, also as of the last entry record in EES, and for refused, revoked and annulled travel authorisations (Article 47).

[33] Annex I of Regulation (EU) 794/2016 of the European Parliament and of the Council of 11 May 2016.

Data in common with EES are surnames, first names and given names, nationality or nationalities, date and place of birth, information about the travel document and its validity. Data included only in ETIAS would be: aliases, residence information, the data subject's email address, phone number, education and current occupation, IP address, whether the applicant is subject to any disease with epidemic potential, information on criminal offences, stays in conflict zones, and on return decisions. Moreover, for children, the name(s) of their legal guardians or parental authority are included. If a form is filled in on behalf of an applicant, the name(s) and contact information of the firm, organisation or person doing so are also required. The common repository would hold large amounts of personal data of third-country nationals and would be attractive for hackers and oppressive regimes tracking movement of political opponents.

For a variety of reasons, ETIAS may be particularly attractive to hackers. The large amount of personal data envisaged to be stored in a new EU large-scale information system heightens the risks for the data subjects in case of unlawful access and use.

Therefore, there is, on the one hand, a need for robust data security measures and strict supervision of their implementation to prevent unlawful access and data leakages. On the other hand, data retention periods should not be longer than strictly necessary. As FRA pointed out in its opinion on Eurodac, for persons in need of international protection, unlawful access could also undermine the right to asylum enshrined in Article 18 of the Charter.[34]

FRA Opinion 7

The necessity and proportionality of retaining the personal data for five years following the last entry record of the authorisation, or its annulment, refusal or revocation, would need to be better justified in light of the purposes of ETIAS.

[34] See FRA (2016), *The impact of the proposal for a revised Eurodac Regulation on fundamental rights. Opinion of the European Union Agency for Fundamental Rights*, pp. 31-33; and FRA (2016), *Opinion of the European Union Agency for Fundamental Rights on the impact on children of the proposal for a revised Dublin Regulation (COM(2016)270 final 2016/0133 COD),* pp. 54-55.

3. Equality and non-discrimination

Article 20 and 21 of the EU Charter of Fundamental Rights provide for equality before the law and freedom from discrimination. This chapter examines the risk of not having all applicants treated equally in the application processes, mainly due to lack of access to, or knowledge of, modern information technologies. It also examines the risk of ETIAS Screening rules resulting in discriminatory profiling.

3.1. Equality in treatment

The general principle of equal treatment in Article 20 of the Charter requires that "comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified".[35] The proposal foresees a standard procedure for lodging an ETIAS application, which may in practice unduly complicate the obtaining of a travel authorisation for some persons in comparison with other applicants.

Article 13 stipulates that applications must be lodged by filling in an online application sufficiently in advance of any intended travel, directly by the applicant or another person (such as a parent of an underage child) or commercial intermediary (such as a travel agent) authorised by the applicant. The Explanatory Memorandum notes that this would allow the lodging of applications also for persons who cannot create the application themselves for reasons such as old age, disability, literacy level and language knowledge, and lack of access to, or inability to use, information technology.[36] This clearly acknowledges that unimpeded access to and ability to use the internet should not be automatically presumed for all categories of potential travellers.

Persons without access to information technology or unable to use it to the extent necessary to fill in the ETIAS application may also have difficulties in obtaining the assistance of another person. Such persons, if required to submit an online application, are more likely to provide incorrect or incomplete data leading to an increased likelihood of their application being rejected. This could even result in a business model where intermediaries (not all of them necessarily travel agents or other legitimate businesses) offer services against a fee, a model familiar from third countries with visa requirements.

Age, disability or social origin – all prohibited discrimination grounds under Article 21 of the Charter – may put a person at a significant disadvantage, resulting either in additional costs or the inability to travel to the EU. This will affect persons who were previously subject to no such formalities due to visa-free travel, including nationals of neighbouring third countries who may have legitimate interests to visit the EU urgently for family or other reasons.

---

[35] CJEU, C-203/86, *Kingdom of Spain v. Council of the European Union*, 20 September 1988, para. 25 and CJEU C-15/95, *EARL de Kerlast v. Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux*, 17 April 1997, para. 35.

[36] European Commission (2016), *Proposal of a Regulation of the European parliament and of the Council establishing a European Travel Information and Authorization System (ETIAS) and amending Regulations (EU) No. 515/2014,(EU)2016/399, (EU)2016/794 and (EU) 2016/1624* , COM(2016) 731 final, Brussels, 16 November 2016, Explanatory Memorandum, p. 7.

A similar concern arises for persons requested to submit additional information according to Article 23 of the proposed ETIAS Regulation, or who are invited for an interview at a consulate under proposed Article 23 (4), which may involve extensive travel and additional costs.

Negative consequences may more frequently result for people who fail to provide complete information due to reduced ability to use information technologies, including their literacy level and knowledge of required languages of communication.[37]

The ETIAS proposal envisages a fall-back procedure for carriers in Article 40, as well as for the border authorities in Article 42, in cases where it is technically impossible to proceed with the consultation of the system. No such option is planned for travellers providing good reasons for not having completed the ETIAS formalities before travelling.

Options available to persons falling under the scope of ETIAS should not be more limited than those available to persons required to hold a visa. Article 35 of the Visa Code contains a fall-back option for issuing, in exceptional cases, a visa at border-crossing points where the person was not able to obtain the visa in advance and proves unforeseeable and imperative reasons for entry, such as a sudden serious illness of a close relative or urgent medical care.[38]

FRA Opinion 8

To operationalise the non-discrimination safeguards in Article 12 of the ETIAS proposal – which requires that particular attention be paid to children, older persons and persons with disabilities – the EU legislator should envisage an effective fall-back option, particularly to avoid hardship where the travel is justified by urgent reasons. This could be done by introducing into ETIAS a rule for obtaining the travel authorisation directly at the border, similar to Article 35 of the Visa Code.

Provision could also be made to ensure that such applications are assisted at border-crossing points.

3.2. Preventing risks of discriminatory profiling

Article 20 of the Charter sets out the right to equality before the law and Article 21 contains the right to non-discrimination. Non-discrimination law prohibits direct as well as indirect discrimination. These two concepts are defined in Article 2 (2) of the Racial Equality Directive as follows:

- *Direct discrimination* is "taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin";[39]

[37] This is further exacerbated by the modification to Article 23 (2) proposed by the general approach document of the Council, which seeks to give the Member States a possibility to prescribe the languages in which the requested additional information or documents may be submitted.

[38] Commission Decision C(2010) 1620 final of 19.3.2010 establishing the Handbook for the processing of visa applications and the modification of issued visas and Commission Implementing Decision C (2011) 5501 final of 4.8.2011 amending Commission Decision No. C (2010) 1620 final of 19 March 2010 establishing the Handbook for the processing of visa applications and the modification of issued visas (Visa Handbook), p. 93.

[39] Similarly: *Employment Equality Directive*, Article 2 (2) (a); *Gender Equality Directive (Recast)*, Article 2 (1) (a); *Gender Goods and Services Directive*, Article 2 (a).

- Article 2 (2) (b) of the Racial Equality Directive states that "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons".[40]

Article 28 of the proposed ETIAS Regulation envisages a system to predict if a traveller constitutes a risk for irregular migration, security or public health by comparing information submitted by the applicant to specific risk indicators. The proposed regulation leaves significant flexibility in defining which categories of travellers pose such risk. Essentially, the European Commission will determine such risks by delegated acts (Article 78) on the basis of various sources, including data stored in ETIAS and in the EES, information provided by Member States and by the European Centre for Disease Prevention and Control (ECDC). Specifically, these include:

- EES statistics for overstayers and refusals of entry for a specific group of travellers;
- ETIAS statistics on risks associated with specific groups of travellers;
- Correlation between ETIAS and EES risks;
- Information on specific security threats, rates or overstayers for particular groups of travellers provided by individual Member States;
- Information on public health risks provided by individual Member States and ECDC.

The ETIAS Central Unit in Frontex will develop screening rules (algorithms) to operationalise the risk indicators associated with a specific group of travellers. The proposal does not define the concept 'specific groups'. Such algorithms would use the following personal data: age, sex, nationality, place of residence, education level and occupation. The algorithm would compare the individual profile of the travellers with groups at higher risks of irregular migration. As a result, a bona fide traveller, who happens to fit a risk profile, would be put in a disadvantageous position compared to other travellers. He or she would have to go through a considerably more cumbersome procedure, even though there are no *individual* reasons – apart from falling into a possible risk profile – to conclude that the person constitutes a risk of irregular migration. One can also question whether the fact of being part of a group at risk of irregular migration meets the threshold of "reasonable grounds" as per Article 3 (1) (d) of the proposed ETIAS Regulation.

The risk that this may unintentionally lead to discrimination of groups of travellers, based on their age, sex, ethnic or social origin, or membership of a national minority – all prohibited grounds under Article 21 of the Charter – is not negligible. One could imagine, for example, that members of a minority group in a specific region of a third country have the lowest education level and are primarily involved in a particular occupation (e.g. agriculture), a feature which is not shared by other groups. The prohibition of discrimination in Article 12 of the proposed ETIAS Regulation only refers to "racial and ethnic origin" and does not explicitly prohibit discrimination based on "social origin". This could lead to a risk that occupation is used to discriminate, for example, against low skilled workers.

[40] Similarly: *Employment Equality Directive*, Article 2 (2) (b); *Gender Equality Directive (Recast)*, Article 2(1)(b); *Gender Goods and Services Directive*, Article 2 (b).

Figure 2: ETIAS screening rules and impact on fundamental rights

Source: FRA, 2017

If data from the EES show that farmers with low education levels from that area were a category at high risk of irregular migration, the screening rules would result in targeting members of such ethnic group. This means that even in the absence of direct personal information about protected characteristics such as ethnic origin or gender, discrimination can occur inadvertently through the combination of the other information included. As discrimination would mostly occur inadvertently, the proposed safeguard in Article 28 (5) – whereby specific risk indicators may "in no circumstances be based on a person's race or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, sexual life or sexual orientation" – would not be sufficient to mitigate this risk.

In addition, the use of algorithms to identify possible criminal behaviour or irregular migration risk factors is still largely untested territory. Research is still inconclusive on how to make fair predictions using statistics and algorithms without engaging in discriminatory profiling.[41] Moreover, in the field of immigration control, groups at risk of irregular migration may change quickly and it would take some time to update the screening rules to reflect new trends.

The limited research available on the feasibility of using risk indicators without engaging in discriminatory profiling weighs in favour of postponing a possible use of risk indicators to a later stage. Meanwhile, the assessment of entry conditions as per Article 6 (1) (c) of the Schengen Borders Code could continue to be carried out by border guards at border-crossing points based on available risk analysis information. In its opinion on ETIAS, EDPS also questions the necessity of the screening rules and encourages legislator to reconsider such profiling rules.[42]

FRA Opinion 9

Personal data processed in ETIAS should not be checked against risk indicators until a test phase demonstrates that the screening rules are necessary, proportionate and do not result in discriminatory profiling, given the significant risk of inadvertently discriminating against certain categories of travellers based on prohibited grounds listed in Article 21 of the Charter.

---

41 The White House (2016), *Big Data: A report on Algorithmic Systems, Opportunity and Civil Rights.*

42 European Data Protection Supervisor (EDPS) (2017), *EDPS Opinion on the Proposal for a European Travel Information and Authorisation System (ETIAS)*, Opinion 3/2017, 6 March 2017, p. 11.

Therefore, the EU legislator should remove the relevant provisions on screening rules – such as those in recital (40), Article 7, Article 18 (5), the last sentence of Article 21 (3), Article 22 (7), and Article 28 – from the proposed ETIAS Regulation.

An amendment of the regulation to introduce such rules could be considered following a test phase demonstrating that the screening rules are necessary and proportionate and do not result in discriminatory profiling. In that case, the regulation should define the screening rules in more detail, limiting the discretion of implementing rules.

4. Access by law enforcement and fundamental rights

One of the purposes of ETIAS is reinforcing EU internal security. According to the proposal, this would be done in two ways: first, through the identification of persons that pose a security risk before they arrive at the Schengen external border; and second, by making information from the system available to national law enforcement authorities and Europol for combating terrorism and serious crime.[43] This section focuses on the latter, i.e. on provisions that allow law enforcement authorities to access the data submitted to the system by past applicants.

The justification for law enforcement access to ETIAS data provided by the European Commission relies on a comparison with the VIS. The Explanatory Memorandum refers to the cross-border nature of criminal activities – such as trafficking in human beings or smuggling – and the effectiveness and usefulness of VIS for law enforcement purposes.[44] The fact that information similar to that on visa travellers is currently not available to law enforcement agencies for visa-exempt third-country nationals is automatically presented as a gap that requires closing.

With the notable exception of health and education-related data, national law enforcement authorities and Europol would have access to all information collected through ETIAS. Requests for certain types of information (related to occupation, past criminal record, stay in a conflict zone or being subject to a return decision in the past) would require specific justification, but are otherwise subject to the same access conditions.

Access to personal data by law enforcement represents a limitation on the right to respect for private and family life (Article 7 of the Charter) and the right to protection of personal data (Article 8 of the Charter). As such, it must comply with the principle of necessity and proportionality. Under Article 52 (1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. With due regard to the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and if they genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.[45] Usefulness of a measure is not in itself sufficient to comply with these requirements. According to the CJEU, even where a measure pursues an objective of general interest, including a fundamental one such as the fight against organised crime and terrorism, it does not in itself mean that the measure would be considered necessary for the purpose.[46]

Although specific individuals covered by the ETIAS proposal may be connected to organised crime or even terrorism, these persons represent a small segment of the overall number of people whose data are processed in ETIAS. The lack of an even indirect or remote connection between the data retained and the purpose of their

---

[43] European Commission, (2016), *Proposal of a Regulation of the European parliament and of the Council establishing a European Travel Information and Authorization System (ETIAS) and amending Regulations (EU) No. 515/2014,(EU)2016/399, (EU)2016/794 and (EU) 2016/1624*, COM(2016) 731 final, 16 November 2016, Explanatory Memorandum, p. 4.

[44] *Ibid*, p. 20.

[45] CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris van Veiligheid en Justitie*, 15 February 2016, para. 50.

[46] CJEU, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others*, 8 April 2014, para. 51.

retention – serious crime – was among the arguments used by the CJEU in the *Digital Rights Ireland* case to conclude that the Data Retention Directive was not in line with the Charter.[47]

This argument is particularly strong in the case of children. Given that there is no age limit for inclusion in ETIAS, the same data would be available to law enforcement authorities in relation to adults and children. When addressing the issue of blanket retention of biometric data by law enforcement authorities of persons not convicted of a crime, in the case of *S. and Marper*, the European Court of Human Rights (ECtHR) emphasised that this may be especially harmful in the case of children, given their special situation and the importance of their development and integration in society.[48] As emphasised by FRA in relation to the proposed revision of the Eurodac Regulation, these arguments are also applicable where law enforcement accesses data that were originally collected for other purposes.[49]

There is insufficient evidence of the need to process personal data of children to prevent, detect and investigate terrorism and serious crime, particularly for children below the age of criminal responsibility. At the same time, in some cases, ETIAS could possibly help to protect children who are victims of trafficking in human beings. If a child who was previously recorded in SIS II as missing or as a victim of human trafficking applies for authorisation to re-enter the EU, alerted law enforcement authorities could develop a targeted response.

The ETIAS proposal as a whole has not been subject to an impact assessment examining in detail the fundamental rights implications of establishing an EU travel authorisation system. For VIS or Eurodac, law enforcement access was added at a later stage, after some experience with the functioning of the system had already been collected. By contrast, the ETIAS proposal envisages this functionality from the outset, without any assessment period that would allow taking stock of the functioning of the database and its effects on fundamental rights. Furthermore, in its assessment of VIS, the European Commission admits that the conclusions about the usefulness of law enforcement's access to VIS are based on sources of "limited analytical value". By the end of 2015 – the period used to assess the functioning of law enforcement access to VIS – access was still recent and very fragmented; only a minority of the Member States used the system regularly, with a number of Member States actually making declining use of the system.[50]

The necessity and proportionality of law enforcement access should also be examined in the overall framework of the architecture of existing or planned EU information systems in the field of freedom, security and justice, including the ongoing discussions on interoperability of these databases. The overlap with information collected under the planned EES is particularly important. Given that EES should record the entry and exit of both visa holders and visa-free travellers, the benefit of a separate access by national law enforcement authorities and Europol to ETIAS is unclear. Moreover, due to the envisaged interoperability of the two systems, data making a traveller identifiable would be included

---

47 *Ibid,* paras. 58-59.

48 ECtHR, *S. and Marper v. United Kingdom*, Nos. 30562/04 and 30566/04, 4 December 2008, paras. 124-125.

49 FRA (2016), *Opinion of the European Union Agency for Fundamental Rights on the impact on fundamental rights of the proposal for a revised Eurodac Regulation*, FRA Opinion – 6/2016 [Eurodac], 22 December 2016, pp. 22-23.

50 European Commission (2016), *Staff Working Document: Evaluation of the implementation of Regulation (EC) No. 767/2008 of the European Parliament and Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visa (VIS Regulation) / REFIT* Evaluation, SWD(2016) 328 final, Brussels, 14 October 2016, pp. 98-99.

in the common repository mentioned to in the Explanatory Memorandum of the proposal. It would, therefore, be possible to access data that is important for the identification of a person through EES only. It would need to be explained what the added value would be of having access to data that will be stored in ETIAS only, such as, for example, occupation.

In addition to the question on the extent to which law enforcement authorities should be entitled to consult ETIAS data, the conditions for such access also need to be examined. Access would be subject to a set of conditions inspired partly by the procedures for VIS and partly by those of Eurodac. The conditions are similar for national law enforcement authorities and Europol. Access will be indirect, based on submitting a reasoned request for consultation of the data to the central access points, and only receiving further information if there is a match with the data contained in ETIAS ('hit/no-hit system').

According to Article 45 (1) of the proposed ETIAS Regulation, such a request needs to be based on a legitimate purpose – the necessity for combating terrorism or other serious crime in a specific case – and there need to be reasonable grounds to consider that the consultation of the data may substantially contribute to the objective, particularly where the suspect, perpetrator or victims falls under the category of persons covered by ETIAS.

Finally, as in case of Eurodac and beyond what is required in case of law enforcement access to VIS data, consultation of ETIAS by law enforcement would only be possible if the information has not been obtained by a prior consultation of 'all relevant national databases and the Europol data'. Although the requirement is less specific than in the case of Eurodac (which contains a list of databases to be consulted), it is a key safeguard to ensure that ETIAS data is only consulted where the information cannot be obtained from dedicated databases, i.e. in a more proportionate manner.

When comparing ETIAS with Eurodac – which features more advanced safeguards for law enforcement access than VIS – notable differences nevertheless exist. These differences make conditions to access ETIAS less stringent. Concerning the duty to first consult other databases, the proposed ETIAS Regulation does not clarify what information may bar a subsequent search of ETIAS. In case of Eurodac, law enforcement authorities are only permitted to conduct a search if the consultation of other databases did not establish the person's identity. ETIAS, on the other hand, can be consulted if the prior search in other databases "did not lead to the requested information" (proposed Article 45 (1) (d)). This makes the condition susceptible to the specificity of the request and, therefore, considerably vague. Furthermore, whereas both Eurodac and VIS require the presumption that their consultation 'will' substantially contribute to the prevention, detection or investigation of terrorism or serious crime, according to Article 45 (1) (c) of the proposed ETIAS Regulation it is sufficient if there are reasonable grounds to consider that such contribution *may* occur. This reduces the threshold to the existence of a mere possibility that such data may be in any way relevant to the law enforcement objective.[51] Such shift implies a reduced responsibility of the law enforcement authorities to conduct their own proportionality assessment.

On the other hand, in comparison to the existing systems, the ETIAS proposal places additional emphasis on an independent verification of law enforcement requests for

[51] The general approach of the Council to the proposal furthermore proposes to omit the word "substantially", meaning that any potential contribution to the prevention, detection and investigation of such offences would be sufficient. See Council of the European Union, *Annex to Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulation (EU) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624 – General approach*, Brussels, document No. 10017/17, 13 June 2017.

information (with the possibility of an ex post verification in exceptional cases of urgency). Article 44 (2) requires a law enforcement request for consultation of the ETIAS Central System to undergo an 'independent, efficient and timely verification'. The Explanatory Memorandum clarifies that such independent verification is to be conducted "by a court or by an authority providing guarantees of full independence and impartiality" which is "free from any direct or indirect external influence".[52] Responding to the CJEU's requirement in the *Digital Rights Ireland* ruling,[53] this would represent an additional safeguard in comparison to the verification mechanism in place for law enforcement access to other EU databases. In case of VIS, the verification is carried out directly by the central access point and there is no requirement of independence.[54] In case of Eurodac, the verifying authority is supposed to act independently from the authority requesting the information (the designated authority), but it shall be an authority responsible for combating terrorism and serious crime and may be part of the same organisation as the designated authority.[55] The practical difference from the existing verification mechanisms will nevertheless depend on the interpretation of the 'independence' requirement, in particular in combination with the requirements of 'efficiency' and 'timeliness', by the Member States. The fact that the Council's general approach document proposes to instead duplicate the Eurodac verification mechanism already serves as an indication.[56]

The designation of a verification authority represents the most important difference between the access by national law enforcement authorities and Europol. For the latter, Article 46 (3) envisages that this role be taken on by EDPS "where appropriate in accordance with the procedure of Article 44 [of the Europol Regulation]".[57] Such direct involvement of the EDPS would however mean, in light of the EDPS mandate, that it would not be sufficiently removed from a process that it is also responsible for supervising. In its opinion on the ETIAS proposal, EDPS raised concerns over its proposed role, underlining its role to monitor and check compliance with data protection rules rather than to authorise individual investigative activities.[58] Furthermore, it considers that to meet the requirement of "efficient and timely" verification, EDPS would have to verify the requests without a prior consultation of the relevant Member State's Data Protection Authority, as exceptionally envisaged in 'extremely urgent' situations under Article 44 (4) of the Europol Regulation. The EDPS, therefore, concludes that the currently proposed procedure would put it in a

---

52 European Commission (2016), *Proposal of a Regulation of the European parliament and of the Council establishing a European Travel Information and Authorization System (ETIAS) and amending Regulations (EU) No. 515/2014,(EU)2016/399, (EU)2016/794 and (EU) 2016/1624*, COM(2016) 731 final, 16 November 2016, Explanatory Memorandum, p. 21.

53 CJEU, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland* Ltd (C-293/12) *v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others(C-594/12*), 8 April 2014, para. 62.

54 See Article 4 (1) of the VIS Decision.

55 See Article 6 (1) of the Eurodac Regulation.

56 Council of the European Union (2017), *Annex to Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulation (EU) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624 – General approach*, Brussels, document No. 10017/17, 13 June 2017.

57 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24 May 2016, pp. 53-114.

58 European Data Protection Supervisor (EDPS) (2017) *EDPS Opinion on the Proposal for a European Travel Information and Authorisation System (ETIAS)*, Opinion 3/2017, 6 March 2017, para. 90.

position where it legally cannot deliver what is requested, and recommends designating a different independent authority to verify Europol's requests for the consultation of ETIAS.[59]

To conclude, the absence of an impact assessment and the limited availability of comparable evidence make it difficult to justify the interference with the right to respect of private life (Article 7 of the Charter) and the right to protection of personal data (Article 8 of the Charter) that access to ETIAS by law enforcement authorities would entail.

FRA Opinion 10

The EU legislator should postpone the decision of granting law enforcement authorities access to ETIAS until the functioning of the system has been tested in practice and more solid conclusions can be drawn on the proportionality and necessity of accessing personal data beyond what would be included in the EES.

Should law enforcement access nevertheless be granted from the outset, the EU legislator should:

- ***allow law enforcement access to children's data, particularly those below the age of criminal responsibility, only to protect missing children or children who are victims of serious crimes (e.g. trafficking in human beings);***
- ***align the conditions for access by law enforcement authorities in Article 45 (1) of the proposed ETIAS Regulation to the wording of Article 21 (1) of the proposed Eurodac Regulation;***
- ***identify an independent entity other than EDPS to verify Europol requests for access to ETIAS data.***

[59] *Ibid*, para. 92.

5. The right to asylum

Article 18 of the Charter protects the right to asylum with due respect for the rules of the 1951 Geneva Convention and its 1967 Protocol. Effective access to international protection also forms the basis for the protection from *refoulement*, which is reflected in Article 19 of the Charter as well as in Article 78 of the Treaty on the Functioning of the European Union (TFEU). Persons seeking international protection are vulnerable,[60] both due to the reasons that made them leave their country of origin and the situation of uncertainty in which they find themselves in the host country.

5.1. Respecting the principle of non-*refoulement* and access to international protection

The ETIAS proposal does not refer to the right to asylum, or to the principle of *non-refoulement*, both of which are only mentioned in the Explanatory Memorandum.[61] However, asylum applicants from visa-free third countries continue to arrive in the EU, such as Venezuelans to Spain[62] or Ukrainians to Malta, Slovakia or Spain.[63]

ETIAS must be implemented in full respect of the right to asylum and of the prohibition of *refoulement* in case individuals falling under its personal scope present themselves at the EU external borders and are not in possession of a valid travel authorisation.

Under the current EU legislative framework, visa-exempt third-country nationals wishing to seek asylum can simply travel to the EU in possession of a valid travel document and fulfil the other requirements of Article 6 (1) of the Schengen Borders Code. The EU rules in force setting out obligations for carriers (1990 Convention implementing the Schengen Agreement[64] (CISA), Article 26) and on carriers' sanctions (Article 26 (2)-(3) of CISA and Directive 2001/51/EC[65]) do not impose on these travellers other obligations than to possess a valid (biometric) travel document, since they do no need a visa. The present legal regime applicable to carriers thus does not prevent these persons from entering the EU as (prospective) asylum applicants. Moreover, the CISA also sets forth non-affectation clauses by stipulating that the

---

60 ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011, para. 251. See also Lourdes Peroni and Alexandra Timmer (2013), 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law', *International Journal of Constitutional Law*, Vol. 11, No. 4, pp. 1057 and 1064; Elspeth Guild et al., *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*, Study commissioned by the Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, European Parliament, LIBE Committee Report, October 2014, p. 11.

61 European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624*, COM(2016) 731 final, Brussels, 16 November 2016; Explanatory Memorandum, p. 19.

62 In 2016, 3690 Venezuelan nationals applied for asylum in Spain. See Eurostat's webpage on asylum applicants.

63 In 2016, 2550 Ukrainians sought asylum in Spain, 85 Ukrainian nationals in Malta and 15 in Slovakia. See Eurostat's webpage on asylum applicants.

64 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22 September 2000, pp. 19-62.

65 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1995, OJ L 187, 10 July 2001, pp. 45-46.

obligations incumbent upon carriers, including the sanctions, must not affect Member States' "obligations resulting from [...] the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967" (Article 26 (1)-(2) of CISA). The fundamental right to have access to asylum procedures at the EU external borders for those in need of international protection is thereby ensured.

The envisaged rules in the ETIAS proposal tighten the transporters' obligations. Carriers would have to check that their passengers have valid ETIAS travel authorisation before allowing them to board their means of transportation bound to a Schengen country (proposed Article 39 (1)). If a traveller who does not have valid travel authorisation is authorised boarding and is subsequently refused entry, the carrier would not only be liable for taking the traveller back to the initial point of embarkation but would also incur a penalty (Article 26 (2)-(3) of the CISA). This would create an undue barrier for visa-exempt third-country nationals who are in need of international protection, as they would need to produce valid ETIAS authorisation. Without it, they may face the risk of not having access to asylum procedures, contrary to the requirements of Article 6 of the Asylum Procedures Directive (Directive 2013/32/EU).[66]

ETIAS does not include a reference to the right to asylum in the same way as the Schengen Borders Code does. The absence of a safeguard clause for persons in need of international protection may result in serious interferences with the Charter rights to asylum and non-*refoulement* (Articles 18 and 19).

FRA Opinion 11

The EU legislator should underline that the implementation of ETIAS must not affect Member States' obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, as well as EU and international obligations relating to access to international protection.

5.2. Retaining the rules on issuing authorisation to enter with limited territorial validity

Article 38 of the ETIAS proposal envisages a special procedure allowing ETIAS National Units to issue a travel authorisation with limited territorial and temporal validity, when this is justified by humanitarian reasons, reasons of national interest or because of international obligations. The applicant is entitled to apply for such a geographically restricted travel authorisation to the Member State to which he or she intends to travel by indicating the humanitarian ground, the reasons of national interest or the relevant international obligations.

FRA has highlighted the need for legal entry options for persons in need of international protection, noting that it can constitute a viable alternative to risky irregular entry.[67]

Authorisation with limited territorial validity would allow Member States to facilitate the entry of visa-exempt third-country nationals who are in need of international protection and not able to fulfil all conditions to get authorisation to travel. It could also help avoid

[66] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29 June 2013, pp. 60-95.

[67] FRA (2015), *Legal entry channels to the EU for persons in need of international protection: a toolbox – FRA focus*, March 2015.

the emergence of a new market for organised crime networks involved in smuggling visa-free third-country nationals in need of international protection.

FRA Opinion 12

The EU legislator should ensure that Article 38 of the proposal continues to provide for travel authorisations with limited territorial validity to offer persons in need of international protection a legal channel at national level through which they can seek safety.

5.3. Preventing political opponents from leaving their countries of origin

Persons in need of international protection face a number of difficulties in seeking safety through legal channels. As described in Section 5.1, applying carriers' liability also in ETIAS will aggravate this situation. Visa-free third country nationals will no longer be able to reach EU Member States' territory to seek international protection as easily as they currently can.

According to Article 39 of the proposed ETIAS Regulation, carriers would be under an obligation to verify that the traveller holds a travel authorisation upon boarding. Otherwise, carriers may face fines. In these situations, there is a risk that persons in need of international protection will be prevented from finding safety in the EU. In *Zh. and O.* (C-554/13), the CJEU Advocate General underlined that many asylum applicants seek to hide their identity when fleeing their country of origin to protect themselves,[68] while others may be physically unable to obtain the documents necessary for legal entry (such as a passport and visa) when escaping from a conflict zone.[69]

Moreover, in the automated processing of an ETIAS application, information originating from third countries is consulted through the Interpol databases SLTD and TDAWN. Member States need to be aware that third countries wishing to limit the possibilities of persons in need of international protection, such as political opponents, may report their travel documents in such databases to prevent them from leaving. In case of a hit with Interpol databases, information originating from third countries should be subject to a strict verification procedure under Article 20 of the proposal.

FRA Opinion 13

The European Commission's future evaluation of ETIAS, provided for under Article 81 (5) of the proposal, should especially examine how obligatory travel authorisation checks carried out by carriers pursuant to Article 39 affect the right to seek asylum. Based on the results of such an evaluation, the European Commission should propose the necessary legislative changes.

Interpol information on travel documents originating from third countries should be subject to the verification procedure within the automated processing (Article 20 of the proposal), given that oppressive regimes may include information about opponents to prevent them from leaving the country.

---

[68] CJEU, C- 554/13, *Z. Zh. and O. v Staatssecretaris van Veiligheid en Justitie*, opinion of Advocate General Sharpston delivered on 12 February 2015, para. 63.

[69] In relation to the non-penalisation of the use of fraudulent documentation and the applicable UNHCR standards, see, for example, FRA (2015), *Opinion of the European Union Agency for Fundamental Rights concerning the exchange of information on third-country nationals under a possible future system complementing the European Criminal Records Information System*, FRA Opinion - 1/2015 [ECRIS], 4 December 2015, p. 11.

5.4. Managing data transfers to third countries without exposing people in need of international protection to risks

Personal information that can allow the country of origin to deduce directly or indirectly that a person has applied for asylum in another country is extremely sensitive as it can expose the person concerned and/or his or her family members – including children – remaining in the country of origin to retaliation measures. This was also confirmed by UNHCR, which stated that confidentiality of data is particularly important for refugees and other people in need of international protection, as there is a danger that agents of persecution may ultimately gain access to such information, potentially exposing a refugee to danger even in his/her country of asylum.[70] In some cases, the sharing of such information may also create a *sur place* refugee claim.[71]

The original ETIAS proposal does not include a provision allowing for transfers of data outside of the EU, except for sharing information with Interpol for the automated processing (Article 55 (1)). However, the EU Council compromise text of June 2017[72] suggests amending Article 55 of the proposal by making such transfers of data to third countries and other third parties possible for return-related purposes and to third countries for law enforcement purposes (in case of an immediate and serious threat of a terrorist offence or other serious criminal offences). Aware of possible risks, the Council also inserted a safeguard clause in Article 55 (3) modelled after the relevant provision of the EES.[73] It provides that any such transfers of personal data to third countries "cannot prejudice the rights of applicants for and beneficiaries of international protection, in particular as regards *non-refoulement*". This clause is a step in the right direction; however, the practical implementation of such a legal safeguard may be challenging. Moreover, if a transfer to third parties of ETIAS data were envisaged, this would have also to fulfil other conditions. For example, Article 37 (3) of the new Data Protection Directive[74] contains a provision that requires transfers of data (including the

---

70 UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)*, 18 March 2009.

71 This concerns persons who leave their own country for non-refugee related reasons but acquire a well-founded fear of persecution once they are already in the host country. See UNHCR, *Refugee Protection and International Migration*, paras. 20-21.

72 Council Document No. 10017/17, Brussels, 13 June 2017 (Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624 – General approach).

73 European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council 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 of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011*, COM(2016)194 final – 2016/0106 (COD), Brussels, 6 April 2016, Article 38 (2)-(3).

74 Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the

justification of the transfer) to be documented and made available to the supervisory authority upon request. In addition, safeguards would need to be in place to prevent rules on sharing of data with third countries, as specified in the respective legal instruments for the interoperable databases, from being circumvented.

The purpose of ETIAS is not to facilitate returns. Return-relevant data would already be available in other information systems such as in the extended SIS. Data that are only stored in ETIAS and in no other systems (such as education, occupation or health data) are not directly relevant for return purposes. Moreover, as noted in Section 3, ETIAS would rarely contain information additional to what is stored in the EES that would be necessary for law enforcement purposes.

FRA Opinion 14

The EU legislator should not provide for the option of sharing personal data stored in ETIAS with third parties, in light of possible severe risks for applicants and their families and the fact that information on the individuals would already be available in other systems governed by strict sharing rules.

execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4 May 2016, pp. 89-131.

6. The right to an effective remedy

According to Article 47 of the Charter, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal. This fundamental right of horizontal character empowers individuals to challenge a measure affecting any right conferred to them by EU law and not only in respect of the fundamental rights guaranteed in the Charter.[75] The right to an effective remedy also covers administrative decisions, including travel authorisation refusals under ETIAS. The CJEU underlined that Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection and that the characteristics of a remedy must be determined in a manner that is consistent with this principle.[76]

6.1. Appeals against a refusal, annulment, or revocation of authorisation to enter

Under the ETIAS proposal, applicants whose travel authorisation has been refused, annulled or revoked have the right to appeal in the Member State that took the negative decision on the travel authorisation application, in accordance with national law (Articles 31 (2), 34 (3) and 35 (5)). Although reference is made to remedies as set out in Member States' domestic legal systems, in light of Article 47 of the Charter, such domestic remedies must in all cases involve judicial review. Administrative appeal bodies or other non-judicial instances do not satisfy this fundamental requirement of Article 47. The European Commission also underlined this requirement with regard to appeals against a short-stay visa refusal decision.[77]

In addition, Member States are obliged to provide remedies that are sufficient to ensure 'effective' judicial protection, governed by the principles of effectiveness and equivalence. The principle of effectiveness requires that domestic law does not make it impossible or excessively difficult to enforce rights under EU law.[78] The principle of equivalence requires that the conditions relating to claims arising from EU law are not less favourable than those relating to similar actions of a domestic nature (e.g. the right to appeal against a refused application for a long-term national visa). The effectiveness of the judicial review also requires that enough information (reasoning) is provided in the negative decision to have a realistic chance of formulating an appeal.[79] The obligation of national authorities (the ETIAS National Units) to give reasons is a precondition of

---

[75] EU Network of Independent Experts on Fundamental Rights, *Commentary on the Charter on Fundamental Rights of the European Union*, June 2006, p. 360. See also: FRA (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office, p. 92.

[76] CJEU, C-432/05, *Unibet (London) Ltd, Unibet (International) Ltd v. Justitiekanslern*, 13 March 2007, para. 37; CJEU, C-93/12, *ET Agrokonsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashtatelna agentsia*, 27 June 2013, para. 59; CJEU, C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, 18 December 2014, para. 45.

[77] At the end of 2014, the Commission urged five Member States to act to ensure that appeals against a decision to refuse, annul or revoke a visa provide for access to a judicial body. See European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *2014 Report on the Application of the EU Charter of Fundamental Rights*, COM(2015)191 final, Brussels, 8 May 2015, pp. 7-8.

[78] CJEU, C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 16 December 1976; more recently: CJEU, C-415/11, *Mohamed Aziz v. Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, 14 March 2013, para. 50.

[79] CJEU, T-461/08, *Evropaiki Dynamiki*, 9 September 2010, paras. 118-124; CJEU, T-390/08, *Bank Melli Iran v. Council*, 16 November 2011, paras. 35-37.

effective legal protection by enabling the person concerned "to defend his rights under the best possible circumstances"[80] and courts to carefully review administrative decisions.[81]

Pursuant to the proposal, in case of refusal, annulment or revocation, the applicant will immediately receive an e-mail notification with the ground(s) for refusal of the travel authorisation and information on the appeal procedure (Articles 32 and 36). However, the grounds for refusal would only be telegraphically indicated, as enumerated in Article 31 (1) of the proposal. In the absence of more detailed reasoning, it would be very difficult to build upon a meaningful appeal by the person concerned.

The ECtHR has consistently held that remedies must be effective both in law and in practice.[82] The appeal scheme as currently framed in the ETIAS proposal raises serious issues from the perspective of effectiveness of the legal remedy by virtue of Article 47 of the Charter, as interpreted by the CJEU and ECtHR.

FRA Opinion 15

The EU legislator should introduce, in Articles 32 and 36 of the proposal, minimum standards concerning the appeals procedure in the Member States. Amongst others, a judicial body should be responsible for supervision by virtue of Article 47 of the Charter; and sufficient information should be given about the reasons for refusal, annulment or revocation to allow affected individuals to formulate meaningful appeals. To this end, the EU legislator should also change the term "right to appeal" to "right to an effective remedy" throughout the proposal to better align it with the requirements flowing from Article 47 of the Charter.

6.2. Establishing administrative complaints mechanism

Even if a travel authorisation is issued after the automated processing by the ETIAS Central Unit or following the manual processing by ETIAS National Units at Member State level, excessive processing time – not keeping the deadlines – might occur. This could be due to technical problems, to overwhelmed officers responsible for manual processing not respecting the deadline, or other reasons. Other issues of administrative or procedural nature – such as timeliness for deciding on the application or the applicant being requested to provide additional information – might also arise even in cases ultimately resulting in positive decisions.

The proposal does not designate a competent body within Frontex or at Member State level with which applicants can lodge complaints in cases of delay or irregularities in the processing.

FRA Opinion 16

The proposal should include a provision for a complaints mechanism, comparable to the one set up by Frontex in accordance with Article 72 of Regulation (EU) 2016/1624. However, the ETIAS Regulation would also need to impose on National ETIAS Units the

---

[80] CJEU, 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, 15 October 1987, paras. 15-17.

[81] See Jürgen Schwarze (2004), 'Judicial Review of European Administrative Procedure', *Law and Contemporary Problems*, Vol. 68, No. 1, p. 93.

[82] ECtHR, *Kudla v. Poland*, No. 30210/96, 26 October 2000, para. 157; ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011, para. 288.

duty to provide sufficiently reasoned replies to requests by the complaint mechanism within a short deadline.

6.3. Accuracy of data, right of access, correction and erasure

Both Member State authorities and EU entities have an obligation to keep personal data accurate and, where necessary, up to date. Every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy'). This is required by Article 5 of General Data Protection Regulation (EU) 2016/679 and by Article 4 (1) (d) of Regulation (EC) No. 45/2001 (as well as Article 4 (1) (d) of the proposed new Regulation COM(2017) 8 final).

The ETIAS Central and National Units are responsible for keeping the data correct and up to date (Articles 7 and 8 of the proposed ETIAS Regulation). Any factually incorrect or unlawful data must be deleted from the ETIAS Central System (Article 54 of the proposed ETIAS Regulation).

Under Article 18 of the General Data Protection Regulation and Article 15 of Regulation (EC) No. 45/2001 (as well as Article 20 of the proposed new Regulation COM (2017) 8 final), the data subject can demand that the processing of the disputed data is temporarily restricted. This means that the controller must refrain from using the data pending their verification, including further sharing of the data, to ensure that possible false assumptions can be rebutted before a decision is made. This is particularly important where the continued use of inaccurate or illegitimately held data could harm the person – for example, through a denial of the travel authorisation.

As FRA as well as the EU High-level expert group on interoperability noted,[83] SIS has serious data quality issues. The verification procedure undertaken by the ETIAS Central Unit as well as the Member States when undertaking the manual processing will have to deal with such quality problems, as they affect the decision taken and therefore the right to respect for private and family life, among others. Effective verification procedures are necessary while still meeting the strict deadlines for processing the applications. Where relevant, the SIRENE Bureaux, national authorities responsible for the exchange of supplementary information and for the coordination of "the verification of the quality of the information entered in the SIS II"[84] could be involved in the verification procedure, as the Council pointed out in its general approach on the proposal (proposed Article 20a). The possibility for the ETIAS National Units to request the applicant to provide additional information (Article 23) contributes to the accuracy of

[83] European Commission, Final report of the high-level expert group, 11 May 2017; FRA (2017), *Fundamental rights and the interoperability of EU information systems: borders and security*, Luxembourg, Publications Office [forthcoming on 7 July 2017].

[84] Article 7 (2), Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381, 28 December 2016, pp. 4-23 (*SIS II Regulation*). See also: Article 7 (2) of *Proposal for a Regulation of the European Parliament and of the Council 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 Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU COM(2016) 883 final*, COM(2016) 883 final; and of *Proposal of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information system (SIS) in the field of border checks, amending Regulation EU) No 515/2014 and repealing Regulation (EC) No 1987/2006*, COM(2016) 882 final.

the data. The authorities would need to be open to considering information presented by the traveller following such a request.

The person whose data are being processed has the right to request access to his or her data from the controller. The right of access is recognised as a fundamental right in Article 8 (2) of the Charter. It is also included in Article 15 of the General Data Protection Regulation, as well as in Article 8 of the Council of Europe Convention No. 108,[85] and in the legislative acts of the individual EU-wide information systems. If inaccuracies are detected, the person has the right to the rectification of the data without undue delay (Article 16 of the General Data Protection Regulation and Article 16 of Directive (EU) 2016/680). Under Article 15 of Directive (EU) 2016/680, the right of access can be restricted, subject to the principle of proportionality, for specifically listed reasons, such as combating crime or protecting public security.

The person concerned would need to receive clear and unambiguous information on where and how to seek correction.[86] In *Huber*, the CJEU clarified that the concept of necessity of data processing cannot have a meaning that varies among Member States, and that the level of protection of the rights and freedoms of individuals with regard to the processing of personal data must be equivalent in all Member States. In *Digital Rights Ireland*,[87] the CJEU further clarified that the EU legislature's discretion is strictly limited in relation to judicial review of cases concerning accuracy of data, considering the important role played by the protection of personal data in light of the respect for private life.

For applicants to be able to exercise their right of access, correction and erasure effectively, they would need to receive information in a clear and understandable manner – not only in relation to data stored in ETIAS, but also interoperable information systems, including on the common repository with EES. For transparency purposes, a list of authorities that can access ETIAS will be published in the Official Journal, according to Article 76 of the proposed regulation. Other existing or proposed legal instruments for the interoperable information systems also foresee publishing such lists in the Official Journal.[88] An additional hurdle to possibilities to exercise the right of access,

---

85 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, 1981.

86 General Data Protection Regulation, Article 16. See also: Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 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, OJ L 8, 12 January 2001, pp. 1-22; European Commission (2017), *Proposal for a Regulation of the European Parliament and of the Council 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*, COM(2017) 8 final, Brussels, 10 January 2017.

87 CJEU, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others*, 8 April 2014, paras. 47-48.

88 See Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, Article 27; European Commission (2016), Proposal for a Regulation of the European Parliament and of the Council 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

correction and erasure relate to the fact that the data subjects are third-country nationals outside the EU.

FRA Opinion 17

Due to the planned interoperability between ETIAS and other large-scale EU information systems, including a common repository with EES, the EU legislator should add a provision informing applicants how to exercise their right of access, correction and erasure, including where the information originates from other systems.

Member States' embassies and consulates in visa-free third countries should support applicants in exercising effectively their right of access, correction and erasure of data. Their role could be reflected in the proposal.

As inaccurate data included in interoperable databases can cause false hits, due weight should be given to applicants' statements during the manual processing phase.

States of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011, COM(2016) 194 final, Brussels, 6 April 2016, Article 8.

TK-01-17-692-EN-N

ISBN: 978-92-9491-733-1
doi: 10.2811/543161

FRA – European Union Agency for Fundamental Rights

Schwarzenbergplatz 11 ▪ 1040 Vienna ▪ Austria ▪
Tel +43 158030-0 ▪ Fax +43 158030-699
fra.europa.eu ▪ info@fra.europa.eu ▪ facebook.com/fundamentalrights
▪ linkedin.com/company/eu-fundamental-rights-agency ▪
twitter.com/EURightsAgency