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#### COVER NOTE

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From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	10 December 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	COMMISSION DELEGATED DECISION of 10.12.2020 supplementing Regulation (EU) 2018/1240 of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) as regards flagging

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Delegations will find attached document C(2020) 8709 final.

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Encl.: C(2020) 8709 final



Brussels, 10.12.2020  
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**COMMISSION DELEGATED DECISION**

**of 10.12.2020**

**supplementing Regulation (EU) 2018/1240 of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) as regards flagging**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE DELEGATED ACT

In September 2018, the European Parliament and the Council adopted Regulation (EU) 2018/1240, establishing the European Travel Information and Authorisation System (ETIAS)<sup>1</sup>.

That Regulation requires the European Commission to adopt delegated acts for the development and technical implementation of ETIAS.

In particular, pursuant to Articles 36(4), 39(2) and 89 of that Regulation, the Commission is delegated the task of establishing adequate safeguards by providing rules and procedures to avoid conflicts with alerts in other information systems and to define the conditions, the criteria and the duration of flagging.

### 2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

For the purpose of developing the above-mentioned delegated act, an Expert Group was established. All Member States were presented with an opportunity to nominate experts to participate in the Expert Group on Information Systems for Borders and Security, in accordance with Article 89(4) of Regulation (EU) 2018/1240 and with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making. As a result, this Commission Decision was developed on the basis of the input given by experts of the Member States in the framework of the above-mentioned Expert Group. This Expert Group was consulted between 18 December 2018 and 4 February 2020 after which the document was considered final by the experts and by the Commission. The experts were also given the opportunity to provide the European Commission with oral and written comments throughout this period.

In addition, the European Border and Coast Guard Agency, within which the ETIAS Central Unit will be established, and Europol were consulted.

Furthermore, the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice ('eu-LISA') advised the Commission regarding the technical needs and feasibility of the measure proposed.

The European Data Protection Supervisor was consulted before adoption to ensure the respect of data protection provisions.

### 3. LEGAL ELEMENTS OF THE DELEGATED ACT

In accordance with Article 36 of Regulation (EU) 2018/1240, when ETIAS National Units are issuing a travel authorisation, they may issue a travel authorisation with two types of flags. The first type recommends border authorities to proceed with a second line check. The second

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<sup>1</sup> 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, 19.9.2018, p. 1).

type of flag informs border authorities that a hit was triggered during the processing of the application, in one or more of the other information systems which are consulted as part of ETIAS automated checks. That second type of flag is also required to indicate that the hit has been assessed and verified, and it was concluded that it constitutes a false hit or that there are no grounds for the refusal of the travel authorisation. ETIAS National Units may also attach such flags upon the request of a consulted Member State.

In accordance with Article 36(4) of Regulation (EU) 2018/1240, the Commission should provide, through the adoption of delegated acts, rules and procedures to avoid conflicts with alerts in other information systems and to define the conditions, the criteria and the duration of flagging. Furthermore, pursuant to Article 39(2) of Regulation (EU) 2018/1240, the Commission should adopt delegated acts in order to further define the type of additional information that may be added to a flag, its language and formats, as well as the reasons for the flags.

The Decision has been prepared with regard to the requirements of the principle of proportionality. In order to issue a travel authorisation with a flag, the Decision is limited to the provisions on flagging of Regulation (EU) 2018/1240. The additional information that may be added to a flag is restricted to what is necessary for the purpose of carrying out the further verifications required. The Decision establishes adequate safeguards to avoid conflicts with alerts in other information systems. These safeguards define the rules and procedures of flagging by reducing the additional information that may be added to the two types of flags to the precise framework of Regulation (EU) 2018/1240.

## COMMISSION DELEGATED DECISION

of 10.12.2020

### supplementing Regulation (EU) 2018/1240 of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) as regards flagging

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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<sup>2</sup>, and in particular Article 36(4) and Article 39(2) thereof,

Whereas:

- (1) Regulation (EU) 2018/1240 establishes the European Travel Information and Authorisation System (ETIAS) applicable to visa exempt third-country nationals seeking to enter the territory of the Member States.
- (2) When ETIAS National Units process applications, they may add two types of flag to travel authorisations, namely a “further checks needed” flag and a “false hit/no grounds for refusal” flag. The conditions and criteria for flagging and duration of flagging, as well as rules and procedures for flagging should be laid down to ensure that there are adequate safeguards for the use of flags and to avoid conflicts with alerts in other information systems.
- (3) The first type of flag (‘further checks needed’) should be used where there is doubt as to whether sufficient reasons to refuse the travel authorisation exist and recommends to border authorities to proceed with a second line check. The flag should indicate the type of doubt or doubts that triggered the need for further verification by the border authorities.
- (4) The second type of flag (‘false hit/no grounds for refusal flag’) should be used to indicate to border authorities that a hit was triggered during the processing of the application in one or more other information systems which are consulted as part of ETIAS automated checks and that it has been verified that the hit constituted a false hit or that the manual assessment has shown that there were no grounds for the refusal of the travel authorisation.

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<sup>2</sup> OJ L 236, 19.9.2018, p. 1.

- (5) Pursuant to Articles 39(1)(e) and 44(6)(f) of Regulation (EU) 2018/1240, when a flag is added, the reasons for the flagging and any relevant additional information is to be provided to assist the border authorities in the performance of their duties. Pursuant to Article 39(2) it is necessary to define further the reasons for flagging and the type of additional information that ETIAS National Units may add as well as its language and formats. For both types of flags, the ETIAS National Units should be instructed and guided by the ETIAS Information System and presented with a list of options from which to select the type of information to be added to the flags.
- (6) Pursuant to Article 27(1) of Regulation (EU) 2018/1240, where information provided by an applicant in an application form is considered insufficient to enable the taking of a decision on authorisation, applicants may be requested to provide additional information or documentation. These additional information or documentation may, among other things, form part of the additional information relevant for the purposes of second line checks pursuant to Articles 39(1)(e), 44(6)(f) and 47(4) of Regulation (EU) 2018/1240.
- (7) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark did not take part in the adoption of Regulation (EU) 2018/1240 and is not bound by it or subject to its application. However, given that Regulation (EU) 2018/1240 builds upon the Schengen *acquis*, Denmark notified on 21 December 2018, in accordance with Article 4 of that Protocol, its decision to implement Regulation (EU) 2018/1240 in its national law.
- (8) This Decision constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC; Ireland is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (9) This Decision constitutes a development of the provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC<sup>3</sup>; the United Kingdom is therefore not bound by it or subject to its application.
- (10) As regards Iceland and Norway, this Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*<sup>4</sup>, which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC<sup>5</sup>.
- (11) As regards Switzerland, this Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European

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<sup>3</sup> Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* (OJ L 131, 1.6.2000, p. 43).

<sup>4</sup> OJ L 176, 10.7.1999, p. 36.

<sup>5</sup> Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 31).

Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*<sup>6</sup>, which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC, read in conjunction with Article 3 of Council Decision 2008/146/EC<sup>7</sup>.

- (12) As regards Liechtenstein, this Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*<sup>8</sup> which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU<sup>9</sup>.
- (13) As regards Cyprus, Bulgaria and Romania and Croatia, this Decision constitutes an act building upon, or otherwise relating to, the Schengen *acquis* within, respectively, the meaning of Article 3(1) of the 2003 Act of Accession, Article 4(1) of the 2005 Act of Accession and Article 4(1) of the 2011 Act of Accession.
- (14) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council<sup>10</sup> and delivered an opinion on 4 September 2020,

HAS ADOPTED THIS DECISION:

### *Article 1*

#### ***Responsibilities of the ETIAS National Units for flagging travel authorisations***

1. The ETIAS National Unit of the Member State responsible may add a flag as referred to in Article 36(2) of Regulation (EU) 2018/1240 ('further checks needed' flag) or in Article 36(3) of that Regulation ('false hit/no grounds for refusal' flag), or a combination of both flags, to a travel authorisation.

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<sup>6</sup> OJ L 53, 27.2.2008, p. 52.

<sup>7</sup> Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 53, 27.2.2008, p. 1).

<sup>8</sup> OJ L 160, 18.6.2011, p. 21.

<sup>9</sup> Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

<sup>10</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

2. The ETIAS National Units of Member States issuing travel authorisations with limited territorial validity pursuant to Article 44 of Regulation (EU) 2018/1240 may also add the flags referred to in paragraph 1 to such travel authorisations.
3. An ETIAS National Unit of a Member State consulted may request the ETIAS National Unit of the Member State responsible to add a ‘further checks needed’ or a ‘false hit/no grounds for refusal’ flag to a travel authorisation. The request shall be submitted together with the reasoned positive opinion on the application provided for in Article 28(3)(a) of Regulation (EU) 2018/1240.
4. The ETIAS National Unit of the Member State responsible shall decide whether to issue a travel authorisation with a flag taking into account any requests received from the ETIAS National Units of the Member States consulted and only after having received all positive opinions from those ETIAS National Units.
5. Where the ETIAS National Unit of the Member State responsible decides not to add a flag requested by the ETIAS National Unit of a Member State consulted, it shall state the reasons for its decision in a free text recorded in the application file. The reasons shall be automatically communicated by the ETIAS Information System to the Member State consulted.

## *Article 2*

### *Conditions for a ‘further checks needed’ flag*

1. A ‘further checks needed’ flag may be added to a travel authorisation where it is established that each of the following conditions are met:
  - (a) there is a doubt within the meaning of Article 36(2) of Regulation (EU) 2018/1240 which does not constitute a doubt that triggers an obligation to refuse the travel authorisation pursuant to Article 37(2) of Regulation (EU) 2018/1240;
  - (b) the doubt can be verified or removed at the border;
  - (c) the additional information or documentation requested pursuant to Article 27(1) of Regulation (EU) 2018/1240 has been received; and
  - (d) at least one of the reasons for adding a flag listed in Article 4 of this Decision has been selected.
2. The ETIAS National Unit of the Member State consulted may request a ‘further checks needed’ flag to be added to a travel authorisation where it has established that the conditions referred to in paragraph 1 (a) to (d) are met.



### *Article 3*

#### *Fulfilment of conditions for a 'further checks needed' flag*

1. The condition referred to in point (a) of Article 2(1) shall be considered to have been established, where the ETIAS National Unit adding or requesting the addition of the flag has declared that the doubt:
  - (a) falls within the scope of Article 36(2) of Regulation (EU) 2018/1240; and
  - (b) does not constitute a doubt referred to in Article 37(2) of Regulation (EU) 2018/1240 that triggers an obligation to refuse the travel authorisation.
  
2. The condition laid down in point (b) of Article 2(1) shall be considered to have been established where, the ETIAS National Unit adding or requesting the addition of the flag has indicated that the doubt(s) falls into one or more of following categories of risk:
  - (a) a security risk based on doubts concerning:
    - (1) the identity of the person (including misuse of authentic travel documents);
    - (2) the authenticity of travel documents;
    - (3) the authenticity of supporting documents provided by the applicant;
    - (4) the purpose of travel and stay;
    - (5) the possible objects or substances carried by the traveller;
    - (6) a possible victim of trafficking in human beings or of a crime listed in the Annex to Regulation (EU) 2018/1240;
    - (7) a possible connection with a crime listed in the Annex to Regulation (EU) 2018/1240.
  - (b) an illegal immigration risk based on doubts concerning:
    - (1) the identity of a person (including misuse of authentic travel documents);
    - (2) the authenticity of travel documents;
    - (3) the authenticity of supporting documents provided by the applicant;
    - (4) the purpose of travel and stay;
    - (5) means of subsistence.
  - (c) a high epidemic risk based on doubts concerning:
    - (1) the authenticity of supporting documents provided by the applicant;

- (2) a person showing clear symptoms and signs of disease with epidemic potential or possibly having stayed, travelled from or through a country linked with high epidemic risks or any other form of exposure to a high epidemic risk.
3. The condition laid down in point (c) of Article 2(1) shall be considered to have been established where it has been determined by the ETIAS Information System that the applicant has submitted the additional information or documentation requested.
4. The condition laid down in point (d) of Article 2(1) shall be considered to have been established where it has been determined by the ETIAS Information System that one or more of the reasons specified in Article 4 and the additional information specified in Article 5 have been selected by the ETIAS National Unit adding or requesting the addition of the flag for the purpose of further checks.

#### *Article 4*

##### *Reasons for a 'further checks needed' flag*

Pursuant to point (d) of Article 2(1) the ETIAS National Unit adding or requesting the addition of the flag shall select at least one of the following reasons in support of adding a 'further checks needed' flag:

- (a) doubts concerning the authenticity of data/documents;
- (b) doubts concerning the reliability of statements made by the applicant; or
- (c) doubts concerning the veracity of supporting documents.

#### *Article 5*

##### *Additional information referred to in Article 39(1)(e) and Article 44(6)(f) of Regulation (EU) 2018/1240 attached to a 'further checks needed' flag*

1. The additional information, referred to in Article 39(1)(e) and Article 44(6)(f) of Regulation (EU) 2018/1240, to be provided by ETIAS National Unit adding or requesting the addition of the flag for the purpose of second line checks shall consist of the following:
  - (a) one or more of the risks referred to in Article 3(2); and
  - (b) one or more of the reasons referred to in Article 4.
2. Where relevant, it shall also consist of the information or documentation provided by the applicant under Article 27(2) of Regulation (EU) 2018/1240.

## *Article 6*

### *Conditions for a ‘false hit/no grounds for refusal’ flag*

1. A ‘false hit/no grounds for refusal’ flag may be added to a travel authorisation pursuant to Article 36(3) and point (f) of Article 44(6) of Regulation (EU) 2018/1240 where it is established that each of the following conditions are met:
  - (a) the manual processing reveals that the hit was false or that there are no grounds for refusal of the travel authorisation;
  - (b) there is a risk of the recurrence of such a hit at the border; and
  - (c) at least one of the reasons for adding a flag specified in Article 8 of this Decision and additional information as referred to in Article 39(1)(e) and Article 44 of Regulation (EU) 2018/1240 have been provided.
2. The ETIAS National Unit of the Member State consulted may request a ‘false hit/no grounds for refusal flag’ to be added to a travel authorisation where the conditions referred to in paragraph 1 (a) to (c) are met.

## *Article 7*

### *Fulfilment of conditions for a ‘false hit/no grounds for refusal’ flag*

1. The conditions referred to in points (a) and (b) of Article 6(1) shall be considered to have been established, where the ETIAS National Unit adding or requesting the addition of the flag has provided a declaration that the hit was false or that there are no grounds for refusal of the travel authorisation and that there is a risk of the recurrence of such a hit at the border.
2. In order to fulfil the condition laid down in point (c) of Article 6(1) the ETIAS Information System shall automatically determine whether one or more of the reasons specified in Article 8 have been selected by the ETIAS National Unit adding or requesting the addition of the flag and the additional information specified in Article 9(1) have been received from the applicant.

## *Article 8*

### *Reason(s) for a ‘false hit/no grounds for refusal’ flag*

Pursuant to point (c) of Article 6(1), the ETIAS National Unit adding or requesting the addition of the flag shall select at least one of the following reasons in support of adding a ‘false hit/no grounds for refusal’ flag:

- (a) false hit; or

- (b) confirmed hit which should not lead to a refusal of a travel authorisation.

### *Article 9*

#### ***Additional information referred to in Article 39(1)(e) and Article 44(6)(f) of Regulation (EU) 2018/1240 attached to a ‘false hit/no grounds for refusal’ flag***

1. The additional information, referred to in Article 39(1)(e) and Article 44(6)(f) of Regulation (EU) 2018/1240, to be provided by the ETIAS National Unit adding or requesting the addition of the flag to border authorities in connection with the ‘false hit/no grounds for refusal’ flag shall consist of:
  - (a) the indication of the name of the source system of the hit; and
  - (b) the reference number/Schengen ID of the file, record or alert which triggered the hit in the other EU information systems referred to in Article 20 of Regulation (EU) 2018/1240.
2. The additional information may also include information or documentation provided by the applicant under Article 27(2) of Regulation (EU) 2018/1240.

### *Article 10*

#### ***Duration of flagging***

1. A ‘further checks needed’ flag shall be removed in accordance with Article 36(2) of Regulation (EU) 2018/1240.
2. A ‘false hit/no grounds for refusal’ flag shall stay in place for as long as the related travel authorisation is valid.
3. However a ‘false hit/no grounds for refusal’ flag shall be automatically deleted when the underlying file, record or alert in the EU information system referred to in Article 20 of Regulation (EU) 2018/1240 that is linked to the ‘false hit/no grounds for refusal flag’ is deleted.

### *Article 11*

#### ***Format and language***

The additional information referred to in Articles 5 and 9 shall be available in all official languages of the Union, with the exception of the additional information or documentation provided by the applicant as referred to in Articles 5(2) and 9(2).

## *Article 12*

### *Addressees*

This Decision is addressed to the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Croatia, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden.

Done at Brussels, 10.12.2020

*For the Commission*

*Ylva JOHANSSON*

*Member of the Commission*