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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council / Mixed Committee (EU-Iceland/Liechtenstein/Norway/Switerland)
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 and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 2016/399 as regards the use of the Entry/Exit System - Territorial scope of the application of the EES and the calculation of the duration of the short-stay - guidance for further work

On 6 April 2016, the Commission submitted the legislative package on Smart Borders, which consists of a proposal for a Regulation for the establishment of an Entry/Exit System (EES) and a proposal for Regulation amending the Schengen Borders Code to integrate the technical changes that resulted from the new proposal for a Regulation establishing an Entry/Exit System (EES).

The European Council at its meeting of 15 December 2016 concluded that the co-legislators should agree by June 2017, on the Entry/Exit System. The Council should therefore finalise its position with a view to beginning negotiations with the European Parliament as soon as possible. The Rapporteur of the LIBE Committee of the European Parliament tabled this draft report on 30 November 2016 and the Committee vote is expected by the end of February.

The calculation of the duration of stay in Member States not yet fully applying the Schengen acquis with regard to borders and the participation of these Member States in the EES is a major issue that has arisen in the discussions within the Council.

On 28 October 2016 the Council Legal Service issued a written opinion on the territorial scope of application of the EES in the light of Article 6(1) of the Schengen Borders Code for the purpose of calculating the short-stay (90 days in any 180-day period) (doc. 13491/16). On 25 November 2016 the Commission Services reacted in writing, expressing certain objections vis-à-vis the interpretation provided by the Council Legal Service and offering some alternative approaches (doc. 14893/16).

The Slovak Presidency held a number of meetings and amended the text of the Commission proposals so as to implement in a workable manner the principle of single calculation, as suggested by the Legal Service. That draft compromise text is set out in doc. 15575/16.

The solution to be found to address this issue has implications for a number of provisions of the EES draft Regulation as well as for other matters, in particular the common visa policy. Delegations have therefore called for the matter to be considered at a more horizontal level.

However, before turning to the question of the calculation of the authorised stay, the territorial scope of the application of the Entry/Exit System needs to be determined, also having regard to the interoperability with the Visa Information System (VIS).

COREPER is therefore invited to consider the options outlined below, including their consequences as regards:

1. The territorial scope of application of the EES (and related access to VIS)

2. The method of calculation of short stays (90 days in a 180 day period)

3. Additional elements of facilitation with regard to internal borders where controls have not yet been lifted

1. Territorial scope of application of the EES

The EES proposal provides for interoperability with VIS to create, update, authenticate and validate visa information of third country nationals who require a visa when crossing the external borders of the EU. The proposal of the Commission envisages application of the EES in all the Member States including those which do not fully apply the Schengen acquis and which do not have access to VIS.

During the negotiations, it was pointed out that manually inserting the Schengen visa data of travellers subject to the visa obligation when creating the Entry/Exit file for third country nationals could have too significant an impact on passenger flows at the borders. Moreover, there would be an increased risk of errors with more manual inputting and more pressure at the borders in terms of queues.

At the SCIFA meeting of 21 June 2016, there was broad support to continue on the basis of the Netherlands Presidency's proposal to provide passive access to the VIS for Schengen Member States that do not yet fully apply the Schengen acquis but for which the verification in accordance with the applicable Schengen evaluation procedures has already been successfully completed. In the course of the ensuing negotiations, the text was amended to provide for:

- application of the EES to the external borders of those Member States that do not yet fully apply the Schengen *acquis* but for which the verification in accordance with the applicable Schengen evaluation procedures has already been successfully completed (currently Bulgaria and Romania) on the basis that passive access to the VIS would be provided to them for this purpose; and

- non-application at the external borders of the Member States that have not yet successfully completed the Schengen evaluation procedures (currently Croatia and Cyprus). Such Member States would continue to stamp travel documents at the borders[1].

The Visa Working Party of 7 December 2016, considered a draft Council Decision (doc. 15294/16) on the putting into effect of certain provisions of the Schengen acquis relating to the VIS and of the remaining provisions of the Schengen Information System (SIS) in the Republic of Bulgaria and Romania.

During the Visa Working Party of 17 January 2017, some concerns were voiced on the draft Decision, which requires unanimity. Failure to grant passive access to VIS would render the operation of the Entry/Exit System at the external borders of these Member States which do not have access to the VIS impracticable, in view of the time that would be required at the border to manually insert the data for the creation of each traveller's file, as well as of the potential significant number of errors. Following the Visa Working Party, Member States were invited to send written comments, and most of those who did, supported granting passive access.

It is noted that pursuant to Regulation 2013/1053[2], the implementation of the EES in the Member States that do not yet fully apply the Schengen acquis cannot be subject to any Schengen evaluations until the final lifting of the controls on their internal borders by a unanimous Council Decision to that effect.

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1 This solution was suggested by the Council Legal Service in its written opinion as the only admissible derogation to the uniform application of the EES legislation to the whole Schengen Area understood as including all the Member States not yet fully applying the Schengen *acquis*.

2 Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

COREPER is invited to decide whether

a) the Entry/Exit System should be implemented at the external borders of the Member States that do not yet fully apply the Schengen acquis but for which the verification in accordance with the applicable Schengen evaluation procedures has already been successfully completed; and therefore that passive access to the VIS should be provided to these Member States at least for this purpose and at the latest at the same time as the entry into operation of the EES;

or

b) the Entry/Exit System will only be operated by the Member States fully applying the Schengen acquis (at external borders and at internal borders at which controls have not yet been lifted). In such case the existing draft compromise text would need to be amended in order to limit the application of the EES to those Member States fully applying the Schengen acquis and the authorized stay of 90 days in a 180-day period would be calculated only with reference to the area without internal border controls. Those Member States not applying the Entry/Exit System would continue to stamp travel documents on entry/exit.

Should COREPER agree that the Entry/Exit System should apply at the external borders of the Member States that do not yet fully apply the Schengen *acquis* but for which the verification in accordance with the applicable Schengen evaluation procedures has already been successfully completed, Points 2 and 3 of this Note should then be discussed.

2. Calculation of the authorised stay of 90 days in a 180-day period, in accordance with Article 6(1) of the Schengen Borders Code

Should COREPER agree that the Entry/Exit System should apply at the external borders of the Member States that do not yet fully apply the Schengen *acquis* but for which the verification in accordance with the applicable Schengen evaluation procedures has already been successfully completed - and therefore that passive access to the VIS should be provided to these Member States at least for this purpose - the question as to the calculation of the period of authorized stay must be addressed[1].

Currently, the time-limit for short-stays (90 days in a 180-day period) is applied with reference to stays in the area without internal border controls. This is reflected in the EU Visa Waiver Agreements with third countries, as well as in the Schengen and Visa Handbooks (which are non-legislative documents).

The Commission Services and the Council Legal Service have different positions on the legality of this practice, in connection with the interpretation of Article 6(1) of the Schengen Borders Code and specifically the phrase "*in the territory of the Member States*".

The current practice results in 5 different sub-areas allowing for a stay of 90 days in any 180-day period in: (i) the area without internal border controls, (ii) Bulgaria, (iii) Croatia, (iv) Cyprus and (v) Romania. Third country nationals could therefore cumulate consecutive authorised short-stay periods and thereby, in practice, extend their stay indefinitely. The Council Legal Service is of the opinion that this would be in contradiction with the Accession Treaties.

According to the Council Legal Service, the current practice should be changed, so that the 90 days in a 180-day period refers to the area without internal border controls as well those Member States for which internal border controls have not yet been lifted. However, the Council Legal Service considers that the current practice could, for practical and technical reasons, be maintained until the entry into application of the EES which, through the introduction of the automated calculator, would put an end to the practice of separate manual calculation based on stamps for those Member States which are going to operate the Entry/Exit System.

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[1] Although the matter is a broader one, the need to address it at this stage arises in view of the negotiations on the Entry/Exit System. If only the Member States fully applying the Schengen acquis are to apply the Entry/Exit System, the issue would not necessarily have to be addressed immediately, although it still would need to be considered at some stage.

Taking the entry into operation of the EES as the reference point to adjust the system in relation to the calculation of the 90 days in a 180-day period, the following implications should be considered:

For the Entry/Exit System

- one calculator will be introduced for the purpose of verifying the respect of the 90-day time limit set out in Article 6(1) SBC for all the Member States applying the EES (those for which internal border controls have been lifted and those that have successfully completed the relevant Schengen evaluations); and

- the procedures for the stamping of travel documents would be maintained for those Member States not yet operating the EES (the duration of stay would be counted separately for these Member States).

This would reduce the number of 'sub-areas' (separate areas would be formed by the Member States applying the Entry/Exit System and by each of the Member States that would not yet apply the Entry/Exit System[1]).

The distinction would therefore be based on practical and technical considerations, while the aim is to eventually have the Entry/Exit System applying also in the remaining Member States, once they complete their Schengen evaluation and to include stays in them too for the calculation of the 90 days in a 180-day period.

On the other hand, the Commission points out that the calculation of the 90 days in a 180-day period, with the way forward proposed by the Council Legal Service, would be based on technical criteria which are not reflected in any legal basis (because the calculation would apply only to those applying the EES), while the current distinction derives from the Acts of Accession and is based on the (non)-participation to the area without internal borders controls. The Commission also notes that reducing the number of sub-areas would in any case not address the concern of indefinite stays, since even if the sub-areas were reduced to just 2, third country nationals could still stay for an indefinite period between these 2 areas.

[1] In the current situation, where there are two Member States which have not yet completed successfully their Schengen evaluations, the number of areas would be reduced from 5 to 3.

i) the Visa Waiver Agreements[1] would need to be renegotiated to provide that the 90-days in a 180-day period covered by the visa waiver covers stays not only in the Member States fully applying the Schengen acquis but also in those that have successfully completed the Schengen evaluations even if controls at their internal borders have not yet been lifted.

- According to the Council Legal Service, these renegotiations should be undertaken since the Agreements should be brought in conformity with the Schengen Borders Code (and not vice versa).

[1] The list of third countries with which there is a Visa Waiver Agreement in force (or is applicable as of the signature thereof) include: Antigua & Bermuda, Bahamas, Barbados, Mauritius, St Kitts and Nevis, Seychelles, Brazil (diplomatic and ordinary passports), Dominica, Grenada, Saint Lucia, St Vincent & Grenadines, Samoa, Timor Leste, Trinidad & Tobago, United Arab Emirates, Vanuatu, Tonga, Colombia, Palau, Peru, Kiribati, Marshall Islands, Micronesia, Solomon Islands, Tuvalu and China (diplomatic passports).

- On the other hand, the Commission, in its written note of 25 November 2016, points out that this could have an impact on the credibility of the Union visa and admission policy. If the renegotiation of the Agreements could not be achieved before the entry into operation of the EES, there would be a discrepancy between EU legislation and the EU's Visa Waiver Agreements with third countries, and third-country nationals concerned may invoke the application of those Agreements before the courts. Moreover, if some of these Agreements are renegotiated in time and others not, it could have political implications considering that there would be different terms applying for different Visa Waiver Agreements[1]. This would also require the EES to apply different calculators for different nationalities in order to avoid automatically flagging any travellers as overstayers when the Visa Waiver Agreement that applies to them has not yet been renegotiated. This would have both budgetary and technical implications.

- Apart from the above, the Commission Services raise a concern with regard to visa exempt third country nationals who may have to be refused entry to the area without internal border controls because they have exhausted their period of authorised stay in Member State(s) at whose internal borders controls still apply.

[1] The Council Legal Service notes that there are precedents for such procedures. Notably, the Commission obtained a mandate and is currently renegotiating seven bilateral Visa Waiver Agreements in order to bring them into conformity with the Schengen acquis following amendments introduced by Regulation 610/2013 (the question of replacement of references to three months in any six months by the references to 90 days in a 180-day period) (doc 13387/14). On the other hand, the Commission Services note that checks are currently still manual, so it remains possible for human intervention to ensure that in practice this is applied correctly. With the EES, the system would be automated and a third country national would automatically be flagged as an overstayer once the 90 days in a 180-day period as per the EES calculator (as opposed to the Visa Waiver Agreement) is exhausted.

Therefore, apart from the renegotiation of the Agreements, sufficient information would need to be provided for third country nationals benefitting from the visa waiver, since the current Agreements allow for visa waived stays of 90 days in a 180-day period in each 'sub-area'. On the other hand, it is noted that many third country nationals who are to make use of their visa waiver to travel to the European Union may be expected to check which Member States are covered by the Agreement and that such information could clearly be set out on relevant websites and provided on entry at the border.

ii) Consulates issuing Schengen visas would need to take into account stays by a visa applicant in the Member States that have successfully completed the Schengen evaluation but for which internal border controls have not yet been lifted, before proceeding to issue a given visa.

The Commission argues that this would be in contradiction with the Visa Code, whose scope of application currently extends only to the Member States fully applying the Schengen acquis, and that the consulates of those Member States are therefore currently only required to check the duration of previous stays in the Member States fully applying the Schengen acquis (Article 21(4) Visa Code). It is noted that the Council Legal Service does not share these concerns.

For the consulates concerned, checking the duration of previous stays in both the Member States fully applying the Schengen acquis and those which have completed the Schengen evaluation should be straightforward since the EES (through the interoperability with VIS) would provide them with the remaining period of authorised stay for a given third country national.

However, consulates will not have access to information on national short terms visas of the Member States that do not yet fully apply the Schengen *acquis*. The Commission is of the opinion that granting a visa where a third-country national is already in possession of a national visa and where the combined authorised stay goes beyond 90 days, would be misleading for the traveller. Travellers wishing to combine stays based on those two types of visa would need to be informed by consulates of the overriding obligation to respect the overall limit of 90 days in a 180-day period (consequence of combined application of Article 30 of the Visa Code and of Article 6(1) SBC).

iii) Holders of a Schengen visa may nevertheless have to be refused entry at the border of the area without internal border controls due to previous stays in Member States that have successfully completed the Schengen evaluation but for which internal border controls have not yet been lifted

- The Commission Services and the Council Legal Service agree that the possession of a valid visa does not confer an automatic right of entry.

- However, the Commission Services argue that a visa creates an expectation and refusal of entry in spite of a valid visa should remain the exception, in order not to undermine the credibility of the Union visa policy.

- The Council Legal Service argues that the limit of 90 days in a 180-day period, as set out in the Schengen Borders Code, applies regardless of the visa held and therefore, the fact that a third country national might hold a Schengen visa and a national visa issued by Bulgaria or Romania, does not mean that the third country national may stay for more than 90 days in a 180-day period.

Here again, it would be necessary to ensure that adequate information is provided at the time when a Schengen visa is issued, so as to ensure that visa holders are aware of the overall limit of 90 days in a 180-day period, independently of whether they also hold national visas issued by the Member States concerned (consequence of combined application of Article 30 of the Visa code and of Article 6(1) SBC). For the border guards, checking previous stays should not be a concern since the period of stay would be calculated automatically by the EES and the border guard therefore would be alerted if the 90-day period has been exhausted. In any case, it is clear that all entry conditions need to be respected in order be granted entry, and that includes the overall period of authorised stay.

COREPER is invited to decide whether:

a) the practice with regard to the calculation of the time limit of 90 days in a 180-day period for short stays should be aligned with Article 6(1) of the Schengen Borders Code, and if this should, for practical and technical reasons, be done, in parallel with the entry into operations of the EES. This would mean:

- stays in Member States that do not fully apply the Schengen acquis but which have successfully completed the Schengen evaluation, and which therefore operate the EES, should also count towards the authorized stay of 90 days in a 180-day period;

- the Visa Waiver Agreements concluded between the EU and third countries should be renegotiated with a view to aligning the authorized stay for visa exempt nationals with Article 6(1) of the Schengen Borders Code, before the entry into operation of the EES. Such renegotiation should be accompanied with adequate information on the issue, including on relevant Commission and Member State websites;

- the Schengen Handbook and the Visa Code Handbook should be amended accordingly once the EES is to start operations and the practice regarding the calculation of duration of stay is therefore to be adjusted.

Or

b) the current system should be maintained, and therefore the 90 day in a 180-day period should continue to be calculated separately for the area without internal border controls and for each Member State that does not fully apply the Schengen acquis. In this case, the latest compromise text submitted by the Slovak Presidency (doc. 15575/16) would need to be amended accordingly.

3. Additional elements

If it is agreed to implement the EES at the external borders of Member States that do not yet apply the Schengen acquis in full with regard to borders, and taking into account the fact that the controls at the internal borders of the Member States that do not yet fully apply the Schengen acquis should be lifted once the Schengen evaluation procedures are successfully completed (by way of unanimity in Council), and that investment relating to the EES at these borders should therefore be minimized, the following elements would also be envisaged (regardless of the decision as to the calculation of the 90 days in a 180-day period):

- for land borders, the EES would only be deployed on one side of the internal borders where controls have not yet been lifted, by the Member State fully applying the Schengen acquis which would carry out the full process as is required also at the external borders (at internal borders where border controls have not yet been lifted, the checks carried out must be the same as those carried out at the external border).

- the Commission considers that at the border between Member States that have successfully completed the Schengen evaluation but do not yet apply the Schengen acquis in full, the EES would need to be consulted, and that it could be done using alphanumeric data (hence, the biometric verification would not be performed). This check would be carried out in one operation, i.e. when the travel document of the traveller is scanned for the compulsory border check, both the SIS and the EES would be consulted at the same time (not requiring any interconnection between the two systems for that operation).

COREPER is invited to agree on these two additional elements.