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From: Presidency

To: Permanent Representatives Committee/Council / Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)

Subject: Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders

The above mentioned proposal, which is part of the Borders legislative package, was submitted by the Commission on 15 December 2015. Its main objective is to contribute in the prevention of threats against internal security and public policy. This proposal replies to the call expressed by the JHA Council in November 2015 for "a targeted revision of the Schengen Borders Code to provide for systematic controls of EU nationals, including the verification of biometric information, against relevant databases at external borders of the Schengen area, making full use of technical solutions in order not to hamper the fluidity of movement". Bearing in mind also the Conclusions of the European Council in December 2015 and February 2016, reaching agreement on this proposal is a matter of absolute priority.

Substantial progress was made during detailed discussions at the Working Party on Frontiers on 8, 19 and 29 January 2016 and the JHA Counsellors on 4 February 2016, and the Presidency submitted a compromise text to the Permanent Representatives Committee on 10 February 2016, where further progress was made. Following these proceedings and the discussions at JHA Counsellors on 18 February 2015, the Presidency has prepared the revised compromise text set out in the Annex.¹

The compromise text set out in the Annex was at the JHA Counsellors meeting acceptable to a sufficient majority of delegations, with the exception of the possible derogation from systematic checks at air borders. Article 7(2d) of the text provides for such a derogation for air borders for a maximum period of three years. Several delegations were of the view that there should be no derogation possible for air borders, and that in any case three years was too long a period. Several other delegations continued to favour this derogation.

The issue needs to be addressed at political level with a view to finding the right balance between the security priorities and the economic and travel-related impact of the proposed new measures on border controls.

Two solutions could be considered:

- No derogation for air borders, leading to the deletion of Article 7(2d) and an adjustment to Article 7(2a), or
- Maintaining a derogation for air borders for a limited period of time.

The Presidency invites Coreper/Council to examine this last outstanding question with a view to the adoption of a general approach on the proposal at the February 2016 JHA Council.

¹ It is noted that the changes vis-à-vis the Commission proposal in the attached text are demonstrated in underline. The text in relation to a possible derogation regarding air borders is put between square brackets for further consideration.

DRAFT REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Control at external borders remains one of the main safeguards of the area without controls at internal borders. It is carried out in the interest of all Member States. One of the purposes of such controls is to prevent any threat to the Member States' internal security and public policy, irrespectively of the origin of such threat.
- (2) The phenomenon of foreign terrorist fighters, many of whom are Union citizens, demonstrates the necessity to strengthen the checks at external borders with regard to Union citizens.
- (3) The documents of persons enjoying the right of free movement under Union law should therefore be checked systematically against relevant databases related to stolen, misappropriated, lost and invalidated travel documents in order to avoid that persons hide their real identity.

- (3a) Member States are obliged to check systematically third country nationals against all databases on entry. It should be ensured that such checks are also carried out systematically on exit.
- (4) Border guards should for the same reason also systematically check persons enjoying the right of free movement under Union law against relevant national and European databases in order to ensure that they do not represent a threat to internal security or public policy.
- (5) Technological developments allow in principle to consult relevant databases without delaying the process of crossing the border, as the controls on documents and persons can be carried out in parallel. Automatic border control gates may be relevant in that context. The use of passenger information received in accordance with Council Directive 2004/82/EC, or in accordance with other Union or national legislation, may also contribute to speeding up the process of required controls during the border crossing process. It is therefore possible without disproportionate negative effect on persons travelling in good faith to strengthen checks at external borders to better identify those persons who intend to hide their real identity or who are subject to relevant alerts for security reasons or for arrest. Systematic checks should be carried out at all external borders.
- (5a) However, if systematic checks at (...) borders were to have a disproportionate impact on the flow of traffic at the border, Member States should be allowed not to carry out systematic checks against databases but only if based on a risk analysis assessing that such a relaxation would not lead to a security risk. Such risk assessment should be transmitted to the Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Council Regulation (EC) No 2007/2004¹ and be the subject of regular reporting both to the Commission and to the Agency. [This derogation should, however, only apply for a limited period regarding air borders.]

¹ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004, p.1).

- (5b) Where a Member State intends to carry out targeted consultations regarding persons enjoying the right of free movement under Union law, it should notify without delay the other Member States, the Agency and the Commission. A procedure for this notification should be developed by the Commission, in cooperation with the Member States, in the context of the Schengen Borders Code Handbook.
- (6) With Council Regulation (EC) No 2252/2004¹, the Union introduced the facial image and fingerprints as security elements in the passport of Union citizens. These security features have been introduced in order to render the passports more secure and establish a reliable link between the holder and the passport. Member States should therefore verify at least one of these biometric identifiers, in case of doubts on the authenticity of the travel document or on the identity of its holder. The same approach should apply to the checks on the third-country nationals, where this is possible.
- (7) This Regulation is without prejudice to the application of Directive 2004/38/EC of the European Parliament and of the Council².
- (8) *(moved up in the Preamble and became Recital 3a).*
- (9) Since the objective of this Regulation, namely reinforcing the checks against databases at external borders in reply in particular to the increase of the terrorist threat concerns one of the safeguards of the area without internal border control and as such concerns the proper functioning of the Schengen area, it cannot be sufficiently achieved by the Member States individually, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

¹ Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ L 385, 29.12.2004, p.1).

² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, 30.4.2004, p. 77).

- (10) In accordance with Articles 1 and 2 of the Protocol No 22 on the position of Denmark, as annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen *acquis*, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Regulation whether it will implement it in its national law.
- (11) This Regulation constitutes a development of the provisions of the Schengen *acquis*, in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC¹; the United Kingdom is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (12) This Regulation constitutes a development of the provisions of the Schengen *acquis*, in which Ireland does not take part, in accordance with Council Decision 2002/192/EC²; Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (13) As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*³, which fall within the area referred to in point A of Article 1 of Council Decision 1999/437/EC⁴.

¹ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* (OJ L 131, 1.6.2000, p. 43).

² Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis* (OJ L 64, 7.3.2002, p. 20).

³ OJ L 176, 10.07.1999, p. 36.

⁴ Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.07.1999, p. 31).

- (14) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*¹ which fall within the area referred to in Article 1, point A of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC².
- (15) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*³ which fall within the area referred to in Article 1, point A of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU⁴.
- (16) As far as the use of Schengen Information System is concerned this Regulation constitutes an act building upon, or otherwise relating 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. The results of queries in the Schengen Information System should be without prejudice to Article 1(4) of Council Decision 2010/365/EU.

¹ OJ L 53, 27.2.2008, p. 52.

² Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 53, 27.2.2008, p. 1).

³ OJ L 160, 18.6.2011, p. 21.

⁴ Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

- (17) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (18) Regulation (EC) No 562/2006 of the European Parliament and of the Council¹ should therefore be amended accordingly,

Article 1

Regulation (EC) No 562/2006 is amended as follows:

Article 7 is amended as follows:

(a) Paragraph 2 is replaced by the following:

"2. On entry and on exit, persons enjoying the right of free movement under Union law shall be subject to the following checks:

(a) verification of the identity and the nationality of the person and the validity and authenticity of the travel document, including by consulting the relevant databases, in particular:

- (1) the Schengen Information System;
- (2) the Interpol database on stolen and lost travel documents;
- (3) national databases containing information on stolen, misappropriated, lost and invalidated travel documents.

For passports and travel documents containing a storage medium as referred to in Article 1(2) of Council Regulation 2252/2004, the authenticity of the storage medium shall be checked.

¹ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).

(b) verification that a person enjoying the right of free movement under Union law is not considered to be a threat to the internal security, public policy, international relations of any of the Member States or to public health, including by consulting the relevant Union, and national databases, in particular the Schengen Information System.

(c) Where there is doubt on the authenticity of the travel document or on the identity of its holder, (...) verification of at least one of the biometric identifiers integrated in the passports and travel documents issued in accordance with Council Regulation (EC) No 2252/2004*. Where possible, such verification shall also be carried out regarding travel documents not covered by that Regulation.

2a. Where [at external land and sea borders] the consultation of the data bases referred to in paragraph 2(a) and (b) would have a disproportionate impact on the flow of traffic, a Member State may decide to carry out those consultations on a targeted basis at specified border crossing-points, based on an assessment of the risks related to internal security, public policy, international relations of any of the Member States or a threat to public health.

The scope and duration of the temporary reduction to targeted checks shall not exceed what is strictly necessary and shall be defined in accordance with a risk assessment established by the Member State concerned. The risk assessment shall explain the reasons for the temporary reduction to targeted checks and shall take into account, inter alia, the disproportionate impact on the flow of traffic and assess the possible risks and shall provide for statistics on passengers and incidents related to cross border crime. It shall be updated regularly.

The Member State concerned shall without delay transmit its risk assessment and updates to it to the Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) No 2007/2004 and shall report every six months to the Commission and to that Agency on the application of the checks carried out on a targeted basis. The Member State concerned may decide to classify the risk assessment or parts thereof.

2b. Where a Member State intends to carry out targeted consultations pursuant to paragraph 2a, it shall notify the other Member States, the Agency and the Commission accordingly without delay. The Member State concerned may decide to classify the notification or parts thereof.

In case the Member States, the Agency or the Commission have concerns about the intention, they shall notify the Member State in question of these concerns without delay. The Member State in question shall take these concerns into account.

2c. The Commission shall, before two years after [date to be inserted: date of application/entry into force, depending on the final wording of Article 2], transmit to the the European Parliament and the Council an evaluation of the implementation and consequences of paragraphs 2a and 2b.

[2d. With regard to air borders, paragraphs 2a and 2b shall apply for a maximum period of three years from [date to be inserted: date of application/entry into force, depending on the final wording of Article 2].

2e. The consultation of the databases referred to in paragraph 2(a), and the consultation of the relevant Union and national databases referred to in paragraphs 2(b) may be carried out in advance based on passenger information received in accordance with Council Directive 2004/82(EC) or in accordance with other Union or national legislation.

In case this consultation is carried out in advance based on such passenger information, a verification shall take place at the border crossing point. This process shall consist of a verification of the received advanced data against the data in the travel document and the verification of the identity and the nationality of the person concerned, as well as the validity and the authenticity of the travel document.

* Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ L 385, 29.12.2004, p. 1)."

(aa) Paragraph 3(a)(i) and (ii) are replaced by the following:

"(i) Verification of the identity and the nationality of the third country national and the validity and authenticity of the travel document, including by consulting the relevant databases, in particular:

(1) the Schengen Information System;

(2) the Interpol database on stolen and lost travel documents;

(3) national databases containing information on stolen, misappropriated, lost and invalidated travel documents

For passport and travel documents containing a storage medium, the authenticity of the chip data shall be checked, subject to the availability of valid certificates.

(ii) verification that the travel document is accompanied, where applicable, by the requisite visa or residence permit."

(b) Paragraph 3(b)(iii) is replaced by the following:

"(iii) verification that the third-country national concerned is not considered to be a threat to public policy, internal security or international relations of any of the Member States, including by consulting the relevant Union and national databases, in particular the Schengen Information System;"

(c) Paragraph 3(c)(iii) is deleted.

(d) In paragraph 3, the following points are added:

"(x)The consultation of the databases referred to in paragraph 3(a)(i), and the consultation of the relevant Union and national databases referred to in paragraphs 3(a)(vi) may be carried out in advance based on passenger information received in accordance with Council Directive 2004/82(EC) or with other Union or national legislation.

In case this consultation is carried out in advance based on such passenger information, a verification shall take place at the border crossing point. This process shall consist of a verification of the received advanced data against the data in the travel document and the verification of the identity and the nationality of the person concerned, as well as the validity and the authenticity of the travel document. "

(y) Where there is doubt on the authenticity of the travel document or on the identity of the third country national, the checks, where possible, shall include the verification of at least one of the biometric identifiers integrated in the travel documents."

Article 2

Entry into force and applicability

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall apply from [...]¹

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

¹ Date to be inserted.