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NOTE

From: Presidency
To: Working Party on JHA Information Exchange (IXIM)
Subject: US Enhanced Border Security Partnership
– *Exchange of views*

I. INTRODUCTION

In February 2022, the US contacted several Member States and informed them of plans to introduce a new condition for participating in its Visa Waiver Program ('VWP'), i.e. to conclude bilateral agreements to set up an Enhanced Border Security Partnership ('EBSP'). Through the new Partnership, VWP members would allow the Department of Homeland Security to access their relevant biometric records for the purpose of immigration screening and vetting activities, namely to authenticate travellers' identities, including in the context of applications for asylum in the US.

II. WORK WITHIN THE COUNCIL

Member States took note of the introduction of a new criterion for inclusion in the US VWP. The EBSP raises many questions, such as data protection, the modalities of the biometric search, the interplay of EU and Member States competence on the issues at stake and the lack of full reciprocity of the data to be exchanged. Data transfers required under the EBSP need to comply with EU data protection law (GDPR and Police Directive). Considering the continuous and systematic transfers envisaged by the US, these should be based on an international agreement or administrative arrangement ensuring sufficient data protection safeguards.

In June 2022, following information provided to Coreper by the Commission on the state of play of the file and the issues at stake, Coreper concluded that discussions should be pursued at technical level:

- i. The new requirements under the US VWP are being discussed between the Commission and the US in a dedicated Working Group that was set up in September 2022 with a view to better understanding the scope of the new EBSP requirements, as well as their possible legal and policy implications.
- ii. Regular discussions and debriefings have been organised on this file in JHA Counsellors meetings and in the Working Party on JHA Information Exchange ('IXIM'). It appeared from those discussions that coordination at EU level is desired.

III. COORDINATION AT EU LEVEL

To move away from competence issues that have been stalling discussions at EU level so far, the Commission has recently opted for a pragmatic approach, that is to dissociate information exchange from issues linked to visa policy.

The Commission also confirmed in IXIM that bilateral negotiations could be initiated between Member States and the US to the extent that the issues discussed concern information exchange only, and not the EU's common policy on visa. IXIM also noted that the Commission is not preparing a Commission proposal for a Council Decision authorising the opening of negotiations for an agreement on EBSP between the EU and the US. The Commission has furthermore announced that it is working on a Proof of Concept that would assess the added value of this sharing of information.

On the basis of the last tour de table held in IXIM on 22 February 2023, it seems to the Presidency that delegations are generally happy with the extent of EU coordination so far. However, in light of the fact that the US have started approaching Member States with a view to discussing arrangements to implement the EBSP through existing agreements on Preventing and Combating Serious Crime ('PCSC'), the Presidency would like to raise the question of what type of coordination that Member States would like to see.

The Presidency suggests the following way forward:

- Organise regular debriefings in IXIM or JHA Counsellors meetings where the Commission updates delegations on their contacts with the US, including in the context of the above technical Working Group, and on the progress on the Proof of Concept;
- Organise exchanges of views between delegations in IXIM or JHA Counsellors meetings to support each other in negotiations with the US, which could include sharing information and draft texts, templates and agreements provided to Member States by the US (and vice-versa), as well as discussing possible lines to take with involvement of Coreper where needed.

IV. QUESTIONS

Against this backdrop, delegations are invited to share their views on the questions below during the forthcoming IXIM meeting on 24 April:

- Are you satisfied with the proposed way forward? Do you see further coordination needs, and if so, in which format?

 - In terms of timing, do you wish to wait for the results of the Proof of Concept, or do you see a need to start further EU coordination already now?
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