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NOTE

From: Presidency

To: Working Party on Frontiers/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)

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 of third country nationals crossing the external borders of the Member States of the European Union

- Access for law enforcement purposes: Summary of the replies to the questionnaire

I. INTRODUCTION

On 15 July 2013, the Presidency issued a questionnaire (12107/13) seeking further information from delegations as regards current national rules and statistics on law enforcement authorities' access to their own national entry/exit systems (NEESs) as well as on salient cases where such access has proved to be crucial in a criminal investigation.

In the view of the Presidency such information is indispensable in order to examine the necessity and proportionality of any envisaged access for law enforcement purposes and may also be useful in future discussions within the Council and with the EP.

20 Member States and one associated country have sent in their replies.

The replies provide solid evidence that access to national entry and exit systems (NEES) is an effective tool to prevent, detect, investigate and prosecute criminal offences, especially in such areas as facilitated illegal immigration, trafficking in human beings, terrorism, drug smuggling, money laundering, smuggling of excise goods or trafficking in stolen vehicles.

NEESs are run by border authorities. Access is granted to immigration authorities, the police and other law enforcement authorities, e.g. prosecution and anti-corruption services or bodies dealing with money laundering offences. In addition, in most Member States access is also granted to customs and excise authorities. In a few Member States access is also granted to national security agencies.

The purposes of the NEESs as it emerges from the replies are: use for border checks and controlling length of stay; for immigration purposes; to carry out controls inside the territory; prevention, detection, investigation and prosecution of criminal offences; providing evidence in court proceedings; detection of tax evasion and customs' offences; and risk-analysis and statistics.

The procedures for granting access to the NEES for law enforcement purposes vary among Member States, but in all of them all the information recorded in the NEES can be accessed for law enforcement purposes. In some Member States access is based on a need-to-know basis and is granted following a written request. In those cases, access is granted by border authorities which are the holders of the information and a decision is taken on a case-by-case basis. In other Member States, police or judicial authorities do not need to submit a written request. Instead, they have credential rights which authorise them to have systematic access to the NEES under certain conditions.

As regards the retention period provided for in NEES, it is 5 years in six Member States, 10 years in three Member States and 25 years in one Member State. It is worth highlighting the case of one Member State which initially established a retention period of six months. In 2011, it changed the retention period to 5 years to meet the needs of the daily activities of the different authorities. The Member State in question explained that an investigation most often takes more than 6 months, especially if it is necessary to identify all the members of a criminal organisation. In judicial proceedings there may be a need for such data 2 or 3 years after the border crossing, and not only for criminal investigation purposes but also to protect the rights of persons. It is important that this information is borne in mind when the Working Party discusses amendments to the EES draft Regulation to incorporate access for law enforcement purposes into it.

II. MAIN ADDED VALUE OF GRANTING ACCESS FOR LAW ENFORCEMENT PURPOSES

In their replies, delegations have shared substantial information on their NEESs and have emphasised, quoting salient cases, the contribution of those systems in the prevention, detection and prosecution of criminal offences. Four delegations which do not have an NEES in place have also made very valuable contributions to show the added value of granting access to the future EES for law enforcement purposes.

From the replies it appears that the main added value of allowing access to the NEES for law enforcement purposes may be summarised as follows:

- Access to detailed information on cross-border passenger traffic (NEES data and, in domestic transport, operators' passenger data) is extremely relevant with regard to obtaining intelligence data and the targeting of preliminary investigations as well as in confirming or dismissing suspicions about a person or for identifying victims of the suspects.
- Entry and exit data has been useful for tracking movements of members of itinerant criminal groups.

- The data from the NEES is also used, for example, to establish whether a person suspected of being involved in criminal offences travels regularly to a particular country and whether he/she travels with other persons also suspected of being involved in criminal activities. In addition, the information helps to determine the modus operandi and to draw conclusions on the travel routes. The analysis of travel route patterns may give an indication as to involvement of other persons in a given criminal activity.
- Moreover, it is not always or only a question of matters established in reactive investigation, but for several delegations retrieving proactive data and intelligence information from the data files is very important for preventing organised crime.
- Data in the NEES support the work of the judicial authorities (courts, prosecutors, etc.) in tracing accused persons and witnesses, serving summons, the execution of orders for compulsory court appearances and compulsory prohibition measures on leaving the country. In other cases, the information recorded in the NEES was used as evidence in criminal trials.

Delegations which do not have a NEES see the added value of access to the future EES for law enforcement purposes as follows:

- The type of data gathered in the future EES will prove highly useful in fighting terrorism and serious crimes. Violent extremist movements and organised crime groups adapt very rapidly to the new methods and techniques put in place by the investigation services and often manage to circumvent them. They use counterfeit documents and move around frequently.
- Terrorist and/or criminal networks, groups and organisations are increasingly relying on "backup persons", "middlemen" or other "small-time couriers" and "facilitators" to assist them. In order to avoid detection, these individuals often have an exemplary profile. Some organisations make sure that their "backups" change countries frequently.

- Access to the EES would make it possible to identify suspicious or wanted individuals on the basis of biometric data, to follow their movements, and to retrace their routes. The "backups" could also be targeted by making connections with other investigation data, either national or from other Member States or third countries. Lastly, it would complement the access already granted - under certain conditions - to the VIS (Visa Information System) and to EURODAC (European database for recording data on asylum applicants and third-country nationals crossing the borders of the European Union illegally).

Many examples provided by delegations showed the added value for law enforcement purposes. The Presidency would like to bring some of them to the attention of delegations:

- In an on-going investigation of the brutal murder of a young child which took place in the border area of one Member State, no suspect has yet been identified, but the Criminal Police has information with regard to the age of the criminal (30-45) and knows the exact time when the murder was committed. One of the working hypotheses includes a scenario whereby the criminal originated in the neighbouring third country. On the basis of the defined profile, relevant data will be extracted from the NEES to screen the list of persons entering and leaving the country. In cooperation with the neighbouring third-country's border authorities, checks will be carried out to see whether the list includes persons who have committed similar crimes in the past.

- A national authority sent an alert to the relevant airport regarding a known tobacco smuggler. The authority decided to go back through the travel history of the subject, and studied the manifests for previous inbound flights on which the subject had travelled. This investigation identified two other persons who had been travelling on the same flights as the main individual, had travelled on previous flights with him, and who also had a history of tobacco smuggling in their own right. The operator added the details of these two individuals to the alert, stating that they might be worth investigating further. As a result of the operator's diligence and ability to check travel history, the two passengers she had identified were stopped by commodities staff at the airport, and were found to be in possession of 99 000 cigarettes, which were seized.
- Information in the NEES was used to solve a series of luxury car thefts. The information was used to trace vehicles and couriers and to document their movements for the purposes of pre-trial investigation and court proceedings. The cases involved extensive international cooperation.

- A Member State conducted an investigation into the smuggling of irregular immigrants across the border from third countries into a Member State and onwards to the Western EU Member States. One facilitator, whose identity was known to the authorities, was a national of a Member State and operated on the territory of that Member State. His accomplice, who operated in Moscow, was unidentified at that time; the Member State's authorities were only aware of him being a national of Afghanistan. One of the illegal immigrants apprehended by the Member State concerned revealed that the facilitator of Afghan nationality had arrived in that Member State from another Member State. Upon a request from the first Member State's authorities, the other Member State's authorities extracted an NEES record with personal data of the Afghan national, who had arrived from Belarus at a particular date, and also provided the Member State's authorities with his photo. The irregular migrant recognised the person in the photo as the facilitator who had organised his illicit travel from Russia to the Member State and confirmed that this was the person who had arrived from the other Member State. On the basis of this information a European arrest warrant was issued and the Afghan national was tracked down in one of the associated countries and successfully extradited to the Member State concerned for pre-trial investigation.
- A recent example is a case in which the accused were found guilty of aggravated offences relating to procurement for prostitution and narcotics. Examination of the NEES data revealed a time-related and factual connection between supplying of prostitutes, bringing the exploited women into the country and the supplier's entry and exit from the country (the supplier and a friend). The aforementioned information was used in order to direct the investigation. Obtained from the register, the exploited women's periods of residence in the country were attached as evidence to the pre-trial investigation report. These served as a basis for e.g. proving the professional character and continuity of the procurement, and defining the proceeds of the crime.

For a majority of delegations, it was not possible to provide statistics showing cases where access to data stored in the NEES was key for the investigation or for the resolution of a case. The reasons are twofold: in the first place, records of the entry and exit of third-country nationals represent only a part of the data in a case and therefore it is impossible to ascertain that any given record has led to successful investigation or solution of the case. Secondly, criminal proceedings may last several years and consequently it would only be possible to say that such a record was conclusive after a period of three, four or five years on the basis of a definitive conviction by a criminal court. Without a monitoring system in place which would allow criminal courts to report back to prosecutors, and the prosecutors back to the police, and further to the border authorities, it would appear almost impossible to collect such statistics.

Delegations also argued that statistics are not very relevant because a search in the database may be negative but that does not mean that the search has been inefficient. In particular, such a negative search may exclude someone's involvement thereby reducing a number of working hypotheses and contributing to the investigation of a criminal offence.

III. CONCLUSION

All the Member States have conveyed the same message that from the point of view of all the law enforcement authorities, the NEES data or data in the future EEE is highly significant because it helps to prevent, detect and investigate criminal offences.

The Presidency invites delegations to take note of this summary.
