

Juan Fernando López Aguilar
Chairman of the LIBE Committee, European Parliament

13 November 2019

By email only

Ref: OUT2019-0049

Subject: Your request to the EDPB for a legal assessment on the Commission proposals for Regulation of the European Parliament and of the Council establishing the conditions for accessing the other EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU) yyyylyxxx {ECRIS-TCN} - 2019/0001(COD) - COM(2019)0003; and Regulation of the European Parliament and of the Council establishing the conditions/or accessing other EU information systems for ETIAS purposes and amending Regulation (EU) 2018/1240, Regulation (EC) No 767/2008, Regulation (EU) 2017/2226 and Regulation (EU) 2018/1861 - 2019/0002(COD) - COM(2019)0004

Dear Mr López Aguilar,

we would like to thank you for the LIBE Committee's request of 4 April 2019, by which the EDPB was asked for a legal assessment on the implications of the aforementioned Commission proposals on the right to the protection of personal data in the framework of the envisaged automated processing.

The recent Commission proposals have to be seen as part of a bigger picture. At a first glance, they seem to contain only necessary follow-up amendments to Regulation (EU) 2018/1240 establishing a European Travel Information and Authorisation System (ETIAS Regulation)¹. Those amendments concern the ETIAS Regulation itself as well as the legal bases for four other European information systems, namely the Schengen Information System (SIS), the Visa Information System (VIS), the Entry Exit System (EES)² and the European Criminal Record Information System on Third Country Nationals

¹ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2018:236:FULL&from=EN>.

² REGULATION (EU) 2017/2226 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:327:FULL&from=EN>.

(ECRIS-TCN)³. Three of those systems are not yet established. Nevertheless the establishing legislation is already being amended in these Commission proposals.

The EDPB wishes to stress that such a regulatory approach – amending provisions for databases that are not yet in place – does neither align with the principle of transparency nor with the principle that data processing has to be based on clear, precise and accessible rules.

It is necessary to look at this from a holistic point of view where the core items of these proposals should be considered as implementing parts of the new Interoperability Framework⁴. The ETIAS is one of six systems (the five systems already mentioned and Eurodac) that are going to be incorporated in the Interoperability Framework, interconnected by a common search portal, a common identity repository, a common biometric matching service and a common tool for multiple identity detection. The setting up of a common repository for identity data from the EES and the ETIAS will serve as technical basis for the future Common Identity Repository of the Interoperability Framework. The setting up of an instrument for the automated comparisons made by the ETIAS central system in SIS, VIS, EES and ECRIS-TCN will serve as the technical basis for the future European Search Portal (ESP) in the Interoperability Framework. Furthermore, the widened access rights to VIS for law enforcement authorities for identification purposes that are part of the Interoperability Framework marks the final discard of the thresholds put up by Council Decision (EU) 2008/633⁵ for law enforcement agencies' access to VIS.

The Interoperability Framework poses enormous risks to the rights for privacy and data protection. By interconnecting IT systems enabling cross access processes that are difficult to account for the legislator is disregarding its own encoded principle of Data Protection by Design and by Default. The EDPB wishes to recall that the European data protection authorities have already analyzed the implications of the Interoperability Framework and commented on them in detail in the former Working Party 29's Opinion on Commission proposals on establishing a framework for interoperability

³ Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:135:FULL&from=EN>.

⁴ Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:135:FULL&from=EN>, and Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:135:FULL&from=EN>.

⁵ COUNCIL DECISION 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0633&from=EN>.

between EU information systems in the field of borders and visa as well as police and judicial cooperation, asylum and migration (WP 266) adopted on 11 April 2018⁶.

The concerns expressed by the WP 29 are still valid. Thus, the recent proposals are only one further step in the big project once tabled in the Communication from the Commission to the European Parliament and the Council “Stronger and Smarter Information Systems for Borders and Security”⁷. Since then there has been a steady flow of new regulatory initiatives with the purpose of extending existing information systems, establishing new information systems and incorporating all of them into the Interoperability Framework that was finally adopted in May 2019 and came into force shortly thereafter.

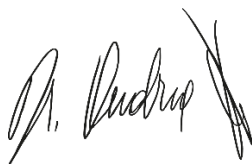
The new architecture for information systems in the field of border management, asylum, migration, police and judicial cooperation has been negotiated with tremendous speed and with a continuous flow of complex legislative proposals, all interconnected with one another. This way of processing has been a clear challenge for the data protection assessments requested. Since the underlying legislation that is the cause for the amendments in these proposals is already in force, the EDPB can only recall all its previously expressed concerns.

The EDPB wishes to express its deep concern with regards to the challenges the Interoperability Framework poses for compliance with the principle of purpose limitation, data subjects’ rights and additionally the fulfillment of supervisory tasks of the data protection authorities.

We remain at your disposal for any questions or clarifications you may require on these subjects.

Yours sincerely,

For the EDPB



Andrea Jelinek

⁶ see https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=624198

⁷ COM (2016) 205 final, see <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52016DC0205>.