

Mr Marc SULON
Head of Unit 'Digital Schengen'
Directorate-General for Home Affairs
European Commission

Brussels, 07 August 2024

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for all correspondence

Subject: Implementation of the ETIAS

Dear Mr Sulon,

On behalf of the Coordinated Supervision Committee (CSC) of the European Data Protection Board, I hereby would like to bring to your attention a matter of urgency in relation to the status of the implementation of the ETIAS.

Currently, the implementation is being steered by Frontex' ETIAS Central Unit Division. Despite their commendable efforts, and acknowledging the challenges faced by the representatives of the Member States in the numerous working formats, central elements in the interpretation of the ETIAS Regulation are raising questions, which have serious implications for the operation of the system in compliance with fundamental rights, including data protection and privacy.

First, Articles 56 and 64 of the ETIAS Regulation pertain (inter alia) to the handling of data subject requests. In particular the wording of Article 56(2) is creating uncertainty among ETIAS controllers with regard to whether and precisely which processing operations by ETIAS National Units should fall under the scope of the Law Enforcement Directive (LED). There is concern that the differentiated interpretations of Article 56(2) ETIAS Regulation may lead controllers to overlook the fact that it is

only in very exceptional and limited circumstances that the LED may be applied to the processing of applications by ENUs, while the GDPR (or EUDPR) remains the default data protection instrument applicable to the processing of ETIAS applications, reflecting the overarching purpose of ETIAS as a migration management system.

In line with this approach, Article 64 omits any reference to the LED or to Chapter IX EUDPR. This issue is relevant as it has a bearing on the scope and modalities for applying restrictions to data subject rights. In view of the decision of the legislator to bring the handling of data subject requests concerning personal data stored on applicants in the central system under the scope of the GDPR in all instances, reflecting the inherent nature of ETIAS as a border management tool, and linked to the issuance of all ETIAS decisions under the GDPR (Article 56(2) third subparagraph of the ETIAS Regulation), it would seem important to clarify the implications of this decision to Member States, some of whom would need to foresee the adoption of restrictions under Article 23 GDPR in order to accommodate the sharing and processing of confidential data by and between ETIAS entities. The current uncertainty risks resulting in fragmented procedures and erosion of legal certainty in the ETIAS framework.

Second, the CSC wishes to take this opportunity to draw attention to the fact that, given the approaching entry into operation and the complexity of the ETIAS, there is inconsistency in the interpretation of the need to conduct data protection impact assessments (DPIAs) and also in the progress of those that are being undertaken. DPIAs should allow for the identification of risks, but also of their mitigation, including by means of data protection by design and by default. The timing of the drafting of DPIAs comes at a very late stage in the implementation process. Consequently, compliance issues may be identified by controllers - or by supervisory authorities - very close to the current scheduled date for entry into operation. This calls into question the degree of meaningful intervention that can be made at such a point in the development process, and which may jeopardise the implementation of this sensitive large-scale EU information system in full respect for fundamental rights in line with the current timeline.

Thirdly, the Committee would like to stress, in light of ongoing discussions on procedures for handling data subject requests, that the guiding reference for such work must be the core objective of such requests, namely to support data subjects to exercise their fundamental rights. Controllers are under the obligation to undertake all reasonable efforts, and put in place the appropriate means, to facilitate the exercise of data subject rights. Situations that confront the data subject with multiple entities and with the prospect of being redirected to, or referred back and forth between entities, should be strictly

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 $^{^{1}}$ EDPB Guidelines 01/2022 of March 2023 on data subject rights - Right of access.

avoided. The concept of a single point of contact for data subject requests concerning data processed

within ETIAS may prove the most appropriate means to serve the core objective.

Finally, the CSC would like to draw the Commission's attention to an issue of deep concern which has

arisen in the context of the EDPB's membership of the ETIAS Fundamental Rights Guidance Board

(EFRGB). Article 10 of the ETIAS Regulation mandates the EFRGB to perform regular appraisals and

issue recommendations to the ETIAS Screening Board (ESB). To be able to perform this monitoring and

advisory role, Article 10(4) grants the EFRGB access to all meetings and to all information and files of

the ESB. However, the soon to be adopted Rules of Procedure of the ESB risk limiting the capacities of

the EFRGB to fulfil its mandate, by establishing the possibility to hold closed sessions that would

exclude the EFRGB. The EDPB understands that the establishment of an ETIAS Fundamental Rights

Guidance Board was intended by the legislator to function as a critical fundamental rights safeguard

in the operation of ETIAS, not least with respect to the inclusion of algorithmic profiling via the ETIAS

screening rules. It is in the interest of all stakeholders concerned that this advisory mechanism be

enabled to fulfil its function in line with the ETIAS Regulation, and the EDPB calls on the Commission

to ensure the correct implementation of Article 10 ETIAS Regulation in this regard.

I would like to reiterate the Committee's appreciation of the work of the ETIAS Central Unit Division

and of the different stakeholders, while at the same time calling for an even stronger coordinative and

guiding role of the Commission, to help ensure full respect for fundamental rights, including for the

right to protection of personal data, when striving for the entry into operation of the ETIAS.

Yours Sincerely,

On behalf of the CSC,

Sebastian Hümmeler

Deputy Coordinator

cc.: Ms Nayra Perez, DPO of Frontex;

Ms Encarna Gimenez, DPO of eu-LISA;

Mr Spyros Argyros, Head of Data Management Office, Frontex