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**NOTE**

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From: Presidency

To: Council

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Subject: Entry/Exit System (EES)

a) 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 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

b) 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

- Progress report

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**I. INTRODUCTION**

1. The Presidency hereby submits its report on the progress achieved on the Smart Borders Package. This report has been drawn up under the responsibility of the Presidency on the basis of the positions expressed within the Council and its preparatory bodies.

### The Commission proposals

2. On 6 April 2016 the Commission presented a legislative package on Smart Borders, which included a proposal for a Regulation for the establishment of an Entry/Exit System (EES)<sup>1</sup> and a proposal for Regulation amending the Schengen Borders Code to integrate the technical changes that resulted from the above proposal for a Regulation establishing an Entry/Exit System (EES)<sup>2</sup>. These are a revised version of the proposals presented by the Commission in February 2013 and for which the co-legislators had voiced technical, financial and operational concerns.
3. The Entry-Exit System (EES), which will replace the current system of manual stamping of passports, aims at modernising external border management by improving the quality and efficiency of controls as well as the detection of document and identity fraud. The system will apply to all non-EU citizens who are admitted for a short stay in the Schengen area (maximum 90 days in any 180-day period). The system will register the name, type of travel document and biometrics and the date and place of entry and exit. This will facilitate the border crossing of bona fide travelers, detect over-stayers and identify undocumented persons in the Schengen area. The EES will also record refusals of entry. The second, ancillary, objective of the EES is to reinforce internal security and the fight against terrorism and serious crime, by providing access, under strictly defined conditions, for designated authorities and Europol to a record of travel histories of third country nationals including crime suspects.

### The proceedings in the Council

4. The technical examination of the proposals by the Working Party on Frontiers started right after their presentation. Since then, ten meetings were held, which allowed for several readings of the proposals, as well as the examination of a number of compromise suggestions presented by the Netherlands and the Slovak Presidencies. The JHA Counsellors also met to further develop the work carried out at Working Party level.

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<sup>1</sup> Doc. 7675/16.

<sup>2</sup> Doc. 7676/16 + ADD1.

5. Policy debates were held at political level, both in the JHA Council (21 April and 13 October 2016) and in SCIFA (21 June, 13 September and 25 October 2016), to give guidance to the Working Party on some of the most sensitive issues.
6. The European Council at its meeting of 20 October 2016 called on the Council to establish its position by the end of the year. The Presidency is deploying its best efforts to meet this objective to the extent possible, without losing sight of the need to address adequately all the legal and practical concerns which have emerged during this examination and which have ramifications on other parts of the *acquis* as well.

### *The proceedings in other institutions and bodies*

7. In the European Parliament (EP) the proposals were referred to the Civil Liberties, Justice and Home Affairs (LIBE) Committee, which appointed Mr Agustín DÍAZ DE MERA (EPP, ES) as rapporteur.
8. The EP held a first exchange of views on 24 May 2016. The draft reports have been published on 6 December and they are scheduled to be presented in the LIBE Committee on 8 December 2016. According to the planning, the EP should be able to adopt its position by the end of January 2017.
9. The European Economic and Social Committee adopted its opinion<sup>3</sup> on 21 September 2016, by 155 votes for and 2 against.
10. The European Data Protection Supervisor adopted its position 6/2016<sup>4</sup> on the same date.

## **II. STATE OF PLAY IN THE COUNCIL**

11. Widespread support was expressed by Member States to the objectives of the proposals. As far as the substance was concerned, delegations considered that the new proposals represented an improvement compared to the version presented in 2013.

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<sup>3</sup> Soc./544, rapporteur Cristian PÎRVULESCU.

<sup>4</sup> Doc. 12562/16.

12. Discussion at technical level focused in particular on the following issues, for which the Presidency considers that a provisional agreement has been reached:
- the scope of the proposal<sup>5</sup>;
  - the optimal choice and use of biometrics identifiers to be included in the system;
  - the transfer of data to third countries;
  - data retention periods at EU and national level;
  - the interoperability with VIS for Member States that have not yet access to this database;
  - the costs at European and national level.
13. While considerable progress has been registered on many technical aspects of the proposals, some issues remain outstanding and are currently the object of negotiations with a view to reaching a Council position on the Smart Borders package.
14. With regard to the calculation of the duration of stay in Member States not yet applying the Schengen acquis in full, the Presidency has further amended the text in particular to reflect the written opinion of the Council Legal Service 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)<sup>6</sup>.

This approach has implications on a number of provisions of the EES draft Regulation The Commission Services confirmed in writing their views on the same subject-matter on 25 November 2016, whereby they express certain objections vis-à-vis the above interpretation provided by the Council Legal Service and provide some alternative approaches.<sup>7</sup>

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<sup>5</sup> Some delegations have asked to enlarge the scope of the proposal to include people enjoying the right of free movement under Union law.

<sup>6</sup> Doc. 13491/16.

<sup>7</sup> Doc. 14893/16

During the last Working Party on Frontiers the interpretations of the two Legal Services were examined, and delegations are now examining them. However, it was acknowledged that further work is needed on this issue.

In the same context, the possibility to grant Romania and Bulgaria passive access to VIS for the purpose of applying the EES has also been considered by the Presidency, and addressed as a parallel track in the Visa Working Party.

15. Coreper, at its meeting on 7 December 2016, examined the following other outstanding issues:

- the conditions to grant access to the EES to law enforcement authorities (Chapter IV);
- the interaction between the EES and bilateral agreements (Art. 54);
- the obligation/possibility of stamping travel documents in case of technical failure of the EES (Art. 19).

The Presidency considers that an agreement was reached on the issue of stamping. On the other hand, it is clear, in the light of comments made, that the other two issues still need further examination.

In Coreper it was also noted that the issue of registering movements of persons enjoying the right of free movement in the context of the fight against foreign terrorist fighters would be further examined, possibly with a view to addressing this issue in separate legislation.

16. The Presidency intends to pursue actively the examination of the outstanding issues with a view to finding an agreement on a mandate to open interinstitutional negotiations as soon as possible.

17. In light of the above, the Council is invited to take note of this progress report.

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