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From: Presidency
To: Working Party on Frontiers/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)
Subject: 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

Delegation will find attached a Presidency compromise text of the above Proposal. The compromise suggestions reflect the discussions and the relevant contributions by delegations put forward during the previous readings of the draft Regulation, as well the Council Legal Service opinion (doc. 13491/16).

The new additions are highlighted in **bold/underline**. The changes already included in the previous version of the text (doc. 12178/16) are highlighted in underline. Deletions of parts of the Commission's proposal are marked as [...].

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System

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 Articles 77(2)(b) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) 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 (Schengen Borders Code)¹ lays down the conditions, criteria and detailed rules for the crossing of the external borders of the Member States.

¹ 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 (Schengen Borders Code) (Codification) OJ L 77, 23.3.2016, p. 1.

- (2) Regulation (EU) N° XXX of the European Parliament and of the Council establishing the 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]² aims at creating a centralised system for the registration of entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the Union for a short stay [...].
- (3) In order to carry out checks on third country nationals pursuant to Regulation (EU) 2016/399, which include the verification of the identity and/ or the identification of the third country national as well as the verification that the third country national has not exceeded the maximum duration of authorised stay in the territory of the Member States, border guards should use all the information available, including data from the EES. The data stored in that system should also be used to verify that third country nationals holding a single or double entry visa have respected the maximum number of authorised entries.
- (4) To ensure full effectiveness of the EES, entry and exit checks need to be carried out in a harmonised way at the external borders. The establishment of the EES requires to provide the biometric data for creation of an individual file of third country nationals and also for the checks during the crossing of external borders. For effective implementation of that measures at the external borders, the entry conditions for third country nationals should be amended by the obligation to provide that biometric data. If a third country national refuses to provide biometric data for creation of the individual file or for performance of border check, the refusal of entry decisions should be adopted.

² OJ L ...

(5) The establishment of an EES requires adapting the procedures for checking persons when crossing the external borders **or internal borders with regard to which the checks have not yet been lifted** laid down in Regulation (EU) 2016/399. In particular, the EES aims to abolish on entry and exit the stamping of the travel documents of third country nationals admitted for a short stay by replacing it by the electronic recording of the entry and exit directly in the EES. However, stamping of travel document on refusal of entry of a third country national is maintained since it concerns higher risk travellers. Furthermore, the establishment of the interoperability between the EES and the Visa Information System (VIS) needs to be taken into account in the border checks procedures. Lastly, the EES opens the possibility to use new technologies for the border crossings of short stay travellers.

(5a) The above-mentioned adaptations of procedures should become effective in the Member States operating the EES on the date of entry into operation of the EES determined in accordance with the EES Regulation (EU) N° XXX.

(5b) By derogation to those adaptations, during the transitional period pending their connection to the EES, Member State not operating the EES should continue to apply the existing procedures laid down in Regulation (EU) 2016/399. Those procedures should include the maintenance of the stamping obligation and the existing procedures for check on borders, which do not include verification of the EES. For the reasons of transparency and legal certainty, those procedures should be set out in an Annex which should be added for this purpose to Regulation (EU) 2016/399.

- (6) During a period of six months after the EES has started operations, border guards should take into account the stays in the territories of the Member States during the six months preceding the entry or the exit by checking the stamps in the travel documents in addition to the entry/exit data recorded in the EES. Such measure should enable the required verifications to be carried out in those cases where a person would have been admitted for a short stay on the territory of the Member States in the six months preceding the start of operations of the EES. In addition there is a need to lay down specific provisions for those persons having entered the territory of the Member States and who have not yet exited it before the entry into operations of the system. In these situations, the last entry should also be recorded into the EES when exiting the territory of the Member States.
- (7) Taking into account the different situations in the Member States and at different border crossing points within the Member States concerning the number of third country nationals crossing the borders, Member States should be able to decide whether and to what extent to make use of technologies such as automated border control systems, "self-service kiosks" and e-gates. When using such technologies, it should be ensured that entry and exit checks are carried out in a harmonised way at the external borders and that an appropriate level of security is ensured.
- (8) In addition, the tasks and roles of the border guards when making use of such technologies need to be defined. In this regard, it should be ensured that the results of border checks performed through automated means are available to border guards so as to enable them to take the appropriate decisions. In addition, there is a need to supervise the use of the automated border control systems, "self-service kiosks" and e-gates by travellers so as to prevent fraudulent behaviour and uses. In addition, when carrying out this supervision, border guards should pay particular attention to minors and should be placed in a position that should enable them to identify persons needing protection.

- (9) Member States should also be able to establish national facilitation programmes on a voluntary basis to allow pre-vetted third country nationals to benefit at entry from derogations to the thorough checks. When using such national facilitation programmes, it should be ensured that they are established in a harmonised way and that the appropriate level of security is guaranteed.
- (10) This Regulation is without prejudice to the application of Directive 2004/38/EC of the European Parliament and of the Council³.
- (10a) (...) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and delivered an opinion on ...
- (11) Since the objective of this Regulation, namely to provide for amendments to the existing rules of Regulation (EU) 2016/399 can only be achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as also set out in that Article, this Regulation does not go beyond what is necessary in order to achieve this objective.

³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, 30.4.2004, p. 77).

- (12) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union 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*, Denmark shall, 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.
- (13) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC⁴; the United Kingdom is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (14) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC⁵; Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (15) As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen *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 the latter's association with the implementation, application and development of the Schengen *acquis*⁶ which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC⁷.

⁴ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* (OJ L 131, 1.6.2000, p. 43).

⁵ Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis* (OJ L 64, 7.3.2002, p. 20).

⁶ OJ L 176, 10.7.1999, p. 36.

⁷ Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 31).

- (16) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *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*⁸ which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC⁹ read in conjunction with Article 3 of Council Decision 2008/146/EC¹⁰.
- (17) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen *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*¹¹ which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC¹² read in conjunction with Article 3 of Council Decision 2011/350/EU¹³.

⁸ OJ L 53, 27.2.2008, p. 52.

⁹ Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 31).

¹⁰ Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, 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* (OJ L 53, 27.2.2008, p. 1).

¹¹ OJ L 160, 18.6.2011, p. 21.

¹² Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 31).

¹³ Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, 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*, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

(17a) As regards Bulgaria, Croatia, Cyprus and Romania, provisions of this Regulation referring to VIS constitute provisions building upon, or otherwise relating to, the Schengen *acquis* within, respectively, the meaning of Article 3(2) of the 2003 Act of Accession, Article 4(2) of the 2005 Act of Accession and Article 4(2) of the 2011 Act of Accession,

(18) Regulation (EU) 2016/399 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) 2016/399 is amended as follows:

(19) In Article 2, the following points 22, 23, 24 and 25 are added:

"22. 'Entry/Exit System (EES)' means the system established by [Regulation (EU) N^o XXX of the European Parliament and of the Council establishing the 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;

23. 'Self-service system' means an automated system which performs all or some of the border checks that are applicable to a person and which may be used for pre-enrolling data in EES;

24. 'e-gate' means an infrastructure operated by electronic means where the effective crossing of an external border takes place;

25. 'Automated Border Control system' means a system which allows for an automated border passage, and which is composed of a self-service system and an e-gate.

(1a) In Article 6 paragraph 1, point (f) is added:

“(f) they provide the biometric data, if required for:

- (i) creating the individual file in the Entry/Exit system in accordance with Articles 14 and 15 of Regulation establishing the Entry/Exit System (EES)];
- (ii) carry out of border checks according with Article 8(3) (a) (i) and (g) (i) of this Regulation, Article 21(2) and (4) of [Regulation establishing the Entry/Exit System (EES)] or Article 18 of Regulation (EC) No 767/2008.

(20) The following Article 6a is inserted:

"Article 6a

Third country nationals for which data shall be entered into the EES

1. Data on entry and exit of the following categories of persons shall be entered into the EES in accordance with Articles 14, 15, 17 and 18 of [Regulation establishing the Entry/Exit System (EES)]:
 - (a) third country nationals admitted for a short stay pursuant to Article 6(1) [or for a stay on the basis of a touring visa];
 - (b) third country nationals who are members of the family of a Union citizen to whom Directive 2004/38/EC applies and who do not hold a residence card pursuant to that Directive;
 - (c) third country nationals who are members of the family of nationals of third countries enjoying the right of free movement under Union law and who do not hold a residence card pursuant to Directive 2004/38/EC.
2. Data on third country nationals whose entry for a short stay [or on the basis of a touring visa] has been refused in accordance with Article 14 of this Regulation shall be entered in the EES in accordance with Article 16 of [Regulation establishing the Entry/Exit System (EES)].

3. Data on the following categories of persons shall not be entered into the EES:
- (a) third country nationals who are members of the family of a Union citizen to whom Directive 2004/38/EC applies and who hold a residence card in accordance with that Directive;
 - (b) third country nationals who are members of the family of nationals of third countries enjoying the right of free movement under Union law who hold a residence card referred to in Directive 2004/38/EC;

(b1) holders of residence permits referred to in point 16 of Article 2 other than those covered by points (a) and (b) of this paragraph;

(b2) holders of long-stay visas;

- (c) nationals of Andorra, Monaco, and San Marino and holders of a passport issued by the Vatican City State;
- (d) persons or categories of persons exempt from border checks or benefitting from facilitation of border crossing:
 - (i) heads of State, heads of government and members of national government with accompanying spouses, sovereigns and other senior members of a royal family and members of their delegation in accordance with point 1 of Annex VII;
 - (ii) pilots of aircraft and other crew members in accordance with point 2 of Annex VII;
 - (iii) seamen in accordance with point 3 of Annex VII **and seamen who are present within the territory of a Member State only when their ship puts in the area of the port of call;**
 - (iv) cross-border workers in accordance with point 5 of Annex VII;

- (v) rescue services, police, fire brigades acting in emergency situation and border guards in accordance with point 7 of Annex VII;
- (vi) offshore workers in accordance with point 8 of Annex VII;
- (vii) crew members and passengers of cruise ships in accordance with points 3.2.1, 3.2.2 and 3.2.3 of Annex VI;
- (viii) persons on board a pleasure boat who are not subject to border checks in accordance with points 3.2.4, 3.2.5 and 3.2.6 of Annex VI;
- (e) persons who are exempt from the obligation to cross external borders only at border crossing points and during the fixed opening hours pursuant to Article 5(2);
- (f) persons who present a valid local border traffic permit for their border crossing in accordance with Regulation (EC) No 1931/2006 of the European Parliament and of the Council;
- (g) crew of passengers and good trains on international connections;
- (h) persons who present for their border crossing a valid Facilitated Rail Transit Document issued in accordance with Regulation (EC) No 693/2003

The data of the family members referred to in points (a) and (b) shall not be entered into the EES, even if they are not accompanying or joining the Union citizen or a third country national enjoying the right of free movement."

(21) Article 8 is amended as follows:

- (a) in paragraph 2, first subparagraph, the following sentence is added:

["If the travel document contains an electronic storage medium (chip), the authenticity and integrity of the chip data shall be confirmed using the complete valid certificate chain, unless this is impossible, for technical reasons or, in the case of a travel document issued by a third country, due to the non-availability of valid certificates."]

(b) paragraph 3 is amended as follows:

(i) points (a)(i), (a)(ii) and (a)(iii) are replaced by the following:

["(i) verification of the identity and the nationality of the third country national and the validity and authenticity of the travel document, by consulting the relevant databases, in particular:

- (1) the Schengen information system;
- (2) the Interpol database on stolen and lost travel documents;
- (3) national databases containing information on stolen, misappropriated, lost and invalidated travel documents.

This verification includes a thorough scrutiny of the travel document for signs of falsification and counterfeiting.]

[...] If the travel document contains a facial image recorded in the electronic storage medium (chip) and if the facial image recorded in the chip can be [...] technically accessed, this verification shall include the verification of the facial image recorded in the chip, by comparing electronically this image with the live facial image of the concerned third country national, except for third country nationals who have an individual file already registered in the EES. If technically and legally possible, this verification may be done by verifying the live fingerprints with the fingerprints recorded in the chip.

(ii) verification that the travel document is accompanied, where applicable, by the requisite visa, [touring visa], long-stay visa or residence permit.

If the residence permit contains an electronic storage medium (chip) the authenticity and integrity of the chip data shall be confirmed using the complete valid certificate chain, unless this is impossible, for technical reasons. The thorough checks on entry shall also comprise a systematic verification of the validity of the residence permit or long stay visa by consulting, in the SIS and in other relevant databases, information exclusively on stolen, misappropriated, lost and invalidated documents.[¹⁴]

(iii) for persons whose entry or whose refusal of entry is subject to a registration in the EES pursuant to Article 6a of this Regulation, a verification of the identity of the person in accordance with Article 21(2) of [Regulation establishing the Entry/Exit System (EES)] and, where applicable, an identification shall be carried out in accordance with Article 21 (4) of [Regulation establishing the Entry/Exit System (EES)]."

(ii) the following point (a)(iii a) is inserted after point (a)(iii):

"(iii a) for persons whose entry or whose refusal of entry is subject to a registration in the EES pursuant to Article 6a of this Regulation, verification that the third country national has not already reached or exceeded the maximum duration of authorised stay in the territory of the Member States and, for third country nationals holding a single or double entry visa, verification that they have respected the number of the maximum authorised entries, by consulting the EES in accordance with Article 21 of [Regulation establishing the Entry/Exit System (EES)]."

¹⁴ These paragraphs may require further adjustments after the adoption of COM's proposal (2015)670/2.

(iii) point (b) is replaced by the following:

"(b) if the third country national holds a visa [or a touring visa] referred to in Article 6(1)(b) the thorough checks on entry shall also comprise the verification of the authenticity, territorial and temporal validity and status of the visa [or a touring visa] and, if applicable, of the identity of the holder of the visa [or a touring visa], by consulting the VIS in accordance with Article 18 of Regulation (EC) No 767/2008 of the European Parliament and of the Council¹⁵"

(iv) point (g)(i) is replaced by the following:

"(i) verification that the third country national is in possession of a document valid for crossing the border and that the document is accompanied, where applicable, by the requisite visa, [or a touring visa], long-stay visa or residence permit. Verification of the document shall include the consultation of relevant databases, in particular the Schengen Information System; the Interpol database on stolen and lost travel documents; and national databases containing information on stolen, misappropriated, lost and invalidated travel documents.^[16] [...] If the travel document contains a facial image recorded in the electronic storage medium (chip) and if the facial image recorded in the chip can be [...] technically accessed, this verification shall include the verification of the facial image recorded in the chip, by comparing electronically this image with the live facial image of the concerned third country national, except for third country nationals who have an individual file already registered in the EES. If technically and legally possible, this verification may be done by verifying the live fingerprints with the fingerprints recorded the in the chip.

¹⁵ 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)."

¹⁶ This conditions is foreseen in the proposal (COM(2015)670/2) amending Article 7 of the SBC and will be part of the compulsory checks for persons enjoying the right of free movement. Depending on the final version of the text adopted, this sentence may require adjustments.

(v) the following points (g) (iv) and (v) are added:

"(iv) for persons whose exit is subject to a registration in the EES pursuant to Article 6a of this Regulation, a verification of the identity of the person **in accordance with Article 21(2) of [Regulation establishing the Entry/Exit System (EES)]** and, where applicable in accordance with Article 21(4) of [Regulation establishing the Entry/Exit System (EES)], an identification shall be carried out;

(v) for persons whose exit is subject to a registration in the EES pursuant to Article 6a of this Regulation, verification that the third country national did not exceed the maximum duration of authorised stay in the territory of the Member States, by consulting the EES in accordance with Article 21**(3)** of [Regulation establishing the Entry/Exit System (EES)]."

(vi) point (h) (ii) is deleted.

(vii) point (i) is replaced by the following:

"~~(i)~~ for the purpose of identification of any person who may not fulfil, or who may no longer fulfil, the conditions for entry, stay or residence on the territory of the Member States, the VIS may be consulted in accordance with Article 20 of Regulation (EC) No 767/2008 and the EES may be consulted in accordance with Article 25 of [Regulation establishing the Entry/Exit System (EES)]."

(viii) the following paragraph 9 is added:

"9. Any third country national shall have the right to ask border guard during border checks at entry about the maximum remaining number of days of his/her authorized stay, which shall take into account the number of entries and the length of stay authorised by the visa {or the touring visa}, and be provided with such information by the border guard on that occasion."

(22) The following Article 8a is inserted:

"Article 8a

Use of automated border control systems for EU/EEA/CH citizens and for third country nationals who hold a residence card

1. The following categories of persons may be permitted to use automated border control systems if the conditions listed under paragraph 2 are met:
 - (a) Union citizens within the meaning of Article 20(1) of the TFEU[...];
 - (b) nationals of third countries who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens;
 - (c) third country nationals who are members of the family of a Union citizen to whom Directive 2004/38/EC applies, who hold a residence card referred to in that Directive;
 - (d) third country nationals who are members of the family of nationals of third countries enjoying the right of free movement under Union law who hold a residence card referred to in Directive 2004/38/EC.
2. In order to be permitted to use automated border control systems, the following cumulative conditions shall be met:
 - (a) the travel document [...] shall contain an electronic storage medium (chip) and the authenticity and integrity of the chip data shall be confirmed using the complete valid certificate chain;
 - (b) the travel document [...] shall contain a facial image recorded in the chip which can be technically accessed by the automated border control system so as to verify the identity of the holder of the travel document by comparing the facial image recorded in the chip and the live facial image; **if technically and legally possible, this verification may be done by verifying the live fingerprints with the fingerprints recorded in the chip of the travel document;**

(c) in addition, third country nationals enjoying the right of free movement under Union law who hold a valid residence card shall meet the following conditions:

(i) the residence card [...] shall contain an electronic storage medium (chip) and the authenticity and integrity of the chip data shall be confirmed using the complete valid certificate chain;

(ii) the residence card [...] shall contain a facial image recorded in the chip which can be technically accessed by the automated border control system so as to verify the identity of the holder of the residence permit or residence card, by comparing the facial image recorded in the chip and the live facial image; **if technically and legally possible, this verification may be done by verifying the live fingerprints with the fingerprints recorded the in the chip of the travel document.**

3. Where the conditions under paragraph 2 of this Article are met, the border checks on entry and exit provided for in Article 8(2) and the border crossing itself may be carried out using an automated border control system. When carried out by means of an automated border control system, the border check on entry and exit shall systematically include the verification that the person does not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to public health, including by consulting the relevant Union and national databases, in particular the Schengen Information System.^[17]
4. On entry and exit, the results of the border checks carried out through a self-service system shall be made available to a border guard. Taking into account the results of the border checks, this border guard shall monitor the results of border checks and authorise the entry or exit or, otherwise, refer the person to a border guard who shall proceed with further checks.

¹⁷ A similar conditions is foreseen in the proposal (COM(2015)670/2) amending Article 7 of the SBC (further to the codification, current Article 8) and will be part of the compulsory checks for persons enjoying the right of free movement. Depending on the final version of the text adopted, this sentence may become redundant/obsolete.

5. The person shall be referred to a border guard in the following situations:
- (a) when one of the conditions listed under paragraph 2 is not fulfilled;
 - (b) when the results of the checks on entry or exit provided for under Article 8(2) question the identity of the person or when they reveal that the person represents a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to public health;
 - (c) in case of doubt.
6. Without prejudice to paragraph 4, the border guard supervising the border crossing may decide to refer persons using the automated border control system to a border guard based on other reasons.
7. Automated border control systems shall be operated under the supervision of a border guard who shall be in charge of observing the users and detecting any inappropriate, fraudulent or abnormal use of the system."

(23) The following Article 8b is inserted:

"Article 8b

Use of automated border control systems for third country nationals who hold a residence permit

1. Third country nationals who hold a residence permit may be [...] permitted to use automated border control systems where the following cumulative conditions are met:
- (a) the travel document [...] shall contain an electronic storage medium (chip) and the authenticity and integrity of the chip data shall be confirmed using the complete valid certificate chain;
 - (b) the travel document [...] shall contain a facial image recorded in the chip which can be [...] technically accessed by the automated border control system so as to verify the identity of the holder of the travel document by comparing the facial image recorded in the chip and his or her live facial image;

- (c) the residence permit [...] shall contain an electronic storage medium (chip) and the authenticity and integrity of the chip data shall be confirmed using the complete valid certificate chain;
 - (d) the residence permit [...] shall contain a facial image **or fingerprints** recorded in the chip which can be technically accessed by the automated border control system so as to verify the identity of the holder of the residence permit, by comparing the facial image **or fingerprints** recorded in the chip and the live facial image **or, where applicable, the fingerprints.**
2. Where the conditions set out in paragraph 1 are met, the applicable border checks on entry and exit and the border crossing itself may be carried out using an automated border control system. In particular:
- (a) on entry, third country nationals who hold a residence permit shall be subject to the border checks referred to in Article 8(2) and points (i),(ii) [...] and (vi) of Article 8(3)(a);
 - (b) on exit, third country nationals who hold a residence permit shall be subject to the border checks referred to in Article 8(2) and points (i),(ii) and (iii) of Article 8(3)(g).
3. On entry and exit, the results of the border checks carried out through the self-service system shall be made available to a border guard. Taking into account the results of the border checks, this border guard shall monitor the results of border checks [...] and authorise entry or exit or, otherwise, refer the person to a border guard who shall proceed with further checks.
4. The person shall be referred to a border guard in the following situations:
- (a) when one or several of the conditions listed under paragraph 1 is or are not fulfilled;

- (b) when the results of the checks on entry or exit set out in paragraph 2 put into question the identity of the person or when they reveal that the person is considered to be a threat to the internal security, public policy, international relations of any of the Member States or to public health;
 - (c) when the checks on entry or exit set out in paragraph 2 of reveal that one or several of the entry or exit conditions are not met;
 - (d) in case of doubt.
5. Without prejudice to paragraph 4, the border guard supervising the border crossing may decide to refer persons using the automated border control system to a border guard based on other reasons-
6. Automated border control systems shall be operated under the supervision of a border guard who shall be in charge of observing the users and detecting any inappropriate, fraudulent or abnormal use of the system."

(24) The following Article 8c is inserted:

"Article 8c

Use of self-service systems for pre-enrolling data in the EES

1. Persons whose border crossing is subject to a registration in the EES in accordance with Article 6a may use self-service systems for the purpose of pre-enrolling [...] **the** file data **referred in paragraph (4)(a) of this Article** [...] provided the following cumulative conditions are verified:
- (a) the travel document [...] shall contain an electronic storage medium (chip) and the authenticity and integrity of the chip data shall be confirmed using the complete valid certificate chain;

- (b) the travel document [...] shall contain a facial image recorded in the chip which can be [...] technically accessed by the [...] self-service system so as to verify the identity of the holder of the travel document by comparing the facial image recorded in the chip and his or her live facial image.
2. Pursuant to paragraph 1, the self-service system shall verify whether the person has a previous registration in the EES and the identity of the third country national in accordance with Article 21(2) of [Regulation establishing the Entry/Exit System (EES)].
3. In conformity with Article 21(4) of [Regulation establishing the Entry/Exit System (EES)], the self-service system shall carry out an identification in accordance with Article 25 of [Regulation establishing the Entry/Exit System (EES)] [...]
- (a) — [...]
- (b) [...]
- (c) — [...]

In addition, in accordance with Articles 21(4) of the [Regulation establishing the Entry/Exit System (EES)] where an identification in the EES is carried out, the following provisions shall apply:

- (a) for third country nationals who are subject to a visa requirement to cross the external borders, if the search in the VIS with the data referred to in Article 18(1) of Regulation (EC) No 767/2008 indicates that the person is recorded in the VIS, a verification of fingerprints against the VIS shall be carried out in accordance with Article 18 (5) of Regulation (EC) No 767/2008.; In circumstances where a verification of the person pursuant to paragraph 2 of this Article failed, the border guard [...] shall access the VIS data for identification in accordance with Article 20 of Regulation (EC) No 767/2008.

(b) for third country nationals who are not subject to a visa requirement to cross the external borders and who are not found in the EES further to the identification run in accordance with Article 25 of [Regulation establishing the Entry/Exit System (EES)], the VIS shall be consulted in accordance with Article 19a of Regulation (EC) No 767/2008.

4. In the event that data on the person is not recorded in the EES pursuant to paragraphs 2 and 3, the following provisions shall apply:

(a) third country nationals who are subject to a visa requirement to cross the external borders shall pre-enrol in the EES through the self-service system the data listed under Article 14(1), **(2)(c), (d), (e), (f) and (g)** and, where relevant, the data referred to under Article 14 (6) of [Regulation establishing the Entry/Exit System (EES)] and third country nationals who are not subject to a visa requirement to cross the external borders shall pre-enrol in the EES through the self-service system the data listed under Articles **15(1)(a), (b) and (c) and 14(2)(c) and, where relevant, the data referred to in Article (15)(1)(d)**, of [Regulation establishing the Entry/Exit System (EES)];

(b) subsequently, the person shall be referred to a border guard who shall:

(i) [...] where not all the required data could be collected through the self-service kiosk, pre-enrol the concerned data,

(ii) [...] verify:

([...]1) that the travel document used at the self service system corresponds to the one held by the person in front of the border guard;

([...]2) that the live facial image of the person concerned corresponds to the facial image that was collected though the self service system;

([...]3) and, for persons who do not hold a visa required pursuant to Regulation (EC) No 539/2001, that the live fingerprints of the concerned person correspond to the fingerprints that were collected through the self-service system;

(iii[...]) when the decision to authorise or refuse entry has been taken, confirm the [...] **data referred to in point (a) of this paragraph** and introduce the data foreseen under Articles 14(2)(a), (b) [...] or 16(2)(a), (b), (c) and (d) [...] of the [Regulation establishing the Entry/Exit System (EES)].

5. Where it results from the operations provided for in paragraphs 2 **and** 3 [...] that data on the person are recorded into the EES, the self-service system shall check whether one or more of the data **referred in paragraph (4)(a) of this Article** [...] need to be updated. In addition, if it results that data on the person are recorded into the EES but that the third country national intends to cross for the first time after the creation of the individual file the internal borders according Article 3a(2) of the [Regulation establishing the Entry/Exit System (EES)] or external borders of a Member State which is subject to the **full** application of Regulation (EC) No 767/2008, the VIS shall be consulted as referred to under Article 21(5) of the [Regulation establishing the Entry/Exit System (EES)].
6. Where it is verified pursuant to paragraph 5 that the person has a [...] **individual** file registered in the EES but that his or her **data** [...] needs to be updated, the following provisions shall apply:
 - (a) the person shall pre-enrol through the self-service system the updated data in the EES;
 - (b) the person shall be referred to a border guard. That border guard shall verify the correctness of the update that was pre-enrolled through the self-service system and, when the decision to authorise or refuse entry has been taken, update the individual file in accordance with Article 13(2) of [Regulation establishing the Entry/Exit System (EES)].

7. Self-service systems shall be operated under the supervision of a border guard who shall be in charge of detecting any inappropriate, fraudulent or abnormal use of the system."

(25) The following Article 8d is inserted:

"Article 8d

Use of self-service systems and/or e-gates for the border crossing of third country nationals of whose border crossing is subject to a registration in the EES

1. Persons whose border crossing is subject to a registration in the EES in accordance with Article 6a may be permitted to use a self-service system to have their border checks performed if the following cumulative conditions are met:
 - (a) the travel document [...] shall contain an electronic storage medium (chip) and the authenticity and integrity of the chip data shall be confirmed using the complete valid certificate chain;
 - (b) the travel document [...] shall contain a facial image recorded in the chip which can be [...] technically accessed by the [...] self-service system so as to verify the identity of the holder of the travel document, by comparing the facial image recorded in the chip and his/her live facial image;
 - (c) the person is already enrolled or pre-enrolled in the EES.
2. Where the conditions laid down in paragraph 1 are met, the **border** checks on entry [...] provided for in Articles 8(2) and 8(3)(a) and (b) [...] and on exit provided for in Articles 8(2) and 8(3)(g) and (h) may be carried out through a self-service system. When carried out through an automated border control system, the borders check on exit shall include the checks provided for in Article 8(3)(h).

If a person is granted access to a national facilitation programme established by a Member State pursuant to Article 8e, the checks carried out through a self-service system on entry may not include examination of the aspects referred to in Article 8(3)(a) (iv) and (v) when crossing the external borders of that Member State or the external borders of another Member States having concluded an agreement with the Member State which granted the access as referred to under Article 8e(4).

3. On entry and exit, the results of the border checks carried out through the self-service system shall be made available to a border guard. Taking into account the results of the border checks, this border guard shall monitor the results of the border checks and authorise the entry or exit or, otherwise, refer the person to a border guard who shall proceed with further checks.
4. The person shall be referred to a border guard in the following situations:
 - (a) when one or several of the conditions listed under paragraph 1 is or are not fulfilled;
 - (b) when the checks on entry or exit under paragraph 2 reveal that one or several of the entry or exit conditions are not met;
 - (c) when the results of the checks on entry or exit under paragraph 2 put into question the identity of the person or when they reveal that the person is considered to be a threat to the internal security, public policy, international relations of any of the Member States or to public health;
 - (d) in case of doubt.
 - (e) when no e-gates are available.

5. In addition to the situations referred to in paragraph 4, the border guard supervising the border crossing may decide to refer persons using self-service system to a border guard based on other reasons.
6. Persons whose border crossing is subject to a registration in the EES in accordance with Article 6a(1) and who used a self-service system for the performance of their border checks may be authorised to use an e-gate. Where an e-gate is used, the corresponding registration of the entry/exit record and the linking of that record to the concerned individual file pursuant to Article 13 of [Regulation establishing the Entry/Exit System (EES)] shall be carried out when performing the border crossing through the e-gate. Where the e-gate is not aggregated to the self- service system, a verification of the identity of the user shall take place at the e-gate in order to verify that the person using the e-gate corresponds to the person that used the self-service system. The verification shall be made by using at least one biometric identifier.
7. Where the conditions listed in [...] paragraph 1(a) or (b) this Article, or in both, are not fulfilled, part of the border checks on entry pursuant to Article 8(3)(a) and (b) and exit [...] pursuant to Article 8(3)(g) and (h) may be carried out through a self-service system. [...] The border guard may perform only those verifications pursuant to Article 8(3)(a) and (b) as well as Article 8(3)(g) and (h) that could not be carried out through the self-service system. In addition, the border guard shall verify that the travel document used at the self- service system corresponds to the one held by the person standing before the border guard.
8. Self-service systems and e-gates shall be operated under the supervision of a border guard who shall be in charge of detecting any inappropriate, fraudulent or abnormal use of the system or e-gate, or both."

(26) The following Article 8e is inserted:

"Article 8e

National facilitation programmes

1. Each Member State may establish a voluntary programme in order to allow third country nationals [...] or nationals of a specific third country who do not enjoy the right of free movement under Union law [...] to benefit from the facilitations made pursuant to paragraph 2 of this Article when crossing the external border of a Member State.
2. By way of derogation from Article 8(3)(a), for third country nationals referred to paragraph 1 of this Article and who are granted access to the programme, the thorough checks on entry may not include examination of the aspects referred to in Article 8(3)(a) (iv) and (v) when crossing the external border of such a Member State [...].

2a. The Member State shall carry out a pre-vetting of the third country nationals applying to the programme

The pre-vetting is carried out by border guards, visa authorities defined under Article 3(1)(4) of Regulation establishing Entry/Exit system (EES) or by immigration authorities [...] defined under Article 3(1) (3) of Regulation establishing Entry/Exit system (EES);

(a) [...]

(b) [...]

~~(e)~~3. The competent authorities of a Member State [...] only grant access to the programme when the following minimum conditions are met:

a) [...];

b) [...];

c) the applicant fulfils the entry conditions set out in Article 6(1) of this Regulation;

- d) the applicant's travel document, visa, [or a touring visa], long-stay visa and/ or residence permit presented, is or are valid and not false, counterfeited or forged;
- e) the applicant proves the need for or justifies the intention to travel frequently or regularly;
- f) the applicant proves integrity and reliability, in particular, if applicable, that previous visas with limited territorial validity have been lawfully used, the applicant's economic situation in the country of origin and the genuine intention to leave the territory of the Member States in due time. In accordance with Article 23 of [Regulation establishing the Entry/Exit System (EES)], the competent authorities [...] shall have access to consult the EES to verify that the applicant has not previously exceeded the maximum duration of authorised stay in the territory of the Member States;
- g) the applicant justifies the purpose and conditions of the intended stays;
- h) the applicant possesses sufficient means of subsistence both for the duration of the intended stays and for the return to the country of origin or residence, or that the applicant is in a position to acquire such means lawfully;

[...]

[...]

~~(d)~~4. First access to the programme shall be granted for a maximum of one year, and can be prolonged after this first year for a maximum of 5 more years or until the end of the validity of an issued multiple-entry visas, long-stay visas and residence permits whichever is shorter;

In case of a prolongation the Member State shall reassess every year the situation of each third country national who is granted access to the programme in order to ensure that, based on updated information, the [...] the third country national concerned still meets the conditions laid down in [...] paragraph 3. This reassessment could be performed at the occasion of border checks.

~~(f)~~5. The [...] checks on entry [...] pursuant to Articles 8(3)(a) and 8(3)(b) and on exit pursuant to Article 8(3)(g) shall also comprise [...] the fact that the third country has a valid access to the programme;

Border guards may carry out verification of the third country national benefiting from the programme on entry pursuant to Articles 8(3)(a) and 8(3)(b) and on exit pursuant to Article 8(3)(g) without comparing electronically biometrics, but by comparing a facial image taken from the chip and the facial image of the passenger's individual EES file with a passenger. Full verification shall be carried out on random risk analysis based.

~~(g)~~6. the competent authorities of a Member State [...] shall immediately revoke the access granted to a third country national to the programme:

- (i) if it becomes evident that the conditions for granting access to the programme were not met;
- (ii) if it becomes evident that the conditions for granting access to the programme are no longer met.

7. When verifying that the applicant fulfils conditions set out in [...] paragraph 3, particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member State(s) and whether the applicant intends to leave the territory of the Member State(s) during the authorised stay.

The means of subsistence for the intended stays shall be assessed according to the duration(s) and the purpose(s) of the envisaged stay(s) and by reference to average prices in the Member State(s) concerned for board and lodging in budget accommodation, on the basis of the reference amounts set by the Member States in accordance with Article 39(1)(c). A proof of sponsorship or private accommodation, or both, may also constitute evidence of sufficient means of subsistence.

The examination of an application shall be based in particular on the authenticity and reliability of the documents submitted and on the veracity and reliability of the statements made by the applicant. If a Member State responsible for examining an application has any doubts about the applicant, the applicant's statements or supporting documents that have been provided, it may consult other Member States before any decision on the application is taken.

48. Two or more Member States having established their own national programme pursuant to this Article may conclude among them an agreement in order to ensure that the beneficiaries of their national programmes may benefit from the facilitations recognised by the other national programme(s). Within the time-limit of one month from the conclusion of the agreement, a copy of the agreement shall be transmitted to the Commission.

59. The Commission shall, before the end of the third year of application of this Article, transmit to the European Parliament and to the Council an evaluation of its implementation. On the basis of that evaluation, the European Parliament or the Council may invite the Commission to propose the establishment of a Union programme for frequent and pre-vetted third country national travellers."

(27) Article 9 is amended as follows:

(a) Paragraph 3 is replaced by the following:

"3. Even in the event that checks are relaxed, the border guard shall enter the data in the EES, in accordance with Article 6a. Where the data cannot be entered by electronic means it shall be entered manually."

(b) The following paragraph 3a is inserted:

"3a. In case of technical impossibility to enter data in the Central System of the EES or in case of failure of the Central System of the EES, the following provisions shall apply:

- (i) by way of derogation from Article 6a of this Regulation, the data referred to in Articles 14, 15, 16, 17 and 18 of [Regulation establishing the Entry/Exit System (EES)] shall be temporarily stored in the National Uniform Interface as defined in Article 6 of [Regulation establishing the Entry/Exit System (EES)]. If this is not possible, the data shall be temporarily stored locally. In [...] all cases, the data shall be entered into the Central System of the EES as soon as the technical impossibility or failure has been remedied. Member States shall take the appropriate measures and deploy the required infrastructure, equipment and resources in order to ensure that such temporary local storage can be carried out at any time and for any of their border crossing points;

In the exceptional situation where there will be no technical possibility to register in the Central System, in the National Uniform Interface and local electronic temporary storage is technically impossible, Member States shall store manually the data referred to in articles 14, 15, 16, 17 and 18 with the exemption of **biometric data and in addition affix an entry or exit stamp in the travel document of a third country national**. These **manually stored data** shall be entered in the system as soon as possible.

- (ii) by way of derogation from Articles 8(3)(a)(iii) and 8(3)(g)(iv) for nationals of third countries holding a visa [or a touring visa] referred to in Article 6(1)(b), when technically possible, the verification of the identity of the holder of the visa shall be carried out by consulting directly the VIS in accordance with Article 18 of Regulation (EC) No 767/2008."

(28) In Article 10, the following paragraphs 3a and 3aa are [...] added:

"3a. Where Member States decide to use automated border control systems, e-gates and/or self-service systems, [...] they shall use the signs provided for in part D of Annex III to identify the respective lanes."

3aa Where Member States decide to establish a national facilitation programme in accordance with Article 8e, they may decide to use specific lanes for the third country nationals benefiting from such national facilitation programme.

(29) Article 11 is replaced by the following:

"Article 11

Stamping of travel documents

1. Where provided expressly by its national legislation, a Member State may stamp on entry and exit the travel document of third country nationals holding a residence permit or long-stay visa issued by that Member State.

1a. The travel document of a third-country national holder of a Facilitated Rail Transit Document issued in accordance with Regulation (EC) 693/2003 **may** be stamped on entry and exit.

2. The practical arrangements for stamping are set out in Annex IV".

(30) Article 12 is replaced by the following:

"Article 12

Presumptions as regards fulfilment of conditions of short stay

1. Without prejudice to Article 12a, if a third country national present on the territory of a Member State [...] **has no individual file created** or [...] there is no last relevant entry/exit record [...], the competent authorities may presume that the person does not fulfil, or no longer fulfils, the conditions [...] of duration of authorised stay [...] **within the territory of the Member States.**

In addition, without prejudice to Article 12a, the competent authorities may presume that a third country national did not fulfil the conditions relating to the duration of the previous stay if during the performance of the border checks **on entry** it results that the previous entry/exit record of the third country national does not contain an exit date.

2. This presumption shall not apply to a third country national who can provide, by any means, credible evidence that he or she [...] enjoys the right of free movement under Union law or that he or she [...] holds a residence permit or a long stay visa. Where applicable, Article 32 of [Regulation establishing the Entry/Exit System (EES)] shall be applied.

3. The presumption referred to in paragraph 1 may be rebutted where the [...] third country national provides, by any means, credible evidence, such as transport tickets or proof of his or her presence outside the territory of the Member States or of the date of expiry of a previous residence permit or long stay visa, that he or she has respected the conditions relating to the duration of a short stay.

In such [...] a case the competent authorities shall create an individual file if necessary or indicate in the Entry/Exit System the date on which, and the place where, he or she crossed the external border of one of the Member States in accordance with Article 18 of [Regulation establishing the Entry/Exit System (EES)];

4. Should the presumption referred to in paragraph 1 not be rebutted, the third-country national may be returned in accordance with Directive 2008/115/EC¹⁸ and with national law respecting that Directive.

[...]

A third country national [...] enjoying the right of free movement under Union law may only be [...] returned [...] in accordance with Directive 2004/38/EC."

- (31) The following Article 12a is inserted:

"Article 12a

Transitional period and transitional measures

1. For a period of six months after the EES has started operations, in order to verify at entry that a person has not exceeded the number of entries authorised by the single or double entry visa and to verify at entry and at exit that a person entering for a short stay has not exceeded the length of the maximum authorised stay, the [...] border guards [...] shall take into account the stays in the territories of the Member States during the 180 days preceding the entry or the exit by checking the stamps in the travel documents in addition to the entry/exit data recorded in the EES.

¹⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98).

2. Where a person has entered the territory of the Member States and has not yet exited it before the EES started operations, an individual file shall be created in the EES and the date of that entry shall be entered in the entry/exit record in accordance with Article 14(2) of [Regulation establishing the Entry/Exit System (EES)] when the person exits. This rule shall not be limited to the six months after the EES has started operations referred to in paragraph 1. In case of discrepancy between the date of the entry stamp and the data recorded in the EES, the concerned stamp shall prevail."

(32) Article 14 is amended as follows

(a) in paragraph 2 the following third subparagraph is added:

"Data on third country nationals whose entry for a short stay [...] has been refused shall be registered in the EES in accordance with Article 6a(2) of this Regulation and Article 16 of [Regulation establishing the Entry/Exit System (EES)]."

(b) in paragraph 3 the third subparagraph is replaced by the following:

"Without prejudice to any compensation granted in accordance with national law, the third country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the data inserted into the EES or of the cancelled entry stamp, or both, and any other cancellations or additions which have been made, by the Member State which refused entry."

(14a) Article 20 is amended as follows

Paragraph 1(a) is replaced by the following:

"Hheads of State, heads of government and members of national government with accompanying spouses, sovereigns and other senior members of a royal family and members of their delegation(s)."

- (33) Annexes III, IV, [...]V **and VII** are amended in accordance with the Annex to this Regulation
- (34) Annex VIII is deleted.
- (35) **Annex IX is added.**

Article 2

- 1.** This Regulation shall enter into force on the twentieth day following that of its publication.
- 2.** It shall apply from the date on which the EES is to start operations, as determined by the Commission in accordance with Article 60 of [Regulation (EU) N° XXX of the European Parliament and of the Council establishing the Entry/Exit System (EES) to register entry and exit 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].
- 2a. By derogation to paragraph 2, during the transitional period pending their connection to the EES in accordance with Article 60(1b) of [Regulation (EU) N° XXX of the European Parliament and of the Council establishing the Entry/Exit System (EES) to register entry and exit 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], Member States not operating the EES, for checks on borders in accordance with Regulation (EU) 2016/399 shall apply procedures set out in Annex IX to that Regulation.**
- 3.** This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament

The President

For the Council

The President