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NOTE

From:	Presidency
To:	Permanent Representatives Committee
No. Cion doc.:	16639/24
Subject:	Proposal for a Regulation of the European Parliament and of the Council on a temporary derogation from certain provisions of Regulation (EU) 2017/2226 and Regulation (EU) 2016/399 as regards a progressive start of operations of the Entry/Exit System – Preparation for a general approach

I. INTRODUCTION

1. On 4 December 2024, the Commission presented a proposal for a Regulation of the European Parliament and of the Council on a temporary derogation from certain provisions of Regulation (EU) 2017/2226 and Regulation (EU) 2016/399 as regards a progressive start of operations of the Entry/Exit System ('the proposed Regulation')[1].

2. The general objectives of this proposal result from the Treaty-based goals to further improve the management of the external borders of the Schengen area by starting to apply, as soon as possible, the EES harmonised rules on cross-border movements and therefore contribute to the internal security of the European Union.

[1] 16639/24

3. This initiative lays the ground for a progressive start of the EES operations, derogating temporarily from certain provisions of Regulation (EU) 2017/2226 ('EES Regulation')[2] and Regulation (EU) 2016/399 ('Schengen Borders Code')[3] that require Member States to use the EES fully.

4. The general objective of the proposal is to facilitate the operationalisation of the EES Regulation, thereby enabling Member States to achieve the EES's objectives set out in the EES Regulation in a timely and efficient manner.

II. WORK IN THE OTHER INSTITUTIONS

5. In the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) has been designated as the competent Committee, with Ms Assita Kanko (ECR, BE) appointed Rapporteur for the file.

III. WORK IN THE COUNCIL PREPARATORY BODIES

6. On 5 December 2024, under the Hungarian Presidency, the proposed Regulation was presented to the Working Party on JHA Information Exchange (IXIM).

7. A first examination of the proposal took place in two JHA Counsellors meetings (IXIM, with Frontiers Counsellors invited) on 10 and 13 December 2024.

8. Discussions on the proposed Regulation continued under the Polish Presidency. The proposal was on the agenda of the 13 January 2025 IXIM Working Party meeting, and discussed in three more meetings of JHA Counsellors (IXIM, with Frontiers Counsellors invited) on 16 January, 6 February and 17 February 2025.

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[2] Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 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 and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 (OJ L 327, 9.12.2017, p. 20–82).

[3] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (OJ L 77, 23.3.2016, p. 1–52)

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9. Ahead of the 6 February meeting, the Polish Presidency proposed a first compromise text. Delegations welcomed the text and some remaining concerns were taken on board in a revised compromise text proposed ahead of the 17 February meeting. The revised compromise text received unanimous support from the JHA Counsellors.

10. The Presidency compromise text subsequently underwent some legal revision that did not alter its substance.

11. The main elements of the Presidency compromise text relate to the following aspects in particular:

– Affirming that the delay in applying the EES in full should be as limited as possible. The compromise text clarifies that the declarations of readiness to apply the EES already submitted remain valid. It does not extend the proposed 180-day period for the progressive start of operations of the EES.

– While confirming that Member States wishing to apply the EES fully from the first day of the period of progressive start of operations can do so, maintaining minimum common milestones to ensure the EES is rolled out steadily during that period. In that context, the compromise text also clarifies that Member States making use of the progressive start of operations can start operating the EES in one or some lane(s) of a border crossing point.

– Highlighting the importance of confirming, monitoring and addressing any issues in the performance of the EES central system. It makes explicit references to the role of eu-LISA's governing bodies in that context, including by introducing that the EES Programme Management Board should continue its activities until the end of the progressive start of operations of the system. The compromise text also includes that eu-LISA's high-level roll-out plan should confirm performance and availability targets of the EES central system, the strategy regarding eventual functional defects, and be approved by the eu-LISA management board. It introduces a notification system in case of failure of the EES central system.

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– Mitigating any additional administrative and operational burden on Member States created by the progressive approach. The compromise text clarifies that the roll-out plans Member States are required to produce under the proposed Regulation should not be cumbersome. It also simplifies Member States' reporting obligations by enabling them to focus on any deviation from their roll-out plan. The timeframe for Member States to notify a suspension of the EES to the Commission and eu-LISA is doubled from six to twelve hours. The compromise text also clarifies the interplay between stamps affixed on the travel documents and EES individual files, and further specifies the cases where EES records should not be used.

– Catering better for exceptional circumstances immediately after the end of the progressive start of operations. The compromise text allows Member States to suspend the registration of biometric data in the EES after the end of the progressive start of operations of the EES for a limited period of 90 days, instead of the proposed 60 days.

– Contributing to greater transparency about the new approach to the start of operations. The compromise text notably specifies that the Commission should adapt materials of the EES information campaign before the progressive start of operation of the EES and support Member States in preparing the campaign's adapted materials.

IV. CONCLUSIONS

12. COREPER is invited to examine the compromise text in Annex of this note in view of submitting it to the Council for a General Approach at the 6 March 2025 session of the Justice and Home Affairs Council meeting.

13. Changes compared to the Commission proposal are marked in ***bold and italics*** for additions and in ~~strikethrough~~ for deletions.

PUBLIC

ANNEX

2024/0315 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on a temporary derogation from certain provisions of Regulation (EU) 2017/2226 and Regulation (EU) 2016/399 as regards a progressive start of operations of the Entry/Exit System

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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) points (b) and (d) and Article 87(2) point (a), 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[4],

Whereas:

[4] [placeholder] Position of the European Parliament of [date to be added after agreement] and decision of the Council of [date to be added after agreement].

(1) Article 66(1) of Regulation (EU) 2017/2226 of the European Parliament and of the Council[5], establishing the Entry/Exit System (***the*** 'EES'), provides that the Commission is to decide the date from which the EES is to start operations, provided that certain conditions are met.

(2) However, the Commission has not received all notifications pursuant to Article 66(1), point (c), of Regulation (EU) 2017/2226, which is one of the conditions for deciding on the start of operations of the EES. ***Moreover, a full start of operations overnight could constitute a risk factor for the resilience of the system as a whole.***

(3) Regulation (EU) 2017/2226 only allows for a full start of operations, requiring all Member States to start using the EES fully for all third-country nationals subject to registration in the EES and to use the EES simultaneously at all their border crossing points.

(4) To provide Member States with the necessary flexibility to start using the EES according to their level of readiness and ***to*** facilitate technical and operational adjustments when starting to operate the EES, it is necessary to lay down rules for a progressive start of operations of the EES. To ensure these adjustments reflect potential travel flows and seasonal peaks, ***while considering that the progressive start of operations may also have some impact for the Member States in terms of increased workload at the border crossing points,*** such a progressive start ***of operations of the EES*** should have a ***limited*** duration of 180 calendar days.

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[5] Regulation 2017/2226 of the European Parliament and of the Council of 30 November 2017 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 and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 (OJ L 327, 9.12.2017, p. 20, ELI: http://data.europa.eu/eli/reg/2017/2226/oj).

(5) To enable a progressive start of operations of the EES it is therefore necessary to derogate ***temporarily*** from certain provisions of Regulation (EU) 2017/2226 and Regulation (EU) 2016/399 of the European Parliament and of the Council[1] ('Schengen Borders Code'). Other rules set out in Regulation (EU) 2017/2226 that are not affected by this Regulation apply as provided for in that Regulation. In particular, the ***rules set out in Regulation (EU) 2017/2226 apply to the*** data recorded in the EES throughout the progressive start of operations ~~follow the rules set out in Regulation (EU) 2017/2226 and are~~***of the EES and those data are therefore*** considered reliable and accurate. ***In addition, this Regulation does not affect the validity of the notifications already provided by Member States under Article 66(1) of Regulation (EU) 2017/2226***.

(6) Member States should progressively start operating the EES to record, on entry and exit, the data of third-country nationals subject to registration in the EES at one or more ***border crossing points, and at one or more lanes of such*** border crossing points. If possible and applicable, Member States should include a combination of air, land and sea border crossing points. To ensure a controlled launch of the EES and to better manage and avoid potential long waiting times at the borders, where relevant, Member States should deploy all the functionalities of the EES progressively and register the data of all third-country nationals subject to registration in the EES gradually. To ensure a coordinated approach, the progressive start of operations ***of the EES*** should be implemented in phases, which should set the minimum requirements to be reached by Member States. Member States will have the possibility to accelerate implementation at national level or start operating the EES fully from the beginning of the progressive approach.

(7) To facilitate a smooth deployment of the EES, the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) should develop a high-level roll-out plan to provide guidance to Member States and Union agencies on planning and executing the ~~EES~~ deployment ***of the EES*** during its progressive start of operations ***(the 'eu-LISA high-level roll-out plan')*** and should submit it to the Commission, Member States and Union agencies. This plan should ~~include the capacity limits~~***confirm performance and availability targets*** of the ***EES*** central system as ~~specified by eu-LISA for each phase of deployment~~***well as the strategy regarding eventual functional minor, major and blocking defects and be adopted by the eu-LISA Management Board***. Member States' decisions to start or advance operations should take into account the ~~capacity of the Central System as outlined in the~~ high-level roll-out plan.

(8) To facilitate a smooth deployment of the EES, Member States should develop national roll-out plans in consultation with the Commission and eu-LISA. For each of the phases of the progressive start of ~~the EES~~ operations ***of the EES***, the national roll-out plans should include the information on the set thresholds and requirements, in particular: (i) the ***expected*** date from which the EES will operate at ~~each~~ border crossing ~~point~~***points***; (ii) the ***expected*** percentage of the estimated number of border crossings to be registered in the EES out of the total number of third-country nationals subject to registration in the EES; and (iii) where applicable, the biometric functionalities***, expected*** to be operated at ~~each selected~~ border crossing ~~point~~***points***. When preparing their respective national roll-out plans, Member States are encouraged to appropriately coordinate with the operators of infrastructure where border crossing points are located. To monitor compliance with the progressive start of operations ***of the EES***, Member States should provide the Commission and eu-LISA ***with*** monthly reports on the implementation of their ***national*** roll-out plans. Such monthly reports should include corrective measures, where necessary, to ensure compliance with the progressive start of operations.

(9) ~~Due to the progressive start of operations of the EES and~~***Considering the*** possible incompleteness of the data recorded in ***the EES during the progressive start of operations of*** the EES, travel documents of third-country nationals should be systematically stamped on entry and exit during the progressive start of operations of the EES. National authorities should take into account the possible incompleteness of entry/exit records or of refusal of entry records***. In case there is no relevant EES data, they*** ~~and~~ should consider stamps as prevailing ~~over the information registered in the EES. In addition, when providing information to third-country nationals about the maximum remaining duration of their authorised stay, national authorities~~***. In case a stamp is missing, they*** should ~~base their assessment on the stamps affixed in the travel documents.~~***consider*** the data recorded in the EES ~~should prevail~~***as prevailing.*** In case ***of a discrepancy between the individual file containing biometric data and the stamp, they should consider the EES data as prevailing. In case of a discrepancy between the individual file without biometric data and the*** ~~a~~ stamp ***or in cases referred to in Article 16(4) of Regulation (EU) 2017/2226, they should decide, on a case by case basis, whether the stamp or the EES data is prevailing*** ~~is missing~~.

(10) Considering that the data registered in the EES during the progressive start of operations of the EES might be incomplete, national authorities should not take into account the results provided by the automated calculator on the maximum remaining duration of the authorised stay of third-country nationals registered in the EES. Similarly, when carrying out their tasks, national authorities should not take into account the automated mechanism to identify or flag the lack of exit records following the date of expiry of an authorised stay or the records for which the maximum duration of authorised stay was exceeded, generating lists of persons identified as overstayers.

PUBLIC

(11) To provide Member States with the necessary time to adjust to the start of ***operations of*** the EES, ~~for~~***during*** the first 60 calendar days of the progressive start of operations ***of the EES***, the use of biometric functionalities at border crossing points should not be mandatory. No later than the 90th calendar day ~~after~~***from the first day of*** the progressive start of operations ***of the EES***, Member States should operate the EES with biometric functionalities at least at half of their border crossing points. Providing biometric data should not be an entry condition for third-country nationals subject to registration in the EES at the border crossing points where the EES is operated without biometric functionalities.

(12) To accommodate the need to progressively deploy the EES with biometric functionalities at some border crossing points, the biometric verification of third-country nationals subject to registration in the EES should only be carried out at the border crossing points at which the EES is operated with biometric functionalities.

(13) To ensure coherence of the operations of the interoperability between the Visa Information System (VIS) established by Regulation (EC) No 767/2008 of the European Parliament and of the Council[6] and the EES, the VIS should only be accessed directly at those border crossing points at which the EES is not operated. At the border crossing points at which the EES is operated, border authorities should make use of the interoperability between the EES and the VIS.

[6] Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ L 218, 13.8.2008, p. 60, ELI: http://data.europa.eu/eli/reg/2008/767/oj).

(14) Third-country nationals whose data are to be recorded in the EES should be informed about their rights and obligations regarding the processing of their data in the form of a template as provided in Article 50(5) of Regulation (EU) 2017/2226. The information to be provided to ***those*** third-country nationals subject to the EES registration should refer to the progressive start of operations of the EES. Third-country nationals should be informed in the template of their obligation to provide biometric data at border crossing points where it constitutes an entry condition. They should be made aware in the template of the consequences of not providing biometric data. They should be informed in the template that it will not be possible for them to verify the remaining duration of the authorised stay by automated means.

(15) To reflect the progressive start of operations of the EES, the Commission should introduce relevant updates on the EES website.

(16) ~~The aim of raising awareness among third-country nationals on their specific rights and obligations would be best achieved if Member States customise the implementation of the campaign based on how the EES will operate at their borders at which the EES is operated in accordance with Article 4 of Regulation (EU) 2017/2226.~~ The information materials developed by the Commission ~~with the support of Member States~~ in the context of Article 51 of Regulation (EU) 2017/2226 should ~~therefore~~ be adapted ***by the Commission*** to carry out the information campaign accompanying the progressive start of operations ***of the EES, with the support of Member States***.

(17) During the progressive start of operations of the EES, the web service ***referred to in Article 13(1) of Regulation (EU) 2017/2226*** will not enable third-country nationals to electronically verify the exact duration of their authorised stay.

(18) This Regulation does not affect the obligations of air carriers, sea carriers and international carriers transporting groups overland by coach as set out in Article 26(1) of the Convention implementing the Schengen Agreement[7] and Council Directive 2001/51/EC.[8] In this respect, carriers should verify the stamps affixed in travel documents. To ensure effective communication with carriers about the distinct application of the EES at the border crossing points, ultimately benefiting travellers, it is crucial that Member States are transparent about the deployment of the EES at their border crossing points.

(19) Article 22 of Regulation (EU) 2017/2226 and Article 12a of Regulation (EU) 2016/399 provide for a transitional period and transitional measures referring to the start of operations of the EES. ***To enable a progressive start of operations of the EES,*** it is necessary to derogate from those Articles to ensure that the transitional period and the transitional measures apply only ~~as~~ ***after*** of the end of the progressive start of operations ***of the EES***. That derogation should cease to apply 5 years and 180 calendar days after the date decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226.

(20) To ensure that national authorities and ~~EU~~ ***Union*** agencies, in the performance of their tasks, avoid taking decisions exclusively based on data registered in the EES, they should take into account that individual files registered in the EES may contain incomplete data sets. That derogation should cease to apply 5 years after the date decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226 to reflect the 5-year retention period for data sets for which the exit record is missing as set out in Article 34(3) of that Regulation. ***Entry and exit records created during the progressive start of operation should not be used for automated reporting, nor for automated processes, including automated consultation from ETIAS.***

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7 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders ('the Convention implementing the Schengen Agreement') (OJ L 239, 22.9.2000, p. 19, ELI: http://data.europa.eu/eli/convention/2000/922/oj).

8 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 *(OJ L 187, 10.7.2001, p. 45,* ELI: http://data.europa.eu/eli/dir/2001/51/oj).

(21) When ensuring compliance with the provisions ~~in~~***of*** Regulation (EU) 2017/2226 on the amendment of data and advance data erasure, Member States should complete the incomplete data to the extent permitted by the limited availability of the sets of data registered in the EES during the progressive start of operations.

(22) The European Border and Coast Guard Agency should ~~refrain from~~***not access*** ~~using~~ data registered in the EES during the progressive start of operations for carrying out risk analyses and vulnerability assessments due to the incompleteness of the data that could lead to misleading risk and vulnerability assessments.

(23) To ensure effective management of the external borders during the progressive start of operations of the EES, ***specific rules should apply.*** At the border crossing points at which the EES is not operated, border checks should be carried out in accordance with Regulation (EU) 2016/399 as applicable ~~[~~the day before the date from which the EES is to start operations as decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226~~]~~. At the border crossing points at which the EES is operated, border checks should be carried out in accordance with ~~Regulation~~ ***Regulations*** (EU) 2017/2226 and ~~the Schengen Borders Code. However,~~ ***(EU) 2016/399 with*** specific derogations from these Regulations ~~should apply~~ ***established under this Regulation to be applied*** with regards to the verification at the border crossing points at which the EES is operated without biometric functionalities to enable the progressive start of operations ***of the EES***. This should happen without prejudice to verifications of visa holders by using fingerprints, in accordance with Regulation (EC) ~~787/2008~~***767/2008***.

PUBLIC

(24) To enable an effective adjustment of technical and organisational arrangements during the progressive start of operations of the EES in each Member State and to address exceptional circumstances of failure of the EES Central System, national systems or communication infrastructure, or excessive waiting times at their borders, ***all*** Member States***, regardless of whether they start using the EES fully or progressively,*** should have the possibility to suspend the operations of the EES at certain border crossing points, fully or partially. In case of partial suspension, the registration of biometric data in the EES should be suspended. In case of full suspension, no data should be registered in the EES. ***The use of the suspension mechanism does not affect obligations as regards the timeline for the progressive start of operations, but it may temporarily affect the envisaged percentages.*** To mitigate additional risks related to the deployment of the EES with biometric functionalities, ***all*** Member States should have the possibility, in exceptional circumstances leading to traffic of such intensity that the waiting times at borders become excessive, to suspend the registration of biometric data in the EES after the end of the progressive start of operations ***of the EES***. Such a suspension should be possible ~~for~~***during*** a limited period of ~~60~~***90*** days after the end of the progressive start of operations of the EES, and should be extended by 60 days if less than 80% of the individual files registered in the EES during the progressive start of operations of the EES contain biometric data.

(25) eu-LISA should issue reports on the statistics on the use of the ***EES*** system, which should serve to evaluate the system's performance, assess Member States compliance with the ***eu-LISA high-level roll-out and the national*** roll-out plans, identify areas for improvement, monitor compliance with the progressive start of operations of the EES, and support decision-making relating to the system's further development and optimisation. ***In addition, eu-LISA should continue its usual reporting to its Management Board. The Management Board of eu-LISA should monitor the progressive start of EES operations.***

PUBLIC

(26) The preparatory work related to the ***eu-LISA high-level roll-out and the national*** roll-out plans should be triggered by the date of the entry into force of this Regulation. The progressive start of operations ***of the EES should start and the derogations established by this Regulation*** should apply from the date decided by the Commission in accordance with Article 66(1) of ~~EES~~ Regulation ***(EU) 2017/2226***. As this Regulation provides for temporary derogations, it should cease to apply 180 calendar days after the date decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226. However, the derogatory rules on the application of ***the*** transitional period and ***the*** transitional measures ***provided for in Regulation (EU) 2017/2226***, ***on the*** access to EES data, ***on the*** verification by the carriers of stamps affixed in the travel documents and ***on*** the suspension of the EES should apply for a limited period after the end of the progressive start of operations ***of the EES***.

(27) ***Since*** the objective of this Regulation, ***namely*** authorising derogations from ~~Regulation~~***Regulations*** (EU) 2017/2226 and ~~Regulation (EU) 2016/299~~***(EU) 2016/399*** to provide for a progressive start of operations of the EES, cannot be sufficiently achieved by ***the*** Member States but can rather, by reason of the scale and ~~impact~~***effects*** of the action, be better achieved at Union level~~. Therefore~~, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union ***(TEU)***. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve ~~those objectives~~***that objective***.

(28) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU 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~~ ***acquis***, Denmark should, 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.

(29) This Regulation ~~does not constitute~~***constitutes*** a development of the provisions of the Schengen ~~acquis~~ ***acquis*** in which Ireland ~~takes~~***does not take*** part in accordance with Council Decision 2002/192/EC. Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(30) As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen ~~acquis~~ ***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 ~~those states~~***the latters'*** association with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC.

(31) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen ~~acquis~~ ***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~~ ***acquis***, 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/EC.

(32) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen ~~acquis~~ ***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~~ ***acquis*** 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/EU.

PUBLIC

(33) As regards Cyprus, the provisions of this Regulation relating to the VIS constitute provisions building upon, or otherwise relating to, the Schengen ~~acquis~~ ***acquis*** within the meaning of Article 3(2) of the 2003 Act of Accession. The operation of the EES requires the granting of passive access to the VIS. As the EES is only to be operated by those Member States that fulfil the conditions related to VIS at the start of the operation of the EES, Cyprus will not operate the EES from the start of operations. Cyprus is to be connected to the EES as soon as the conditions of the procedure referred to in Regulation (EU) 2017/2226 are met.

(34) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 and delivered its opinion on [xx].

(35) This Regulation establishes strict rules concerning access to the EES, as well as the necessary safeguards for such access ***during the progressive of operations of the EES and for a certain period after the end of the progressive start of operations of the EES***. It also ~~sets out~~***maintains*** the individuals' rights of access, rectification, completion, erasure and redress, in particular the right to a judicial remedy and the supervision of processing operations ***of EES data*** by public independent authorities. This Regulation therefore respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the right to human dignity, the prohibition of slavery and forced labour, the right to liberty and security, respect for private and family life, the protection of personal data, the right to non-discrimination, the rights of the child, the rights of the elderly, the integration of persons with disabilities and the right to an effective remedy and to a fair trial.

(36) This Regulation is without prejudice to the obligations deriving from the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967.

PUBLIC

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation lays down rules on a progressive start of operations of the Entry/Exit System ***established under Regulation*** (***EU) 2017/2226 (the 'EES'*** ~~EES~~) at the borders of the Member States at which the EES is operated in accordance with Article 4 of ***that*** Regulation ~~(EU) 2017/2226~~ and temporary derogations ***of certain provisions from Regulations*** ~~from Regulation~~ (EU) 2017/2226 and ~~Regulation~~ (EU) 2016/399 (EES).

Article 2

Definitions

For the purposes of this Regulation, the definitions in Article 3(1) of Regulation (EU) 2017/2226 apply. In addition, the following definitions apply:

(a) 'progressive start of operations of the EES' means the period of 180 calendar days starting from the date decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226;

(b) 'national authorities' means the authorities referred to in Article 9 of Regulation (EU) 2017/2226;

(c) 'estimated number of border crossings' means a Member State's estimate of the number of border crossings of third-country nationals ***as*** referred to in Article 2(1) and (2) of Regulation (EU) 2017/2226 in each Member State based on the yearly average of the total number of border crossings of third-country nationals travelling ~~for a short stay in~~***to*** that Member State ***for a short stay*** calculated for the ***3 years*** preceding ~~3 years from~~ the date of application referred to in Article 8(1), second subparagraph, of this Regulation. ***Estimations shall be determined based on the border crossings at the borders referred to in Article 4 of Regulation (EU) 2017/2226.***.

PUBLIC

Article 3

Roll-out plans ***and reporting***

1. By [~~the 30th~~***OJ office: 30*** calendar ~~day after~~***days from*** the entry into force of this Regulation], the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) shall provide the Commission, Member States, as well as Europol, with a high-level roll-out plan ***(the 'eu-LISA high-level roll-out plan')*** on the progressive start of operations of the EES, taking into account the phases set out in ***paragraphs 2 to 5 of*** Article 4. That roll-out plan shall include guidance ~~on the use of the EES~~ to Member States and Europol~~, including capacity limits~~ ***on the use*** of the EES***. This plan shall confirm performance and availability targets of the*** central system ***as well as the strategy regarding eventual functional minor, major and blocking defects***.

2. By [~~the 60th~~***OJ office: 60*** calendar ~~day after~~***days from*** the entry into force of this Regulation], in consultation with the Commission and eu-LISA, ***each*** Member ~~States~~***State*** shall develop a national roll-out plan on the progressive start of operations of the EES, taking into account the ***eu-LISA*** high-level roll-out plan ~~referred to in paragraph 1 of this Article~~ and the phases set out in Article 4.

3. For each of the phases set out in Article 4, the national roll-out plans shall include the information on the thresholds and requirements set out in that Article.

4. From the 30th calendar day after ***the first day of*** the progressive start of operations of the EES, Member States shall provide monthly reports to the Commission and eu-LISA ~~on~~***confirming*** the implementation of their national roll-out plans, ~~including~~***or identifying*** corrective measures**,** where necessary**,** to comply with the obligations set out in Article 4.

PUBLIC

5. At the request of the Commission, eu-LISA shall provide the Commission with the statistics necessary for the monitoring of the of the ***eu-LISA high-level roll-out plan and the*** national roll-out plans, in accordance with Article 63(6) of Regulation (EU) 2017/2226.

5a. The eu-LISA Management Board shall adopt the eu-LISA high-level roll-out plan referred to in paragraph 1 of this Article. The eu-LISA Management Board shall also monitor the development of the EES Central System in accordance with Article 19 of Regulation (EU) 2018/1726, in particular as regards the progressive start of operations.

Article 4

Progressive start of operations

1. By way of derogation from Article 66(6) of Regulation (EU) 2017/2226 during the progressive start of operations of the EES, the Member States shall use the EES as set out in ***paragraphs 2 to 6 of*** this Article.

2. From the first day of the progressive start of operations of the EES, each Member State shall start using the EES on entry and exit at one or more border crossing points with, if possible and applicable, a combination of air, land and sea border crossing points, to record and store data of third-country nationals referred to in Article 2(1) and (2) of Regulation (EU) 2017/2226. ***By the 30th calendar day from the first day of the progressive start of operations of the EES,*** Member States shall register in the EES at least 10% of the estimated number of border crossings in that Member State.

~~For~~ ***During*** the first 60 calendar days of the progressive start of operations of the EES, Member States may operate the EES without biometric functionalities, and national authorities may create ~~or~~***and*** update individual files without biometric data.

PUBLIC

3. ~~No later than~~***By*** the 90th calendar day ~~after~~ ***from the first day of*** the progressive start of operations of the EES, Member States shall operate the EES with biometric functionalities at least at half of their border crossing points. Member States shall register ***in the EES*** at least 50% of the estimated number of border crossings in that Member State. The individual files of third-country nationals referred to in Article 2(1) and (2) of Regulation (EU) 2017/2226 that are registered in the EES shall contain biometric data.

4. ~~No later than~~***By*** the 150th calendar day ~~after~~ ***from the first day of*** the progressive start of operations of the EES, Member States shall operate the EES with biometric functionalities at all their border crossing points and shall continue registering in the EES at least 50% of the estimated number of border crossings in that Member State.

5. ~~No later than~~***By*** the 170th calendar ~~days~~***day*** ~~after~~ ***from the first day of*** the progressive start of operations of the EES, Member States shall operate the EES with biometric functionalities at all their border crossing points and shall register in the EES all third-country nationals referred to in Article 2(1) and (2) of Regulation (EU) 2017/2226.

6. Refusals of entry, decided at a border crossing point at which the EES is operated, shall be recorded in the EES, ~~as set out~~ in ***accordance with*** Article 18 of Regulation (EU) 2017/2226. ***For the purpose of this paragraph,*** where the EES is operated with biometric functionalities, refusals of entry shall be recorded with biometric data~~.~~ ***and*** where the EES is operated without biometric functionalities, refusals of entry shall be recorded without biometric data***, except where the biometric data may be retrieved from the VIS***.

7. From the first day of the progressive start of operations of the EES, Europol shall use the EES as provided for in Regulation (EU) 2017/2226.

PUBLIC

Article 5

Other derogations from Regulation (EU) 2017/2226 and Regulation (EU) 2016/399

1. In addition to the rules of Article 4, the rules set out in this Article shall apply during the progressive start of operations of the EES.

2. Border authorities shall systematically stamp the travel documents of third-country nationals referred to in Article 2(1) and (2) of Regulation (EU) 2017/2226 on entry and exit.

   The stamping obligations referred to in Article 42a(1), second subparagraph, and Article 42a(2), (5) and (6) of Regulation (EU) 2016/399 shall apply *mutatis mutandis* in the Member States operating the EES.

3. For entering, amending, erasing and consulting the data in the EES, national authorities that are competent for the purposes laid down in Articles 23 to 35 of Regulation (EU) 2017/2226 shall ~~consider stamps as prevailing over the EES data, including in cases of discrepancy or in cases referred to in Article 16(4) of that Regulation. The data recorded in the EES shall prevail in case a stamp is missing.~~***:***

   (a) consider stamps affixed as prevailing where there is no relevant EES data,

   (b) consider EES data as prevailing:

      (i) where there is discrepancy between the individual file containing biometric data and the stamp affixed, or

      (ii) where a stamp is missing;

   (c) decide on a case-by-case basis whether the stamp or the EES data is prevailing:

      (i) where there is a discrepancy between the individual file without biometric data and the stamp affixed according to paragraph 2; or

      (ii) in cases referred to in Article 16(4) of Regulation (EU) 2017/2226.

PUBLIC

4. In the absence of a stamp affixed in the travel document and of an individual file created in the EES for a third-country national present in the territory of ~~the~~***a*** Member ~~States~~***State***, national authorities may presume that the third-country national does not fulfil**,** or no longer fulfils**,** the conditions relating to entry or stay in the Member States.

~~This~~***The*** presumption ***referred to in the first subparagraph*** shall not apply to third-country nationals who can provide, by any means, credible evidence that they enjoy the right of free movement under Union law, ~~have a right of residence in a host Member State under the EU–UK Withdrawal Agreement,~~ or that they hold a residence permit or a long-stay visa.

~~This~~***The*** presumption ***referred to in the first subparagraph*** may be rebutted where the third-country nationals provide, by any means, credible evidence***, such as transport tickets or proof of presence outside the territory of the Member States or of the date of expiry of a previous residence permit or long-stay visa,*** that they have respected the conditions relating to the duration of a short stay.

Where the presumption is rebutted, national authorities ***using the EES*** shall perform one or more of the following tasks ~~at the border crossing points at which the EES is operated~~, to the extent allowed by this Regulation:

(a) create an individual file for that third-country national in the EES, if necessary;

(b) update the latest entry/exit record by entering the missing data;

(c) erase an existing file where Article 35 of Regulation (EU) 2017/2226 provides for such erasure.

5. Border authorities shall make use of the interoperability between the EES and the VIS referred to in Article 8(2) of Regulation (EU) 2017/2226 only at the border crossing points at which the EES is operated. Border authorities shall continue accessing the VIS directly:

(a) at the border crossing points at which the EES is not operated;

(b) where the EES is suspended ~~in accordance with~~ ***pursuant to*** Article 7 of this Regulation.

6. National authorities and Europol shall disregard the following:

(a) the results of the automated calculator that provides information on the maximum duration of the authorised stay referred to in Article 11 of Regulation (EU) 2017/2226;

(b) the automatically generated list of overstayers and its consequences in particular as referred to in Article 6(1), points (c) and (h), Article 12(3), Article 16(4), Article 34(3), Article 50(1), points (i) and (k), Article 63(1), point (e) of that Regulation.

7. ***For the purposes of Articles 45 and 48 of Regulation (EU) 2017/2226,*** processing operations ***of EES data*** by Member States ~~that comply with~~***pursuant to*** this Regulation shall not be considered as unlawful or ***as*** not compliant with Regulation (EU) 2017/2226 ~~for the purposes of Articles 45 and 48 of that Regulation~~.

8. Verification of the identity and previous registration of third-country nationals pursuant to Article 23 of Regulation (EU) 2017/2226 shall be carried out on the third-country nationals referred to in Article 2(1) and (2) of that Regulation at the border crossing points at which the EES is operated with biometric functionalities, including through self-service systems, where available.

PUBLIC

9. In addition to the specific information referred to in Article 50(5) of Regulation (EU) 2017/2226 that is to be added by the Member States in the template to provide information to third-country nationals ***referred to in Article 2(1) and (2) of that Regulation*** about the processing of their personal data in the EES, Member States shall ~~accompany~~***complement*** the template to be ~~handed over to~~***provided to those*** third-country nationals at the time the individual file of the person concerned is being created with the following information:

'The Entry/Exit System is being progressively rolled out. During ***the period of this progressive***~~this~~ roll-out ~~period~~ [from …], your personal data, including your biometric data, might not be collected for the purposes of the Entry/Exit System at all Member States' external borders. If we need to mandatorily collect this information and you choose not to provide it, you will be refused entry. During this period of the progressive roll-out your data will not be automatically added to a list of overstayers. In addition, you will not be able to check how much longer you are authorised to stay using the website or equipment available at border crossing points.

Please note that when the progressive roll-out of the EES is completed, your personal data will be processed according to the information provided in the document accompanying this form.'

10. The information on the EES website referred to in Article 50(3) of Regulation (EU) 2017/2226 shall be adapted by the Commission to reflect the progressive start of operations ***of the EES***.

11. The information campaign referred to in Article 51 of Regulation (EU) 2017/2226 accompanying the start of operations of the EES, shall reflect the ~~specific~~ conditions at the border crossing points, ensuring that the relevant information is communicated to those affected, and taking into account the phases set out in Article 4 of this Regulation. The Commission shall ***adapt materials of the information campaign in a reasonable timeframe, prior to the start of operations. The Commission shall*** support Member States in preparing the adapted materials of the information campaign.

PUBLIC

12. The application of ***Article 11(3),*** Article 12(1) and (2), Article 13(1) and (2), Article 20 and Article 21 of Regulation (EU) 2017/2226***, as well as the application of Article 8(9) of Regulation (EU) 2016/399*** shall be suspended.

13. By way of derogation from Article 22 of Regulation (EU) 2017/2226 and Article 12a of Regulation (EU) 2016/399, the transitional period and the transitional measures set out in those Articles shall apply from the first day after the ***end of the*** progressive start of operations of the EES ~~has ended~~.

14. At the border crossing points at which the EES is not operated, border checks shall be carried out in accordance with Regulation (EU) 2016/399 as applicable on the day before the date from which the EES is to start operations as decided by the Commission in accordance with Article 66(1) Regulation (EU) 2017/2226.

At the border crossing points at which the EES is operated, border checks shall be carried out in accordance with Regulation (EU) 2017/2226 and Regulation (EU) 2016/399.

By way of derogation from the second subparagraph, at the border crossing points where the EES is operated without biometric functionalities, Article 6(1), point (f)(i) ***of Regulation (EU) 2016/399***, and the provisions on the verification of third-country nationals based on biometric data, solely for the purposes of the EES, referred to in Articles ~~6~~***6(1)***, point (f) (ii) and Article 8 (3), points (a) and (g) of ***that*** Regulation ~~(EU) 2016/399~~ shall not apply.

For the purposes of this Regulation, Article 9(3) and Article 12 of Regulation (EU) 2016/399***, as well as Article 8(9) of Regulation (EU) 2017/2226*** shall be suspended.

14a. By way of derogation to Article 37 of Regulation (EU) 2017/2226, the Programme Management Board shall continue its activities until the end of the progressive start of operations of the EES, and in particular shall monitor such progressive start.

PUBLIC

Article 6

Access to the EES data

1. When accessing the entry and exit records registered in the EES during the progressive start of operations of the EES in the performance of their tasks:

   (a) national authorities and Europol shall take into account that, due to the variable operations of the EES in each Member State during the progressive start of operations of the EES, the data could be incomplete;

   (b) national authorities shall take into account that the data could be incomplete when communicating data in accordance with Articles 41 and 42 of Regulation (EU) 2017/2226;

   (c) the ETIAS Central Unit shall take into account that the entry and exit records registered in the EES during the progressive start of operations of the EES could include incomplete sets of data for the purpose of verification in accordance with Article 25a(2) of Regulation (EU) 2017/2226.

2. Competent authorities, the Commission and relevant Union agencies shall take into account that the data registered in the EES during the progressive start of operations of the EES ~~may~~***could*** be incomplete when accessing data for ***the purpose of*** reporting and statistics ~~as referred~~ in ***accordance with*** Article 63 of Regulation EU 2017/2226.

PUBLIC

3. ~~By way of derogation from Article 13(3) of Regulation (EU) 2017/2226, carriers may start using the web service referred to in that Article from the 90th calendar day of the progressive start of operations of the EES.~~ Carriers shall verify the stamps affixed in the travel documents with a view to fulfilling their obligations under Article 26(1) of the Convention implementing the Schengen Agreement and under Council Directive 2001/51/EC for the duration of the progressive start of operations of the EES. ***By way of derogation from Article 13(3) of Regulation (EU) 2017/2226, carriers may start using the web service referred to in that Article from the 90th calendar day of the progressive start of operations of the EES.***

~~For a period of~~***During*** 180 calendar days after the end of the progressive start of operations of the EES, carriers shall, in addition to using the web service ~~as referred to in~~***pursuant to*** Article 13(3) of Regulation (EU) 2017/2226 continue verifying the stamps affixed in travel documents with a view to fulfilling their obligations under Article 26(1) of the Convention implementing the Schengen Agreement and ***under*** Council Directive 2001/51/EC.

4. When fulfilling the obligations referred in Articles 35 and 52 of Regulation (EU) 2017/2226 in relation to the completion of personal data recorded in the EES, Member States shall complete the relevant data only to the extent possible taking into account the limited availability of the sets of data collected during the progressive start of operations of the EES. Where applicable, the administrative decision referred to in Article 52(4) of Regulation (EU) 2017/2226 shall refer to the conditions set out in Article 4 of this Regulation that allow for the registration of incomplete files.

5. By way of derogation from Article 63(1), second subparagraph, of Regulation (EU) 2017/2226, the duly authorised staff of the European Border and Coast Guard Agency shall not access the data registered in the EES during the progressive start of operations of the EES for the purpose of carrying out risk analyses and vulnerability assessments.

Article 7

Suspension of the EES

1. During the progressive start of operations of the EES, Member States may fully or partially suspend operating the EES at certain border crossing points in exceptional circumstances of failure of the EES Central System, national systems or communication infrastructure, or events leading to traffic of such intensity that the waiting time at a border crossing point becomes excessive.

In case of partial suspension, the data referred to in Articles 16 to 20 of Regulation (EU) 2017/2226 shall be collected, with the exception of biometric data.

In case of full suspension, Member States shall completely suspend the EES operations and shall not collect the data referred to in Articles 16 to 20 of that Regulation.

In both cases, Member States shall promptly and no later than ~~6~~***12*** hours after the start of the suspension notify to the Commission and eu-LISA the reason for the partial or full suspension and its expected ***or actual*** duration and ~~ensure that~~***, if relevant according to the local circumstances of the border crossing points, shall inform*** the operators of infrastructure hosting border crossing points and carriers ~~are duly informed~~ of such suspension. Once the exceptional circumstances that led to the suspension cease, Member States shall promptly notify the Commission and eu-LISA.

1a. In case of failure of EES Central System, eu-LISA shall promptly notify the Commission and Member States of the reason and its expected duration. Eu-LISA shall also promptly notify them when the failure is remedied. All Member States shall promptly confirm restart of operations to eu-LISA and the Commission.

PUBLIC

2. ~~For~~***During*** a period of ~~60~~***90*** calendar days after the end of the progressive start of operations of the EES, Member States may partially suspend operating the EES as referred to in paragraph 1, second subparagraph, at a certain border crossing point for a limited time of maximum ~~6~~***12*** hours and only in exceptional circumstances leading to traffic of such intensity that the waiting time at a border crossing point becomes excessive. ***During such a partial suspension,*** Member States shall be relieved of their obligation set out in ***that*** Article 21(1) of Regulation (EU) 2017/2226 as regards ***the registration of*** biometric data. In those cases, Member States shall promptly and no later than ~~6~~***12*** hours after the start of ***the partial*** suspension notify the reason for the suspension and its expected ***or actual*** duration to the Commission and eu-LISA.

3. If less than 80% of the individual files registered in the EES during the progressive start of operations of the EES contain biometric data, the period ***of 90 calendar days*** set out in paragraph 2 ~~of this Article~~ shall be automatically extended by 60 calendar days.

4. ~~At the latest~~ By the 10th calendar day after the end of the progressive start of operations of the EES, eu-LISA shall provide the Commission with statistics allowing the Commission to verify if this percentage ***referred to in paragraph 3*** has been reached. No later than by the 30th calendar day after the end of the progressive start of operations of the EES, the Commission shall inform the Member States of the outcome of its verification.

Article 8

Entry into force and application

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

   It shall apply from the date from which the EES is to start operations as decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226.

   However, Article 3 of this Regulation shall apply from ***[OJ Office: the date of*** ~~the~~ entry into force of this Regulation***]***.

2. This Regulation shall cease to apply 180 calendar days from the date from which the EES is to start operations as decided by the Commission in accordance with Article 66(1) Regulation (EU) 2017/2226. However:

(a) Article 5(13) shall cease to apply 5 years and 180 calendar days after the date ***from which the EES is to start operations as*** decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226;

(b) Article 6(1), (2), (4) and (5) shall cease to apply 5 years and 180 calendar days after the date ***from which the EES is to start operations as*** decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226;

(c) Article 6(3), second subparagraph, shall cease to apply 360 calendar days after the date ***from which the EES is to start operations as*** decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226;

(d) Article 7(2) and (3) shall cease to apply ~~300~~***330*** calendar days after the date ***from which the EES is to start operations as*** decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226;

(e) Article 7(4) shall cease to apply 210 calendar days after the date decided by the Commission in accordance with Article 66(1) of Regulation (EU) 2017/2226.

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

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

PUBLIC