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From: Presidency

To: Permanent Representatives Committee/Mixed Committee

Subject: Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 2016/399 as regards the use of the Entry/Exit System

On 29 June 2017 the 6th political trilogue on the proposal for a Regulation for the establishment of an Entry/Exit System (EES)¹ and the proposal for a Regulation amending the Schengen Borders Code (SBC) to integrate the technical changes that will result from the EES proposal² took place.

The agenda of the trilogue was the following:

1. Bilateral agreements (Article 64(5)(h))
2. Schengen Borders Code (Article 8a, 8b, 8d)
3. Calculator (Article 10(4))

¹ 7675/16.

² 7676/16 + ADD1.

4. Access to the EES by asylum authorities (Articles 25a and 25b and related provisions)
5. Enrolment of biometrics in case of refusal of entry (Article 16)
6. Transfer of data to third countries (Article 38)
7. Structure of Article 5
8. Data Retention (Article 31)

The compromise package resulting from this trilogue is set out below for delegations' consideration.

1. On bilateral agreements, Article 54 was agreed as set out in doc. 10545/17 ADD 1.

Paragraph 5 of Article 64 (Monitoring and Evaluation) was agreed as follows:

"5. Three years after the start of operations of the EES and every four years thereafter, the Commission shall produce an overall evaluation of the EES. This overall evaluation shall include:

- (a) an assessment of the application of the Regulation;
- (b) an examination of results achieved against objectives and the impact on fundamental rights;
- (c) an assessment of the continuing validity of the underlying rationale;
- (d) an assessment of the adequacy of the biometric data used for the proper functioning of the EES;
- (e) an assessment of the use of stamps in the exceptional circumstances referred to under Article 19(2);
- ~~(f) an assessment of the use made of the provisions referred to in Article 54 both in terms of frequency and practical implications as well as taking into account any related developments in the Union's visa policy;~~
- (g) an assessment of the security of the EES;
- (h) an assessment of any implications **including any disproportionate impact on the flow of traffic on the waiting time at border crossing points** and those with a budgetary impact on the Union budget

The evaluation shall include any necessary recommendations. The Commission shall transmit the evaluation report to the European Parliament, the Council, the European Data Protection Supervisor and the European Agency for Fundamental Rights.

Those evaluations shall also include an assessment of the use made of the provisions referred to in Article 54 both in terms of frequency (number of third country nationals making use of these provisions per Member State, their nationality, average duration of their stay) and practical implications as well as taking into account any related developments in the Union's visa policy. The first evaluation report may include options in view of phasing out the provisions referred to in Article 54 and replacing them with a European instrument. It shall be accompanied, if appropriate, by a legislative proposal amending Article 54 of this Regulation."

2. Concerning the draft Regulation amending the Schengen Borders Code, an agreement was found on the approach set out in doc. 10545/17 ADD 2, i.e. the deletion of Article 8a and 8b (use of ABC gates by EU/EEA/CH citizens and for third country nationals outside the scope of the EES) and the addition of a new paragraph in Art. 8d, which reads as follows:

"This article is without prejudice to the possibility of Member States to allow the use of self-service systems and/or e-gates for the border crossing of EU/EEA/CH citizens and third country nationals whose border crossing is not subject to registration in the EES."

3. On the calculation of the 90 days in any 180-day period, the Council's position set out in the Council mandate (6960/17) was agreed by the European Parliament.

In addition, it should be noted that the European Parliament raised the question of moving Article 2(2b) of the draft Regulation amending the Schengen Borders Code to Article 6(1) of the Schengen Borders Code for the sake of legal clarity, since Article 2(2b) as proposed in the Council mandate would not actually appear in the consolidated text of the Schengen Borders Code. This was a new point, but seemed to be rather legal/technical, and not of substance (given that the substance already appears in the Council position), and it was agreed that this would be tackled at technical level.

4. On access by asylum authorities, the European Parliament maintained its position despite the arguments reiterated by the Presidency. In the context of the overall package, it was agreed to exclude access for asylum authorities from the scope of the EES.

5. On the enrolment of biometrics in case of refusal of entry (Article 16), the European Parliament continued to have difficulties with the reference to letter I of Annex V, Part B of Regulation (EU) 2016/399. The compromise found was to retain it with reference to internal security, including elements of public policy, as set out below:

"1a. In the specific case where the third country national is refused entry on the basis of a reason corresponding to letter(s) B, D, H and/or I of Annex V, Part B of Regulation (EU) 2016/399 and where no previous file has been registered in the EES for that third country national, the border authority shall create an individual file in which it shall enter the alphanumeric data referred to in paragraph 1 as well as the following data:

a) in the case of third country nationals subject to a visa requirement: the facial image referred to in Article 14(1)(f)

b) in the case of a visa exempt third country nationals the biometric data required pursuant to Article 15(1)(b) and (c)

c) in the case of third country nationals subject to a visa requirement who are not registered in the VIS: the facial image referred to in Article 14(1)(f) and the fingerprint data as referred to Article 15(1)(c)

1aa. By way of derogation to paragraph 1a, where the reason corresponding to letter H applies and the biometric data of the third country national are recorded in the SIS alert resulting in the refusal of entry, the biometric data of the third country national shall not be entered in the EES.

1aaa. By way of derogation to paragraph 1a, where the reason corresponding to letter I applies, the biometric data shall only be entered in the EES when the entry is refused because the third country national is considered to be a threat to internal security, including, where appropriate, elements of public policy.

6. On the transfer of data to third countries (Article 38), the compromise proposal put forward in the technical meeting of 27 June concerning paragraph 2(da) was confirmed:

"2(da). - a return decision adopted pursuant to Directive 2008/115(EC) has been issued in relation to the individual concerned provided its enforcement is not suspended, **and provided that no appeal has been lodged which may lead to the suspension of the enforcement of this return decision.**"

As far as Article 38(4a) is concerned, the possibility to transfer data to third countries in the case of an imminent danger associated with a terrorist offence or an imminent danger for the life of a person associated to a serious criminal offence was agreed. However, the possibility to transfer data in case of an imminent danger for the physical integrity of a person could not be accepted. It was agreed to add a recital clarifying that an imminent danger for the life of a person should be interpreted broadly and would therefore concern serious criminal offences such as trafficking in human beings, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, as well as rape (all crimes against the person listed in Article 2(2) of the Framework Decision on the European Arrest Warrant).

"4a. By way of derogation from paragraph 4, the data referred to in Article 14(1)(a), (b) and (c) 14 (2) (a) and (b), 14 (3) (a) and (b) and 15(1) (a) may be transferred or made available by the designated authority to a third country in individual cases, only if the following cumulative conditions are met:

- (a) there is an exceptional case of urgency, where there is
 - (i) an imminent danger associated with a terrorist offence as defined under Article 3(1)(26) of this Regulation
 - (ii) or an imminent danger for ~~the physical integrity or~~ the life of a person and this danger is associated with ~~another a~~ serious criminal offence as defined under Article 3(1)(27) of this Regulation,

- (a1) the transfer of data is necessary for the prevention, detection or investigation in the territory of the Member States or in the third country concerned of such offence or offences;
- (a2) the designated authority has access to such data in accordance with the procedure and the conditions set out in Articles 28 and 29
- (b) the transfer is carried out in accordance with the applicable conditions set out in Directive (EU) 2016/680, in particular Chapter V thereof on transfers of personal data to third countries or international organisations
- (c) a duly motivated written or electronic request from the third country is submitted
- (d) and the reciprocal provision of any information on entry/exit records held by the requesting third country to the Member States operating the EES is ensured.

Where a transfer is based on this paragraph, such a transfer shall be documented and the documentation shall be made available to the supervisory authority on request, including the date and time of the transfer, information about the receiving competent authority, the justification for the transfer and the personal data transferred."

7. The structure of Article 5 as set out in the European Parliament's mandate was agreed.
8. The compromise on the data retention period of 3 years for non-overstayers and 5 years for overstayers was confirmed.

In the light of the above, Coreper is invited to confirm the compromise package agreed at the political trilogue of 29 June 2017 so that work can continue at the technical level on this basis, with a view to finalizing the entire text.
