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NOTE

From: Bulgarian and Romanian delegations

To: Strategic Committee on Immigration, Frontiers and Asylum/Mixed Committee (EU-Iceland/Liechtenstein/Norway/Switzerland)

Subject: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System

- The calculation of the duration of stay in the framework of the automated calculator

1. INTRODUCTION

In April 2016 the Commission submitted a revised proposal for a Regulation establishing an Entry/Exit System (EES), aiming at addressing border check delays and improving quality of border checks for third country nationals, ensuring systematic and reliable identification of overstayers and reinforcing internal security and the fight against terrorism and serious crime.

In contrast to the proposal from 2013, the revised proposal explicitly stipulates (in Article 10) that stays of third country nationals (TCN) in Member States which are not yet fully applying the Schengen acquis in accordance with their respective Acts of Accession shall not be taken into account in the calculation of the duration of the authorised stay in the Schengen area. Such Member States should register in the EES the stay of the third country nationals, but the automated calculator in the system should not compute it as part of the authorised length of stay.

During the Dutch Presidency of the first semester in 2016, intensive discussions were held on the calculation of the duration of stay, which was considered as a stay in the EU and not only as a stay in the Schengen area. Up to present, a meeting was held also under the Slovak Presidency on this topic.

The discussions held so far highlighted the need for clear provisions regarding the calculation of the duration of stay of 90 days in any 180-days period provided for by Article 6(1) of Regulation (EU) 2016/399 (Schengen Borders Code - SBC), as this issue has direct impact over the automated calculator referred to in Article 10 of the EES proposal.

2. SCOPE OF THE AUTOMATED CALCULATOR

The revised text of Article 10 of the EES proposal was discussed at the last meeting of the Working Party on Frontiers on 11 July 2016 (based on the Presidency compromise suggestions contained in doc. 10880/16). The main concerns for Member States not fully applying the Schengen acquis is that **the proposal does not clearly specify if the automated calculator will calculate the duration of stay of third country nationals on their territories**, as the text makes a separation, in the current version of Article 10(4a)¹, between the duration of stays in Member States fully applying Schengen acquis and periods of stay in Member States not yet fully applying the Schengen acquis.

The current provisions may be implemented differently, as follows:

- a) **Either having five calculators**, i.e. one for the Member States fully applying Schengen acquis and one for each of the 4 Member States concerned – BG, CY, HR and RO. This option, which requires establishing EES also at EU internal borders, poses the problem of investing additional national funds for no clear reason, while giving the possibility to a TCN to reside on the EU territory in an uninterrupted way for more than the appropriate time, in spite of the rules of the EU legislation.

¹ Article 10(4a): The automated calculator will also separately indicate the duration of authorised stay for third country nationals registered in the EES admitted for a **short authorised stay in a Member States which does not apply the provisions of Title III of Regulation (EU) 2016/399. are not yet fully applying the Schengen *acquis* in accordance with their respective Act of Accession.**

- b) **Or having one calculator** only for the Schengen Member States fully applying Schengen acquis, thus leaving BG, CY, HR and RO outside the benefits/facilities of the new EES system and without any means to calculate the duration of stay, while fully accepting the incumbent obligations. This cannot be accepted, for legal, practical and financial reasons described below.

A third option of **having one single calculator for all Member States**, including BG, CY, HR and RO was discussed during the previous formal SCIFA meeting on 21 June 2016. This option received in principle a significant number of Member States. In the opinion of CLS, such solution was legally acceptable and sound.

This interpretation and the content of this discussion paper should under no circumstances be regarded as having consequences over the Schengen membership status, as it relies simply on practical issues derived from the current application of Article 6 SBC provisions and has impact over the future design of the EES architecture. In this context, it is worth pointing out some aspects concerning the issue under analysis:

Legal arguments:

Article 52 of the Treaty on European Union (TEU) sets out **the Member States** to which the Treaties apply; in this context **it refers to EU Member States**. In direct connection, Protocol 19 to the Treaty for the Functioning of the European Union (TFEU) defines the Member State authorised to establish closer cooperation among themselves in areas constituting the Schengen acquis; it comprises the same Member State, as those under Art. 52 TEU, with the exception of the United Kingdom and Ireland, not applying the acquis on some Schengen areas.

The EU policy on border checks and immigration refers to all Member States under the EU primary law. According to Article 77 (2) (c) and Article 79 (2) (b) of the TFEU measures should be taken in the area of free movement of the TCN **within the Union** and of residence of the TCN in **Member States**.

The Schengen acquis was integrated in the *acquis communautaire* back in 1999, by the Protocol annexed to the Treaty on European Union and the Treaty establishing the European Community.

The concept of the duration of stay was introduced by the Convention implementing the Schengen Agreement, providing, in former Article 5 and in Chapter 4 (Art. 19-24), the right of the TCN to move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry (changed into maximum 90 days in any 180-days period by Regulation (EU) No 610/2013).

The central pillar of EU external border management is the SBC which lays down rules on external border crossings, the movement of persons across borders and provides for rules dealing with the calculation of the authorised length of short-term stays in the Union.

Article 6 of the SBC stipulates the entry conditions of the third country nationals for *intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period.*

Furthermore, paragraph 2 states that *the date of entry shall be considered as the first day of stay on the territory of the Member States and the date of exit shall be considered as the last day of stay on the territory of the Member States.*

In terms of their Act of Accession the provision of Article 6(1) and (2) are applicable to Bulgaria, Croatia, Cyprus and Romania.

Recital 9 of the Preamble of the SBC states that it is necessary to provide for rules dealing with the calculation of the authorised length of short-term stays in the Union. Clear, simple and harmonised rules in all legal acts dealing with this issue would benefit both travelers as well as border and visa authorities.

The *Decision of the Executive Committee of 21 November 1994 on the acquisition of common entry and exit stamps (SCH/Com-ex (94) 16 rev.)*, the legal basis for the entry and exit stamps used at the border to calculate the duration of stay is also applicable to Bulgaria, Croatia, Cyprus and Romania.

In direct connection, Article 8(3)a)iii) of the SBC lays down the rules for border checks and explicitly provides that thorough checks for TCN should focus on the examination of the entry and exit stamps on the travel document of the third-country national concerned, in order to verify, by comparing the dates of entry and exit, that the person has not already exceeded the maximum duration of authorised stay in the territory of the Member States.

Finally, the presumption referred to in Article 12 of the SBC makes no any difference on the practices of the Member States if the TCN is found on the territory of a Member State applying the Schengen acquis in full or on the territory of the Member State in respect of which the decision contemplated in Article 3(2) of the 2003 Act of Accession, in Article 4(2) of the 2005 Act of Accession and in Article 4(2) of the 2011 Act of Accession has not been yet taken. The Member State concerned should indicate in the travel document the date and place of crossing the **external border and** not of the internal border on which the border control is not abolished.

From a legal point of view, for the purposes of calculation of the stay, the date of crossing the external border is important, not the specific entry condition for example a single visa or national visa.

Practical Arguments

The perspective of separating the calculation of the duration of stay of the TCN between the territory of the Member States fully applying the Schengen acquis from the territory of those Member States not yet fully applying the Schengen acquis could lead to a situation giving TCN the opportunity to turn a short stay into an indefinite stay just switching between the “different areas” of the EU/Schengen area, basically in an area covered by a *common corpus* of legislation.

In this context, a situation where a TCN could stay for an unlimited period of time on the territory of the Schengen/EU countries – 90 days in the Schengen area, 90 days in a EU Member State not fully applying the Schengen acquis and back to the previous Member State, etc cannot be disregarded.

Furthermore, there are no clear rules regarding the implementation of Article 12 of the SBC. The Member States not yet fully applying the Schengen acquis are confused about how to proceed in cases where there is no entry stamp and no information for crossing the external border of such a Member State (according to the Article 12(2)(b)) due to the fact that the TCN has entered the Member State concerned crossing its internal border. In such case, the presumption is not applicable because it refers only to the crossing of external borders. This affects the rights of the TCN and the aim of the aforementioned Recital 9 of the Preamble of the SBC (as stated in its second sentence) cannot be fulfilled.

Financial arguments

Separating the calculation of the stay of third country nationals will mean in practice that the concerned Member State should deploy national components of the entry/exit system at their internal borders in order to pair the entries into each of the 4 Member State's territories with the exits from their territories.

This will entail **unreasonable financial burden** on national resources, (since, under the financial framework 2014-2020, European funds cannot be used for investments for infrastructures, buildings and systems required at border crossing points at temporary external borders, in the meaning of Article 4 of Regulation no. 515/2014) and **domestic human resources**, without a clear, written basis for complying with this option. This solution, solely for the purpose of calculation of the stay in each of the four Member States, is without any added value to the rest of Member States fully applying the Schengen acquis.

At the same time, all these investments (both in infrastructure and personnel) shall be done without any clear vision of the length of support of the EES system at these borders, with potential negative impact on the overall border management.

Deploying new system at the internal borders goes against one of the aims of the current EES proposal, namely **strengthening the security at the external borders**. Instead of focusing the resources, efforts and infrastructure on the external borders, Member States not fully applying the Schengen acquis shall be obliged to ensure the same standards also at the internal borders.

3. TEXT PROPOSALS

The BG-RO proposals for amendments are marked in **bold and italic and grey-coloured highlights** and ~~strikethrough~~, where applicable; previous markings of the last version of the texts are available in underlined or strikethrough:

The text of the proposal for EES regulation could include the following:

Recital (43) (initial text of COM proposal of EES regulation - doc. 7675/16)

This Regulation establishing the EES replaces the obligation to stamp passports of third country nationals which is applicable by all acceding Member States. Stays in Member States which **do not apply the provisions of Title III of Regulation (EU) 2016/399 are not yet fully applying the Schengen acquis in accordance with their respective Acts of Accession** should **not** be taken into account in the calculation of the duration of the authorised stay **in the Schengen area of 90 days in any 180-days period. Such Member States should register in the EES the stay of third country nationals but the automated calculator in the system should not compute it as part of the authorised length of stay.**

Article 10 (compromise text of EES proposal – doc. 10880/16)

4) Stays in Member States which do not apply the provisions of Title III of Regulation (EU) 2016/399 are not yet fully applying the Schengen *acquis* in accordance with their respective Acts of Accession shall **not** be taken into account in the calculation of the duration of the authorised stay **in the territory of the Member States which apply the provisions of Title III of Regulation (EU) 2016/399** the Schengen *acquis* in full schengen area. **Those Member States shall register the stays of third country nationals on their respective territory in the EES. The automated calculator in the system shall not however compute stays in Member States which do not apply the provisions of Title III of Regulation (EU) 2016/399** are not yet fully applying the Schengen *acquis* **as part of the authorised length of stay.**

4a ~~The automated calculator will also separately indicate the duration of authorised stay for third country nationals registered in the EES admitted for a short authorised stay in a Member States which does not apply the provisions of Title III of Regulation (EU) 2016/399.~~ are not yet fully applying the Schengen *acquis* in accordance with their respective Act of Accession.

The text of the proposal for amending SBC could include the following:

Recital 4) (compromise text of SBC proposal – doc. 10876/16)

To ensure full effectiveness of the EES, entry and exit checks need to be carried out in a harmonised way at the external borders. ***To this end, the duration of authorised stay of 90 days in any 180-days period will cover periods spent on the territory of the Member States which apply the provisions of Title III of Regulation (EU) 2016/399 and of the Member States not applying the provisions of Title III of Regulation (EU) 2016/399.***

Article 1

(1xa) (New) the chapeau of Article 6 paragraph 1 of Regulation no. 399/2016, is replaced by the following:

For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay ***on the territory of the Member States which apply the provisions of Title III of Regulation (EU) 2016/399 and of the Member States not applying the provisions of Title III of Regulation (EU) 2016/399***, the entry conditions for third-country nationals shall be the following:...

Article 12 (compromise text of SBC proposal – doc. 10876/16)

Presumptions as regards fulfilment of conditions of duration of stay

3. The presumption referred to in paragraph 1 may be rebutted where the ~~person~~third country national provides, by any means, credible evidence, such as transport tickets or proof of his or her presence outside the territory of the Member States or of the date of expiry of a previous residence permit or long stay visa, that he or she has respected the conditions relating to the duration of a short stay.

In such a case:

- (i) ~~where the third-country national is found on the territory of a the Member States which applies the provisions of Title III of Regulation (EU) 2016/399 applying the Schengen acquis in full, the competent authorities shall create an individual file if necessary or indicate in the Entry/Exit System the date on which, and the place where, he or she crossed the external border of one of the Member States which apply the provisions of Title III of Regulation (EU) 2016/399 applying the Schengen acquis in full, in accordance with Article 18 of [Regulation establishing the Entry/Exit System (EES)];~~
- (ii) ~~where the third-country national is found on the territory of a Member State which does not apply the provisions of Title III of Regulation (EU) 2016/399 in respect of which the decision contemplated in Article 3(2) of the 2003 Act of Accession, in Article 4(2) of the 2005 Act of Accession and in Article 4(2) of the 2011 Act of Accession has not been taken, the competent authorities shall create an individual file if necessary or indicate in the Entry/Exit System the date on which, and the place where, he or she crossed the external border of this one Member States. in accordance with Article 18 of [Regulation establishing the Entry/Exit System (EES)]. situations the competent authorities shall apply the procedure laid down in Article 18 of [Regulation establishing the Entry/Exit System (EES)].~~

4. CONCLUSIONS

With the EES proposal, the Member States not yet fully applying the Schengen acquis are at a crossroads in the interpretation of how the duration of stay should be calculated, with impact on the design of the future EES system, but also on the desired uniformity in the way the Schengen acquis is put into practice.

This differentiating approach goes against the provisions of the Treaties and of the current provisions of the Schengen Borders Code without any legal arguments being presented.

As it would be difficult to conceive that the term *Member States* in a Regulation has other meaning than in the Treaties, it should be pointed out that **not a single provision exists in the Schengen Borders Code or elsewhere in the EU legislation drawing a division between the Member States applying in full the Schengen acquis (some of them non-EU countries) and the Member States not yet fully applying the Schengen acquis (all of which are EU Member States) in terms of the way of calculating the duration of stay.**

Thus, the so-called category II provisions of the Schengen acquis are clearly marked in Recital 44² of the Preamble of the Regulation (EU) 2016/399; they do not include Article 6(1)³, making the latter automatically a category I provision applicable by the Member States not yet fully applying the Schengen acquis as **from the date of accession to EU and not from the date of full Schengen membership.**

In the concerned Member State's understanding, that means that **the calculation of the duration of stay of no more than 90 days in any 180-day period should cover both stays in Member States applying in full the Schengen acquis and in Member States not yet fully applying the Schengen acquis.**

The application of the provision relating to the stamps used during border checks for calculating the duration of stay as from the date of accession to EU, as the only tool serving this purpose, shows even clearer that **this instrument was designed to cover the entire EU/Schengen territory, without distinction.** In this sense, it would not be logical to provide that this tool could also be enforced by Member States not yet fully applying the Schengen acquis if only the Schengen Member States **fully applying the Schengen acquis** could use it for the purpose it was originally designed. It would also be unclear having a single authorised duration of stay if the provision was supposed to be applied differently by some Member States from the others.

² As regards Bulgaria, Croatia, Cyprus and Romania, the first paragraph of Article 1, Article 6(5)(a), Title III, and the provisions of Title II and the annexes thereto referring to the SIS and to the VIS constitute provisions building upon, or otherwise related to, the Schengen *acquis* within, respectively, the meaning of Article 3(2) of the 2003 Act of Accession, Article 4(2) of the 2005 Act of Accession and Article 4(2) of the 2011 Act of Accession

³ For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

Delegations are invited to exchange views on the interpretation of Article 6(1) of Regulation (EU) 2016/399 as covering the duration of stay of no more than 90 days in any 180-day period both relating to stays in Member States applying in full the Schengen acquis and in Member States not yet fully applying the Schengen acquis. Delegations are also invited to indicate if they can support the proposed texts.
