



Formal comments of the EDPS on a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2019/816 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 Regulation (EU) 2019/818 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 for the purpose of introducing a screening of third country nationals at the external borders

1. Introduction and background

The European Commission presented the New Pact on Migration and Asylum on 23 September 2020.

¹ One of the legislative proposals accompanying the New Pact on Migration and Asylum is the Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (hereinafter the ‘Proposal for a Screening Regulation’²).

The Proposal for a Screening Regulation introduces a pre-entry screening at external borders with the twofold objective of i) ensuring that the identity of the third-country nationals who cross the external border without authorisation as well as any health and security risks are quickly established and ii) referring the third-country nationals concerned towards the applicable procedure (asylum, or procedures respecting Directive (EU) 2008/115/EC³). The same Proposal also creates an EU framework for the screening of irregular migrants apprehended within the territory of the Member States and who eluded border controls on entering the Schengen area, with a view to better protecting the Schengen area.

According to the Proposal for a Screening Regulation, the security checks part of the screening should be at least of a similar level as the checks performed in respect of third country nationals that apply beforehand for an authorisation to enter the Union for a short stay, whether they are under a visa obligation or not. Therefore, verifications for security purposes in the framework of the screening should be carried out against the same systems as for applicants for visas or for travel authorisations, notably:

- the European Travel Information and Authorisation System (ETIAS)⁴,
- the Visa Information System (VIS)⁵,
- the Entry/Exit System (EES)⁶, and
- the Schengen Information System (SIS)⁷.

In addition, persons submitted to the screening should also be checked against:

- the European Criminal Records Information System for Third Country Nationals (ECRIS-TCN)⁸, as regards persons convicted in relation to terrorist offences and other forms of serious criminal offences,
- Europol data,
- the Interpol Stolen and Lost Travel Documents database (SLTD) and
- Interpol Travel Documents Associated with Notices databases (TDAWN).

To this end, the Proposal for a Screening Regulation amends the Regulations establishing VIS, the EES and ETIAS to provide access to these systems by the authorities responsible for the screening. Since Regulation (EU) No 2019/816, which establishes ECRIS-TCN, is not a development of the Schengen acquis, its amendment could not be part of the Proposal for a Screening Regulation. Therefore, the Commission put forward the present Proposal, the subject of these formal comments, as a self-standing amendment of Regulation 2019/816 to provide for access rights in view of the Proposal for a Screening Regulation.

In addition, the Proposal for a Screening Regulation introduces an obligation to check the biometric data of the third country nationals concerned against the Common Identity Repository (CIR) established by Regulations (EU) 2019/817⁹ and (EU) 2019/818¹⁰. While the Proposal for a Screening Regulation provides for changes to Regulation (EU) 2019/817, which applies to the EES, VIS, ETIAS, due to variable geometry, the amendment to Regulation 2019/818, which applies to ECRIS-TCN and Eurodac, was not part of the Proposal for a Screening Regulation. Hence, the current proposal also amends Regulation (EU) 2019/818 to provide access to all data stored in the Common Identity Repository (CIR) for the designated authorities in the context of screening.

According to the Proposal for a Screening Regulation, the security checks including the consultation of ECRIS-TCN database shall be limited to the identification of terrorist offences and other forms of serious criminal offences. To this end, Article 1 of the current Proposal reflects the modification made in Article 5(1)(c) of Regulation 2019/816 by the Proposal establishing the conditions for accessing the other EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU) yyyy/xxx [ECRIS-TCN]¹¹ which introduces a special flag for terrorist offences and other forms of serious criminal offences.

The present formal comments are issued in response to the consultation of the EDPS on the Proposal by the European Commission. In this context, the EDPS regrets the lack of references to this consultation pursuant to Article 42(1) of Regulation (EU) 2018/1725.

2. Comments

According to the Explanatory Memorandum of the draft Proposal, the proposed modifications to ECRIS-TCN would limit the access to data records of third country nationals convicted of terrorism offences and other forms of serious criminal offences, only to those records which are relevant for security checks under the Proposal for a Screening Regulation.¹² It further explains that: “*The evidence-based document prepared in relation to the legislative proposals adopted together with the New Pact on Migration and Asylum remains relevant for this proposal which complements the proposed Screening Regulation*”.¹³ The EDPS

already highlighted in its opinion on the New Pact on Migration and Asylum¹⁴ that due to the lack of an impact assessment accompanying the legislative Proposal on the Screening Regulation, the necessity and proportionality of the envisaged screening activities are not substantiated. Although the Proposal would limit the access to data records of third country nationals convicted of terrorism offences and other forms of serious criminal offences in line with the Proposal for a Screening Regulation, it would lead to further processing of the personal data stored in the ECRIS-TCN system. Furthermore, it would provide access to the system by additional authorities, without clearly defining such authorities and leaving their designation to the discretion of the Member States. Thus, the EDPS reiterates the need to assess properly the necessity and proportionality of such measures, in particular taking into account the sensitive nature of personal data on criminal convictions.

The EDPS further notes that, according to Article 1(5) of the draft Proposal, paragraph 7 in Article 7 of the ECRIS-TCN Regulation shall be replaced. The suggested new paragraph 7 would add an additional purpose for consulting ECRIS-TCN related to the Proposal for a Screening Regulation which reads as follows: “(d) assessing whether a third country national subject to screening checks would pose a threat to public policy or public security, in accordance with Regulation (EU) .../... [Regulation on Screening].” The EDPS considers that the current text of the Proposal diverges from the Proposal for a Screening Regulation as regards the scope of the security check. According to Articles 1 and 11 of the Proposal for a Screening Regulation, security checks have the objective of verifying whether the persons undergoing the screening do not constitute a threat to internal security, instead of public policy or public security, as provided for in the above-mentioned draft provision. Therefore, the EDPS recommends to align the text of the present Proposal with the Proposal for a Screening Regulation by referring to internal security only, to avoid possible confusion on the scope of the security checks.

The present formal comments do not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of Regulation (EU) 2018/1725.

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Wojciech Rafał WIEWIÓROWSKI
(e-signed)

¹ COM(2020) 609 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM:2020:609:FIN>

² COM (2020)612 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:612:FIN>

³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107.

⁴ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, OJ L 236, p. 1–71.

⁵ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60–81.

⁶ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, OJ L 327, 9.12.2017, p. 20–82.

⁷ Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ L 312, 7.12.2018, p. 14–55.

⁸ 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, OJ L 135, 22.5.2019, p.1-26.

⁹ 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.

¹⁰ 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, OJ L 135, 22.5.2019, p. 85–135.

¹¹ COM(2019)3 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019PC0003&qid=1618492304586>

¹² See page 4 of the Proposal of the European Parliament and of the Council amending Regulation (EU) 2019/816 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 Regulation (EU) 2019/818 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 for the purpose of introducing a screening of third country nationals at the external borders.

¹³ Ibid, page 5.

¹⁴ See page 10 of the EDPS Opinion 9/2020 on the New Pact on Migration and Asylum.