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| To:             | Working Party on Frontiers/Mixed Committee  |
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| No. Cion doc.:  | 6928/13 FRONT 13 VISA 51 CODEC 450 COMIX 130  |
| Subject:        | Draft Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union<br>- Access for law enforcement purposes |

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**I. INTRODUCTION**

The above proposal was presented by the Commission at the JHA Council/Mixed Committee on 8 March and in SCIFA/Mixed Committee on 9 April 2013. The Working Party on Frontiers/Mixed Committee has completed the examination of the proposal in first reading.

At the JHA Council/Mixed Committee on 7 March, SCIFA/Mixed Committee on 9 April and the Working Party on Frontiers /Mixed Committee on 14 and 28 May and 25 July 2013, a large majority of delegations favoured to provide for access to the Entry Exit System (EES) for law enforcement purposes, and in particular for the purpose of combating cross-border crime and terrorism, from the date of start of the operation of the EES.

In proceedings on 25 July 2013, the Working Party discussed possible approaches and their consequences for allowing access for law enforcement purposes to the EES.

On 24 September 2013, SCIFA examined the issue of access for law enforcement purposes to the Entry/Exit System (EES) on the basis of doc. 13617/13 FRONT 124 VISA 178 CODEC 2016 COMIX 499. The outcome of these discussions is set out in doc. 14066/13 FRONT 133 VISA 192 CODEC 2126 COMIX 518.

For the purpose of providing evidence on the benefits which allowing access to the EES for law enforcement purposes would bring, the Presidency issued a questionnaire and a summary of the replies provided by Member States set out in documents 12107/13 FRONT VISA CODEC COMIX and 13680/13 FRONT 125 VISA 185 CODEC 2059 COMIX 503.

The Commission included the examination of the technical aspects of the law enforcement access (point 3.3.3) in the scope of the study on the Smart Borders Package, which is currently being conducted (doc. 6993/14 FRONT 46 VISA 56 CODEC 580 COMIX 126).

As agreed in Coreper on 4 February 2014, the study and the pilot project should not involve an interruption of negotiations on the Smart Borders Package and the examination of the legislative proposals should continue within the Council. (doc. 5828/14 FRONT 22 VISA 27 CODEC 209 COMIX 64).

In the conclusions on Borders and Terrorism adopted by the JHA Council on 5 June 2014 (6626/14/4), the Council concluded "*that the examination of the proposals on the Smart Borders Package (Entry/Exit System and Registered Travellers Programme) should be continued and that the legal and technical conditions for the access for law enforcement purposes to the Entry/Exit System by competent authorities of Member States should be examined by the Commission and the Member States so that this access is effective from the beginning*".

## **II. GENERAL ISSUES**

The Commission in its Impact Assessment (doc. 6928/13 ADD 1 p.16) recognised that *"there is an information and verification gap concerning third country nationals that are not covered by the Visa Information System (VIS)".* In particular, the Commission reminded that this information gap covers the following situations:

- Lack of information on the travel and cross-border movements of suspect persons;
- Difficulties in detecting persons subject to an alert who use different identities to cross the borders;
- Difficulties identifying a suspect having destroyed his or her travel documents.

However, the Commission proposal for a EES does not provide for access to that system for law enforcement purposes. In that regard, Article 46(5) of the proposal provides that the first overall evaluation of the EES, to be submitted by the Commission two years after the EES is brought in operation, *"shall specifically examine the contribution the EES could make in the fight against terrorist offences and other serious criminal offences and will deal with the issue of access for law enforcement purposes to the information stored in the system, whether and if so, under which conditions such access could be allowed, whether the retention period shall be modified and whether access to authorities of third countries shall be granted taking into account the operation of the EES and the results of the implementation of the VIS"*. This approach implies that the possible introduction of access for law enforcement purposes would depend on the submission by the Commission and the adoption by the European Parliament and the Council of a legislative proposal to that effect.

14 Member States of the Schengen area (BG, CY, CZ, EE, ES, FI, HU, LT, LV, MT, PL, PT, RO and SK) have a national Entry Exit System or similar. In the summary of the replies to the questionnaire set out in doc. 13680/13 FRONT 125 VISA 185 CODEC 2059 COMIX 503, they provided valuable evidence on the contribution of their national systems to the fight against terrorism and serious crime. FR also provided a series of arguments justifying the need to allow access to the EES for law enforcement purposes as set out in doc. 13806/13 FRONT 127 VISA 184 CODEC 2057 COMIX 508. EE presented the note set out in doc. 5815/14 FRONT 20 VISA 26 CODEC 207 COMIX 62 where it was underlined the added value of allowing access to the EES for law enforcement purposes.

In the course of the study undertaken by the Commission, the analysis of the technical aspects of access to the EES for law enforcement purposes is still being pursued.

The Commission is invited to take due account in its study of all relevant elements arising from previous discussions on the subject matter as well as the results of these deliberations.

### **III. LEGAL ISSUES**

At the SCIFA meeting on 24 September 2013, a large majority of delegations favoured granting access to the EES for prevention, detection and investigation of terrorist offences and other serious criminal offences and this from the start of the operation of that system. In addition, there was general support to the suggestion made by the Presidency that access to the EES for law enforcement purposes should be provided for by introducing it in the proposal as an ancillary/secondary objective as it is the case regarding the VIS Decision (Council Decision 2008/633/JHA) and EURODAC (Regulation (EU) No 603/2013). On that occasion, the Commission reiterated the need for a clear justification for granting access to the EES for law enforcement purposes based on sufficient evidence that such access is necessary and proportionate and emphasised that the costs of the EES could not constitute in itself a justification for expanding the objectives of that system. COM finally reserved its position pending the outcome of the discussions within the Council and, later on, between the co-legislators.

The inclusion in the proposal of access to the EES for law enforcement purposes as an ancillary/secondary objective could be envisaged by adding to the current proposal the relevant provisions. This objective should be clearly stated in the draft Regulation and should be based on the appropriate legal basis. A reference to Article 87(2)(a) TFEU and, in case EUROPOL would also be given access, Article 88(2)(a) TFEU, should be added. With this approach, the Regulation would continue to constitute a development of the Schengen acquis and would continue to be subject to Protocol 19 TFEU, including its rules on participation and opt-out. This would involve the participation of the 4 associated Schengen countries, application to DK and non-participation of IE and UK.

In the examination of these questions, it is crucial to take into account the recent judgment of the Court of Justice of 8 April 2014 in Joined Cases C-293/12 and C-594/12. The Council Legal Service has issued an Information Note on the judgment set out in doc. 9009/14 9009/14 JUR 249 DAPIX 58 TELECOM 106 COPEN + COR 1. At the JHA Council on 5/6 June 2014, delegations had an exchange of views on the consequences of the ruling.

In its judgment, the Court of Justice made clear that certain provisions of EU law may interfere with fundamental rights but this should be justified in accordance with the conditions set out in Article 52 (1) of the Charter. This Article allows limitations to fundamental rights, provided that such limitations, in addition to being provided for by law:

- respect the essence of the rights;
- genuinely meet objectives of general interest recognised by the Union; and
- subject to the principle of proportionality, are necessary.

The Court in its judgement upheld the general approach of data retention as a tool to fight terrorism and serious crime and thus to protect public security. The Court of Justice also recalled that "*Article 6 of the Charter lays down the right of any person not only to liberty, but also to security*". Allowing access to the personal data stored in the EES for the purpose of prevention, detection and investigation of terrorist offences or of other serious criminal offences would constitute a tool to fight terrorism and serious crime and therefore genuinely pursues an objective of general interest to the EU.

However, in the light of the judgement, any access for law enforcement purposes to the EES should be made possible only in so far as is strictly necessary and with the necessary safeguards in relation to the protection of personal data. Thus, the draft Regulation should lay down clear and precise rules governing the scope and application of the measure in question and impose minimum safeguards so that the persons whose data have been retained have sufficient guarantees for the effective protection of their personal data against the risk of abuse and against any unlawful access and use of that data.

As regards the other requirements of the Court of Justice judgment in Joined Cases C-293/12 and C-594/12, in particular that any interference should respect the essence of the rights and should, to comply with the first element of the proportionality test, be appropriate for attaining the objective pursued, see points 7 and 10 of the Council Legal Service Information Note (9009/14).

#### **IV. QUESTIONS TO DELEGATIONS**

In the light of the above and in order to make progress on this important issue, the Presidency invites delegations to express their views on the following questions:

##### **A) Purpose limitation**

The Commission proposal is based on Article 77(2)(b) and (d) TFEU. Article 4 of the proposal provides that " the EES shall have the purpose of improving the management of the external borders and the fight against irregular migration, the implementation of the integrated border management policy and consultation between border and immigration authorities by providing access by Member States to the information of the time and place of entry and exit of third country nationals at the external borders and facilitating decisions relating thereto".

In SCIFA, there was general agreement that access to the EES for law enforcement purposes should be provided for by introducing it in the proposal as an ancillary/secondary objective. As regards the types of criminal offences for which such access should be granted, a large majority of delegations was in favour of limiting it to the prevention, detection and investigation of terrorist offences and other serious criminal offences along the lines of the VIS Decision (Council Decision 2008/633/JHA) and EURODAC (Regulation (EU) No 603/2013). These offences are listed in Articles 1 to 4 of the Council Framework Decision Council of 13 June 2002 on combating terrorism (2002/475/JHA) and to Article 2 (2) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant.

*Questions:*

- 1. Can delegations confirm that access to the EES, for law enforcement purposes should be granted from the start of the operations of the EES, and that this should be provided for by introducing access for law enforcement purposes as an ancillary/secondary objective in the proposal submitted by the Commission?*
- 2. Can delegations confirm that such access be limited for the purpose of prevention, detection and investigation of terrorist offences and of other serious criminal offences?*

**B) Authorities, procedure and conditions for access to the EES for law enforcement purposes**

As established by the Court of Justice case law, it is necessary to lay down clear and precise rules governing the scope and application of the access for law enforcement purposes. Therefore, it is necessary to establish objective criteria respecting the principles of proportionality and necessity to determine which authorities would be authorised to have access to the personal data stored in the EES and under which conditions. Rules should also be in place to limit to what is strictly necessary the use of the data retained in the light of the objective pursued.

In particular, the Court has underlined that "*Access by the competent national authorities to the data retained should be made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions.*" (Point 62)<sup>1</sup> (emphasis added)

In that regard, the Presidency suggests a similar approach as in Articles 5, 6 and 7 of the EURODAC Regulation No 2013/603. That would mean that Member States should designate the authorities to have access to the EES for law enforcement purposes and verifying authorities to ensure that the conditions to have access to the EES are fulfilled.

The Presidency also suggests to allow EUROPOL access to the EES in specific cases and under the same conditions as laid down in the EURODAC Regulation No 2013/163.

#### *Questions:*

*1. What is the most appropriate and efficient way to regulate which authorities would have access to the EES for law enforcement purposes and the procedure to limit access to the data and their use to what is strictly necessary? Is the approach followed in the EURODAC Regulation (articles 5-7 and 19-22) a good starting point?*

*2. Should EUROPOL have access to the EES as to the VIS and EURODAC? If yes in which cases and under which conditions?*

#### **C) Data to be accessed**

The data that would be collected and stored in the EES is listed in Articles 11 (visa holders) and 12 (third-country nationals exempted from the visa obligation). This information would be collected at the borders by border guards and kept in the individual file of the third-country national. On each entry, the system would generate an entry/exit record which would be linked to the individual file.

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<sup>1</sup> As regards the different defects of the Data Retention Directive listed by the Court in its judgment C-293/12 and C-594/12 which illustrates, by implication, what the Directive should have regulated to comply with the Charter, see points 15-18 of the Council Legal Service Information Note (9009/14).



The study currently going on will include one chapter on Data. The study is aiming at identifying the minimum dataset required to fulfill the EES and the RTP objectives while maximising automation. The study also aims at identifying the biometrics identifiers to be used considering the retention period, the size of the database and the objectives of the systems.

For law enforcement purposes, it seems that the most important data to have access to are the fingerprints because they would enable identifying a suspect. Regarding the VIS, on the basis of Council Decision 2013/392/EU of 22 July 2013<sup>2</sup>, Member States' designated authorities may have access to data listed in Article 2 (2) and (3) of Decision 2008/633/JHA, including fingerprints from 1 September 2013.

At a later stage, it would also be necessary to discuss the type of search to be made in the EES and with which data the search could be made.

*Question:*

*Should authorities responsible for the prevention, detection and investigation of terrorist offences and other serious criminal offences have access to all data stored in the EES as listed in the Commission proposal or should there be limitations in the light of the purposes for which access would be granted?*

#### **D) Retention period**

The draft Regulation establishing the EES provides for a data retention period of six months for ordinary cases and in case of overstay five years. The data retention period raised a number of questions in the first reading and for that reason the Commission decided to include it in the scope of the Study. The duration of the retention period would have an impact on border control process, system architecture and performance, data protection rules (especially for biometrics identifiers) and on any access for law enforcement purposes.

The retention period for data stored in the VIS is of 5 years and the same period is provided for in the draft Regulation for a Registered Travellers Programme (RTP).

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<sup>2</sup> OJ L 198 p. 5, 23.7.2013

As expressed by the Court of Justice, the determination of the period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary. The Court also acknowledged that different retention periods should be provided for depending on the purpose for which data would be used. Different retention periods could be foreseen depending on specific category of data.

*Question:*

*For how long data entered in the system should, in your view, be accessible for the following purposes?*

- a) For verification at the external borders (Article 15)*
- b) For examining and deciding on visa applications (Article 16)*
- c) For examining applications for RTP (Article 17)*
- d) For verification within the territory (Article 18)*
- e) For access to data for identification (Article 19)*
- f) For the prevention, detection and investigation of terrorist offences and other serious criminal offences. In this regard, the issue of access to search with latent or partial fingerprints should be considered.*
- g) possible other purposes.*

*Delegations are invited to provide arguments justifying their choice.*

## **E) Other issues**

The Presidency has noted other issues in relation to access to the EES for law enforcement access which could be examined at a later stage by delegations such as:

- The possible need to do previous checks in the VIS/SIS or other databases;
- Rules on security and protection of data;
- Liability and sanctions;
- The exchange of the information with law enforcement authorities from third countries, and
- Impact of touring visa, ICT mobility scheme.

## **V. CONCLUSION**

**The Presidency invites the Working Party to discuss the questions set out in point IV for the purpose of making progress on the access for law enforcement purposes to the EES.**

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