

NEW EUROPEAN APPROACH ON PASSENGERS' DIGITAL SURVEILLANCE THROUGH ELECTRONIC PLATFORM (ETIAS) – PASSENGERS' AND CARRIERS' PERSPECTIVE

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ABSTRACT

On the basis of basic European legal concepts on collecting air passengers' data, as an important mechanism in fight against terrorism and illegal immigration, the authors point to the European legal provisions of Regulation (EU) 2018/1240 on the newly established IT authorisation system, the application of which guarantees more comprehensive security checks of visa-free third-country nationals (non-EU citizens) when they, as passengers, want to travel to EU. The aim of this work is to present, analyse and review the legal issue of new European rules which prescribe digital surveillance of passengers through electronic system – “European Travel Information and Authorisation System” (ETIAS) even before they arrive at the external border of the Schengen area. When ETIAS becomes operational (expected in November 2023), screening requirements for passengers will mean that some category of passengers will need valid travel authorisation to travel to the Schengen area. Authors point out the significance of pre-screening control of passengers' data with special emphasis on passengers' obligation to apply for travel authorisation (through ETIAS) prior to travelling to the Schengen area and carriers' (air carriers, sea carriers and international carriers transporting groups overland by coach) obligation to use ETIAS to verify passengers' possession of a valid travel authorisation and their

liability in case they were transporting third-country nationals (who are exempt from the visa requirement) without valid travel authorisation. Carrying out a theoretical elaboration of the problem in question, in the conclusion the authors clearly indicate the shortcomings of normative legal norms – open legal issues that have not been resolved, such as, for example, the general and insufficiently clear legal regulation of the terms security risk, illegal immigration risk or high epidemic risk in the provisions of the Regulation (EU) 2018/1240 especially considering that these risks represent reasons for profiling of passengers (visa-free third-country nationals) from 60 countries. The authors consider it necessary and justified to adopt a series of delegated acts that will systematically and comprehensively regulate all aspects of the legal and technical issues of the establishment and application of ETIAS.

Keywords: carriers, ETIAS, passengers' digital surveillance

1. INTRODUCTION

The Schengen regime (free movement regime) means free movement of persons and is one of the founding principles of EU integration.¹ Every year, there are some 400 million crossing of the Schengen border by EU citizens, and 200 million by non-EU citizens.² The total number of regular border crossings in 2025 is forecast to rise to 887 million, of which around one-third are expected to be by third country nationals traveling to Schengen countries.³ The identities of third-country nationals are often checked at port of entry – airports, seaports and land borders.⁴ It is estimated that in 2025 there will be 127 million of border crossing by visa-exempt third country nationals from which 107 million will occur at air borders.⁵ It is important to underline that there is currently no separate, systematic recording of border crossing by visa-holding and visa-exempt third-country nationals.⁶ In the past, there were no advance information on visa-exempt third-

¹ See more Duić, D.; Rošić, M., *Interoperability between the EU information systems – from an idea to the realisation*, Policija i sigurnost, Vol. 31, No. 2, 2022, p. 120.

² Explanatory Memorandum to COM(2016)731 – *European Travel Information and Authorisation System (ETIAS)*, November 2016 [https://www.eumonitor.eu/9353000/1/j4nvhdvdk3hydzq_j9vvik7m-1c3gyxp/vk9bd6mxr5zn], Accessed 20 September 2022.

³ European Commission, 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, Bussels, 6.4.2016, COM(2016) 194 final, 2016/0106(COD), p. 1 [<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A52016PC0194>], Accessed 15 November 2022.

⁴ Bellanova, R.; Glouftsiou, G., *Formatting European security integration through database interoperability*, European Security, Vol. 31, No. 3, 2022, p. 466.

⁵ European Commission, *Technical Study on Smart Borders*, p. 15 [https://home-affairs.ec.europa.eu/system/files/2016-12/smart_borders_executive_summary_en.pdf], Accessed 20 September 2022.

⁶ Directorate-general for internal policies, *Study for the libre committee – European Travel Information and Authorisation System (ETIAS): Border management, fundamental rights and data protec-*

country nationals (because they were not subject to prior checks) when they travelled to the Schengen Area, so their individual entry conditions were not verified until they arrived at a border-crossing point to the Schengen Area.⁷ Although today we have a mechanism such as Advance Passenger Information (API data) and Passenger Name Record (PNR data) for air passengers' pre-screening control, this paper will point out the legal effects of new European provisions on digital pre-screening control of visa-exempt third country nationals from passengers' and carriers' (air carriers, sea carriers and international carriers transporting groups overland by coach) perspective.

2. EUROPEAN LEGAL BEGINNINGS OF THE DIGITAL SURVEILLANCE OF PASSENGERS THROUGH AIR PASSENGER DATA

Importance of datafication for control and surveillance in security and trans-border activities has been presented as a natural answer from new threats: terrorism, transnational crime, migration and refugee arrivals, and more generally surveillance of anomalies in the patterns of travellers.⁸ Travel has emerged as an inherently dangerous activity and mobility operates as a trigger for state surveillance.⁹ Freedom of movement is now almost forgotten and replaced by so-called "smart borders" technologies developing in the name of speed and easy freedom to move, increasing tools of surveillance and goals of prevention of suspicious acts ending up with lists of data-suspects.¹⁰

Less than 20 years ago, the European legislator adopted Directive 2004/82/EC¹¹ as an important tool in achieving better border control on the EU external borders (borders of the EU Member States with third countries) and very important mechanism for combating illegal immigration. According to Art. 3(1) Directive

tion, 2017, p. 29 [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583148/IPOL_STU%282017%29583148_EN.pdf], Accessed 20 September 2022.

⁷ European Commission, Feasibility Study for a European Travel Information and Authorisation System (ETIAS), November 2016, p. 9 [https://home-affairs.ec.europa.eu/system/files/2020-09/etias_feasibility_study_en.pdf], Accessed 20 September 2022.

⁸ Bigo, D., *The socio-genesis of a guild of "digital technologies" justifying transnational interoperable databases in the name of security and border purposes: a reframing of the field of security professionals*, International Journal of Migration and Border Studies, Vol. 6, No. 1-2, 2020, p. 75.

⁹ Vavoula, N., *The "Puzzle" of EU Large-Scale Information Systems for Third-Country Nationals: Surveillance of Movement and Its Challenges for Privacy and Personal Data Protection*, European Law Review, p. 32 [https://qmro.qmul.ac.uk/xmlui/handle/123456789/60690], Accessed 12 January 2023.

¹⁰ Bigo, D., *op.cit.*, note 8, p. 75.

¹¹ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, [2004] OJ L261/24-27.

2004/82/EC, an air carrier (which is transporting passengers into the territory of the EU Member States) has an obligation to transmit (until the end of passengers' check-in process) the data from passengers' travel document¹² (regardless of whether the passengers are EU citizens or non-EU citizens). The goal of introducing this carrier's obligation is to process the relevant data and assess the passenger's security risk before his arrival at the border crossing, so the air carrier obligation exists only on request of the authorities responsible for passenger control at external borders. Although the exchange of this data between EU Member states is prohibited, due to the constant threat of cross-border terrorism there is a need for the necessary cooperation of EU Member states in exchanging of information that the competent authorities consider relevant for prevention, detection, investigation and prosecution of terrorist offences and serious crime. Law enforcement authorities were advocating for this measure as they were struggling to track the movement of the foreign terrorist fighters (European citizens who underwent training on IS territory and returned to the EU to organize terrorist acts) in/out and within EU.¹³ Collecting, transferring and processing of air passengers' data eg. passenger name record (PNR) data¹⁴ of passengers of extra-EU flights,¹⁵ are the subjects of regulation in the Directive (EU) 2016/681.¹⁶ According to Art. 8(1) Directive (EU) 2016/681, EU Member States shall adopt the necessary measures¹⁷ to ensure that air carriers transfer PNR data to the database of the passenger information unit (PIU)¹⁸ of the Member State on the territory of which the flight will land or from the territory of which the flight will depart.¹⁹ The exchange of information between EU Member States is regulated in Art. 9 of Directive (EU) 2016/681 and

¹² See more: Rossi dal Pozzo, F., *International and EU legal frameworks of aviation security*, in: Szyliowicz, J. S.; Zamparini, L. (eds.), *Air Transport Security Issues and National Policies*, Edward Elgar Publishing, 2018, p. 55.

¹³ Andreeva, C., *The evolution of information-sharing in EU counter-terrorism post-2015: a paradigm shift?*, *Global Affairs*, Vol. 7, No. 5, 2021, p. 763.

¹⁴ The 18th category of data is being created – see Annex I. Directive (EU) 2016/681 “Passenger name record data as far as collected by air carriers”.

¹⁵ EU Member State may decide to apply this Directive only to selected intra-EU flights (Art. 2(3) Directive (EU) 2016/681).

¹⁶ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, [2016] OJ L119/132–149.

¹⁷ See more: Abeyratne, R., *Legal Priorities in Air Transport*, Springer, 2019, p. 252.

¹⁸ See more Glouftsiou, G.; Leese, M., *Epistemic fusion: Passenger Information Units and making of international security*, *Review of International Studies*, 2022, p. 1-18 [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/D9221B8518A91F9BB18A3CE036A2EA4C/S0260210522000365a.pdf/epistemic_fusion_passenger_information_units_and_the_making_of_international_security.pdf], Accessed 22 November 2022.

¹⁹ PIU is responsible for: a) collecting PNR data from air carriers, storing and processing those data and transferring those data to the competent authorities of EU Member States; b) exchanging both PNR

it does not occur exclusively on request of the authorities responsible for passenger control at external borders (as prescribed in Directive 2004/82/EC).

3. DIGITAL SURVEILLANCE OF PASSENGERS THROUGH EUROPEAN TRAVEL INFORMATION AND AUTHORISATION SYSTEM (ETIAS)

Today, around 1.3 billion people from around 60 countries worldwide can benefit from visa - free travel to the EU.²⁰ Prior travelling to the Schengen Area,²¹ travellers/passengers²² (visa-free third-country nationals)²³ must take to consideration new European rules contained in Regulation (EU) 2018/1240²⁴ on establishing

data and the result of processing those data with the PIUs of other Member States and with Europol (Art. 4 Directive 2016/681).

²⁰ European Commission, State of Schengen Report, Bruxelles, 24.5.2022, COM(2022) 301 final/2, p. 7 [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0301&qid=1668707809033&from=EN], Accessed 17 November 2022.

²¹ Schengen Area covers 26 European states: a) 22 EU Member States which are also countries of the Schengen Area (Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden); b) non-EU Member States but countries of the Schengen Area (Iceland, Liechtenstein, Norway i Switzerland) - Europska komisija, *Europa bez granica, Schengenski prostor* [http://publications.europa.eu/resource/cellar/09fcf41f-ffc4-472a-a573-b46f0b34119e.0001.01/DOC_1], Accessed 19 September 2022. From January 1, 2023 – Croatia joined the Schengen Area as a 23rd EU Member State and 27th Schengen Area state.

²² Regulation (EU) 2018/1240 applies to passengers who are travelling by air, sea or land (if international carriers transport groups overland by coach) - see more Art. 45(1) Regulation (EU) 2018/1240); Frontex, *Frequently Asked Questions (FAQ) In support of carriers' public section*, Warsaw, December 2022, p. 12-13 [https://www.eulisa.europa.eu/Organisation/GoverningBodies/Documents/WG%20Carriers/Documents/Carrier_FAQ.pdf], Accessed 11 January 2023.

²³ Nationals of third countries (60) who are exempt from the visa requirement (when crossing the external borders of the Member States for stays of no more than 90 days in any 180-day period) are listed in Annex II of the Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement ([2018] OJ L303/39–58) and in Regulation (EU) 2019/592 of the European Parliament and of the Council of 10 April 2019 amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union [2019] OJ L103/1–4.

²⁴ 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, [2018] OJ L236/1–71. More on Amendments to Regulation (EU) 2018/1240 see Art. 61 of the 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 system sin field of border 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/HA, [2019] OJ L135/27–84.

a new information system²⁵ - “European Travel Information and Authorisation System” (ETIAS).²⁶ Regulation (EU) 2018/1240 constitutes a development of the provisions of the Schengen acquis.²⁷

The necessity of the ETIAS has been based on the perceived risk posed by visa-exempt travellers, without, however, substantiating the existence of that risk.²⁸ ETIAS externalises border control²⁹ by subjecting visa-free passengers to digitalised advance checks for security and irregular migration.³⁰ It is automated risk profiling of travellers.³¹ Similar type of travel authorisation we can find in Australia,³² Canada,³³ USA,³⁴ South Korea³⁵ etc.³⁶

²⁵ More on protection of EU external borders through numerous digital systems see Martins, B. O.; Lidén, M.; Gabrielsen Jumbert, M., *Border security and the digitalisation of sovereignty: insights from EU borderwork*, European Security, Vol. 31, No. 3, 2022, pp. 475-494.

²⁶ More on beginnings in consideration of European travel authorisation scheme in 2008 see Bigo, *op.cit.*, p. 87. More on ETIAS see Cesarz, M., *A new type of EU visa? The legal nature of a travel permit issued under the European Travel Information and Authorization System (ETIAS)*, Studia Prawnicze KUL, Vol. 88, No. 4, 2021, pp. 15-16).

²⁷ Michéa; F.; Rousvoal, L., *The Criminal Procedure Out of Itself: A Case Study of the Relationship Between EU Law and Criminal Procedure Using the ETIAS System*, European Papers, Vol. 6, 2021, No 1, p. 475.

²⁸ Vavoula, N., *The “Puzzle” of EU Large-Scale Information Systems for Third-Country Nationals: Surveillance of Movement and Its Challenges for Privacy and Personal Data Protection*, *op.cit.*, p. 23.

²⁹ More on ETIAS as control measure of “regular” travellers to Schengen and very radical shift in the management of “legal” mobility see Hansen, F.; Pettersson, J., *Contradictory migration management? Differentiated security approaches to visa overstay and irregular border crossing in the European Union*, European Security, Vol. 31, No. 1, 2022, p. 129.

³⁰ Lehtonen, P., Aalto, P., *Smart and secure borders through automated border control systems in the EU? The views of political stakeholders in the Member States*, European security, Vol. 26, No. 2, 2017, p. 208.

³¹ Martins, B. O.; Lidén, M.; Gabrielsen Jumbert, M., *op.cit.*, p. 476.

³² Electronic Travel Authority – ETA, see more: Australian Government – Department of Home Affairs, *Electronic Travel Authority* [https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/electronic-travel-authority-601], Accessed 11 January 2023.

³³ Electronic Travel Authorisation – eTA, see more: Government of Canada, *Electronic Travel Authorisation – eTA* [https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/eta/apply.html], Accessed 11 January 2023.

³⁴ Electronic System for Travel Authorisation – ESTA, see more: U.S. Customs and Border Protection, *Official ESTA Application* [https://esta.cbp.dhs.gov/], Accessed 11 January 2023.

³⁵ Korea electronic travel authorisation – K-ETA, see more: Ministry of Justice – Korea Immigration Service, *K-ETA*, [https://www.immigration.go.kr/immigration_eng/1832/subview.do?enc=Zm5jdDF8QEB8JT-JGYmJzJTGaW1taWdyYXRpb25fZW5nJTJGMjI5JTJGNTUxMzU3JTJGYXJ0Y2xWaWV3Lm-RvjTNGcGFzc3dvcmlM0QlMjZyZ3NCZ25kZVN0ciUzRCUyNmJic0NsU2VxJTNEJTI2cmdz-RW5kZGVtDHIIM0QlMjZpc1ZpZXNdNaW5lJTNEZmFsc2UlMjZwYwYwJlJTNEUyNmJic09w-ZW5kZGVtRTZXEIM0QlMjZzcmNoQ29sdW1uJTNEJTI2c3JjaFdyZCUzRCUyNg%3D%3D], Accessed 11 January 2023.

³⁶ See more Cesarz, M., *A new type of EU visa? The legal nature of a travel permit issued under the European Travel Information and Authorization System (ETIAS)*, Studia Prawnicze KUL, Vol. 88, No. 4, 2021, pp. 15-16.

According to the provisions of Art. 15-17 Regulation (EU) 2018/1240, passengers (visa-free third-country nationals / visa-exempt non-EU citizens) must in advance of any intended travel to the Schengen Area (which is a geographical scope of ETIAS),³⁷ make application³⁸ for travel authorisation through ETIAS system³⁹ (via online application form) by providing personal data,⁴⁰ which will be cross-checked⁴¹ against a number of databases.⁴² ETIAS records alphanumeric and biographic data⁴³ inserted by person via application⁴⁴ and, as a automated IT border control system,⁴⁵ helps to estimate whether the presence of those third-country nationals in the territory of the EU Member States would pose a security risk,⁴⁶ illegal immigration risk⁴⁷ or high epidemic risk⁴⁸ (Art.1(1) Regulation (EU) 2018/1240) before they come to

³⁷ European Commission, Feasibility Study for a European Travel Information and Authorisation System (ETIAS), November 2016, p. 13 [https://home-affairs.ec.europa.eu/system/files/2020-09/etias_feasibility_study_en.pdf], Accessed 20 September 2022.

³⁸ Passengers (aged above 18 and until under 70 at the time of the application), as applicants, need to pay a travel authorisation fee (7 EUR) for each application – Art. 18(2) Regulation (EU) 2018/1240.

³⁹ According to Art. 32(1-2) of the Regulation (EU) 2018/1240, as a rule, a decision on the application will be made no later than 96 hours after the submission of an application.

⁴⁰ See more Art. 17 Regulation (EU) 2018/1240. More on risks of discriminations in respect of protection of personal data, protection of fundamental rights etc. see Borges Fortes, P. R.; Baquero, P. M.; Restrepo Amariles, D., *Artificial Intelligence Risks and Algorithmic Regulation*, European Journal of Risk Regulation, Vol. 13, 2022, p. 358; Michéa, F.; Rousvoal, L., *The Criminal Procedure Out of Itself: A Case Study of the Relationship Between EU Law and Criminal Procedure Using the ETIAS System*, European Papers, Vol. 6, 2021, No 1, p. 477. On other controversies regarding the Regulation (EU) 2018/1240 see Tiekstra, W., *Free movement threatened by terrorism: an analysis of measures proposed to improve EU border management*, ICCT Policy Brief, 2019, pp. 7-9 [<https://icct.nl/app/uploads/2019/10/Free-movement-threatened-by-terrorism.pdf>], Accessed 16 November 2022.

⁴¹ The delivery of an authorisation to travel under the ETIAS scheme is conditional upon the automated processing (comparison) of applicant personal data held in existing information systems (Bigo, *op.cit.*, p. 88).

⁴² Brouwer, E., *Schengen and the Administration of Exclusion: Legal Remedies Caught in between Entry Bans, Risk Assessment and Artificial Intelligence*, European Journal of Migration and Law, Vol. 23, 2021, p. 494.

⁴³ If we consider the volume of personal data it will process, ETIAS should be conceived as a platform for mining and profiling personal data rather than a platform for issuing automated or manual travel authorisation decisions (Bigo, *op.cit.*, p. 88).

⁴⁴ Duić, D.; Rošić, M., Interoperability between the EU information systems – from an idea to the realisation, *Policija i sigurnost*, Vol. 31, No. 2, 2022, p. 136.

⁴⁵ More on ETIAS as a tool of extraterritorial control see Vavoula, N., *The “Puzzle” of EU Large-Scale Information Systems for Third-Country Nationals: Surveillance of Movement and Its Challenges for Privacy and Personal Data Protection*, *op.cit.*, p. 14.

⁴⁶ “Security risk” means the risk of a threat to public policy, internal security or international relations for any of the Member States (Art. 3(1) point 6 of the Regulation (EU) 2018/1240).

⁴⁷ “Illegal immigration risk” means the risk of a third-country national not fulfilling the conditions of entry and stay as set out in Article 6 of Regulation (EU) 2016/399 see more *infra*, footnote 54 (Art. 3(1) point 7 of the Regulation (EU) 2018/1240).

⁴⁸ “High epidemic risk” means any disease with epidemic potential as defined by the International Health Regulations of the World Health Organization (WHO) or the European Centre for Disease Preven-

the external borders of Schengen Area.⁴⁹ For these purposes, a travel authorisation⁵⁰ is introduced (Art. 1(1) Regulation (EU) 2018/1240), so if visa-free third-country nationals want to travel to the Schengen Area, they need to have (prior to their arrival at the border of the Schengen Area)⁵¹ valid travel authorisation.⁵² Valid travel authorisation will be mandatory pre-condition for the entry to the Schengen Area.⁵³ Furthermore, according to Art. 71(1) point m) of the Regulation (EU) 2018/1240, the possession of a valid travel authorisation is a condition for stay that has to be fulfilled during the entire duration of a short stay⁵⁴ on the territory of Member States, i.e. Schengen Area countries. Although it is a measure that ensures increased security and protection and strengthening of external border management at the European level, whether or not the person has a valid travel authorisation shall not be regarded as a decision to authorise or refuse entry in accordance with Regulation (EU) 2016/399 (Art. 45(2) Regulation 2018/1240).

While some of ETIAS authorisation goals are improving EU internal security, preventing of illegal immigration, protecting of public health, enhancing the effectiveness of border control for security purposes, from the passengers' perspective we can say that obtaining the authorisation in question does not guarantee visa-exempt

tion and Control (ECDC) and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States (Art. 3(1) point 8 of the Regulation (EU) 2018/1240).

⁴⁹ To assess whether a person is eligible to enter the EU, three levels of information sorting will be used (Brouwer, E., *Schengen and the Administration of Exclusion: Legal Remedies Caught in between Entry Bans, Risk Assessment and Artificial Intelligence*, European Journal of Migration and Law, Vol. 23, 2021, p. 495).

⁵⁰ See Art. 3(1), 5 Regulation (EU) 2018/1240.

⁵¹ Quintel, T., *Connecting personal data of Third Country Nationals: Interoperability of EU databases in the light of the CJEU's case law on data retention*, Faculty of Law, Economics and Finance, University of Luxembourg, Law Working Paper Series, Paper number 2018-002, p. 8, [<https://orbilu.uni.lu/bitstream/10993/35318/1/Teresa%20Quintel%20Interoperability%20of%20EU%20Databases.pdf>], Accessed 12 January 2023. More on ETIAS function as "pre-screening travellers" see Casarz, M., *op.cit.*, p. 24.

⁵² A travel authorisation shall be valid for three years or until the end of validity of the travel document registered during application, whichever comes first, and shall be valid for the territory of the Member States (Art. 36(5) Regulation (EU) 2018/1240).

⁵³ Memo: *Questions and Answers on ETIAS* [https://home-affairs.ec.europa.eu/system/files/2022-07/European%20Travel%20Information%20and%20Authorisation%20System-ETIAS-memo_en.pdf], Accessed 20 September 2022.

⁵⁴ Short stay means stays in the territory of the Member States within the meaning of Article 6(1) of Regulation (EU) 2016/399 (Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders - Schengen Borders Code, [2016] OJ L77/1-52) i.e., intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay (see more Art. 3(1) point 11 and Art. 80 of the Regulation (EU) 2018/1240).

non-EU citizens automatic rights of entry but it seems that using ETIAS authorisation will make crossing the external borders easier. However, it is important to emphasise that passengers who are EU citizens do not need to have ETIAS authorisation but they, including non-EU citizens who are not subject to the visa-free regime, will benefit from using ETIAS for visa-exempt non-EU citizens. In fact, digital surveillance and pre-authorisation through ETIAS represent collection and sharing of numerous visa-exempt non-EU citizens' personal data and security database check through numerous EU electronic databases (IT systems). This pre-entry screening process involves using of improved security actions through algorithm profiling. Since the mentioned procedure is carried out prior to the visa-exempt non-EU citizens' travel to the Schengen Area (i.e. before they come to the external borders of Schengen Area), we can conclude that these new European requirements for visa-exempt non-EU citizens will contribute to the implementation of more efficient (automated) border control, which will consequently result in an easier and faster passage through all stages of border control for all passengers crossing external borders. At the same time, we can conclude that this will contribute to a better perception of all passengers of their safety during the trip, since for visa-exempt non-EU citizens, who represent security, illegal immigration or high epidemic risk, travel authorisation shall be refused and they would not be able to cross the external borders, so they would be turned away from the border.

Although ETIAS is not in operation yet, it is estimated that it should be operational from November 2023.⁵⁵ When fully operational, ETIAS will be mandatory, pre-screening millions of visa-free third country nationals entering Schengen airports.⁵⁶

4. CARRIER'S OBLIGATION OF USING ETIAS

ETIAS enables national migration and security authorities to use the pre-screening and gives them the possibility of assessing security and migratory risks prior to arrival at the border, so there will be reducing refusals of entry at the border for visa-exempt third-country nationals.⁵⁷ More precisely, the carrier⁵⁸ is responsible

⁵⁵ 2022: *Last chance to visit Europe before ETIAS*, [<https://www.etias.info/2022-last-chance-to-visit-europe-before-etias/>], Accessed 20 September 2022.

⁵⁶ Center for Immigration Studies, *Entry-Exit Biometric Controls Are Coming to Schengen; EU "Smart Borders" Poised to Surpass U.S.*, June 2022 [<https://cis.org/Linderman/EntryExit-Biometric-Controls-Are-Coming-Schengen-EU-Smart-Borders-Poised-Surpass-US>], Accessed 20 September 2022.

⁵⁷ European Commission, *Feasibility Study for a European Travel Information and Authorisation System (ETIAS)*, November 2016, p. 12 [https://home-affairs.ec.europa.eu/system/files/2020-09/etias_feasibility_study_en.pdf], Accessed 20 September 2022.

⁵⁸ According to Art. 45(1) Regulation (EU) 2018/1240, questions on access to data for verification by carriers includes air carriers, sea carriers and international carriers transporting groups overland by coach. See more Vavoula, N., "*You (Probably) Are Who I Say You Are*" – *ETIAS and the Fourfold Shift in*

for ensuring that the passenger has valid and authentic travel document for the country he is traveling to.⁵⁹ Currently, carriers only check whether visa-exempt passengers have a travel document.⁶⁰

4.1 Carrier's obligations of verification of passengers' possession of a valid travel authorisation

In chapter VII "Use of ETIAS by carriers" of the Regulation (EU) 2018/1240 (Art. 45-46) contains decisions on carrier obligation to use ETIAS. According to Art. 45(1) Regulation (EU) 2018/1240, by sending a query⁶¹ (through carrier interface⁶²) to the ETIAS Information System, carriers are obliged to verify⁶³ whether or not third-country nationals (who are exempt from the requirement to be in possession of a visa when crossing the external borders) are in possession of a valid travel authorisation to enter the Schengen Area which they will be able to read electronically⁶⁴ based on passenger travel document and indicating the EU Member State of entry. It is important to state that according to Art. 5(1) of the Regulation (EU) 2022/1380, carriers shall provide more passenger data (than data according to Art. 45(1) Regulation (EU) 2018/1240). To be more precise, according to Art. 5(1) Regulation (EU) 2022/1380 stipulates the carrier shall provide

the Operationalisation of Information Systems, in: Immigration and Privacy in the Law of the European Union, Brill Nijhoff, 2022, pp. 498-499. More on derogation from the provision of the Art. 45(1) Regulation (EU) 2018/1240 in regards to international carriers transporting groups overland by coach see Art. 45(9) of the Regulation (EU) 2018/1240. More on carriers which are/are not bound by ETIAS see Frontex, *op.cit.*, pp. 10, 26-30.

⁵⁹ See more Boccardi, I., *Europe and Refugees: Towards an EU Asylum Policy*, Kluwer Law International, 2002, p. 47.

⁶⁰ European Commission, *Evaluation of the Council Directive 2004/82/EC on the obligation of carriers to communicate passenger data (API Directive)*, Brussels, SWD(2020) 174 final, p. 44 [<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0174&qid=1668776873018&from=EN>], Accessed 18 November 2022.

⁶¹ Such a query is to be made by means of secure access to a carrier gateway – Preamble on 3) of the Commission Implementing Regulation (EU) 2022/1380 of 8 August 2022 laying down the rules and conditions for verification queries by carriers, provisions for data protection and security for the carriers' authentication scheme as well as fall back procedures in case of technical impossibility and repealing Implementing Regulation (EU) 2021/1217, [2022] OJ L207/1–11, hereafter: Regulation (EU) 2022/1380 (see more Art. 3(1) and 5(1) Regulation (EU) 2022/1380).

⁶² Carrier interface means the carrier gateway to be developed by eu-LISA in accordance with Article 73(3) of Regulation (EU) 2018/1240 and consisting of an IT interface connected to a read only database – Art. 2(1) of Regulation (EU) 2022/1380. According to Art. 3(3) of Regulation (EU) 2022/1380, carriers shall ensure that only authorised staff have access to the carrier interface.

⁶³ The verification query shall be sent at the earliest 48 hours prior to the scheduled time of departure (Art. 3(2) of Regulation (EU) 2022/1380).

⁶⁴ More on electronic travel authorisation see Shachar, A., *Beyond open and closed borders: the grand transformation of citizenship*, Jurisprudence, Vol. 11, No. 1, 2020, p. 10.

the following traveller data: a) data from passenger travel document:⁶⁵ aa) surname (family name); first name or names (given names); ab) date of birth, sex and nationality; ac) the type and number of the travel document and the three letter code of the issuing country of the travel document and ad) the date of expiry of the validity of the travel document; and b) data on: ba) the scheduled day of arrival at the border of the Member State of entry; bb) one of the following - the scheduled Member State of entry or where possible to identify the scheduled Member State of entry, an airport in the Member State of entry; and bc) the details (local date and time of scheduled departure, identification number where available or other means to identify the transport) of the means of transportation used to access the territory of a Member State. These are provisions that further determine the rules and conditions for verification queries by carriers.

If carriers transport passengers to the country of the Schengen Area, they shall (prior to the boarding of a passenger) provide the data contained in the machine-readable zone of the travel document, indicate the Member State of entry and verify whether the third-country national is in possession of a valid travel authorisation.⁶⁶ Carriers have obligation to verify passenger's possession of a valid travel authorisation except in case when it was technically impossible to proceed with the query referred to in Art. 45(1) Regulation (EU) 2018/1240 because of a failure of any part of the ETIAS Information System (Art. 46(1) Regulation (EU) 2018/1240). In case when third-country nationals subject to the travel authorisation requirement do not have a valid travel authorisation, carriers are not allowed to transport them.

4.2. Carrier's obligations in the case when visa-free third-country nationals (passenger without valid travel authorisation) were refused entry at the border

In the case when carriers transport third-country nationals (who are exempt from the requirement to be in possession of a visa and do not have a valid travel authorisation) they will get refusal of entry at Schengen borders so carriers will be obligated to return them from borders at carrier's expense and the carrier will also be subject to penalties⁶⁷ according to Art. 45(5) Regulation (EU) 2018/1240. The

⁶⁵ Carriers shall be allowed to scan the machine-readable zone of the travel document (Art. 5(2) Regulation (EU) 2022/1380).

⁶⁶ In the case of airport transit, air carrier shall not be obliged to verify whether the third-country national is in possession of a valid travel authorisation (Art. 45(2) Regulation (EU) 2018/1240).

⁶⁷ More on carriers' sanctions as standard control mechanisms see Mau, S.; Brabandt, H.; Laube, L.; Roos, C.: *Liberal States and the Freedom of Movement: Selective Borders, Unequal Mobility*, Palgrave Macmillan, 2001, p. 95.

legal basis for the introduction of such type of obligations for carriers (in terms of transportation third-country nationals without valid travel authorisation) can also be found in earlier European legal provisions: Convention Implementing the Schengen Agreement (Art. 26(2)) and Directive 2001/51/EC (Art. 4) referred to in Art. 45(5) Regulation (EU) 2018/1240.

4.2.1. Convention Implementing the Schengen Agreement, Directive 2001/51/EC

Aiming to achieve gradual abolition of checks at borders, on 19 June 1990 in Schengen the Convention Implementing the Schengen Agreement (CISA Convention)⁶⁸ was signed which entered into force on 26 March 1995.⁶⁹ The Contracting Parties of the CISA Convention (Belgium, Germany, France, Luxembourg, Netherlands)⁷⁰ have undertaken to implement into their own national legislation provisions on the carrier's⁷¹ duty to: a) take all the necessary measures to ensure that an alien⁷² carried by air or sea is in possession of the travel documents⁷³ required for entry into the territories of the Contracting Parties (Art. 26(1) on b) CISA Convention);⁷⁴ and b) if aliens are refused entry into the territory of one of the Contracting Parties, the carrier which brought them to the external border⁷⁵ by air, sea or land shall be obliged immediately to assume responsibility for them again, eg. carrier shall be obliged, at the request of the border surveillance

⁶⁸ 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, [2000] OJ L239/19–62.

⁶⁹ CISA Convention included the abolition of border controls as a legal obligation (Salomon, S.; Rijpma, J., *A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship*, German Law Journal, p. 13 [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/1E2B43D2B7F58EE752053CD7F10C050E/S2071832221000602a.pdf/a-europe-without-internal-frontiers-challenging-the-reintroduction-of-border-controls-in-the-schengen-area-in-the-light-of-union-citizenship.pdf], Accessed 22 November 2022.

⁷⁰ Hereafter: Contracting Parties.

⁷¹ Carrier means mean any natural or legal person whose occupation it is to provide passenger transport by air, sea or land (Art. 1. CISA Convention).

⁷² Alien shall mean any person other than a national of a Member State of the European Communities (Art. 1 CISA Convention).

⁷³ There is no definition of travel documents in CISA Convention. More on the list of travel documents which entitle the holder to cross the external borders – see Decision No 1105/2011/EU of the European Parliament and of the Council of 25 October 2011 on the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa and on setting up a mechanism for establishing this list, [2011] OJ L287/9-12.

⁷⁴ See more Cholewinski, R., *The EU Acquis on Irregular Migration: Reinforcing Security at the Expense of Rights*, European Journal of Migration and Law, No. 2, 2000, p. 382.

⁷⁵ External borders means Contracting Parties' land and sea borders and their airports and sea ports, provided that they are not internal borders (Art. 1 CISA Convention).

authorities, to return the aliens to the third state⁷⁶ (from which they were transported or which issued the travel document on which they travelled) or to any other third state to which they are certain to be admitted (Art. 26(2) on a) CISA Convention).⁷⁷ It is important to note that the provisions of Art. 26(2) CISA Convention require that Contracting Parties impose penalties⁷⁸ on carriers which transport aliens (who do not possess the necessary travel documents) by air or sea from a third state to their territories.⁷⁹ Carrier sanctions constitute a primary tool for ensuring pre-arrival migration control.⁸⁰

The provisions of Art. 26 CISA Convention are supplemented by provisions of Directive 2001/51/EC⁸¹ which harmonises the amount of financial penalties provided by the EU Member States.⁸² European legislator prescribed that EU Member States shall take the necessary steps to ensure that the penalties applicable to carriers under the provisions of Art. 26(2) CISA Convention are dissuasive, effective and proportionate and that: a) either the maximum amount of the applicable financial penalties is not less than 5 000 EUR, for each person carried; or b) the minimum amount of these penalties is not less than 3 000 EUR, for each person carried; or c) the maximum amount of the penalty imposed as a lump sum

⁷⁶ Third state means any State other than the Contracting Parties (Art. 1 CISA convention).

⁷⁷ The aforementioned obligations are also prescribed according to the provisions of the Annex V, part A “Procedures for refusing entry at the border”, point 2 of the Regulation (EU) 2016/399; Art. 45(8) of the Regulation (EU) 2018/1240.

⁷⁸ See more Brouwer, A.; Kumin, J., *Interception and Asylum: When Migration Control and Human Rights Collide*, Refuge, Vol. 21, No. 4, 2003, p. 10.; Mcnamara, F., *Member State Responsibility for Migration Control within Third States – Externalisation Revisited*, European Journal of Migration and Law, Vol. 15, No. 3, 2013, p. 331.; Primorac, Ž., *Pravne posljedice provjere putnikovih putnih isprava u zračnim lukama – opravdanost razloga za uskraćivanje ukrajca na let*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 40, No. 3, 2019, pp. 1142-1143.

⁷⁹ See more Puntervold Bo, B., *Recent tendencies in immigration control policies in Europe: undermining legal safeguards and refugee protection?*, in: *Migration and Mobility in Europe: Trends, Patterns and Control*, Edward Elgar Publishing, 2009, p. 280. More on EU Member States (Belgium, Germany, Denmark, Greece, France, Italy, Luxembourg, Netherlands, Portugal) were carriers may be fined see Cruz, A., *Carriers Liability in the Member States of the European Union*, Churches Commission for Migrants in Europe, CCME Briefing Paper No.17, 1994, p. 10-12 [https://ccme.eu/wp-content/uploads/2018/12/Briefing_Paper_17_UK.pdf], Accessed 18 November 2022.

⁸⁰ Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, 2011, p. 160.

⁸¹ 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 1985 entered into force on 9 August 2001 [2001] OJ L187/45-46, hereafter: Directive 2001/51/EC.

⁸² More on carriers’ sanctions in Austria, Greece, France, Italy, Netherlands and Portugal see Amnesty International, *No Flights to Safety, Carrier Sanctions*, ACT 34/21/97, November 1997, pp 3-7 [<https://www.amnesty.org/en/wp-content/uploads/2021/06/act340211997en.pdf>], Accessed 21 September 2022.

for each infringement is not less than 500 000 EUR, irrespective of the number of persons carried.⁸³ EU Member States are able to retain or introduce additional measures or penalties for carriers.⁸⁴

4.2.2. Regulation (EU) 2018/1240

Although Regulation (EU) 2018/1240 entered into force at the beginning of October 2019, the previously analysed provisions are still not applied. More precisely, according to Art. 96 of Regulation (EU) 2018/1240 it is prescribed that the European Commission will determine the start of application of the relevant provisions in accordance with Art. 88, i.e. European Commission shall determine the date from which ETIAS is to start operations (by fulfilling the conditions from Art. 88(1) of the Regulation (EU) 2018/1240) and by publishing the relevant decision in the Official Journal of the European Union (Art. 88(4) of the Regulation (EU) 2018/1240).

It is expected that the start of ETIAS application will come from November 2023, so carriers will be subject to penalties in the case of transporting a third-country national who does not have a valid travel authorisation (application of the provisions of the Art. 26(2) CISA Convention and Art. 4 of the Directive 2001/51/EC).⁸⁵ Exceptionally, if for the same third country nationals carrier is already subject to penalties provided for in accordance with Art. 26(2) CISA Convention and Art. 4 Directive 2001/51/EC, penalties referred to in Art. 45(5) Regulation (EU) 2018/1240 shall not apply.⁸⁶ Also, the penalties referred to in Art 45(5) of the Regulation (EU) 2018/1240 shall not be imposed on carriers in the case of a technical impossibility to access data by carrier because of a failure of any part of the ETIAS Information System (Art. 46(1-2) Regulation (EU) 2018/1240). In that case, if the carrier was not able to access data because of the technical impossibility (failure) of any part of the ETIAS Information System, carrier shall be exempted of the obligation to verify passengers' possession of valid travel authorisation and carrier shall not be imposed penalties from Art. 45(5) of the Regulation (EU) 2018/1240. Therefore, the application of penalties to the carrier will only occur if the carrier transports a visa-free third-country national with a valid and authentic passport or other travel document, but without a valid travel authorisation⁸⁷ (if the transportation of the mentioned persons without a valid travel authorisation-

⁸³ Art. 4(1) Directive 2001/51/EC.

⁸⁴ Preamble on 4) Directive 2001/51/EC.

⁸⁵ Art. 45(5) Regulation (EU) 2018/1240.

⁸⁶ Art. 45(6) Regulation (EU) 2018/1240.

⁸⁷ Primorac, Ž., *op. cit.*, p. 1144.

did not occur due to technical impossibility to access data by carrier because of a failure of any part of the ETIAS Information System).

From the carriers' view there is fear that ETIAS authorisation will contribute to an increase in the number of delays, since the amount of work that the carrier's employees will have to undertake will increase. We can conclude that they will need to bear all financial costs that will arise from their obligation to verify visa-free non-EU citizens' possession of a valid ETIAS authorisation prior to boarding which can cause disruption and possibly have an impact on an obligatory recruitment of new personnel, including costs for taking all technical and technological measures for providing verification of ETIAS authorisation, costs for penalties if they transport visa-free non-EU citizens without a valid travel authorisation etc.

5. CONCLUSION

Passengers can travel within the Schengen Area without being carried out controls at the internal borders, but the strengthening of internal security presupposes the implementation of increased surveillance at the external borders of the Schengen Area (carrying out of border controls). The implementation of the provisions on ETIAS requirements contained in Regulation (EU) 2018/1240, which constitute the Schengen acquis, aims to strengthen external border controls by identifying those visa-free third-country nationals (visa-exempt non-EU citizens) who want to travel to Schengen Area, and who represent a security risk, illegal immigration risk or high epidemic risk. For visa-exempt non-EU citizens, we already use all available passenger data control mechanisms according to the provisions of Directive 2004/82/EC (regardless of whether the passengers are EU citizens or non-EU citizens, eg. passengers with or without visa; air carriers' data transmission only on request of the authorities responsible for passenger control at external borders; aiming to achieve better border control on the EU external borders; prohibited exchange of this data between EU Member states) and Directive (EU) 2016/681 (for all passengers of extra-EU flights; air carrier transmission to the PIU database of the EU Member State on the territory of which the flight will land or from the territory of which the flight will depart; aiming to achieve prevention, detection, investigation and prosecution of terrorist offences and serious crime; possible exchange of information between EU Member States).

When ETIAS, as a digital pre-travel screening system, becomes operational (expected in November 2023) and a mandatory requirement,⁸⁸ prior to travel to

⁸⁸ During the period of six months from the date of commencement of the ETIAS, the use of the ETIAS is not mandatory and the obligation to have a valid travel authorization does not apply (Art. 83(1))

the Schengen Area all visa-exempt non-EU citizens will have to make an online application (through ETIAS) for travel authorisation if they want to have short visiting stay (up to 90 days) in Schengen Area. ETIAS authorisation is valid for an unlimited number of entries to 30 European countries on the condition that ETIAS authorisation is valid and that visa-exempt non-EU citizens also fulfill all other entry conditions (valid travel document, but also other accompanying documentation regarding entry conditions required by the state they are planning to visit). ETIAS authorisation is valid for the time period of max. 3 years or shorter if visa-exempt non-EU citizen's travel document expires earlier (in that case, until the end of validity of the travel document). It is important to note that visa-exempt non-EU citizens do not need ETIAS authorisation for the internal travel within the Schengen Area.

ETIAS will help estimate whether the presence of visa-exempt non-EU citizens would pose a security risk, illegal immigration risk or high epidemic risk even before they travel to the Schengen Area. That information will be useful for greater efficiency of external border checks. According to new European rules in Regulation (EU) 2018/1240, visa-exempt non-EU citizens have an obligation to apply for travel authorisation (through ETIAS) prior to travelling to the Schengen Area, and carriers (air carriers, sea carriers and international carriers transporting groups overland by coach) have an obligation to verify whether visa-exempt non-EU citizens have a valid travel authorisation (ETIAS authorisation) to enter the Schengen Area which they will be able to read electronically, prior to boarding. In the case when visa-exempt non-EU citizens do not have a valid travel authorisation, carriers are responsible to deny them boarding. Carriers are not allowed to transport them, otherwise, if they get refusal of entry, carriers will have the obligation to return them from borders and they will also be penalised (fined) according to Regulation (EU) 2018/1240, CISA Convention and Directive 2001/51/EC.

Since Regulation (EU) 2018/1240 was adopted on 12 September 2018 and entered into force on 9 October 2018, after more than 4 years since its entry into force to date ETIAS is not operational. Considering the complexity and extensiveness of the measures that necessarily include solving the financial, technological⁸⁹ and legal aspects of using ETIAS, the question arises whether it can be expected that ETIAS, as new electronic platform for digital surveillance and automatic profiling

Regulation (EU) 2018/1240).

⁸⁹ More on ETIAS which combines complexity on technological and legal level see Michéa; F; Rousvoal, L., *The Criminal Procedure Out of Itself: A Case Study of the Relationship Between EU Law and Criminal Procedure Using the ETIAS System*, European Papers, Vol. 6, 2021, No 1, p. 476-477. More on data protection standards, fundamental rights and privacy aspects in case of using multiple EU information systems of passengers surveillance see Quintel, *op.cit.*, p. 1-19.

of passengers from 60 countries, will truly start being applied by the end of 2023? We can see that there are more questions that need to be answered. This includes the necessity of answering key legal issues regarding verification of passenger data which are given when submitting an online request for travel authorisation, protection of fundamental rights, passengers data protection rules etc. The European Commission is authorised to adopt a series of delegated acts, including an act that defines in more detail the risks related to security or illegal immigration or a high epidemic risk (Art. 33(2) Regulation (EU) 2018/1240) since the standardisation of the terms security risk, illegal immigration risk and high epidemic risk within the provisions of Regulation (EU) 2018/1240 enables their uneven interpretation, which contributes to legal uncertainty, and the risks in question represent reasons for profiling of visa-free non-EU citizens from 60 countries. Considering that the authorisation in question was granted to the European Commission for a period of five years starting from 9 October 2018 (that is, until 9 October 2023),⁹⁰ it remains to be seen whether the European Commission, which is responsible for proposing European legal acts, will succeed in formulating appropriate delegated acts, the adoption of which would contribute to the formation of a systematic and complete European legal framework on the establishment and implementation of ETIAS. While legal framework is not yet complete, there is still time to implement provisions which will enable better interoperability between existing and newly established ETIAS information system for security and border control and to find balance between massive visa-free non-EU citizens surveillance, automated processing and profiling of their personal data in numerous information systems (where ETIAS is an instrument for visa-free non-EU citizens control when they are outside the external borders of the Schengen Area!) and data processing protection standards and requirements which must be respected in the EU.

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