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From:	the Presidency
To:	Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) / Mixed Committee (EU-Iceland/Liechtenstein/Norway/Switzerland)
Subject:	Discussion paper on the Smart Borders Package

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**Introduction**

On April 6 the Commission published the revised smart borders package. Within the different preparatory Council bodies much progress has been made with the aim of reaching a Council position as soon as possible. This paper sets out the remaining four outstanding points and seeks possible ways forward.

1. Scope of the Entry/Exit System (EES)

Several Member States have expressed that the current scope of the EES should be broadened to all third country nationals and EU citizens. The Presidency, in close consultation with the Commission, the Council Legal Service and Council Secretariat has concluded that broadening the scope to this effect is not compatible with the purpose of the current proposal. Nevertheless these requests deserve proper follow-up and are therefore included in actions 41 and 43 of the Roadmap Interoperability which was endorsed by the JHA-Council of 10 June, stating that the Commission in close cooperation with a high level expert group will examine the need and added value of registering travel movements of persons enjoying free movement rights, including an assessment of impact, costs, proportionality of the different possible solutions (including broadening the scope of EES) by the end of 2016.

**Presidency would like to ask Member States if they can agree with leaving EU citizens, residence permit holders, residence card holders and long stay visa holders out of the scope of this Regulation for now, subject to further examination in the framework of the follow-up on the Roadmap adopted by the JHA Council on 10 June.**

## 2. Bilateral agreements

Several Member States since long have bilateral agreements with third countries providing these third country nationals with legal stay in those Member States which can exceed the maximum of legal short stay of 90 days within 180 days as permitted by EU-legislation.

Next to this, it is possible for third country nationals who benefit from multiple bilateral agreements to accumulate the legal stay of each single agreement to exceed the maximum of legal short stay of 90 days within 180 days as permitted by EU-legislation even more.

Giving the automatic nature of the EES, the EES would unfoundedly flag these third country nationals as overstayers if they stay longer than 90 days within 180 days. In earlier discussions, also in the context of the Touring Visa proposal, possible ways forward have been explored, which focused on (fully) renegotiating the bilateral agreements, including (administrative) limitations to the right of legal stay, introducing manual checks on the EES list of overstayers and general exclusions of third country nationals enjoying rights under the bilateral agreements. None of the solutions had sufficient support to take this issue forward. As the Presidency is aware of the importance of the bilateral agreements, this paper presents a compromise proposal, which aims to respect the existence of the bilateral agreements as much as possible and at the same time seeks to maximize the benefit of the EES.

*In the current proposal (Article 54), Article 20, paragraph 2 of the Convention implementing the Schengen Agreement would be amended as follows:*

### Article 20

1. Aliens not subject to a visa requirement may 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, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).

2. Paragraph 1 shall not affect each Contracting Party's right to extend beyond three months an alien's stay in its territory in exceptional circumstances ~~or in accordance with a bilateral agreement concluded before the entry into force of this Convention.~~

3. This Article shall apply without prejudice to Article 22.

#### *Presidency compromise proposal*

#### Article 20

1. Aliens not subject to a visa requirement may 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, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).

2. Paragraph 1 shall not affect each Contracting Party's right to extend beyond three months an alien's stay in its territory in exceptional circumstances or ~~if in accordance with a bilateral agreement, concluded before the entry into force of this Convention,~~ **provides a right to stay beyond three months.**

**3. Aliens who wish to extend their stay beyond three months within the territory of the Contracting Party on the basis of a bilateral agreement within the meaning of paragraph 2, have to enter and exit at the external border of the Member State involved in the specific bilateral agreement. At entry the Alien has to report it's intent to stay on the basis of the specific bilateral agreement.**

**4. The right of stay on the basis of the bilateral agreement cannot be accumulated to any other stay in the territories of the Contracting Parties.**

~~4~~5. This Article shall apply without prejudice to Article 22.

#### *Background*

The amendment to paragraph 2 intends to make clear that every bilateral agreement which in itself provides for legal stay in a Member State for more than three months remains untouched.

To prevent that the EES signals these stays as overstay, the measure in paragraph 3 is needed.

Paragraph 4 is meant to end the practice of accumulated legal stays on the basis of bilateral agreement(s) and/ or paragraph 1.

### 3. Fingerprint data

During the discussions within the Council preparatory bodies Member States have put forward their positions and concerns on the number of fingerprints and which specific fingerprints should be recorded in the EES. Some Member States are of the opinion that more than 4 fingerprints are necessary because they have concerns that four fingerprints are insufficient to carry out a secure identification process of third country nationals at the external border or in the territory of the Member States. The technical study and the pilot project concluded that the combination of 4 fingerprints and a facial image provide for sufficient safeguards for the identification of the person.

**The Presidency would like to know whether SCIFA believes the recording of four fingerprints in combination with the facial image is sufficient to ensure a secure identity check at the external borders or in the territory of a Member States.**

Furthermore several Member States have raised questions on whether the proposal should define which fingerprints have to be used. The Commission proposes to define the fingerprints to ensure interoperability between EES and VIS and to ensure control speed. Some Member States prefer another definition for law enforcement purposes.

**Does SCIFA agree with proposal of the Commission?**

### 4. Access to VIS for Schengen Member States who do not yet fully apply the Schengen acquis

Due to the limitations related to the implementation of the Schengen acquis on the Schengen Member States who do not yet fully apply the Schengen acquis these Member States will not be able to fully use the functionalities of the EES as the other Member States.

Since interoperability with the VIS is an important component of this proposal, the lack of access to VIS limits the usefulness of the system for these Member States.

In order to maximize the benefits of the system for these Member States, the Presidency would like to hear the views of SCIFA on the possibility to provide access to VIS for those member states for which the verification in accordance with the applicable Schengen evaluation procedures has already been successfully completed, but for which the decision on the lifting of controls on their internal borders pursuant to relevant provisions of relevant Acts of Accession has not yet been taken.

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