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From: Presidency

To: Working Party on Frontiers/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)

Subject: Proposal for a Regulation of the European Parliament and of the Council
establishing a European Travel Information and Authorisation System
(ETIAS)

The Commission presented its proposal for a Regulation establishing a European Travel Information and Authorization System ("the ETIAS proposal") on 16 November 2016.

The Working Party on Frontiers examined the ETIAS proposal (except for Articles 49 to 60 on data protection, and Articles 74 and 75 on costs and revenues) at its meetings on 20/21 December 2016, 9/10 January 2017 and 6/7 February 2017.

Following this first reading, the Presidency is of the opinion that several key issues need to be further clarified and decided upon before revised text proposals can be submitted to delegations. The Presidency would therefore like to further hear the delegations' views on those questions: (i) division of competences between the European Border and Coast Guard Agency (EBCG) and the Member States; (ii) definition of 'responsible Member State'; and (iii) duration of the authorization.

1. Division of competences between the EBCG and the Member States

Article 7 of the ETIAS proposal provides for an ETIAS Central Unit being established within the EBCG Agency. In accordance with Article 8, Member States designate a competent authority as the ETIAS National Unit.

The tasks consisting in processing the applications are therefore shared between the EBCG and the Member States, in accordance with a set of detailed rules outlined in the ETIAS proposal. *Before looking more closely into those rules, the Presidency would like to hear further thoughts from the delegations with regard to the architecture of the system as described in the ETIAS proposal.*

During the aforementioned working party meetings and in their written comments, delegations have indicated some misgivings on the issue of division of competences, while others supported the system presented in the Commission proposal:

- More centralization at EU level would alleviate the administrative and budgetary burden for Member States. More centralization could have a positive impact on the operational costs and could result in a situation where National Units don't have any more the obligation of being operative on a 24/7 basis;
- A procedure involving an automated system and the ETIAS National Units would be sufficient (no need for the ETIAS Central Unit); The complete decentralization of the manual process would allow Member States to keep complete control over the process but could have a negative impact on the operational costs and would result in a higher workload for the ETIAS National Units;
- Where the ETIAS Central System is not in a position to issue a travel authorisation, the applicant should automatically be subject to a visa requirement (thereby making superfluous the creation of the ETIAS Central Unit and National Units). *The Presidency notes however that this approach, which would also require a substantial revision of the Visa policy, has not been advised by the Legal Service.*

The Presidency therefore presents the following questions for consideration:

Would the better approach be to keep the infrastructure as proposed by the Commission?

Should there perhaps be a liaison officer from each national unit working at the central unit?

Can Member States identify tasks particular to the national units, which they believe can be carried out by the central unit?

2. Definition of 'responsible Member State'

According to Article 22(1) of the ETIAS proposal, the responsible Member State is the Member State of first entry as declared by the applicant.

This definition is important as it is the ETIAS National Unit of the responsible Member State which will issue or refuse travel authorizations, in case a hit is found during the automated processing of applications. It is also relevant as a decision by the responsible Member State denying a travel authorisation can be appealed in the Member State that has taken that decision, in accordance with the national law of that Member State.

On the basis of the comments made by delegations during the Working Party on Frontiers meetings, as well as in their written contributions, it appears that several delegations have concerns in relation to that definition and would therefore wish to define the responsible Member State differently.

Delegations have outlined the following issues:

- Defining the responsible Member State as the Member State of first entry would not lead to a fair distribution between Member States of the workload linked to the authorisation process. It is likely that Member States with large airports or with a land border with a third country would receive the highest number of applications. In that respect, defining the responsible Member State as the Member State of intended stay could assuage such concern.

- One should consider what happens in practice in relation to applicants who need a visa to enter the EU: often, the actual Member State of first entry is not the one that was declared by the traveller in his application. If such phenomenon would also take place as regards the ETIAS, it could lead to complications and lack of clarity as to the consequences for the applicant (e.g. he would be allowed entry to the EU, but only if he did not present himself at the border crossing point of the declared country of first entry because of a *force majeure*; in such case, would the burden of proof lay with the applicant or with the carrier?)
- Appeals procedure issue: Given that a Member State may be obliged to refuse a travel authorization on the basis of an alert introduced by another Member State or will be obliged to refuse it if provided with a negative opinion by another Member State, should that Member State be the one responsible in case of an appeal?

Considering the above, several delegations took the view that the responsible Member State should be the Member State which is at the origin of the alert leading to a "hit" during the automated processing.

However, such definition would need to be refined to take into account the hypothesis of an application triggering several hits (either in one system/database or in several systems/databases). The following alternative definitions have therefore been put forward by delegations. The responsible Member State is the Member State which created:

- the first -and still valid- alert;
- the last -and still valid- alert;
- the alert linked to the most serious criminal offence;
- the alert with the longest validity period.

Other delegations also suggested a mixed system where the responsibility of the Member State is determined either by the destination declared by the applicant or by the alert criterion. If one would opt for such system, the general rule could be that the responsible Member State is the Member State which has issued the alert (to be further specified), but in case there is a hit against a Europol, Interpol or other database such as the EES, the responsible Member State could be the Member State of declared first entry.

In order to make some progress on this issue, the Presidency would like to hear the delegations' views on their preferred definition:

Should the Member State of first entry be kept as the responsible member state in all cases?

Is the option of having the Member State of destination as responsible Member State a viable option?

Should the Member State that entered an alert be the responsible Member State and a hierarchy be established when more than one Member State has entered alerts?

Who would be the responsible Member State by default when an alert was not directly introduced by a Member State in a system (e.g. alert introduced by Europol based on information obtained through international cooperation).

3. Duration of the authorization

While some Member States are fine with the five-year duration of the authorization, others find this validity period too long and have suggested shorter terms. Such suggestions have varied from single use to two years (the latter being the case of the US ESTA system). In order to reflect on this issue, the impact on costs and on the workload of the Central and National Units and the burden on travelers (from a 5€ fee for 5 years to 5€ fee for 2-3 years) should be taken into consideration.

The Presidency therefore asks:

Bearing in mind the increased costs, workload and the added burden for travelers, would the Member States prefer a shorter period of validity, such as for example a 2-year one?

Considering that the main concerns by Member State relate to having only an assessment once in a 5-year period of time, would the possibility for additional re-assessment in case new alerts are introduced in the systems solve the Member States concerns (i.e. extend the re-assessment foreseen in Article 35(3) and (4) in case of new alerts in SIS and the ETIAS watchlist to other systems)?
