

May 2016

The Establishment of an EU Entry/Exit System

Impact Assessment (SWD (2016)115, SWD (2016)116 (summary)) of Commission proposals for (1) a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union, 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 (COM(2016)194) and (2) a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System (EES) (COM(2016)196)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [Impact Assessment](#) (IA) accompanying the above Commission proposals, submitted on 6 April 2016 and referred to Parliament's Committee on Civil Liberties, Justice and Home Affairs.

Between 2002 and 2011 the European Commission issued a series of communications envisaging integrated management of the external borders of the Union.¹ In February 2013 the Commission put forward the Smart Borders Package (the 2013 Package) consisting of three draft regulations: (i) one on the establishment of an Entry/Exit system (EES) to register entry and exit data of third country nationals (TCN)² crossing the external borders of the Member States of the European Union³, (ii) one on the establishment of a Registered Traveller Programme (RTP)^{4 5}, and (iii) one to make the necessary amendments in the Schengen Borders Code with regard to the EES and the RTP⁶. The package was accompanied by impact assessments⁷. Initial appraisals⁸ of the quality those impact assessments pointed out shortcomings in the evidence base of the proposed measures. Although there seemed to be consensus regarding the need for the establishment of an EU EES, in the examination of that

¹ Commission Communications: 'Towards integrated management of the external borders of the Member States of the European Union', [COM\(2002\)233](#); 'Preparing the next steps in border management in the European Union', [COM\(2008\)69](#); 'Smart borders - options and the way ahead', [COM\(2011\)680](#).

² For the purposes of this appraisal the term TCN has the same meaning as defined in the IA and in Article 2(6) of the Schengen Borders Code, i.e. 'Any person who is not a Union citizen within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not covered by the definition of persons enjoying the Community right of free movement outlined in Article 2.5 of the Schengen Borders Code', IA, p. [79](#).

³ [COM\(2013\)95](#).

⁴ [COM\(2013\)97](#).

⁵ An RTP is a programme whereby passengers choose to pre-register to undergo vetting procedures before they present themselves at the border crossing in order to benefit from faster processing at the border crossing.

⁶ [COM\(2013\)96](#).

⁷ [SWD\(2013\) 47](#) and [SWD\(2013\) 50](#).

⁸ Ballon, E., [Smart Borders Package: European Commission proposal on the entry/exit data of third-country nationals crossing the external borders of the EU](#), European Parliament, Directorate General for Internal Policies of the Union (DG IPOL), European Union, 2013, and Ballon, E., [Smart Borders Package: European Commission proposal on a Registered Traveller Programme](#), European Parliament, Directorate General for Internal Policies of the Union (DG IPOL), European Union, 2013.

package the European Parliament and the Council raised technical, financial and operational concerns on the proposed system⁹.

In response to these concerns the Commission embarked on a two-stage 'proof of concept' exercise. This started with a technical study on Smart Borders which was completed in October 2014. The technical study identified a limited set of technical options which were then tested in a pilot project carried out by eu-LISA¹⁰ and completed in November 2015 (the pilot). The new IA, which is the subject of this appraisal, explains that the pilot was carried out in 18 border crossing points in 12 Member States, where 78 test variations were conducted. It served to collect quantitative test case results and feedback from travellers and border guards.

On the basis of the 'proof of concept' exercise and of consultations with the co-legislators, stakeholders and the public, the Commission decided to modify its 2013 package by revising the proposed regulation on the establishment of an EES and the proposed regulation making the necessary amendments in the Schengen Borders Code (these are the proposals now under consideration) whilst withdrawing the originally proposed regulation on the establishment of an RTP.

Problem definition

The new IA explains that it builds on the IA of the 2013 Package and as such 'recalls' the problems which that package seeks to address, viz. the increase in border crossings and the consequent delays in border checks, the difficulties in calculating the authorised period of stay for TCN, the lack of reliable information on irregular immigration, and the exploitation of information and verification gaps with regard to TCN to the advantage of international criminal and terrorist networks. The IA states that there is now general recognition that an EES is required to address these problems and it does not, therefore, delve into whether such a system is necessary or desirable.

The new IA also takes into consideration the implementation problems raised by the co-legislators during the examination of the 2013 Package, i.e. 'the limited number of potential users and administrative burden of implementing RTP, the length of the data retention period in the EES, the choice of the biometric identifiers, the extent to which the national entry exit systems could be integrated and/or reused, the need for enhanced synergies and/or interoperability with existing systems used during border controls and, last but not least, the possibility for law enforcement authorities to access the system'¹¹.

Objectives of the legislative proposals

The *general* objectives of the Commission proposals are in essence the same as for the 2013 Package. They are the following, in order of priority:

1. improve the management of external borders;
2. reduce irregular migration, by addressing the phenomenon of overstaying;
3. contribute to the fight against terrorism and serious crime and ensure a high level of internal security.¹²

Even the *specific* objectives are put in order of priority, and are as follows:

1. enhance the efficiency of border checks through monitoring of the rights to authorised stay at entry and exit;
2. identify and detect overstayers (also within the territory) and enable national authorities of the Member States to take appropriate measures including to increase the possibilities for return;
3. free up border control resources from performing checks that can be automated and enable better focus on traveller assessment;
4. facilitate the crossing by third-country nationals of EU external borders through self-service systems and semi-automated or automated systems while maintaining the current level of security;
5. enable consulates to have access to information on the lawful use of previous visas;

⁹ For more information on the 2013 Package and the concerns raised by the co-legislators see Orav, A., [At a glance: Smart Borders package](#), European Parliamentary Research Service, European Union, 2015.

¹⁰ European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

¹¹ IA, p. 8.

¹² IA, p. 19.

6. inform third country nationals of the duration of their authorised stay;
7. improve the assessment of the risk of overstay;
8. support evidence-based EU migration policy making;
9. combat identity fraud;
10. identify and apprehend terrorist and criminal suspects, as well as detect victims of human trafficking, crossing the external borders;
11. generate information on travel histories of third country nationals including crime suspects that would help investigations related to terrorism or serious crime.¹³

These objectives address the problems identified in the IA of the 2013 Package, taking into consideration also the implementation problems raised during the examination of that package.

After the identification of the preferred policy options, the IA sets out the following *operational* objectives. However, some of these do not seem to set measurable targets and tend to read more like indicators than objectives:

- that the yearly increase of the number of the full-time equivalent of border guards (data to be obtained from Member States) is proportionally inferior to the yearly increase of the number of border crossings by third country nationals (as reported by EES);
- the percentage of border crossings by third country nationals based on electronic checks as reported by EES;
- the number of overstayers identified and the number effectively apprehended as reported by Member States and correlated with access to EES for this purpose;
- the percentage of return decisions that are executed based on Member State reporting;
- the percentage of third country nationals for whom the remaining authorised period of stay is effectively controlled in virtue of the EES;
- the average border crossing time for visa-exempt third-country nationals remains identical or decreases as reported by the EES;
- the impact on the average border crossing time of visa-required third-country nationals remains neutral or decreases as reported by the EES;
- statistics on border crossing and overstay are systematic and provide breakdown per citizenship and other characteristics (e.g. traveller's age, gender and border crossing point) as reported by the EES;
- statistics and case stories in relation to access by law enforcement authorities.

Range of options considered

The presentation of the options considered in the IA is quite atypical; this is explained by the unusual circumstance that the IA under assessment is a continuation of the IA of the 2013 Package and that the need for the establishment of an EES is taken as a given. Thus, although the IA makes what appears to be a good analysis of how the situation would evolve if no EU action were taken, this is done outside the framework of the presentation of the options and is not considered as the baseline scenario, as would normally be the case in an IA. Rather, the baseline scenario is based on the set-up proposed in the 2013 Package.

Furthermore, since this IA focuses on the implementation problems raised by the co-legislators during the examination of the 2013 Package, it splits those implementation problems into the following five areas of concern and identifies a set of policy options for each of those five areas:

Area of Concern	Policy options
Architecture of the system	<ul style="list-style-type: none"> • separate EES and RTP systems (2013 Package) • one single EES/RTP system
Biometrics used to identify travellers	<ul style="list-style-type: none"> • fingerprints only (2013 Package) • fingerprints and facial image combined • facial image only
Facilitation of border crossings	<ul style="list-style-type: none"> • RTP (2013 Package) • RTP with on-line registration • no RTP and the use of process accelerators¹⁴

¹³ IA, p. 19.

	available for the largest possible number of passengers
Retention time for the storage of data	<ul style="list-style-type: none"> • an EES data retention period of 181 days (5 years for overstayers) and an RTP data retention period of 5 years (2013 Package) • an EES data retention period of 181 days and reduction of the data retention period for RTP • an extension of data retention periods
Access for law enforcement purposes to the EES data	<ul style="list-style-type: none"> • evaluation after two years (2013 Package) • law enforcement access as secondary objective from the start • no law enforcement access

For each of these areas the IA makes an organised and clear description of the options and gives contextual information to facilitate understanding. Options seem to be well developed and presented in a balanced and unbiased way.

The preferred option, presented as such after the analysis of impacts and comparison of options, is a combination of the preferred options for each of the aforementioned areas of concern. The preferred solution is for the system not to include an RTP. This renders irrelevant the choice in architecture between one single system or two separate systems. Instead of an RTP, for the facilitation of border crossings the proposals favour the use of accelerators that are available for all TCN, with the possibility of the establishment of national RTPs on a voluntary basis. With regard to biometrics, the preferred option envisages the use of a combination of fingerprints and facial image for the identification of travellers. It is also proposed that data be retained for a period of five years and that law enforcement authorities have access to the EES from the start of operations under strictly defined conditions.

Scope of the Impact Assessment

As explained above, the scope of the IA is understandably restricted to some extent in that it builds on the previous IA of the 2013 Package and the need for an EES is taken for granted. The scope of this IA is limited to the modalities for the establishment of the EES. This has an effect on the methodology used to analyse the impacts. The IA sets off with the premise that 'the various policy options do not fundamentally change the nature of the expected impact, but may affect their magnitude'. It therefore uses as a point of departure the expected impacts of the establishment of an EES (whatever its modalities), going on to analyse the difference in magnitude of the expected impacts according to the different policy options.

The IA identifies five types of impact, divided into sub-categories where appropriate:

social impacts	<ul style="list-style-type: none"> • impact on EU citizens • impact on third country nationals • impact on local border traffic • impact on protection of personal data • impact on other fundamental rights
economic impacts	<ul style="list-style-type: none"> • impact on tourism • impact on airports, seaports and carriers • impact on retail activities close to border crossing points • impact on the informal labour market
impacts on SMEs	
impacts on public services	<ul style="list-style-type: none"> • impact on border control • impact on migration management • impact on law enforcement authorities
impact on international relations	

¹⁴ Process accelerators are on site methods and systems for swifter handling of border crossing procedures.

Of these, particular attention is given to impacts on fundamental rights, especially the right to protection of personal data. In fact, the need was felt for a separate assessment of the impact of the preferred option on fundamental rights, with special focus on Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights. Annex 13 to the IA describes in detail this separate assessment. Although access to data by law enforcement authorities is part of the preferred option, the assessment evaluates the effects on fundamental rights under the two eventualities: with access to data by law enforcement authorities and without such access.

The policy options are compared for their effectiveness in achieving the general objectives of the EES and for the magnitude of their impact. The IA also makes a cost/benefit analysis to compare the economic efficiency of the policy options. The results of the analysis are presented in what seems to be a clear and concise manner in the body of the IA, with a number of annexes detailing the processes that led to these results.

Subsidiarity / proportionality

The IA includes a specific section on subsidiarity and proportionality with regard to the preferred option. The IA argues that Member States acting individually are unable to cope with irregular immigration and to combat international terrorism and crime. Furthermore, it maintains that 'in an area without internal borders, action against irregular immigration should in principle be undertaken on a common basis'.¹⁵ This section highlights the added value that an EU measure would bring over national systems acting individually. The new system, however, does not imply scrapping altogether the existing national systems. Calls had been made within the European Parliament for the EES to be 'interoperable, as far as possible, with pre-existing national systems'¹⁶. In this respect the Commission clarifies that, within the framework of an EU EES as is being proposed, 'national entry exit systems may be maintained for national security purposes in accordance with Member States' own security-related legislation'¹⁷.

Subsidiarity is also a consideration in the dropping of the proposal made in the 2013 Package for an EU RTP. The Commission now considers it more in line with the subsidiarity principle to propose instead the creation in the Schengen Borders Code of a harmonised legal basis for the establishment of voluntary national facilitation programmes.

At the time of writing no national parliaments had issued a reasoned opinion on non-compliance with the principle of subsidiarity. The deadline for submissions is 28 June 2016.

With regard to proportionality in general, the IA affirms that the measure does not go beyond what is necessary to meet the defined objectives. More specifically, proportionality is particularly relevant in the discussion on data protection. In this regard, emphasis is placed on the principles of 'privacy by design', which entail 'embedding personal data protection in the technological basis of a proposed instrument, limiting data processing to that which is necessary for a proposed purpose and granting data access only to those entities that "need to know"¹⁸. In terms of costs, the IA uses the cost/benefit analysis to support its assessment of the proportionality of the proposals.

Budgetary or public finance implications

For the analysis of the costs, the IA makes a distinction between (i) the costs for the development and putting into operation of the EES and (ii) the costs for the implementation of the EES at national level. The costs for the development and putting into operation of the EES are to be borne by the EU budget and cover the cost of the central system and of the national systems, including the technical integration of the national systems with the

¹⁵ IA, p. 71.

¹⁶ Committee on Civil Liberties, Justice and Home Affairs, [Working Document](#) on the Entry/Exit System (EES) to register entry and exit data of third-country nationals crossing the EU Member States' external borders, p. 5.

¹⁷ IA, p. 72.

¹⁸ IA, p. 22.

National Uniform Interface. They include also adaptations which would be required to the Visa Information System (VIS) and to the Schengen Information System (SIS). In total the cost to the EU budget would amount to €480 million. The cost model applied is explained in Annex 6 of the IA.

The EES implementation costs at national level include set-up costs at Member State level (€57 million over the three-year development period), costs for border equipment (€109.5 million over the three-year development period) and maintenance costs (€8 million during the development period and €11 million yearly thereafter). These costs are to be borne by the Member States' budgets, though Member States may be eligible for EU financial support within the ambit of the Internal Security Fund. Annex 10 gives a more detailed explanation on how these implementation costs are calculated.

SME test / Competitiveness

Although the IA includes a specific section on impacts on SMEs, this section is very brief, merely pointing out that the EES has no specific impact on SMEs beyond what is analysed generally under economic impacts on retail activities close to border crossing points. In that analysis, which is also quite brief, the IA acknowledges the need for swift border crossings (especially at land borders, but also in a limited number of seaports and airports) so as not to discourage entry into the EU for shopping purposes. With regard to the impact on tourism, which is also relevant to SMEs and to the competitiveness of the EU as a whole, the IA claims that the EES does not change the border crossing process and therefore is not expected to have an impact on tourism.

Simplification and other regulatory implications

The IA considers that the EES does not create any additional administrative burden as the data to satisfy reporting obligations can be produced by the system. The impact on public services, and in particular the impact on border guards' workload is analysed in substantial detail in the IA. It is argued that, with the preferred option, the repetitive and administrative tasks in border control would be to a large extent automated, allowing the human input to be more focused on assessment of those travelling.

The IA analysis also goes into some detail in discussing the coherence of the proposals with other EU policies and the Charter of Fundamental Rights. The proposals form part of the European Agenda on Security¹⁹ and the European Agenda on Migration²⁰. Furthermore, inherent in the proposals is technical interoperability with VIS, SIS and Eurodac²¹ which implies coherence with the legal acts regulating these systems. No mention is made of the recently adopted EU PNR Directive²² and any possible interaction between the two new systems in the future.

Relations with third countries

The IA acknowledges that an EES is by its very essence a 'very visible feature of human mobility'²³ between the EU and third countries. It anticipates objections by some visa-exempt third countries to their citizens having their biometric data collected by the EU, and pressure by some to negotiate exemptions from the system for their citizens. The IA envisages the involvement of diplomatic channels and information campaigns to explain the reasons for the system and reassure that it is not intended to target any specific third countries.

¹⁹ [COM\(2015\) 185](#).

²⁰ [COM\(2015\) 240](#).

²¹ Eurodac is the European fingerprint database for identifying asylum applicants and persons who have been apprehended in connection with an irregular crossing of an external border of the Union.

²² [Directive of the European Parliament and of the Council on the use of passenger name record \(PNR\) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime](#) (awaiting publication in the Official Journal).

²³ IA, p. 49.

The IA also anticipates the need for existing bilateral visa waiver agreements to be adapted to allow the proper functioning of the EES. Of particular relevance in this respect is also the Commission proposal for a regulation establishing a touring visa²⁴ which is currently undergoing first reading in Parliament.

Quality of data, research and analysis

The proof of concept exercise, launched in 2014, had the objective to identify, assess and test technical options for a border management system for the EU. The identification and assessment of options were conducted in the first phase of the proof of concept exercise, the technical study. This also included a cost analysis with the objective to provide up-to-date, reliable cost estimates for a new border management system in response to the criticism presented by the Parliament and the Council regarding the cost efficiency of the 2013 proposals. The final report on the technical study explains the methodological approach used and seems to make reasonable assessments based on sound analysis. Of the options assessed, a limited number passed through to be tested in the next phase of the exercise, the pilot. Here these options were tested in operational and relevant environments for their accuracy, effectiveness and impact on border crossing operations. The pilot was conducted by eu-LISA and covered border crossings in varied situations and environments to give a comprehensive view of real-life situations. The IA details the analytical models used in the technical study and in the pilot.

The IA also makes a cost/benefit analysis based on the expected impacts and their assessment as elaborated in the IA. In all, the IA provides quite a varied and comprehensive blend of qualitative and quantitative data, research and analysis that give what appears to be a solid evidential and analytical grounding to the proposals.

Stakeholder consultation

The views of different types of stakeholders were obtained through a range of consultation initiatives:

- a 12-week internet-based, public consultation that included four different questionnaires targeting different types of stakeholders. In all 101 responses were received: 62 individuals including 9 non-EU nationals, 14 organisations (NGOs and industry representatives), 14 public authorities from EU Member States and 11 carriers and infrastructure operators;
- feedback during the pilot by TCN and border guards;
- specific stakeholder consultation meetings targeting, separately, (i) EU citizens and TCN, who were represented by nine NGOs, (ii) law enforcement authorities, (iii) carriers and operators of infrastructures; and (iv) border guards, during a debriefing session at the end of the test case;
- a survey by the Fundamental Rights Agency conducted on 1 234 randomly selected TCN at border crossing points;
- the IA mentions also the input taken from consultation initiatives organised by the European Parliament. Specifically, it mentions the consultation of national parliaments of Member States on the basis of the 2013 Package and a meeting organised by the Parliament's Committee on Civil Liberties, Justice and Home Affairs from 23 to 26 February 2015 with representatives of the national parliaments.

The views expressed by the various stakeholders in these consultations are reflected throughout the IA. Furthermore, Annex II of the IA gives a detailed and organised account of the consultation exercises, of the opinions expressed, and of how (or whether) those views were taken into account.

Noteworthy is one instance where, although an option enjoyed the support of several stakeholders, this option was discarded and not considered among those retained. This was the option to build the functionalities of the EES and the RTP²⁵ on the basis of VIS. The IA gives ample justification for discarding the option. It would involve big risks to subject a complex system that is already in full operation to a complex testing phase and entry into operation of added functionalities. The development of stand-alone systems is simpler to accomplish, whilst still

²⁴ [COM\(2014\) 163](#).

²⁵ At that juncture the establishment of an RTP had not yet been ruled out.

achieving full interoperability between the EES (and RTP²⁶) and VIS. The use of VIS as a platform for EES and RTP would entail a complex legislative process involving significant adaptation of the VIS legal framework.

Monitoring and evaluation

For purposes of monitoring and evaluation the proposals set a number of reporting requirements. During the development phase eu-LISA is charged with submitting, every six months, a report to the European Parliament and to the Council on the state of play of the development of the system. The IA establishes a number of monitoring indicators for the development and operation of the system respectively. In this regard, it suggests that eu-LISA should be obliged to report every two years to the European Parliament, the Council and the Commission on the technical functioning of the EES, whilst the Commission would produce an overall evaluation of the EES three years after the start of operations and every four years thereafter.

Under the proposals, reporting requirements are also imposed on Member States and Europol with regard to the effectiveness of access to EES data for law enforcement purposes.

Commission Regulatory Scrutiny Board (RSB)

The Board issued a positive [opinion](#) on 22 January 2016. The opinion includes some points for clarification and improvement in the context of the proposals and in the presentation of the objectives and the options. The recommendations of the Board appear to have been addressed in the final version of the IA.

Coherence between the Commission's legislative proposals and IA

It appears that in general the proposals follow what has been identified in the IA as the preferred option. A small discrepancy is observed in respect of the start of evaluation obligations for the Commission. The IA (and the detailed explanation of the proposal that accompanies it²⁷) state that the first full evaluation should start two years after the system starts operations, whereas the proposal requires the first evaluation three years after the start of operations.

Conclusions

The impression is that the legislative scrutiny of the original 2013 package and the unusual opportunity for the proposals to be backed by, not one, but by two impact assessment exercises, have resulted in proposals that are very robustly evidence-based. The co-legislators' input in the examination of the 2013 Package allowed the second IA process to be more focused and more aware of potential practical and political pitfalls. To get to the preferred option, which is ultimately reflected in the proposals, the IA appears to follow a detailed, organised and systematic analysis based on a combination of sound qualitative and quantitative data and research. In particular, the proof of concept exercise provides a wealth of technical and field information that contributes substantial added value to the support of the decision-making process.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposals. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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²⁶ See footnote 22.

²⁷ [SWD\(2016\) 114](#).