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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 last technical meeting and preparation of the political trilogue

I. Introduction

The interinstitutional negotiations on the VIS file, resumed in September, have now reached full speed. In addition to several informal meetings, a technical meeting took place on 13 October and a political trilogue – the first under the German Presidency and the fourth since the beginning of the negotiations – will take place on 27 October. This trilogue will hopefully inject further political momentum into the process, with a view to making progress on a number of outstanding issues.

The purpose of the present note is to inform delegations about the latest developments in the technical discussions and to seek delegations' guidance for the preparation of the political trilogue.

II. Progress in the technical discussions

Considerable further progress was made on issues that had been negotiated in writing during the Croatian Presidency (*see Annex I to WK 11144/2020*).

The co-legislators were able to green the following lines:

- 374 (information to the EP on security incidents);
- 392-393 (penalties);
- 586 (statistics on the number and type of cases which have ended in successful identifications through law enforcement access to VIS data): here the Presidency managed to secure agreement on the Council text, so no specific statistics on child trafficking will need to be provided;
- 798-799 (protection of personal data accessed in accordance with Chapter IIIb);
- 834 (standards for the technical requirements for the facial image).

The following lines were discussed as well:

- 192 (temporary access to EES, ETIAS, SIS, Eurodac or SLTD in the case of an appeal procedure);
- 800 (purposes of law enforcement access to VIS data) and 801 (logging for law enforcement access);
- 886 (fundamental rights): the Presidency's position remains that the Visa Code should be reopened only insofar it has to be adapted to the changes brought into VIS. As a consequence, there should not be a complete overhaul of the provisions on fundamental rights, negotiated in early 2019, but only adaptations, for example to take into account of the new VIS provisions on fingerprinting of children and elderly people. Nor should the discrimination grounds include elements which are actually taken into account when deciding on the issuance of visas.

The negotiators also dealt with one of the core elements of the amending VIS Regulation - biometrics - and made considerable progress there. The objective was to confirm the outcome of the 3rd political trilogue which took place shortly before the pandemic lockdown and to continue the discussions on this issue which were complex and challenging. A separate table compiling all the lines related to biometrics was used to facilitate this exercise (*see annex II of WK11144/2020*[1]). Numerous elements were confirmed/agreed upon:

- lowering of the fingerprinting age to six, with the accompanying safeguards;
- checks of children's biometrics within the territory;
- derogation for law enforcement access to children's biometric data below 14 years of age instead of 18;
- 75 years as the upper age limit for fingerprinting;
- deletion of biometrics of children below 12 upon exit from the Schengen area and expiry of the visa (an automatic notification by EES to VIS was added to allow for the deletion of the data);
- the basic rule is that the facial image is taken live. Member States may request a paper photo, which will be included in the VIS but will not be used for biometric matching. A flag in the system will indicate when the facial image was taken live upon the submission of the application;
- the biometrics *shall* be copied for applications lodged within 59 months[2]. If it is not confirmed that the fingerprints and facial image were collected within this period, the current rule will continue to apply, i.e. 'the applicant may request that they be collected' (see line 832). On this point, the Presidency could not maintain the Council position, which was that '[the biometrics] shall be collected again'. The Presidency entered a positive scrutiny reservation, trusting that Member States can go along with this solution, which, it is recalled, is the current rule;
- in exceptional cases the facial image can be extracted from the chip of the eMRTD (the Council position has been accepted in its entirety on this issue (line 841)).

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1 The corresponding lines in the main 4-column table should therefore be disregarded, as they are outdated now. Once agreed upon, the provisions on biometrics will be inserted back in the main table.

2 See line 830. A majority of delegations had signalled flexibility on this issue in the past.

Other issues have not yet been agreed upon:

– exceptions to the live facial image (line 840): the Presidency offered, on the basis of the discussions of the JHA Counsellors back in February, to withdraw the exception concerning children under six years of age. In other words, children under six years of age would be required to have their facial image taken live so that at least one biometric identifier would be available in the interest of countering child trafficking. However, the EP, previously not particularly interested in this issue and having not intended to propose any amendment on it, is now sceptical of a provision that implies that another piece of biometric data is collected for children, having been reluctant to accept the lowering of the fingerprinting age. This is a potential topic for the political trilogue as well.

– The search with facial image is also particularly problematic for the EP, which sees it as an unwelcome extension of the use of biometric data. The Presidency will continue to push for the search with facial image and will stress that there could be conditions in place which should be conceived as safeguards: the facial image is used only if the search with fingerprints fails (subsidiary use) and never alone but together with at least one piece of alphanumeric data.

III. Preparation of the fourth political trilogue

Four items will feature on the agenda for the next political trilogue:

a) Query of ECRIS-TCN under the automated checks both for short-stay visas and for long-stay visas and residence permits

At the last JHA Counsellors meeting, the Presidency informed delegations that the EP had agreed to include ECRIS-TCN among the IT systems to be automatically queried when deciding on a visa, subject to further confirmation by the shadows[3]. While the agreement in principle was confirmed, the EP put forward an additional condition to be met, i.e. a time limitation whereby only convictions for terrorist offences during the previous 20 years and convictions for other serious criminal offences during the previous 10 years would be taken into consideration when consulting ECRIS-TCN (the background is the fact that there are apparently different storage limits in the Member States' criminal registers). Delegations will note that such an idea brings to mind a

[3] See 11193/20.

somewhat similar provision in the ETIAS Regulation: according to Article 17(4)(a), the ETIAS applicant has to indicate in the application form '*whether he or she has been convicted of any criminal offence listed in the Annex over the previous 10 years and in the case of terrorist offences, over the previous 20 years, and if so when and in which country*'.

The Presidency is aware that this is a new element which at least partly reopens the package deal on the automated checks. While it is open to listening to delegations' reactions and understands that the nature of crimes makes it difficult to put time limits on their relevance, the Presidency would like to offer the following elements for reflection as well:

– when the Council mandate on the ETIAS Regulation was being drawn up, delegations were adamant on inserting a time limitation for the convictions to be declared in the ETIAS application form – an element not present in the Commission proposal for ETIAS. The discussion at that time focused on the time span to consider, not on the principle itself. While the Presidency is aware that the declaration by the applicant is not the same as the automated checks actually carried out, it considers nonetheless that this is an element to be carefully considered;

– the following elements may play a role in handling this issue: the VIS and ETIAS concern two different categories of applicant in terms of migratory requirements; the ECRIS-TCN hits reflect concrete and individual criminal aspects of risks to be taken into account in the visa and travel authorisation process in a similar way; the time limitation should remain proportionate given the relevance, for the visa process, of the past convictions of the applicant; the reduction of the number of hits to be verified and therefore a reduced workload; greater harmonisation between the VIS and ETIAS[4] is to be welcomed, in particular from the point of view of implementation.

As it turns out that this issue is a condition *sine qua non* for the EP to include ECRIS-TCN among the systems to be queried, the Presidency's intention is to show openness on this issue to the EP, possibly with longer time limitations, considering that this is a reasonable price to be paid given the importance of the consultation itself. The Presidency will also weigh this concession against the overall agenda of the trilogue.

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[4] A time limitation for the convictions for terrorist offences and other serious criminal offences to be taken into consideration when consulting ECRIS-TCN might be raised by the EP in the context of the ETIAS consequential amendments as well.

b) Query of Eurodac and purpose of the automated checks for long-stay visas and residence permits

Discussions have started at technical level on the automated checks for long-stay visas and residence permits. The idea is to mirror as much as possible the text for short-stay visas (see Annex III to WK 11144/20). Two main problems have emerged. Firstly, it will not be possible to make reference to a central visa authority competent for residence permits, because in some Member States, in particular those with a federal structure, there is no one single such authority. In the Presidency's view, this could be solved by referring to the 'competent authorities'.

Secondly, and more importantly, the database to be checked remains controversial.

The Presidency has already consulted delegations on the margin of flexibility it has as far as the query of Eurodac for long-stay visas and residence permits is concerned. It is clear that a good number of delegations want to stick to the Council mandate on this issue and therefore the Presidency will defend it at the trilogue, taking into consideration the arguments offered by Member States. However, as already pointed out, the other two institutions have taken a firm position on this issue, and all legal services have serious and principled misgivings about the legal soundness of checks in Eurodac for long-stay visas. The chances of a positive outcome therefore seem to be limited.

Furthermore, a partial inconsistency in the Council mandate will not help the Presidency in this endeavour either. Both in the Commission proposal and in the EP position, for VIS, EES and ETIAS, only security-related refusals should be checked, not migration-related ones (line 644). The Council has deleted that line but, inconsistently with the deletion of line 644 and the introduction of Eurodac, it has accepted in line 615 that automated checks for long-stay visas should be carried out '*solely for the purpose of assessing whether the person could pose a threat to the public policy, or internal security or public health of the Member States*'. So, the problem goes beyond queries in Eurodac and encompasses not only the legal grounds for the checks, but also the wider question of the purposes for and the necessity and proportionality of the checks.

c) Implementation deadline

Delegations will recall that the issue of the implementation deadline was dealt with at the very first trilogue, under the Finnish Presidency. Invoking the precedent represented by the SIS Regulation, the EP is insisting on introducing a fixed deadline, in particular given the long implementation period for the VIS in the past. While the issue was discussed again at technical level, the Presidency had envisaged that it would be dealt with at political level at the end of the negotiations, as an element of the final deal. However, the EP wishes to discuss it again, given the new momentum created by the Commission, which mentioned 2023 as the deadline for reaching full interoperability of IT systems, including the VIS, in the Pact on Migration and Asylum.

The Presidency thinks, on one hand, that 2023 risks being too short a deadline to have the revamped VIS up and running and, on the other hand, that having a fixed deadline mentioned in a Regulation is unwise in terms of law-making. If the deadline is missed, either Member States are in breach of the Regulation or a new legislative proposal has to be tabled and adopted by the ordinary legislative procedure for the date to be amended. The EP, mentioning the precedent of the SIS, considers on the contrary that having a deadline for implementation in the Regulation provides for the necessary leverage for the Commission, Member State authorities and eu-LISA to call for the necessary budgetary and human resources, so as to avoid undue delays.

In order to bridge the gap between the two positions, the Presidency has identified the following elements for a possible compromise suggestion:

- conditions for the deadline to apply:
  - i) Member States have made the necessary technical and legal arrangements,
  - ii) eu-LISA has successfully completed all testing activities,
  - iii) the implementing acts and delegated acts necessary for the application of this Regulation have been adopted;
- ‘chain effect’: the fixed deadline will not apply unless ETIAS started its operations at least [x] months before. This would make the deadline *de facto* a rolling one;
- ‘review mechanism’ to change the date of application in the event of a substantial delay, i.e. by delegated act;

– earlier application of some provisions, e.g. data protection, Frontex access to the VIS;

– sufficient reporting during the implementation period to keep track of the development of the system.

The Presidency intends to present the above ideas at the trilogue and, if there is no agreement, is ready to revert to this issue in the framework of the final deal.

d) Search with facial image

As indicated above, the search with a facial image remains a problem for the EP, particularly in the case of identification (one to many). The Presidency will try to defend the Council position, if necessary by harmonising this type of search across the Regulation using the two safeguards outlined above: subsidiary search and search in conjunction with alphanumeric data.

III. Conclusion

Delegations are invited to:

– provide their feedback on line 832,

– provide guidance to the Presidency on the items on the agenda for the political trilogue, in particular with respect to the intentions outlined in this note.