

## Initial appraisal of a European Commission Impact Assessment

### Smart Borders Package: European Commission proposal on the entry/exit data of third-country nationals crossing the external borders of the EU

Impact Assessment (SWD (2013) 47, SWD (2013) 48 (summary)) of a Commission proposal for a Regulation of the European Parliament and of the Council establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union (COM (2013) 95)

#### • 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-mentioned proposal, submitted on 28 February 2013.

The proposed Regulation establishes an automated entry/exit system (EES), entailing the electronic registration of personal data together with the dates of entry and exit of each third-country national admitted for a short stay when they cross the external borders of the Schengen area. The Commission presents this proposal as a step in the 'progressive establishment of a European model of integrated management of external borders', which would allow efficient monitoring of the travel flows and movements of third-country nationals across the external border for the Schengen area (IA, p. 4).

The Commission already suggested the establishment of an EES in its Communication of 13 February 2008 ('Preparing the next steps in border management in the European Union')<sup>1</sup> and in the accompanying IA.<sup>2</sup> The proposal to set up an EES was endorsed in the Stockholm Programme, agreed by the European Council in December 2009<sup>3</sup>. On 25 October 2011, the Commission adopted its Communication entitled 'Smart borders, options and the way ahead'<sup>4</sup>.

The present IA builds on these communications and has as its purpose the identification of the best possible way to implement the EES system.

Other centralised databases have been set up and/or are being developed at EU level (IA, Annex 4, p.69). The Schengen Information System (SIS) contains mainly alerts on persons and objects, for example on persons wanted for arrest for extradition purposes, missing persons,

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<sup>1</sup> COM(2008)69.

<sup>2</sup> SEC(2008)153.

<sup>3</sup> 'An open and secure Europe serving and protecting the citizens', OJ 4.5.2010, C-115/1.

<sup>4</sup> COM(2011)680.

stolen identity cards, etc. The Visa Information System (VIS) is a system for the exchange of short-stay visa data between the Schengen and the Schengen Associated States. The Biometric Matching System (BMS) was developed for the VIS and is an information search engine that can match biometric data from visa applications, identity management systems and policing systems. Eurodac is a fingerprint database that stores and compares the fingerprints of asylum applicant and irregular immigrants.

The Commission proposal is linked to the Commission's initiative on the parallel **Registered Traveller Programme** (RTP), which has a separate IA, subject also to a separate initial appraisal.

## • **Problem definition**

The IA accompanying the Commission's 2008 Communication on 'Preparing the next steps in border management in the EU' identified irregular immigration, the lack of data for identifying overstayers<sup>5</sup>, terrorism and serious crime as the main problems to be addressed through the creation of an EES. The present IA looks again at this overall problem definition, in the light of some developments since 2008.

The monitoring of the authorized stay of third-country nationals at the external border is difficult in the absence of any consistent record of entries and exits of travellers to and from the Schengen area, especially when entry and exit happen in different Member States. The number of border crossings is increasing and delays in border checks are a problem for many Member States. There is a lack of reliable information on irregular immigration, in particular for overstayers, and uncertainty concerning the identity of persons can cause serious problems of return. EES systems (all alphanumeric) have been implemented in 13 Member States and in certain third countries (for example, the US-VISIT programme).

Problems in relation to law enforcement are the lack of information on the travel and cross-border movements of suspect persons, difficulties in detecting persons subject to an alert who use different identities to cross the borders, and difficulties identifying a suspect having destroyed his or her travel documents.

Since the choice for the establishment of an automated EES system was already made in 2008, the Commission also provides a narrower problem description. How should such an EES be designed? What are the core features, and could these features be provided through existing procedures? Questions on implementation to be resolved are, for example i) what type of personal data should be included in an EES?, ii) for which purpose(s) and which authorities could EES be assessed?, iii) for how long should entry/exit data be stored?, and iv) should entry/exit data be stored in a centralised or decentralised way?

Because an EES implies the handling of personal data, fundamental rights issues need to be taken into consideration. The system needs to comply with data protection principles and the requirements of necessity, proportionality, purpose limitation and quality of data.

The IA also briefly sets out how the Commission expects the situation to evolve if no further EU action were taken. The full roll-out and implementation of the VIS, with the biometrics of all visa holders being verified at entry as of 2014, is expected to have 'a positive impact on irregular immigration', but there are no tools concerning visa exempt travellers and 'it is not possible to

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<sup>5</sup> An 'overstayer' is defined in the draft Regulation as 'a third country national who does or fulfil, or no longer fulfils the conditions relating to the duration of a short stay on the territory of the Member States'.

predict how the problem will evolve taking into account the influence of a number of economic and social factors as well as relations with and situations in third countries' (IA, p. 24).

In the light of the concerns of the European Parliament about the interaction of an EES with the existing framework, and even about the (lack of) success of the current systems<sup>6</sup>, it is regrettable that the Commission has not better justified the need for taking immediate action before sufficient experience or evaluation results from the implementation of the VIS system become available, as also requested twice by the Commission's IA Board in two subsequent opinions on drafts of the present IA.

### • Objectives of the legislative proposal

The *general* policy objectives of the proposal are 'to counteract irregular immigration and to contribute to the fight against terrorism and serious crime and ensure a high level of internal security.'

The *specific* objectives are the following:

- to enhance the efficiency of border checks through monitoring of the rights to authorised stay at entry and exit, and to improve the assessment of the risk of overstay;
- to monitor the compliance with the authorised stay of persons within the territory;
- to generate reliable information to allow the EU and the Member States to make informed policy choices concerning visa and migration;
- to identify and detect irregular immigrants, especially overstayers, within the territory and to increase the possibilities for return;
- to identify and apprehend terrorist and criminal suspects crossing the external borders;
- to generate information that would reduce the identification and verification gap concerning third-country nationals that are not covered by the VIS and that would contribute to the apprehension of terrorist and criminal suspects.

These specific objectives are further translated into a number of *operational* objectives.

### • Range of options considered

The IA only contains a limited number of options, focused on how an EES should best be implemented. Key issues are which data have to be processed in the system, for which precise purpose and the retention period. The 'do nothing' option or retention of the status quo is not assessed.

*Option 1:* Core system: an entry/exit system would be set up, with alphanumeric data for the purpose of border control and migration management. The alphanumeric data would include the surname, first names, birth date, gender and nationality of the person, and number and expiry date of the travel document. Full access to the data would be given to the competent border and immigration authorities.

*Option 2:* Core system as under Option 1, with the addition of biometric data (fingerprints). For third country nationals requiring a visa, this would entail use of the VIS. For visa-exempt third country nationals, fingerprints would need to be registered on first entry at an EU external border.

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<sup>6</sup> European Parliament Resolution of 10 March 2009 on the next steps in border management in the European Union and similar experiences in third countries, P6\_TA(2009)0085.

*Option 3:* Core system as under Option 1, with the addition that the EES could be used for law enforcement purposes. Access to alphanumeric data would also be given to national authorities and Europol for the purpose of fighting terrorism and serious crime. Special data protection rules 'could be added to the extent necessary'.

*Option 4:* Core system, with the addition of biometric data and use for law enforcement purposes. This would be a combination of options 2 and 3.

The IA also identifies the following issues linked to the options:

- Only under strict conditions could data stored in the EES be transferred to certain third country authorities, for the purpose of fighting illegal immigration.
- The retention period of the personal data in the EES under policy Options 1 or 2 should be six months as a general rule, while for travellers who have not exited the territory within the authorised stay the period would be five years, and for participants in the Registered Traveller Programme a period equivalent to the time they are granted access to the system. For an EES set up on the basis of either Options 3 or 4, the retention period would be five years for all travellers.
- There are two possibilities for technical implementation: either Member States would set up national databases, running a regular cross-check and exchange data, or there would be a central database with national interfaces. According to the Commission, the centralised approach would be the most efficient and cost-effective solution.

**The Commission's preferred system is based on Option 2**, with biometric data only being added after three years of operation. An evaluation of the system would be foreseen after two years of operation, after which an assessment will be made whether to move to option 4. However, such a change (and/or changing the retention period) will require a new legislative proposal (IA, p.39), accompanied, arguably, by a new IA.

## • **Scope of the Impact Assessment**

The four options are assessed for their ability to meet the policy objectives (both to counteract irregular immigration, and to fight against terrorism and serious crime) and for their impact on border management.

The Commission also provides a rather brief description of the expected impact of the various options on fundamental rights. The relevant fundamental rights, as laid down in the Charter of Fundamental Rights of the European Union, are the protection of personal data (Article 8), the right to liberty and security (Article 6), respect for private and family life (Article 7), the right to asylum (Article 18), protection in the event of removal, expulsion or extradition (Article 19) and the right to an effective remedy (Article 47).

The Commission states it has also taken into account the effectiveness, efficiency and coherence of the options (IA, p. 38), but no separate overview table or even descriptive analysis is given.

The calculation of costs is based on a separate cost study of the different implementation options, conducted with the help of an external contractor<sup>7</sup>. Details of the study are provided in Annex 2 to the IA. The study calculates the one-time development cost of the system, and total yearly operational costs for five years, split into central (EU) costs and costs for Member States (see below 'Budgetary or public finance implications').

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<sup>7</sup> UNISYS (2010), Final Report. Cost Analysis of Entry-Exit and Registered Travellers Systems, available at [ec.europa.eu/home-affairs/doc\\_centre/borders\\_schengen\\_en.htm#studies](http://ec.europa.eu/home-affairs/doc_centre/borders_schengen_en.htm#studies)

## • **Quality of data, research and analysis**

The Commission reports that it has used the following data:

- information on current and future size of travel flows at the EU's external border;
- the time currently needed for border checks;
- the number of irregularly staying third-country nationals within the Schengen area.

The data was collected through questionnaires, case-studies, pilot projects and literature reviews. For the cost calculations, the IA relies heavily on an external study, prepared by and external contractor, UNISYS.

However, the Commission warns that the available data was not always adequate. 'Shortcomings in the availability and/or comparability of existing statistical data and the fact that many aspects (customs checks, security check, infrastructure etc.) affect the time needed for border crossing have made comparison and analysis difficult. With regard to numbers and forecasts of traffic of passengers, it is important to note a wide disparity in the information available according to the different means of transport' (IA, p. 9). One of the objectives of the proposal is gathering information, notable on 'the size and trends of movements across the external borders, especially with regard to irregular immigration' (IA, p. 26).

With the exception of the calculation of costs, the assessment of the expected impacts is of a purely qualitative nature, evaluating the options on a nine-point scale, graphically presented with symbols. The method used for calculating the costs is clearly explained in Annex 2 (IA, p. 51). The parameters used are set out and a brief sensitivity analysis is included.

## • **Subsidiarity / proportionality**

The proposal is based on Articles 74 and 77(2)(b) and (d) TFEU, giving the EU the power to adopt measures relating to the checks on persons and efficient monitoring of the crossing of external borders of the Member States. The Commission states that the objectives could not be sufficiently achieved by the Member States, and that a common regime is needed for the records of cross-border movements in order to increase the efficiency of border management.

No Member State national parliament has issued a reasoned opinion raising problems with respect to subsidiarity.

The Commission states that 'the preferred option is proportionate in terms of the right to protection of personal data in that it does not require the collection and storage of more data for a longer period than is absolutely necessary to allow the system to function and meet its objectives' (IA, p. 46). It also describes the 'added value' of the proposed measures.

However, since the Commission admits that all proposed options would have – to differing degrees – a negative impact on fundamental rights, and since interferences with the right to private life must meet the threshold of being 'necessary in a democratic society', it is regrettable that this IA is not more precise and clear about the necessity of the intervention (demonstrating, for example, the scale of the problem of overstaying), and on the proportionality of the proposed measures<sup>8</sup>.

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<sup>8</sup> See also the very critical Opinion 05/2013 on Smart Borders of the Article 29 Data Protection Working Party, [http://ec.europa.eu/justice/data-protection/index\\_en.htm](http://ec.europa.eu/justice/data-protection/index_en.htm)

- **Budgetary or public finance implications**

The one-off development costs for an EES system as proposed (centralised system with biometrics added after three years), would amount to 183 million euro, of which the Member States would have to bear 146 million and the EU 37 million. The yearly cost over five years of operation would be 74 million euro for Member States and 14 million euro for the EU. The total costs over five years for EU and Member States would thus be 623 million euro.

- **Relations with third countries**

The IA briefly mentions that certain third countries, notably the US, Japan and Australia, have successfully implemented EES, but further possible effects of the introduction of a European EES on relations with third countries are not discussed.

- **Stakeholder consultation**

The Commission refers to its consultation of stakeholders for the 2008 IA and to publishing the 2011 Communication on the various options for 'smart borders'. This consultation mainly took the form of expert meetings and the Commission's presentation of the EES at different seminars. A formal stakeholder consultation on the different implementation methods presented in this IA does not seem to have been conducted.

The request of the Commission's Impact Assessment Board (IAB) that there be a better presentation of the views of the principal affected stakeholders, and that an annex containing their detailed views be included, seems not to have been followed up.

The Commission has consulted the European Data Protection Supervisor (EDPS), inter alia on a draft of the present IA, who considered that access to the EES for law enforcement purposes should not be granted and that biometric data should not be collected (IA, p. 7).

- **Monitoring and evaluation**

The IA contains a list of indicators, linked to the specific objectives of the proposal, which will allow the Commission to monitor and evaluate the functioning of the proposed EES. The text states that: 'The first evaluation (after two years of operation) should focus on whether access for law enforcement purposes should be granted and whether the retention period should be extended and would be accompanied by legislative proposals as appropriate.' (IA, p. 47)

- **Commission Impact Assessment Board**

The Commission's Impact Assessment Board (IAB) issued a first opinion in March 2012, asking for significant improvements and resubmission. In response to the IAB's recommendations, DG HOME has better explained the intervention logic and developed the problem definition in more detail. In its second opinion of May 2012, the IAB reiterated its criticism, mainly that the problem definition should make clear that the evidence currently available does not support the need for EU action involving the collection of biometric data for third-country nationals without a visa, and that the IA should better justify the need to take immediate action before evaluation of the VIS becomes available. The comments by the IAB seem to have been only partially taken into account.

- **Coherence between the Commission's legislative proposal and IA**

The legislative proposal and the IA seem to correspond.

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This note, prepared by the Ex-Ante Impact Assessment Unit for the 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 proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

<http://www.europarl.europa.eu/committees/en/studies.html>

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