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NOTE

From:	Presidency
To:	Delegations
Subject:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA – Outcome of the latest technical meetings

I. Introduction

After a long suspension due to the reluctance by the LIBE committee to engage in the interinstitutional negotiations in the context of the pandemic, pending a decision on the priority nature of the file, the negotiations on the VIS eventually resumed in early September. A stocktaking exercise in mid-July had already allowed the three institutions to go through the outstanding issues, to identify those to be addressed as a priority and to set a calendar for the upcoming negotiating sessions. It was also agreed to arrange some more informal sessions in addition to the technical meetings, with a view to preparing the ground for the technical meetings, thereby accelerating the pace. Given the pandemic, all the meetings are being held in video-conference format, however despite some technical hiccups the work has proceeded at the intended speed and all the necessary measures have been taken to ensure the confidentiality of the negotiations.

Delegations will find below an outline of the discussion that took place in the technical meetings over the month of September and a number of questions on which the Presidency wishes to obtain the delegations' position before returning to the negotiating table. The latest four-column table to which this note refers can be found in WK 10179/2020.

II. Automated checks (lines 154 to 215)

The issue of automated checks was the first to be addressed after the resumption of the negotiations. Very good progress was made and the text is now almost completely 'greened', with some positive results for the Council.

The negotiators at technical level agreed to submit the outcome of the negotiations to their respective institutions as a package. While the principle that '*nothing is agreed until everything is agreed*' continues to apply as usual, the text is now sufficiently stable and both the Presidency and the Rapporteur do not wish to reopen its substance.

Here are the main new elements of the package:

- a) Concerning the **IT systems to be queried**, the following was agreed:
- ECRIS-TCN will be checked¹, but only with regard to convictions related to terrorist offences and other forms of serious criminal offences. The Presidency considers this as a good compromise and one which the Council had already supported in its mandate on the VIS consequential amendments².
 - TDawn will be queried as well³. To overcome the well-known EP resistance to query this Interpol database, which does not meet the EU standards, two conditions were attached to it:

¹ The inclusion of ECRIS-TCN among the IT systems to be queried will need to be re-confirmed by the EP in a shadows' meeting (which explains the lighter shadow of green in the four-column table), but there are reasonable expectations of a positive outcome given the level of commitment of the Rapporteur.

² See 8787/20, Annex II.

³ The same caveat as for ECRIS-TCN applies here.

- ✓ any queries and verification are to be performed in such a way that no information is revealed to the owner of the Interpol alert (see line 176w) and
- ✓ if the implementation of the above condition is not ensured⁴, the VIS will not query Interpol's databases (see line 176x)

In the Presidency's view, this is a reasonable compromise which has some precedents in EU law⁵ or in Council positions⁶.

- While the Rapporteur could agree to the Council suggestion to included SIS alerts on return on condition that the Council accepted Article 9caa(2) (lines 211c, 211d, 211e⁷), such suggestion was challenged by other political groups and will need further discussion by the shadows. The Presidency will keep delegations informed of the EP response and will continue to strive to include the query of the SIS alerts on return in the Regulation, in accordance with the Council mandate.

- b) Concerning the **horizontal issue of public health**, the EP stuck with its intention to address this on a case by case basis. In Article 9a (line 157) it agreed to include public health in the purposes of the automated checks, in line with the Council position.

In Article 9b (line 185), the EP insisted on the need to define the epidemic risk as 'high', in line with the ETIAS Regulation.

- c) Member States' concerns regarding the **VIS designated authority's access to the ETIAS watchlist** have been acknowledged and the new Article 9cb on manual verification and follow-up of hits in the ETIAS watchlist (line 202f and following), together with a number of other adaptations of the text elsewhere, have been greened.

⁴ A cooperation agreement between the EU and Interpol needs to be concluded to implement this condition since it currently contravenes Interpol's rules on the processing of data.

⁵ See Article 12 of the ETIAS Regulation (EU) 2018/1240, and recital 14 and Article 9(5) of the Interoperability Regulation (EU) 2019/818.

⁶ See the Council mandate on the ETIAS consequential amendments (11300/2019), Article 1, point (13)(c). The change of wording compared to the Council mandate on the ETIAS consequential amendments is necessary as the VIS is already operating as an existing system.

⁷ This language mirrors Article 8 of Regulation (EU) 2018/1860.

- d) Paragraph 2 of Article 9c (line 192) has been redrafted to make it clear that competent visa authorities will have only **temporary access to data in the EES, ETIAS, SIS, Eurodac or SLTD** that triggered the hit, i.e. only for the duration of the manual verifications and the examination of the visa application. One outstanding question is how this access will be regulated in the event of an appeal procedure, given the possibility that the retention period for the data that triggered the hit has expired by the time the appeal is introduced.
- e) As for the **nature of the VIS designated authorities**, it was agreed that:
- each Member State can have more than one VIS designated authority (line 202b);
 - as requested by the Council, the EP agreed that the SIRENE Bureaux can assume responsibility for the manual verification of certain hits, but as a compromise it was agreed that where Member States choose to designate the SIRENE Bureau as the VIS designated authority, they *‘shall allocate sufficient additional resources to enable the SIRENE Bureau to fulfil the tasks entrusted to the VIS designated authority under this Regulation’* (line 202b)⁸. Compared to a first version of this text proposed by the EP which used much stronger language, this solution leaves some leeway to Member States. The EP made it clear that a recital would not be sufficient. Against this background, and taking into account the point of departure of the EP, i.e. its original stance of establishing one SPOC and strong opposition to including the SIRENE Bureaux among the VIS designated authorities, the Presidency believes that this compromise is the best that the Council could secure and invites delegations to support it.
 - the VIS designated authorities are to be operational *‘at least during regular working hours’* (line 202c): while the EP had insisted on eight hours' availability per day, the Presidency suggested this compromise, which should give Member States the necessary flexibility.

⁸ See the earlier discussion in the JHA Counsellors meeting on 18 February 2020 (cf. 5998/20).

- f) On the **deadline for sending the reasoned opinion** (see Article 9cab(6) - line 211m), the principle of having a shorter deadline, i.e. two working days, for the manual verification (line 202d) and a longer one for the reasoned opinion was agreed upon⁹. There was, however, disagreement on the latter. The EP wanted five calendar days and the Council seven. The EP would be ready to accept seven calendar days, if the Council could accept that for ECRIS-TCN the deadline is ten *calendar* days, instead of *working* days. The Presidency draws delegations' attention to the fact that seven *calendar* days is also the deadline for the reply in the prior consultation procedure under Article 22(2) of the Visa Code. With regard to the ECRIS-TCN deadline, ten working days (the deadline usually referred to in the judicial context) would almost amount to 15 calendar days for the issuance of the visa, while some time should be left to the visa authorities to take a decision once they receive the reasoned opinion. In the Presidency's view, the Council should accept this compromise, which was the maximum that the Presidency could obtain in the negotiations and represents a balanced and reasonable approach from the Presidency's perspective.
- g) The EP keeps insisting on the need to be involved in the **definition of procedures and rules necessary for the queries, verifications and assessments under the automated checks** (line 213a). In other words, it is asking for the manual to be adopted through a delegated act and not an implementing act. It also insists on singling out this delegated act in particular, thus refusing to solve this issue as part of a horizontal discussion on the use of delegated acts as opposed to implementing acts across the Regulation (Article 48a). While the EP acknowledges Member States' prominent role in deciding certain issues, it considers that the implementation of this new set of rules on automated queries of EU information systems is of such importance that it needs to be defined with the participation of both co-legislators. This line has not been greened yet, but it is a crucial element of the 'package' approach. The Presidency considers that this is a concession that the Council should be able to make, given the numerous and important elements obtained by the Council in the negotiations (e.g. on the databases to be queried, the flexibility in the type of authorities that can be designated to manually verify the hits, the special rules concerning the ETIAS Watchlist and the deadlines). While the Presidency is aware of the sensitivity for the Council of the procedure for adoption of secondary legislation, it warns that insisting on an implementing act could mean reopening the package, which would not be in the Council's interest.

⁹ It should be noted that both deadlines start running from the same day, i.e. the day on which the notification is sent by VIS.

- h) The text on automated checks in the case of short-stay visas is now sufficiently stable for the negotiators to turn to the similar provisions related to **long-stay visas** (Article 22b). The discussions have just started and the Presidency will update delegations as soon as possible in this regard.

In advance of that discussion, the Presidency would like to have Member States' preliminary views on a very sensitive issue, i.e. the **query of Eurodac** as one of the EU systems to be checked for long-stay visas and residence permits. This query is part of the Council mandate (line 616) but it is strongly opposed by both the EP and the Commission. In the view of both the EP and the Commission, which is strongly backed by their respective legal services, only checks pertaining to security (and not migration) should be performed in the case of long-stay visas, which means that Eurodac is not relevant for security purposes. Delegations will recall that, during the preparation of the Council mandate, the Council Legal Service had cautioned about the legality of a query in Eurodac, in relation to the conformity of such a query with the fundamental right to protection of personal data. It is true that such a query would entail a change in the purpose of the data processing in Eurodac, which can only be made if it can be demonstrated that the change is necessary and proportionate. There are strong doubts that the change would pass the necessity test and the proportionality test (the hits would, most probably, be very limited and, at first sight, of somewhat marginal importance in the assessment of an application for a long-term visa or a residence permit). Delegations considered at that time that it was appropriate nevertheless to include Eurodac among the databases to be checked and recital 19 was modified to justify that choice. Faced with significant resistance from the other institutions, the Presidency now wishes to consult Member States again to find out how much flexibility it has on this issue and what arguments it can use in support of the Council mandate. Depending on the rigidity of the Council position, this issue could well end up for decision at the political level, with no guarantee of a positive outcome. And, if it finds its way into the final Regulation, the Legal Service warns there could be a significant risk of annulment by the Court of Justice in the event of a preliminary ruling. Delegations are invited to share their views with the Presidency.

III. Other issues

In addition to the topic of automated checks, the technical meetings dealt with a wide range of issues left over from the round of negotiations that took place in written form back in March under the Croatian Presidency.

Good progress was made and the negotiators were able to green several lines¹⁰. No agreement could be found on a number of lines, however, or else compromise texts were put on the table and the Presidency would like to hear delegations' views. Here is an overview of the latest discussions:

1. Article 2a on the **architecture** (lines 33 to 52) is now entirely greened with the exception of line 46. **Lines 48 and 51** have been merged and lines **48** and **52** have both been slightly redrafted.
2. The **definition of 'designated authorities' and 'VIS designated authorities' (lines 54ba and 54bb)** have been accepted as suggested by the Council.
3. The EP amendment in **line 303** prohibiting entrusting of the operational management of the VIS Central System to **private companies** or private organisations has been redrafted and moved into a recital (39).
4. In **line 374** the EP wanted to be 'immediately' informed by the Commission on any **serious security incident** with political implications. A compromise proposal now provides for information 'without delay', with confidentiality protected as necessary. Delegations are invited to confirm their agreement.
5. Article 33 on **liability (lines 377 to 382)** has been streamlined. A discussion had arisen as to which agencies should be mentioned, despite the fact that the agency held liable will, in the end, be the one which accomplished the act giving rise to liability. The compromise, accepted by all, simply refers to a 'Union institution, body, office or agency' - wording from the treaties - throughout the provision.

¹⁰ See cover note of WK 10179/2020.

6. Neither the Council nor the Commission could support the EP amendment in **line 392** aiming to change Article 36 on **penalties**, their argument being that either that provision should remain as in the current regulation or it should follow the standard interinstitutional language on penalties used in EU law. The EP will have to discuss internally whether it can drop its amendment.
7. Article 36a on **data protection** has now been entirely greened, with the agreement in **line 399** based on the suggestion made by the Council Legal Service. An identical solution has also been used in **line 461**.
8. Article 45 on the '**Implementation by the Commission**' (**lines 474 to 480a**) has been entirely greened. It is a combination of the relevant provisions in the current VIS Regulation and the 2004 Council decision establishing the VIS.
9. Article 45a on **use of data for reporting and statistics (lines 481 to 523)** had already been mostly greened, but the statistics relating to hits during the automated checks were still under discussion (**line 491 and 492**). The EP has made it clear that enabling the assessment of the automated checks as a new element introduced into the VIS is of significant importance for the EP. It was made clear that it was not possible to have statistics on which refusals had been 'caused' by a hit, but only: statistics on the decisions and the grounds for refusal, statistics on hits and statistics on the 'correlation' between hits and negative decisions. The compromise proposal in **lines 491, 492 and 492a** reflects this approach and, given the sensitivities of this matter, the Presidency wishes to obtain confirmation from delegations that such a solution is acceptable for Member States.
10. The provisions concerning **carriers** (Articles 45b and 45c, **lines 524 to 539**, as well as lines **918 and 919**) have now mostly been agreed upon. A few issues remain open:
 - a) the discussion on the derogation for carriers transporting groups overland by **coach (line 534)** is postponed, pending an agreement on the date of implementation of the amending Regulation;

b) **lines 536 and 538** are contentious: the EP has difficulties seeing the need to inform Member States in the event of **technical impossibility to access data by carriers** because of a failure of any part of the VIS or for other reasons. The Presidency takes the view that particularly in the first case, i.e. when the failure is due to the VIS, Member States should be informed. A similar provision does not exist in ETIAS and it seems that during the discussions on the ETIAS implementing acts delegations did not show any appetite for this type of information. However, for the Presidency, this is an important issue and it will not depart from the Council mandate unless delegations confirm their lack of interest in the addition at the end of line 536 and/or 538.

11. As usual, the co-legislators will need to revert to Article 48a on **Delegated Acts (line 560 to 567)** at a later stage, since although the use of the standard language was agreed, the provisions to be referred to for the adoption of delegated acts remain open. As stated above, the EP does not wish to discuss the delegated act for the adoption of the manual in conjunction with the definition of the procedures and rules needed for the queries, verifications and assessments under the automated checks in this horizontal article.
12. On the **no-opinion clause (line 571)** positions remain unchanged, with the EP and Commission against the Council position.
13. Article 50 on '**Monitoring and evaluation**' (**lines 575 to 592**) has been discussed at length:
 - a) in **line 577** the EP agreed to drop its amendment, accepting that the impact of the VIS on fundamental rights is assessed by the Commission in its periodic evaluation (see line 590);
 - b) in **line 579** the EP concurred that its amendment, related to the progress on the development of the project, was wrongly placed in an article on the monitoring of the VIS once it is up and running. The EP amendment has therefore been moved to line 964 and redrafted in a compromise proposal. The EP insisted that possible delays in the development process (line 580) also needed to be included in the report. The EP will have to confirm its final agreement on the compromise solution.

- c) the annual reports by Member States and Europol on the effectiveness of access to the VIS data for law enforcement purposes (**lines 581 to 589**) presented a number of difficulties for the Council, so the Presidency looked for compromise solutions to mitigate the most critical implications:
- i. in **line 586**, while the EP stated that singling out child trafficking was done for political purposes, the Presidency preferred to take a precautionary approach because of the probable differences in the Member States' national systems and statistics. The reference to national law should now leave more flexibility to Member States in this regards and the Presidency asks delegations to confirm that they can accept this solution.
 - ii. the EP position in **line 588** evolved during the negotiations, but it remained problematic for the Council. Its original amendment requested the publication by the Commission of Member States' and Europol's annual reports on the effectiveness of access to the VIS data for law enforcement purposes. Given the sensitivity of those reports, this was unacceptable for the Presidency. The EP then accepted that argument, but claimed that those reports needed to be transmitted to the EP so that the other co-legislator could also oversee and assess the effectiveness of the policy change. A comparative analysis of similar provisions for other EU IT systems showed that there was no precedent for transmission of such reports, with the exception of Eurodac. However, with regard to Eurodac, there is the important difference that the Commission compiles and transmits an annual report on the basis of the reports from Member States and Europol, rather than compiling the annual report itself as proposed by the EP with regard to the VIS. The Presidency then offered a compromise solution, inspired by Article 92(5)(k) of the ETIAS Regulation: a detailed analysis of the data provided in the Member States' and Europol's annual reports under Article 50(4) would be included in the periodic report by the Commission on an overall evaluation of the VIS, with a view to assessing the effectiveness of access to VIS data for law enforcement purposes. This compromise solution has the advantage of avoiding direct transmission of raw data to the EP, making the assessment of law enforcement access part of an overall assessment of the VIS and involving the two co-legislators on an equal footing. The EP will have to confirm its acceptance of this compromise solution (which falls short of its request for information on a yearly basis).

- d) As for the periodicity of the Commission overall evaluation report (**line 590**), ETIAS was used again as a model and the report will be published for the first time three years after the start of the operation of the revised VIS, and every four years thereafter.

14. Article 220a on the ‘**Use of VIS data for the purpose of entering SIS alerts on missing persons or vulnerable persons who need to be prevented from travelling and the subsequent access to those data**’ (**lines 768c and 768d**) has now been greened, with the EP to confirm the agreement. It was clarified that child protection authorities and national judicial authorities will not get technical access to the VIS, but only the right to request data.

IV. Questions to delegations

To sum up, the Presidency, while welcoming any comments on the above, invites delegations to reply to the following questions in particular:

1. Can delegations accept the overall compromise on the automated checks (lines 154 to 215), as outlined in section II above? If not, they are requested to provide relevant comments to the Presidency.
2. In preparation for the discussion on automated checks for long-stay visas and residence permits, can delegations indicate to the Presidency how important they consider the query of Eurodac (line 616) to be and what arguments can be put forward to support this (see section II, point (h) above)?
3. Can delegations accept the compromise solution in line 374 (*confidential information ‘without delay’ to the EP on any serious security incident with political implications*, see section III, point (4) above)?
4. Can delegations accept the compromise solution in line 491 to 492a (*statistics refusals and on the ‘correlation’ between hits under the automated queries and negative decisions*, see section III, point (9) above)?

5. How strongly do delegations see the need to inform Member States in the event of a technical impossibility for carriers to access data owing to a failure of any part of the VIS or for other reasons than a failure of any part of the VIS (lines 536 and 538, see section III, point (10)(b) above)?
 6. Can delegations accept the compromise solution in line 586 (statistics on *‘the number and type of cases, including child trafficking as defined by national law, which have ended in successful identifications’*, see section III, point (13)(c)(i))?
 7. Can delegations accept the compromise solution proposed by the Presidency in lines 588 and 590 on the assessment of the effectiveness of access to VIS data for law enforcement purposes (see section III, point (13)(c)(ii))?
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