Digitalising borders: ETIAS AND ETA

The European Union's (**the "EU"**) long-standing ambition to strengthen the security of the Schengen area has been delayed once again. Since 2016, the EU has sought to introduce an electronic border system to monitor travel of nationals from visa-free countries (including the UK), yet 7 years later this system is still not in place.

Unsurprisingly, the UK is also now in the process of introducing a similar electronic border system that will impact EU nationals, as well as other nationals from visa-free countries. The UK system, however, seems somewhat behind in terms of details of how this new electronic border system will work. Nonetheless, it is a race to the finish line to see who can implement this system first.

1 ETIAS – a visa for visa-free countries?

The European Travel Information and Authorisation System ("**ETIAS**")[1], along with a new Entry/Exit System ("**EES**")[2], aims to enhance the security of the Schengen area in the absence of hard borders.

ETIAS is a new form of travel authorisation for short-term tourist or business visitors from applicable countries. It will require non-EU nationals to obtain authorisation prior to travelling to any country in the Schengen area, including those currently soon to be part of the Schengen area (i.e. Bulgaria, Romania, and Cyprus)[3]. Eligible passengers are required to register online, submit a photo of their passport, and pay a fee of EUR€7 (passengers under 18 or over 70 can apply for free). The aim is that the passenger's application for authorisation should be approved within minutes and if further checks are necessary, these are completed within 30 days. Once authorisation has been granted, passengers will be allowed to enter the EU multiple times over a 3-year period, for up to 90 days in any 180-day period. The European Commission has emphasised that ETIAS is not a visa, but a security measure that will allow the EU to monitor travel from third countries which, after Brexit, includes travellers from the UK. ETIAS is similar to the US ESTA system, in that its aim is to maintain visa-free status for certain nationalities whilst optimising border security.

At the same time, EES will modernise and digitalise border control. The new system will record each time and place of entry into the EU and automatically calculate the duration of authorised stay, making passport stamps a memory from the past. The EES will apply to all non-EU visitors entering the EU, either with an ETIAS or other form of visa (e.g. short-stay visas for one or two entries).

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[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

[2] EES was adopted by 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

[3] The full list of 30 European countries that ETIAS will apply to can be found at: https://travel-europe.europa.eu/etias/who-should-apply_en#ETIAS-countrieso should apply (europa.eu). Ireland does not require ETIAS.

2 How will this affect UK nationals

Since Brexit, UK nationals are regarded as third-country nationals who do not need a visa for short-term visits to the EU. Once ETIAS is implemented, UK nationals, as well as nationals from over 60 visa-exempt countries (e.g. Australia, Canada, New Zealand and the USA), will be required to register for ETIAS in advance of their trip. However, UK nationals who have the right to reside in the EU because they were resident in an EU Member State at the end of the Brexit transition period (31 December 2020) will be exempt.

3 What does this mean for air carriers operating into the EU?

The implementation of both ETIAS and EES will place new obligations on **all carriers transporting passengers from a third country to any of the European countries using EES or requiring an ETIAS**. Crew members who are "*performing their duties*" will be exempt from ETIAS registration. However, each Member State has discretion in determining whether crew members will require an ETIAS when they disembark or travel to the aircraft. It is not clear what is exactly meant by "*performing their duties*" and whether a wide interpretation will be provided by the individual Member States. It therefore remains to be seen what the requirements will be on crew members who are not EU nationals.

Air carriers will be required to confirm that every visa-free third-country national holds a valid ETIAS authorisation prior to boarding the aircraft[4]. In addition, for EES, air carriers must ensure that passengers who hold a short-stay visa issued for one or two entries

have not already used the number of entries authorised by their visa. Where a carrier is responsible for bringing to the EU a traveller who does not hold valid travel documents and authorisation, it will be subject to a penalty imposed by the Member State according to their national law[5] and will be responsible for the costs of repatriation[6]. If a passenger does not have the required ETIAS or has exceeded their short-stay visa, the carrier can refuse boarding to the passenger, and this is unlikely to be regarded as "*denied boarding*" for the purposes of Regulation 261/2004[7].

To that end, air carriers are encouraged to register in advance for the EES and ETIAS carrier interface, which will enable them to verify travellers' status up to 48 hours before the scheduled time of departure. Air carriers are also advised to communicate the change in requirements and the introduction of the ETIAS in its pre-departure correspondence. The European Border and Coast Guard Agency published an FAQ document to provide guidance to carriers on EES and ETIAS[8].

4 Where are we now?

Whilst originally planned for early 2023, both ETIAS and EES have been postponed. EES is due to come into effect from November 2023, and ETIAS will be implemented in 2024 (date to be confirmed). ETIAS and EES face several obstacles, including installing the technology and equipment at national borders, funding, resourcing and training of staff. The European system has been criticised by the aviation, maritime, and rail industries, as many stakeholders fear that it will lead to delays and chaos at airports and ports, especially during first visits to the EU where travellers will be

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[4] Article 26(1)(b) of Convention Implementing the Schengen Area ("**CISA**"), Article 45(1) of Regulation (EU) 2018/1240 and Article 3 of Commission Implementing Regulations (EU) 2022/1380
[5] Article 45 (5) of the Regulation (EU) 2018/1240 and Article 26 of CISA
[6] Article 26(1)(a) of CISA
[7] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on

compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91
[8] Frontex – Frequently Asked Questions (FAQ) in support of carriers' public section, 9 December 2022 (https://www.eulisa.europa.eu/Organisation/GoverningBodies/Documents/WG%20Carriers/Documents/Carrier_FAQ.pdf)

required to provide biometric data. The Eurostar at St Pancras, for example, poses a particular challenge due to the lack of available space. Similarly, ports in their current state seem ill-prepared for the new checks.

The aviation industry has been particularly critical of the lack of any information campaign aimed at travellers. While both schemes envisage a 6-month transitional period, during which ETIAS registration will remain optional, many fear that travellers may still be taken by surprise and refused boarding. Airlines should therefore focus on driving the publicity of the upcoming changes to passengers. Others have also expressed concerns over the new technology, which will need testing to ensure that passengers have a smooth travelling experience. The decision to push back the EES until the end of 2023 was therefore welcomed by Airport Council International Europe, Airlines for Europe, European Regions Airline Association, and the International Air Transport Association who issued a joint statement on the issues that must be resolved before the EES can be implemented smoothly.

5 Reciprocal scheme for the UK's border

The UK has been developing a similar system for travellers from eligible countries, known as the Electronic Travel Authorisation ("**ETA**")[9]. Similar to ETIAS, non-UK passengers who do not need a visa to enter the UK will be required to register online and obtain an ETA prior to travel. ETA is part of a wider plan to fully digitalise borders by 2025 and is being rolled out in a phased process. From 15 November 2023, only nationals of Qatar will need an ETA. From February 2024, nationals from Bahrain, Jordan, Kuwait, Oman, Saudi Arabia and UAE will need an ETA. It is expected that the list will include EU nationals and other nationals from visa-exempt countries (e.g. Australia, Canada New Zealand and the USA). The authorisation process is not as quick as ETIAS, and applications will be approved within 48-72 hours. The cost for an ETA is still to be

determined. Once granted, the ETA will last for 2 years, and passengers can make multiple visits to the UK (including staying in the UK for up to 6 months for tourism, business or study). Carriers are required to ensure passengers entering into the UK have a valid ETA before boarding their flight, otherwise, the carrier could be subject to a penalty of GBP£2,000, as well as the cost of repatriating the passenger back to their country of departure[10].

The UK Government has released very few details about the ETA scheme so far, and further details are expected to be released in due course.

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[9] Section 75 of the Nationality and Borders Act 2022, amending the Immigration Act 1971.

[10] Section 76(2) of the Nationality and Borders Act 2022

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