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on the Entry/Exit System to register entry and exit data of third country nationals crossing the EU Member States' external borders

Committee on Civil Liberties, Justice and Home Affairs

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United in diversity

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Introduction

The proposal for an Entry/Exit System (EES) is part of the proposed Smart Borders Package which includes also the proposal for a Registered Traveller Programme (RTP) and a proposal to amend the Schengen Borders Code (SBC) to take account of the two proposed systems at the border. This working document provides for a short summary of the proposal and presents some political questions for discussion.

Background

Third-country nationals - not subject to a long-term visa or residence permit - are generally allowed to stay within the Schengen area for a total period of up to three months per six-month period (Art. 5 SBC, Art. 1(1) Visa Code (Reg. 810/2009)). The current method to ascertain that third-country nationals respect this provision consists in the stamping of their travel document and subsequent check of the stamps: According to Art. 10 of the SBC "the travel documents of third-country nationals shall be systematically stamped on entry and exit." At the border third-country nationals are subject to a thorough check which includes the "examination of the entry and exit stamps on the travel document of the third-country national concerned, in order to verify, by comparing the dates of entry and exit, that the person has not already exceeded the maximum duration of authorised stay in the territory of the Member States". (Art. 7(3)(a)(iii))

This method is judged as "both time-consuming and difficult". The impact assessment makes the case that "checking a traveller who has been making 10 visits to the Schengen area during the last months means verifying 20 stamps." In addition, "maintaining the quality and security of the stamps requires both resources and efforts, as they can be subject to counterfeiting and forgery." (SWD(2013)47, p. 11)

A further weak point is seen in the fact that there is no consistent record of entries and exits of travellers to and from the Schengen area available and therefore also no reliable data on so-called overstayers. For third-country nationals whose biometric data is not contained in the VIS an identification of identity in case the travel documents have been destroyed is also not possible

The proposed EES

It is these weak points the proposed EES would address. It would be a system to record and store information on the time and place of entry and exit of third-country nationals, to calculate the duration of their stay, and to generate an alert when authorised periods for stay have expired (Art. 1). The purposes of the proposed EES are further detailed in Art. 4 and include "to enable national authorities of the Member States to identify overstayers and take appropriate measures" and "to gather statistics on the entries and exits of third country nationals for the purpose of analysis."

In case a third-country national has been authorised to enter into the Schengen area an individual file in the EES would be created. This file would contain basic personal data including name, type and number of travel document, and if applicable the visa sticker number (Art. 11(1)). For persons not subject to the visa obligation, i.e. persons whose

fingerprints are not stored in the VIS, and for which no previous registration is registered an individual file with ten fingerprints would be created. Children under the age of 12 would be exempted. The Commission proposes that for a period of three years the EES operates only with alphanumeric data (Art. 12).

On each entry of that person an entry/exit record would then be entered indicating the date and time of the entry, the place of entry and the calculation of the number of days the person would be authorised to stay (Art. 11(2)).

The proposed modification of the SBC contains more detailed rules for the border checks using the EES which basically provide for the verification of the authorised period of stay by means of the EES. It also foresees that "upon request, the border guard shall inform the third country national of the maximum number of days of authorised stay." (Art. 1(3)(c) SBC proposal).

Chapter III of the proposal contains provisions for the use of the EES by other authorities than border authorities. Visa authorities would be requested to consult the EES for the purpose of the examination of visa application (Art. 16); visa and border authorities would be requested to consult the EES for the purpose of the examination of an application for access to the RTP (Art. 17); competent authorities of the Member States would have access to verify the identity of a third-country national on their territory and/or whether the conditions of stay are fulfilled (Art. 18); border authorities and authorities of the Member States competent to carry out checks whether the conditions for stay on the territory of the Member States are fulfilled would have access for the purpose of the identification of persons (Art. 19). A use for law-enforcement purposes is not proposed by the Commission. It proposes, however, that the 1st evaluation of the system two years after the start of operation would "specifically examine the contribution the [EES] could make in the fight against terrorist offences and other serious criminal offences and will deal with the issue of access for law enforcement [...]". (Art. 46(5))

The EES proposal furthermore contains provisions related to the storage of the data in the EES database. The proposed retention period is 181 days (Art. 20). There is a general prohibition to share EES data with third countries, international organisations and private parties but exceptions would be possible if certain conditions are fulfilled, including an adequacy finding, and "if necessary in individual cases for the purpose of proving the identity of third-country nationals, including for the purpose of return" (Art. 27). The proposal also foresees provisions on data security (Art. 28), liability (Art. 29), self-monitoring (Art. 31), penalties (Art. 32) as well as on the rights of the data subject and supervision (Chapter VI). These provisions are very similar to those foreseen in SIS II and VIS.

The proposal also describes the technical architecture (Art. 6) and it is foreseen that its technical development - once the legislative process has been finalised - would be undertaken by the IT-Agency eu-LISA (Art. 24).

Experiences of Member States with national EES

According to the impact assessment the following 13 Member States currently have a national EES: Finland, Estonia, Spain, Latvia, Lithuania, Poland, Slovakia, Hungary, Romania, Bulgaria, Cyprus, Portugal, Malta. They all collect only alphanumeric data and their main

purpose "is to give law enforcement authorities the opportunity to store travel records of certain third-country nationals in accordance with security-related national legislation." (SWD(2013)47, p. 14)

Member States generally judge their experiences with EES positively but those who are members of Schengen also point to the missing possibility to reliably check the exit of third-country nationals in the absence of a European system or an exchange of data between Member States.

Questions for discussion

Before proceeding with the draft report the rapporteur wishes to discuss two pertinent general questions: 1) **Do we need an EES and what would be its added value?** and 2) **Is the EES as proposed by the Commission appropriate or should it be modified?**

Regarding the 1st question: as outlined above the current situation is characterised by a number of problems. The rule regarding the authorised period of stay (three months per six-month period) cannot with today's method of stamping and checking of passports be adequately enforced. If we want this rule to be respected other tools for checking and enforcing it need to be found.

Furthermore, it seems justified to seek reliable information as to who enters and who exits the Schengen area at what time and at what place. Even for third-country nationals under visa obligation this information is not available as border authorities only access the VIS for verification of the identity of the visa holder, the authenticity of the visa and/or whether the conditions for entry are fulfilled (Art. 18 of the VIS Regulation 767/2008). The EES would also allow identifying so-called overstayers insofar as the biometrics of all third-country national who entered the Schengen area would be available and not only those under visa obligation.

On the other hand, concerns have been expressed about the necessity and proportionality of the proposed EES. The Article 29 Working Party, for ex., in its opinion not only calls in question "whether the EES can be as effective in achieving its own stated aims as it is hoped" but also "is firmly of the view that the added value of the EES to achieving its stated aims does not meet the threshold of necessity which can justify interference with the rights under Article 8 – EU Charter."

The rapporteur, however, considers this system to be useful and necessary.

Regarding the 2nd question: The questions so far most frequently discussed with regard to the Commission's proposal are the **use of the EES for law-enforcement purposes** and the **use of biometrics** from the start. It is also these questions which were analysed in the impact assessment.

The impact assessment clearly makes the point that the use of biometrics and law enforcement access have a very significant positive impact to counteract irregular immigration and to fight against terrorism and serious crime. It is precisely with the addition of these two elements that the system will be able to demonstrate its potential. "[I]f biometrics are captured and stored

also from third-country nationals not holding a visa, this policy option is likely to have a significant impact on reducing irregular immigration as it will allow for identifying any undocumented third-country national found within the territory." (SWD(2013)47, p. 33).

The argument in favour of law enforcement access is that "[t]he comparison of fingerprints is both a reliable and rapid means to check a suspect's identity." (SWD(2013)47, p. 36) In view of the fact, that the EES will be a relatively expensive system with a huge database, the data should be used most efficiently; the rapporteur underlines that there could be an added value if the EES would provide for law-enforcement access from the beginning. Not only because many Member States already have this possibility and have made positive experiences with it but most of all to prevent and prosecute crime, particularly transnational crime (terrorism, drug smuggling etc.).

Conclusion

The rapporteur invites Members to discuss the issues presented in the working document and to present their views before the draft report is being prepared.