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From: Presidency
To: Working Party on Frontiers/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)
Subject: Smart Borders Package
Wrap-up of discussions

I. INTRODUCTION

Coreper endorsed the approach for the way forward on the Smart Borders Package as set out in 5828/15. The approach involved a proof of concept by the carrying out of a study and a pilot project. The purpose of the proof of concept was to ensure that the two co-legislators would be given an array containing the best possible options and solutions from a technical and a cost-benefit point of view, as an input for negotiations on this Package.

The Commission presented the final report on the study to the Working Party on Frontiers on 15 (main report) and on 31 October 2014 (the cost chapter). Coreper agreed on 10 December 2014 on political guidelines in relation to the pilot project that had been planned by the Commission following the presentation of the study as well as on work that should be taken forward in parallel to it as set out in 16542/14.

The Presidency intends with this note to wrap-up progress achieved on both aspects and to provide a clear input for the Commission in view of the ongoing preparations of the new legislation on Smart Borders.

II. IMPLEMENTATION OF THE PILOT PROJECT

As far as the implementation of the pilot-project is concerned, the above-mentioned political guidelines underlined its voluntary nature regarding participation for Member States and invited the Commission to report regularly, in close cooperation with eu-LISA, to both, the Council and the Parliament, on the implementation of the pilot-project and its interim findings, “*which should be sufficiently detailed in particular as regards the impact of the tests have had on the border control processes*”. During the testing phase of the pilot-project, monthly updates were provided on a regular basis by the Commission and eu-LISA to the Working Party on Frontiers. The timeline for the pilot-project given to eu-LISA was respected and the report on the outcome was submitted in due time, in line with the Coreper approach on a way forward for the Smart Borders Package agreed on February 2014 (*doc. 5828/14*).

During the Working Party on Frontiers on 11 December 2015, the report was presented to the delegations and an exchange of views took place. As pointed out by the Conclusions of the Executive Summary of the pilot-project, main findings are that “*The pilot confirms the feasibility (in terms of accuracy, effectiveness and impact) of deploying biometric identifiers at Schengen external borders. Depending on the choice of biometric identifiers, the use of biometrics adds relatively little duration to the border-crossing process. Desk research proves that this time can be saved if some processes are better streamlined (e.g. by searching the VIS using the passport number). The deployment of accelerators such as ABC gates and kiosks could further decrease border-crossing times. It was observed that the technology set-up and integration, as well travellers’ interaction with it, influences the results much more than the type of border. In addition, border guards felt that training was needed to prepare them for new equipment and processes. These key observations and considerations should now be put together and analysed further in developing successful combinations of biometrics for the future of Schengen borders.*”

In addition to the operational testing, desk research was conducted by eu-LISA, namely through expert meetings in the relevant field. The issues covered were, in particular, potential fall-back procedures in the event that the EES is unavailable or unreachable, and describing related procedures, architecture and consequences and VIS border checks while using the travel document number, web services for travelers and carriers.

III. PROGRESS ACHIEVED ON KEY POLITICAL ISSUES OF THE SBP

The political guidelines agreed by Coreper on 10 December 2014 state that *“In the meantime, the Working Party on Frontiers should continue examining, in close contact with the European Parliament, the findings of the study that are not subject to the pilot project, as well as continue discussion on other policy aspects of the proposed Smart Borders Package, such as law enforcement access to the EES under appropriate conditions and guarantees, the consequences of the abolition of stamping, the fall-back procedures in case of unavailability of the system, or the organizational aspects of the RTP application process”*.

As regards contacts with the European Parliament, the Presidency wants to highlight the contribution to this Package of the hearing organised by the LIBE Committee on 23-24 February 2015 with the participation of national parliaments. During that meeting, views were exchanged on general policy issues (e.g. the objectives of the SBP and the access for Law Enforcement Purposes (LEA)), as well as on important technical elements that may shape up the future proposal(s) of the Commission. It became evident that most national Parliaments are closely following the ongoing debate regarding the SBP and the pilot project and that they are broadly supportive on the added value of the future system. The current Presidency met with the two rapporteurs on the SBP in October 2015. Those meetings allowed to exchange views on how matters were progressing in each institution.

As for the four topics highlighted in the political guidelines, the Presidency wishes to thank previous Presidencies for the work done on these issues, which constitutes a solid basis for further proceedings. Following discussions in the Working Party on Frontiers on these issues, some statements and recommendations have been put forward on which delegations could broadly agree on.

The Presidency has prepared the following summary of progress achieved for each of these four issues as follows:

A. Access for law enforcement purposes

As for law enforcement access to the EES under appropriate conditions and guarantees, a list of the relevant conditions and safeguards which will need to be met regarding the case law of the European Court of Justice have been presented and discussed (*docs 12531/15 and 11635/1/15*). Suggestions with regard to the elements of substance for the future provisions along with the ECJ case law tests are contained in the doc. 12531/15. Document 11635/15 contains a list of statements based on written responses provided by a few delegations to the questions laid down in doc. 8743/15 of the former Latvian Presidency, and on further discussions in the Frontiers Working Party meeting of 22 May 2015, and on ensuing comments received from delegations. Both documents analyse the conditions under which Member States' designated law enforcement authorities and the European Police Office (Europol) may obtain access for consultation of the EES for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, the granting of access to EES of the LEA, the conditions that should be met for access to EES of the LEA as well as considerations regarding the retention period of data in particular for law-enforcement purposes. The Fundamental Rights Agency's presentation during the meeting of the Working Party on Frontiers of 20 July 2015 was also of relevance. In addition, the European Data Protection Supervisor intervened at the Working Party of 19 November 2015 on these issues. These aspects should be borne in mind. Furthermore, delegations broadly agreed on the fact that access should be limited for defined purposes. Mandatory checking of other databases prior to the EES - except for national databases - is not considered as appropriate, because, according to Member States, the above legal instruments have different scopes from the future EES. The search in the EES for records should be duly motivated to be allowed. Concerning the issue of data retention period, a vast majority of delegations affirmed that there should be a uniform retention period of five years for all the listed purposes.

B. The consequences of the abolition of stamping

Under the former Latvian Presidency, delegations discussed the consequences of the abolition of stamping (*doc. 9778/15*). It was put forward that the abolition of the stamping of travel documents is a valuable measure for the innovation and acceleration of border control procedures. As far as the inclusion of the residence permit holders in the EES is concerned and in the light of positions expressed by a large majority of delegations, the Presidency invites the Commission to further explore legal ways for allowing the inclusion of the residence permit holders in the EES or to propose alternative solutions. In the meeting of the Frontiers Working Party of 13 October 2015, the Commission Legal Service submitted its considerations regarding the legal basis, the principle of proportionality with regard to such a measure in the light of the recent case law of the ECJ and in particular of the Schrems case (C-362/14). Concerning the possible inclusion in the EES of refusals of entry, a large majority of delegations are in favour. As regards the use of mobile devices, a majority of delegations welcomed the idea to develop a mobile application that could be installed on devices which are already in use and were generally opposed to invest in uniform mobile devices. Member States generally agree that such mobile devices are secure enough to carry out such tasks.

C. Fall-back procedures and other issues related to the correction of data

Fall-back procedures in case of unavailability of the system have been discussed at numerous experts meetings as well as during the Frontiers Working Party meetings on 13 October 2015 and 19 November 2015. Delegations agreed upon the fact that such procedures are not needed for the RTP. As for the EES, delegations stated that it would be acceptable and necessary for the border guards to allow, despite the unavailability, the border crossing of third country nationals. Nearly all delegations supported the setting up of a notification system for outages and their duration and agreed that buffered data should be handled automatically at central level. Delegations also broadly agreed on setting a status indication in the EES to inform that it was updated with possibly incomplete data /or where normal routines could not be followed. As regards buffering in case of unavailability, data should be recorded and added to the person's individual file as soon as possible after the reinstatement of the EES. Additionally to buffering, border-guards could also make use of the web-service to check whether the person entering its territory disposes of sufficient remaining authorised period of stay.

Finally, manual proceedings should be kept as a last resort option. All delegations underlined the added value of an evaluation of the fall-back procedure after a certain period from the entry into force of the future EES Regulation indicating that such functionality should be considered when building the system (*doc. 14028/15*).

It should also be noted that delegations supported broadly the possibility to amend the EES data entered originally by another Member State. Equally, many delegations considered positively the possibility to allow the traveller to check, e.g. through a web-application, the correctness of his/her data in the EES.

D. Organizational aspects of the RTP application process

Regarding the organizational aspects of the RTP application process, the Presidency refers to the debate held on the basis of its note (*doc. 11631/15*). During that debate, the Commission reminded that the three options summarized in that document (TOM M, TOM N and the use of process accelerators) would be evaluated in the future Impact Assessment. The Commission also clarified that the forthcoming legislative proposal will not necessarily need to opt for one of these options, but could also propose further variations, and/or a combination of options. In the same context, the Presidency would also refer to the contribution by FI₁ entitled "Fast lane for all vs. Registered Travellers Programme" (*doc. 13270/15*), which nine delegations supported and which concluded that in order to maintain the right balance between border checks security and facilitation of border crossings, the fast lane should not replace the RTP. According to this paper, a flexible approach should be adopted with regard to the RTP infrastructure and the granting of the RTP status, while the fast-lane-for-all approach could be used in the busiest border-crossing points (such as big airports and ports). In addition, certain delegations asked for a clearer analysis of the costs that are likely to incur of each of the suggested approaches, whereas some of them advised to wait for the conclusion of the Smart Borders pilot project, before taking a decision.

The Presidency would further like to recall the findings contained in doc. 14026/15 on the basis of delegations replies in relation to the added value of the RTP, the national RTP and the fast-lane-for-all approach. The potential added value of a process to facilitate/accelerate the border crossings by third-country nationals is obvious for delegations. Furthermore, a majority of delegations advocated for an European-wide RTP system. Finally, most delegations showed preference for the RTP TOM N approach, suggested by the Commission in the technical study, which was part of the proof of concept for the future Smart Borders package. In that context the Commission explained that it considers that there is a clear added value in providing for a process to facilitate/accelerate the border crossings by non-EU citizens at the Schengen area's external border crossing for the largest possible category of travelers. It said that the forthcoming legislative proposal could propose further variations and or a combination of options.

IV. CONCLUSION

The Presidency suggests that the Working Party on Frontiers invites the Commission to take duly into account the outcome of the pilot-project and the progress achieved on the access for law enforcement purposes to the EES, the consequences of the abolition of stamping, fall-back procedures and the organizational aspects of the RTP application process, in view of the ongoing preparations of the new legislative proposals concerning Smart Borders.