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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

- Access for law enforcement purposes: Summary and comments by the
Presidency regarding answers provided by the Member States to the
questionnaire of the former Greek Presidency and discussion on the ways
forward

I. INTRODUCTION

At the meeting of SCIFA/Mixed Committee on 24 September 2013, a large majority of delegations favoured granting access to the envisaged Entry/Exit System (EES) for law enforcement purposes from the start of operation of that system as an ancillary/secondary objective, and the Working Party on Frontiers was invited to proceed further on the matter (see for details doc. 13617/13 and doc. 14066/13).

The summary in doc. 13680/13 of the answers to the questionnaire in doc. 12107/13 on access for law enforcement purposes provided useful information for further proceedings.

The Working Party on Frontiers /Mixed Committee at its meeting on 18 June 2014 examined the questions presented by the EL Presidency in doc. 10720/14 and invited delegations to give any further comments in writing - see doc. 11337/14. Written comments have now been received from a total of 24 delegations. On this basis, the Presidency has made the below revised summary and comments for the purpose of further proceedings. It should be read in conjunction with doc. 10720/14 and 11337/14.

A) Purpose limitation

Summary of answers

All delegations having answered confirmed clearly their wish to have access for law enforcement authorities (LEA) from the start of the functioning of the EES, as a secondary objective, in the future Regulation. **Two of them** pointed out that this access in their view should cover biometrics from the beginning, without any transitional period. Granting access from the start of operations would allow LEA to carry out an adequate evaluation of this feature during the first assessment of EES, which would be submitted two years after the start of operations. Certain delegations, whose countries have already a national EES, stated that their respective systems provide already for access for LEA.

Three delegations had concerns about adding access for LEA to EES as an objective in the Regulation, fearing that this may entail that EES would no longer fall within the scope of the Schengen acquis, even though its primary purpose would still be border management.

With regard to the question for granting access for LEA, limited to the purpose of prevention, detection and investigation of terrorist offences and other serious criminal offences, **all delegations having answered** confirmed their agreement with the purpose limitation in question, along the lines with what applies at other large databases, such as VIS and EURODAC. **Three delegations** agreed, that, in addition to these purposes, it would be worthwhile to consider allowing access for other objectives (e.g. for tracking down kidnapped or missing persons, especially minors and unaccompanied minors, or persecuted persons who have absconded). In this direction these **three delegations** suggested that the issue could be further elaborated during a dedicated workshop, that should be organized by the Commission, at a later stage.

Some delegations suggested to add other purposes for granting access, as for example: asylum applications, internal security, public order, public health, missing persons, minors abduction, international search of persons, administrative police, foreign fighters, authorities issuing residence permit and citizenship.

Comments

It is recalled that, as spelled out by the Court of Justice case law in Joint Cases C-293/12 and C-594/12 (Data Retention judgments), it is necessary to set out in the Regulation all the purposes for which the data could be used. This requires detailed analysis of each of the purposes, knowing that the necessity and proportionality of the collecting of data need to be assessed with regard to each of them.

With regard to access for LEA as an ancillary/secondary objective, it is recalled (as mentioned above in the introductory part) that SCIFA/Mixed Committee in September 2013 favoured such as solution, based on the considerations set out in point III (a) of doc. 13617/13. The consequence of such an approach would be that law enforcement access would not affect the main purpose of the EES, and could be integrated as a part of an instrument constituting a development of the Schengen acquis.

It is also recalled that 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, these delegations provided valuable evidence on the contribution of their national EES systems to the fight against terrorism and serious crime. 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.

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

Summary of answers

All delegations, which sent their contributions, in line with principles set out in VIS and EURODAC Regulations, expressed the view that each Member State should identify its own national authorities, which would be designated to have access, as well as its national supervisory/verification authorities.

The verifying authority should de facto be independent in an effective way; for example **one delegation** suggested to place a Data Protection Officer (DPO) within the national contact point, similar to the control unit system used within Europol for access to VIS.

They also considered that objective criteria should be established for the access of the competent authorities to the system as well as procedural and substantive conditions, also in the light of the recent Court of Justice case law.

Most of them (8) considered that as VIS is much closer to EES than EURODAC, VIS should be taken as a starting point in order to set the conditions for access for law enforcement purposes at EES. Under the VIS framework, there is, in particular, no requirement to first exhaust the national and European databases like in the case of EURODAC. They were of the opinion that the framework for access for consultation of the VIS represents the maximum realistic level of limitation and conditions for national authorities.

Delegations further pointed out that the resemblance between EES and VIS is obvious, given their similar target group and purposes. The two-tier model used for VIS would allow a more flexible and workable system than EURODAC, but there should also be sufficient data protection guarantees. **Most of the delegations** also indicated that the EURODAC system is rather complicated and seems less practicable.

Six delegations however, indicated that the relevant provisions of the future EES Regulation could be based, mutatis mutandis, on the EURODAC, which is more recent than the VIS.

These measures (i.e. the relevant provisions of VIS and EURODAC) could provide a model to regulate access to personal data, by guaranteeing the rights of the persons concerned and, at the same time, to let Member States identify autonomously its national authorities responsible for this type of checks. **Some** delegations pointed out that the access will be different depending on the competence of the requesting authority.

All delegations, which sent their contributions, agreed on granting access for EUROPOL to the EES, under conditions similar to those applicable for VIS or EURODAC, providing, as a starting point, for a procedure equivalent to the procedure applicable for national authorities.

Comments

As established by the Court of Justice case law in Joint Cases C-293/12 and C-594/12 (Data Retention judgments), the Regulation must contain a complete set of clear and precise rules governing the conditions, procedures, scope and application with regard to data processing and access for law enforcement purposes, accompanied by sufficient safeguards for the individuals concerned. It must be borne in mind that EES will be a massive scale, centralized database containing personal data of, in principle, unsuspected individuals. This implies that the abovementioned Data Retention case-law is of primordial importance for EES and that particular attention should be given to all the "protective" elements included in that legislation.

In particular, it is necessary to establish objective criteria respecting the principles of proportionality and necessity to determine, based on the scope of their competencies and the place in the organizational structure, which authorities would be authorized to have access to the personal data stored in the EES and under which conditions (notably for which categories of serious crimes).

The Regulation should also define the rules on the authorized checks and types of searches allowed in the database and on the scope and categories of data that can be accessed following such searches so as to limit to what is strictly necessary the use of the data retained in the light of the objective pursued. Further detailed analysis is necessary, so that those rules could be modelled with regard to each of the specific purposes, based on the strict respect of the "need to know" principle.

CLS, during the June and July 2014 meetings of the Working Party on Frontiers, underlined that, in the light of the recent Court of Justice case law on 8 April 2014, each access for law enforcement (LEA) purposes to EES should be granted only when strictly necessary under the proportionality principle and with the essential safeguards on personal data protection. In accordance with this concept, it is necessary to "justify" the objective need and proportionality of the LEA; a mere reference to the costs of the system is not a valid nor sufficient argument to that effect. It is equally necessary to clearly fully define the relevant purposes and corresponding procedures, including retention periods. As a consequence, the most suitable point of departure, on which further discussion should be developed, would be the one provided under EURODAC Regulation, which appeared to be more in line with the abovementioned case law.

C) Data to be accessed

Summary of answers

The vast majority of the delegations which answered, were broadly in favour of granting access for LEAs to all data stored in EES, under conditions, which should be fully in compliance with the above judgement of the Court and which should be developed using the conditions applicable to VIS setup (purpose of the query, proportionality and strict necessity) as a starting point. **Two delegations** preferred to wait for the results of the study, before expressing their opinions.

However, the proportionality requirements may lead to further detailed analysis in order to identify the categories of data that do not necessarily need to be accessed for some of the purposes under consideration.

D) Retention period

Summary of answers

The vast majority of the delegations, which sent their contributions, affirmed that there should be a uniform retention period of five years, in order to harmonize all the systems (RTP, VIS, EES), and for all the listed purposes, included access for LEA, that are likely to be included in the scope of the EES, without differentiation among them.

Some delegations suggested that in some cases this period should be longer, i.e. 10 years for overstayers, investigation on terrorism or other serious crime. In this context, **other delegations** specified that 181 days would be sufficient only in relation to bona fide travellers and not for a proper implementation of an access for LEA in the context of EES. **One delegation** proposed a retention period up to one year with regard to the bona fide travellers, for purposes regarding visa application, the RTP applications, as well as for checks within the territory.

Three delegations proposed to specify that the retention time limit should start from the last exit from the Schengen area of the person concerned.

In reference to RTP, **some delegations** agreed that the period should at least cover the time for which RTP was issued.

Comments

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.

On a more general note, for the reason of proportionality concerns, the length of the periods during which the data stored in the EES may be accessed for specific purposes may need to be more closely adapted to the real, concrete needs stemming from the pursuit of those purposes, as suggested by some delegations.

E) Other issues

The former EL Presidency noted other issues in relation to access to the EES for law enforcement access which could have been 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.*

These issues have been raised to the attention of the delegations for a first exchange of views during the Working Party on Frontiers/Mixed Committee on 18 July 2014. Considering that only **7 delegations** have expressed written opinions to the Presidency and not even covering all the issues, the results cannot be considered as representative of the majority of Member States' opinions.

Nevertheless, some interesting comments have been drawn from the contributions received, as hereunder summarized.

The issue regarding the possible need to do previous checks in other data basis such as the VIS and the SIS calls for particular attention. Considering that only the future EES system will record entry/exit data, which will not be found neither in VIS nor in SIS systems, prior checks in these databases should not be a prerequisite in order to grant access to EES.

Regarding the rules on security and protection of data, the EU existing rules, as well as the requirements in Article 28 of the EES proposal, are considered to be adequate.

In reference to the exchange of the information with law enforcement authorities from third countries, if at a further stage a decision is taken to allow such access, the EU standard level of the provisions on data protection should be ensured, by using the current cooperation mechanism already in use for the exchange of information with third countries and the relevant EU legislation and agreements in force.

Other elements could be added to the list of open issues that need to be further discussed, such as the checks and types of searches in EES which the system would authorise in specific situations and on the scope and categories of EES data that can be accessed following particular types of searches.

II. CONCLUSIONS/WAY FORWARD

The Presidency considers that, from the Member States answers to the questionnaire, the following main conclusions may be drawn:

- Delegations agree on granting access for LEAs to EES from the start of operations, as a ancillary/secondary objective (while the primary one remains border management), limited to the listed purposes.
- Delegations wish to maintain their autonomy in designating, based on the criteria specified in the Regulation, the competent authorities that would have access to EES for law enforcement purposes, along the lines of similar frameworks, but a clarification should be made about which model would be most suitable (VIS or EURODAC) as a starting point; each Member State should also identify its own national supervisory/verification authorities, working independently in a effective way pursuant to the procedures set out in the Regulation.
- Delegations agree on granting access for EUROPOL to the EES, under conditions based on those applicable in the VIS and EURODAC frameworks.,

- The vast majority of the delegations, that sent their contributions, were broadly in favour of providing for access of the LEAs to all data stored in EES, once the relevant conditions, which should be fully in compliance with the above judgement of the Court and which should be developed using the conditions applicable to VIS setup (purpose of the query, proportionality and strict necessity) as a starting point, are met.

These delegations affirmed that there should be a uniform retention period of five years, in order to harmonize all the systems (RTP, VIS, EES), and for all the listed purposes, including access for LEA, without differentiation among them. However, these delegations thought that certain categories of data of particular concern could be retained for longer periods for specific purposes.

- Regarding the question **E**) (other issues), only 7 delegations expressed their opinions and did not cover all the issues contained under this chapter. For this reason, the Presidency thinks that these answers cannot be considered as representative of the majority of Member States' opinions.

The Commission is invited to take the views expressed by delegations regarding access to the EES for law enforcement purposes fully into account in its Study on the Smart Borders.

The Working Party on Frontiers/Mixed Committee is invited to examine at its meeting on 19 September 2014 the above conclusions for the purpose of further proceedings.

The Presidency intends to touch upon the subject-matter of this document in the context of its state-of-play presentation on Smart Borders at SCIFA on 19 September 2014.

Following these discussions the Presidency intends to submit draft provisions regarding the access for law enforcement purposes to EES, with a view to the next meeting of the Working Party on Frontiers, in October 2014.
