

## **EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION**

Council number: 5071/19

**PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING THE CONDITIONS FOR ACCESSING THE OTHER EU INFORMATION SYSTEMS AND AMENDING REGULATION (EU) 2018/1862 AND REGULATION (EU) YYYY/XXX [ECRIS-TCN]**

and

Council number: 5072/19

**PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING THE CONDITIONS FOR ACCESS 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**

Submitted by the Home Office on

**29 JAN 2019**

### **SUBJECT MATTER**

1. This Explanatory Memorandum (EM) relates to legislation to give effect to an earlier proposal to establish a European Travel Information and Authorisation System (ETIAS). In September 2018, the Council and the European Parliament adopted two legislative acts, a Regulation establishing the European Travel Information and Authorisation System (ETIAS) and an amendment of the Europol Regulation for the purpose of establishing ETIAS. Regulation (EU) 2018/1240 and 2018/1241 respectively.
2. Regulation 2018/1240 establishing ETIAS defines which data fields from ETIAS application files can be used to consult other EU systems. It further sets out that amendments to legal acts establishing EU information systems that are necessary to ensure those systems' interoperability with ETIAS shall be the subject of a separate legal instrument. The current proposals set out the technical amendments necessary to fully operate ETIAS by amending the legal acts of the EU information technology systems that ETIAS will query.
3. The European Commission explains that it is necessary to amend other EU Information Systems because not all of the data fields in the ETIAS application process are collected, stored or recorded in the same way in other EU information systems and Europol data. Moreover, the EU information system landscape has also changed since the proposal for a Regulation to establish ETIAS was first put forward.
4. The Commission sets out that in November 2018 the legal texts of the Schengen Information System (SIS), which had been under consideration since December 2016, were amended by the co-legislators. Similarly, proposed revisions to the Eurodac Regulation are currently under consideration as part of the reform of the Common European Asylum System. Additionally, two new EU information systems have also been proposed since the Commission announced its decision to establish ETIAS. These are the Entry/Exit System (EES) and European Criminal

Records Information System – Third Country Nationals (ECRIS-TCN). It is necessary to amend the legal texts of these systems to ensure they are interoperable with ETIAS.

5. The **first proposal (5071/19)** sets out the amendments to the draft Regulation on ECRIS-TCN and proposes amendments to SIS legislation to establish the relationship between ETIAS and SIS.
6. ECRIS-TCN: The proposal will allow ETIAS to define its relationship with ECRIS-TCN, allowing access to the “hit/no hit” centralised ECRIS-TCN system as required. ETIAS will have access to ECRIS-TCN for the purposes of border management (immigration purposes). The proposal amends the ECRIS-TCN draft Regulation such that convicting Member States would be required to add a “flag” to identifying data on the ECRIS-TCN centralised system to indicate that an individual had been convicted for a terrorist offence or other serious criminal offence. ETIAS would then be able to search the ECRIS-TCN centralised system to determine whether a third country national who is seeking entry to the Schengen area via ETIAS has previous criminal convictions in the EU. It is significant that no criminal records information is held in the ECRIS-TCN centralised system, only unique identifiers (alphanumeric and fingerprints). ETIAS will not be able to determine the details of any conviction by the mere identification of a “flag” on ECRIS-TCN. The draft Regulation amending ECRIS-TCN makes clear that ETIAS shall only have access to records to which a flag has been added in the ECRIS-TCN centralised system. The proposal also allows ETIAS to compare data flagged in ECRIS-TCN to verify data held in ETIAS.
7. SIS: The first proposal establishes a relationship between ETIAS and SIS. Personal data in ETIAS applications will be compared with the data present in records, files or alerts in SIS, and, where appropriate, revocation of a grant of admission to a third country national may occur. This might occur where a subject has obtained a travel document by fraudulent means.
8. The **second proposal (5072/19)** seeks to amend the EES Regulation to establish its technical relationship with ETIAS, and to amend the VIS Regulation to allow VIS to receive, process and answer ETIAS queries. It also amends the SIS II measure in the field of border checks (Regulation (EU) 2018/1861). The UK does not participate in any of these measures so will not be bound by this Regulation.
9. EES: The Commission believes an alignment of how EES and VIS work together is necessary to rationalise and simplify the work of border guards, as well as implementing a more uniform border control process for third country nationals entering for a short stay.
10. Visa Information System (VIS): Whilst there is an outstanding proposal to amend the VIS Regulation, which would have the effect as to upgrade that database, the Commission has judged that the negotiations on the VIS Regulation are not sufficiently advanced to include future arrangements with ETIAS in that proposal. However it may become necessary in the future to amend either this or the VIS Regulation. Any such amendments will depend on which proposal is adopted first.

## **SCRUTINY HISTORY**

11. This is a new proposal so there is no previous scrutiny. However, the proposal for a Regulation (now Regulation 2018/1240) establishing ETIAS was the subject of an EM signed on 30 November 2016. The Lords Scrutiny Committee cleared the EM on 23 November 2017. The EM has not cleared the European Scrutiny Committee.

## **MINISTERIAL RESPONSIBILITY**

12. The Home Secretary has responsibility for policy relating to Immigration and Asylum in the United Kingdom.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

13. The United Kingdom's immigration policy is a reserved matter under the devolution settlements. However, the Devolved Administrations have been consulted in the preparation of this EM.

## **LEGAL AND PROCEDURAL ISSUES**

14.

### **i. Legal basis**

The proposal (5071/19) is based on Article 82(1)(d) and Article 87(2)(a) of the Treaty on the Functioning of the European Union (TFEU). The United Kingdom participates in the part of the Schengen acquis relating to police co-operation, including in relation to SIS II, and is bound by Regulation 2018/1862 (SIS II Police Co-operation Regulation). To the extent that the first proposal (5071/19) amends Regulation 2018/162, it is a development of the Schengen acquis in the field of police and judicial co-operation and the UK is therefore deemed to participate unless it decides to opt out under Article 5 of Protocol No. 19) to the EU Treaties. To the extent that the proposal will amend ECRIS-TCN, the UK may decide to participate by opting in under Article 3 and 4a of Protocol (No.21) to the EU Treaties.

The proposal (5072/19) is based on Article 77(2)(a), (b) and (d) of the Treaty on the Functioning of the European Union (TFEU). As the UK does not participate in the immigration and border aspects of the Schengen acquis, the UK will not take part in the adoption of proposed Regulation 5072/19 and so will not be bound by it or subject to its application.

### **ii. European Parliament Procedure**

Ordinary legislative procedure.

### **iii. Voting procedure**

Qualified majority voting.

### **iv. Impact on United Kingdom Law**

As the measures relate to access of one EU system to other EU systems, there will be no impact on UK law.

### **v. Application to Gibraltar**

The first proposal (5071/19) is applicable to Gibraltar to the extent that it amends the ECRIS-TCN regulation, as this Regulation applies to Gibraltar. Aside from that, the proposals are not applicable to Gibraltar.

vi. Fundamental rights analysis

The proposed Regulation complies with the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data. Furthermore, it is also in line with Article 16 TFEU which guarantees everyone the right to protection of personal data concerning them.

**APPLICATION TO THE EUROPEAN ECONOMIC AREA**

15. The Schengen acquis and measures building upon it apply to Norway, Iceland, Switzerland and Liechtenstein under individual Agreements concluded with the European Union.

**SUBSIDIARITY**

16. The Commission has stated in the proposal that, “the Proposal contains amendments of Regulations setting up EU-wide information systems to manage the external borders and the security of an area without controls at internal borders. Such information technology systems can, by their nature, only be set up at EU level, and not by the Member States acting alone.” The Government concurs with this assessment.

**POLICY IMPLICATIONS**

17. On 23 June 2016, the UK voted to leave the EU. On 29 March 2017, the Government triggered Article 50 of the TEU to begin the process of exit. Until 29 March 2019, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period, the Government will also continue to negotiate, implement, and apply EU legislation.

18. Overall, the UK supports efforts to improve the security of the external borders of the EU, of which the ETIAS Regulation represents a significant part. As such, the UK is supportive of these proposals. They enhance efforts to improve the security of the external Schengen border of the EU by supplementing the amount of information available to ETIAS, which will allow for the EU to revoke a grant of admission to a third country national if a relevant alert is identified from EU information systems.

19. As the draft Regulation (5071/19) builds upon aspects of the Schengen acquis in which the UK participates, in accordance with Article 5(2) of Protocol (No. 19), the UK’s Schengen opt-out applies to the provisions related to SIS. As the draft Regulation also cites a legal base in Title V of the Treaty on the Functioning of the European Union (TFEU), in accordance with Article 3, and 4a of Protocol (No 21) on the position of the UK and Ireland in respect of the area of Freedom, Security and Justice annexed to the TFEU, the UK’s opt-in applies to the JHA aspects of the Regulation. The deadline for the UK to opt out of and opt in to the measures in accordance with Protocol (No. 19) and Protocol (No. 21) will be within three months of the publication of the last language version. The Council Secretariat has not yet confirmed the date of publication of the last language version.

20. The Government is committed to taking all opt-out and opt-in decisions on a case-by-case basis, putting the national interest at the heart of the decision-making process. We will undertake a full analysis of the advantages and disadvantages of this Regulation to the UK in making our opt-out and opt-in decisions. The Government will have particular regard to:

- the operational benefits to the UK of not opting out and opting in of the proposal;
- The UK’s non-participation in ETIAS;

- Any potential impact on UK nationals once the UK has exited the EU and UK nationals are obliged to seek ETIAS approval to travel to the EU.
21. In relation to the proposal for ETIAS to be able to revoke a grant of admission to a third country national if it transpires that someone is the subject of another SIS II alert type, or has obtained a document by fraudulent means, the UK is supportive of the principle that SIS II alerts for documentation and alerts to identify where individuals are travelling to should be fully implemented, including where this applies to UK nationals.
  22. In relation to ECRIS-TCN, it is worth noting that criminal convictions in respect of EU-third country (dual) nationals are to be included in the ECRIS-TCN centralised system, and so ETIAS will be able to access/verify some UK-third country (dual) national criminal records data. As UK nationals will become third country nationals when we leave the EU such data will held on all relevant UK nationals as TCNs in their own right. This may result in some UK nationals being refused permission through ETIAS to enter the EU. We are content that where UK nationals have such convictions, they should be subject to the rules of entry into the EU.
  23. The UK's future relationship with these systems post-Brexit is yet to be determined and will be considered as part of future negotiations during the planned implementation period.
  24. More broadly, the Government has set out, in its White Paper entitled *The UK's future skills-based immigration system (CM9722)* published on 19 December 2018, that it intends to establish an equivalent Electronic Travel Authorisation (ETA) scheme for visitors and those in transit. Canada and the United States already have travel authority schemes, therefore proposals for an EU ETIAS are clearly in line with developments in international border security.
  25. The EU has set out, in their *Notice on travelling between the EU and the United Kingdom following withdrawal of the United Kingdom from the EU* published on 13 November 2018, that the UK will become a third country upon leaving the EU; as such UK nationals will be treated as non-EU nationals. In their proposal for a Regulation 2018/0390, the EU have subsequently set out that the ETIAS system will apply to UK nationals (as non-EU nationals by default) once the UK leaves the EU. As a result, UK citizens would be required to apply for an ETIAS before travelling to the EU.
  26. It is the Government's intention to require EU citizens to obtain an ETA, but we intend to discuss this further with the EU in the next phase of negotiations.

#### **CONSULTATION**

27. The Devolved Administrations and Gibraltar have been consulted in the preparation of this EM.

#### **IMPACT ASSESSMENT**

28. Not applicable. The Commission undertook a feasibility study, published on 16 November 2016, which was intended to assess solutions that would address the information gap for visa-exempt third country travellers whilst minimising the negative impacts on stakeholders. The Commission has set out that because the proposal is consistent with the ETIAS Regulation and does not contain new political

elements, instead focusing on "limited technical changes" an impact assessment is not necessary.

#### **FINANCIAL IMPLICATIONS**

29. The Commission has stated that this proposal does not have any budgetary implications.

#### **TIMETABLE**

30. The Commission has previously stated that ETIAS is expected to be operational as early as 2021, although has more recently indicated that it could be 2023. The timetable for negotiations on this proposal are not yet clear.



**Rt Hon Caroline Nokes  
Minister of State for Immigration**