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Mr Valeriu Ștefan ZGONEA
President of the Camera Deputaților
Palace of the Parliament
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Dear President,

The Commission would like to thank the Camera Deputaților for its Opinion on the legislative proposals establishing the Smart Borders, consisting of the Entry Exit System (EES)¹ {COM(2013) 95 final} {COM(2013) 96 final} and the Registered Travellers Programme (RTP)² {COM(2013) 97 final}.

The Commission appreciates the overall support of the Camera Deputaților for the package and is pleased that it recognizes both the need for this EU initiative and its added value.

The Commission would like to offer the following comments on the particular concerns expressed in the Opinion of the Camera Deputaților.

Firstly, concerning the questions on the applicability of the Community/EU financial instruments and the territorial applicability of the EES:

The distribution of national allocations within the European Borders Fund (EBF), in which Romania has participated since 2010, was done on an annual basis in accordance with a distribution key objectively taking into account the specificities of each country regarding the management of its external borders and visa policy. The amounts for the Member States under the new Internal Security Fund-Borders (ISF-B), which is relevant for the EES and RTP, have been calculated on the basis of an average proportional share from the cumulative 2010-2012 EBF allocation. Accordingly, regardless of the still on-going accession process to the Schengen area, the allocation of Romania under the ISF-B was established in the same way as for all other Member States participating in the EBF in the period of 2010-2012.

¹ Proposal for a Regulation of the European Parliament and of the Council establishing an 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

² Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme

Moreover, since the EES aims to replace the provisions establishing an obligation to verify the length of stay and to stamp passports of third country nationals, which are applied by acceding Member States upon accession to the European Union, the EES would be applicable to all Schengen Member States including those that do not yet fully apply the Schengen acquis. The use of the EES as described in the proposal for a Regulation amending the Schengen Borders Code is part of the border checks that are mandatory for all Member States. Romania would therefore have access to the EES in the same way and under the same conditions as other Member States.

The RTP is also a development of the Schengen acquis but it would be required only where Member States apply the Schengen acquis in full. Nonetheless, given its purpose, the Member States which do not yet apply this acquis fully would be able to recognise unilaterally the RTP membership of the registered traveller to benefit from facilitation of border checks at their external borders. Accordingly, they would not be entitled to examine applications or revoke/extend access to the RTP but they can allow RTP clients, for example, access to the e-gates.³

As to the objective of the Entry Exit System, its main purpose is more effective monitoring of authorised stays of third country travellers, not the fight against terrorism. Guided precisely by the principles of necessity, proportionality, privacy by design and the principle of limited scope to which the Camera Deputaţilor's opinion refers, the Commission has not proposed use of the EES for law enforcement purposes directly from the outset.

However, the EES proposal provides for an evaluation of the system to be carried out two years after it has been brought into operation. This evaluation would specifically examine the contribution the entry-exit system could make in the fight against terrorist offences and other serious criminal offences and will deal with the issue of access for law enforcement purposes to the information stored in the system, taking into account the experience of the implementation of the Visa Information Systems (VIS) with regard to access for law enforcement purposes and overall experience with regard to the operation of the EES⁴. The Commission trusts that the Member States requesting the use of the system for law enforcement purposes would contribute proactively to this exercise by providing firm data that would enable a thorough assessment of the situation.

Furthermore, under data protection requirements, data retention periods must be restricted to the minimum length required for the system to serve its purpose fully and effectively. The data generated by the EES would need to be retained for a commensurate period to be used as an effective criminal intelligence tool. Proposed retention periods⁵ – sufficient for border management purposes – do not allow law enforcement authorities to go back sufficiently in time in their analysis of travel routes.

Since the EES would monitor the authorised stay of travellers coming for a short stay on the territory of the Member States, which cannot exceed a "duration of more than 90 days in any 180 day-period", the retention period for regular travellers is limited to a maximum of six months. However, in case of overstayers, the retention period is proposed to be extended up to 5 years following the last day of the authorised stay.

³ Recital 45, Article 3(1) and 60(5) of COM (2013) 97 final,

⁴ Article 46(5) of COM(2013) 95 final

⁵ Article 20 of COM(2013) 95 final

Should access subsequently be granted to the EES for law enforcement purposes, the data retention period currently proposed would have to be revised in light of the aforementioned evaluation.

In general, the Commission wishes to reassure the Camera Deputaţilor that it has paid due attention to the compliance of the proposal with both the Treaties and EU Charter of Fundamental Rights. This applies also to the statistics which will be generated by the Entry Exit System; there should be sufficient guarantees that the data gathered for reporting and statistics will be used only for the purpose provided for in the EES Regulation⁶. The analysis of statistics may indeed assist in policy orientation, which on the other hand does not necessarily mean "performing risk profiling for the relevant categories" to which the Camera Deputaţilor's opinion referred.

The experience with the development of related large-scale IT systems, SIS II in particular, supports the conclusion of the Camera Deputaţilor that "the legislative proposals on border management...in order to establish a centralised system of cooperation...requires a common architecture and common operational rules". Accordingly, the Commission is convinced that the uniform approach is desirable for the development of the EES and RTP, both technically speaking and in terms of budgeting – hence the proposed substantial EU funding and the development to be undertaken by eu-LISA (the EU agency). The Commission considers that the centralised approach, at least up to the point of the uniform interface as reflected in the proposals,⁷ is indispensable for preventing technical complications and cost overruns.

Concerning the amount and types of personal data collected during border controls, the proposed lists of data for both the visa holders and persons exempted from visa obligation⁸ has been designed to ensure coherence with the Visa Code and VIS Regulation, and to reflect the preferences of the Member States in the thorough consultation procedure preceding the legislation initiative. Nevertheless, the Commission is aware of the need for a time-saving procedure at the border crossing points and is therefore open to its further simplification. In general, the Commission would prefer automation to manual intervention.

The EES would not be interconnected with the VIS, due to legal constraints and, in particular, the security of data. The fingerprints of visa holders would therefore only be stored in the VIS which would be consulted for the purpose of the EES but the fingerprints would not be held in the EES. While acknowledging the added value of biometrics for reliable identification of persons, the Commission has proposed the use of biometrics by EES after a three years' transitional period to allow Member States to adapt the border check process and their handling of passenger flows⁹. The VIS is a good example of implementing a large scale system using biometrics only after a transitional period, which in addition contributes to privacy and guarantees better personal data protection. The same safeguards have been applied here, which should ensure that the Member States put in place appropriate procedures guaranteeing the dignity of the person facing difficulties with capturing fingerprints.

⁶ Articles 4 and 40 of COM(2013) 95 final

⁷ Article 6(c) of COM(2013)95 final and Article 21(b) of COM(2013) 97 final

⁸ Articles 11 and 12 of COM(2013) 95 final

⁹ Recital 10 of COM(2013) 95 final

All in all, the EES has been designed as a sophisticated tool enhancing the monitoring of the current system of limited short stays, much more effectively than using stamping as the only means of enforcing it. Accordingly, and also in the interest of further facilitating the job of the border guards, the Commission does not consider preserving the practice of stamping as a valid alternative to registration in the EES during periods of light border controls or in the event of technical problems. In any case, in case of failure of the system a switchover to the Back-up Central Unit¹⁰ would immediately take place. Although not set out in the EES proposal, temporary disconnected functioning of the national system or manual collection of data could also work as fall-back solutions in case of complete breakdown of the system.

Regarding the financial responsibilities for the two systems, the proposal contains financial provisions on the budgetary implications for the national system – the costs incurred by National System would be borne by the Union budget¹¹.

The Commission hopes that these clarifications address the issues raised by the Camera Deputaților and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

¹⁰ Article 6(a) of COM(2013) 95 final

¹¹ Article 25(5) of COM(2013) 95 final and Article 39(5) of COM(2013) 97 final

