

## PSCE WHITE PAPER

### **Smart Borders revisited: An assessment of the Commission's revised Smart Border Proposal by the European Parliament**

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This document is based on the recent study conducted December 2016 by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs and examines the revising legislative proposals ('package') on EU smart borders adopted by the European Commission on 6 April 2016. The original Smart Borders package adopted by the European Commission in February 2013. The EU Smart Borders initially included two key measures: the establishment of an EES and a RTP for third-country nationals crossing the EU's external borders. The 2016 revised package withdraws the legislative proposal for establishing a Resilient Traveller Programme (RTP), leaving the Entry/ Exit System (EES) as the key feature of EU Smart Borders.

This study continues the work of the study published in 2013 entitled "The Commission's legislative proposals on Smart Borders: their feasibility and costs" for the European Parliament, that assessed the technical feasibility and cost of EU Smart Borders. This study provides a critical review of the revised legislative proposals. It takes fully into account the findings of the previous study as well as the concerns expressed by the European Parliament in prior reports about this initiative. The study also presents a thorough fundamental rights check.

#### **1. Findings of the Study**

With regard to the review of the revised Smart Borders package the current study concludes that:

- The discussion on Smart Borders over the last eight years has been characterised by a continuous reshuffling of objectives. The same measures are brought forth in different contexts which implies that the Smart Borders measures may well not meet the general criteria of proportionality applicable to EU action.
- The objective of implementing EU border management policy by facilitating border-crossing procedures for third-country nationals entering or exiting the EU for short stays has decreased. The existing Smart Borders package does not create a legal

requirement for the Member States to introduce facilitation measures for these purposes.

- The assessment work which supports the revised package is better documented. Yet these assessment efforts mostly went into demonstrating the validity of the European Commission's preferred option rather than providing an exhaustive overview of all possible policy options.
- The expense of the Smart Borders to the EU budget is EUR 480 million for four years (three years of development and deployment and one year of operation). This amount is lower than the EUR 623 million for five years of development and deployment of EES in the 2013 package. In the meantime, the overall cost to the EU and Member State budgets is EUR 1.013 billion for the period 2017-2026. Furthermore, the contractor and the European Commission report a 15-20% margin of error in costing.
- The technical aspects of the measures which are mentioned in the legislative package have been examined in real-life conditions, but eu-LISA and the European Commission have not delivered an implementation plan for EES. Furthermore, not all of the findings of the testing phase can be generalised, in particular with regard to the automated/facilitation processes.
- What is more, the measures mentioned in the Smart Borders package appear to be disproportionate. More precisely, EES does not provide substantial evidence which would contribute to curbing overstaying.
- Moreover, the contribution of the envisaged measures to better implementing EU border management policy (by reducing the workload of border guards and facilitating border crossings) is unclear and ambiguous.

As far as the fundamental rights check of the revised Smart Borders package is concerned, the study reveals:

- The large-scale collection and storage of personal data, including biometric data, interfere with the right to private life under the ECHR, as well as under the CFR.
- Due to the special nature of biometric data, the indiscriminate and big collection of it makes the infringement particularly serious.
- The proposal fails the proportionality and necessity test for the objectives of migration and border management as well as criminal law enforcement.

## **2. Detailed Recommendations**

### **a) Impact Assessment**

The deployment as well as the first seven years of operation of EES and the significant margin of error of 15-20% which is indicated in the costing of the proposed measures, the LIBE Committee should require the European Commission to further clarify the financial burden and budget risk to the EU and Member States.

The impact assessment of the revised legislative package does not provide a basis for proportionality – in the sense of Article 5(4) of the TEU – of a measure that specifically aims

to curb overstays of third-country nationals crossing the EU's external borders for short stays. Therefore, the LIBE Committee should exert pressure on the European Commission to design an impact study providing unambiguous evidence that the Smart Borders package does not go beyond what is necessary to achieve the objective of curbing over-staying.

- The impact assessment of the revised legislative package does not provide an evidence-based demonstration that law enforcement access to EES is proportionate in the sense of Article 5(4) of the TEU. The LIBE Committee should require the European Commission, together with eu-LISA, to provide relevant, recent and detailed information regarding searches for law-enforcement purposes involving fingerprints in the VIS. According to the study, the reporting of eu-LISA on the use of VIS for law enforcement remains unresolved, in particular as far as the searches for involving fingerprints are concerned. New evidence must be properly taken into account when considering law enforcement access to EES.
- The study comments that further evidence should be provided by independent experts before the Smart Borders package is taken into consideration by the co-legislators.

#### **b) Use of biometric data (facial images and fingerprints)**

As it has been aforementioned even though the revised legislative package attempts to decrease the biometric data collected, there is still an issue of proportionality which the LIBE Committee must take into account alternative options in order to achieve data minimisation. For instance:

Replacing the physical stamping obligation can be achieved by comparing the facial image which can be stored on the chip of an electronic passport, in order to verify the identity of travellers. This procedure does not require the storage of facial biometrics and it is an alternative to storing fingerprints.

Visual verification by a border guard is sufficient if the passengers do not have e-passports available. The storing of data on the identity of travellers, travel document and visa information, as well as travel history is sufficient only for a period of 181 days.

In case the use of fingerprints is considered fundamental by the co-legislators, their planning should be included from the beginning in order to avoid any issues on the development of JHA information systems. The introduction of fingerprints collection and storage in particular should be made conditional upon an assessment of the functionality of EES without fingerprints after at least two years of operation.

The proposal for a regulation establishing the EES should include: 1) a two-year moratorium on the introduction of the collection and storage of, and access to fingerprints; 2) a suspension

clause should the functioning of EES without the collecting and storing of as well as access to fingerprints be found less than optimal; 3) a sunset clause foreseeing the shutdown of EES functionalities for fingerprints collection and storage.

**c) Introduction of further automated processes at EU external border crossings**

The adoption of a harmonised legal basis for automated processes for border crossings is proportionate given the growing use by border control authorities of Member States of such processes. A harmonised legal basis would provide legal certainty and support facilitation measures to address the growing workload of border guards at the EU's external borders.

Therefore the proposal for a regulation which aims to amend the Schengen Borders Code for this purpose should be considered independently from the proposal for a regulation to establish EES. The LIBE Committee should consider the possibility of amending the proposal for a regulation to amend the Schengen Borders Code so that the provision of a harmonised legal basis for automation does not depend on the establishment of EES.

**d) Regarding law enforcement access to EES**

Currently, there is no evidence for providing law enforcement access to EES, whether by Member State authorities or Europol. Such a measure would not meet the criteria for either necessity or proportionality, either in the sense of Article 5(4) of the TEU or interference with fundamental rights.

Therefore, the LIBE Committee should not endorse law enforcement access to EES.

- Prior to law enforcement access, a thorough inquiry into the effective use of existing systems should be considered, especially VIS. A five-year monitoring and assessment period by eu-LISA is expected to start in 2016 or 2017 in order to inform a decision on law enforcement access to EES. This would give time for law enforcement authorities in the Member States to familiarise themselves with VIS and provide information about its utility.
- Should law enforcement access to EES eventually be found relevant by the co-legislators, provisions similar to the collection and storage of biometrics should apply, namely: 1) a two-year moratorium on law enforcement access to EES in order to ensure that the system is functioning as planned; 2) a suspension clause should the functioning of EES without law enforcement access be found less than optimal; 3) a sunset clause foreseeing the shutdown of law enforcement access to EES should it be found irrelevant (low number of searches) and/or should issues with the purpose of access or use of access arise.

**e) Compliance of the Smart Borders proposal with fundamental rights**

- The EES proposal forms a particularly serious interference with the right to respect for private life and the right to protection of personal data. This interference should be considered disproportionate.

- The retention period of five years cannot be justified since this would be disproportionate to the objective of determining overstay, therefore the originally envisaged retention period of 181 days should be re-considered. However, the possibility of distinct retention periods for distinct categories of persons should be granted.
- The proposal should provide an effective judicial remedy for all data subjects in line with Article 47 CFR. More precisely, the remedy should not only cover access, correction and deletion; it also should not be made dependent on the provision of additional personal data.
- The transfer of data from the EES to third countries in the context of return should be possible only under the strict conditions prescribed in the proposal and exclusively when there is a decision in the third country concerned as regards the protection of personal data.
- The rationale for the collection and access to EES by criminal law enforcement are not supported by objective and sound evidence. It is the task of the EU legislator to provide such evidence.
- The proposal should guarantee the independence of ex-ante control of access to law enforcement.

The provisions regulating access to the EES by law enforcement need to be drafted with precision so as to provide for legal certainty and diverging approaches across the Member States. In particular: 1) in Articles 29(b) and 30(b), the meaning of ‘specific case’ should be clarified; 2) in Articles 29(b) and 29(c), the definition of ‘reasonable grounds’ should be further specified, as well as the exact meaning of ‘substantially contribute’; 3) in Article 29, the meaning of ‘reasonable grounds’ on which access to EES can be authorised without prior searches in national databases and in the Prüm system should be clarified; 4) in Article 29, the notion of criminal intelligence should either be defined or removed, as it is not defined elsewhere in the EES regulation or in EU legislation and therefore constitutes too broad a criteria for authorising law enforcement access.

### **3. Legislative Procedure**

In the context of the preparation of a revised proposal, the Commission launched [a public consultation](#) on the Smart Borders Package from the 29 July 2015 to the 29 October 2015, welcoming all citizens (EU nationals and non-EU nationals) and organisations to contribute. In December 2015, the Commission published the [results of the public consultation](#). The Commission also prepared an Impact Assessment ([part 1](#), [part 2](#) and [part 3](#)) (see also the [executive summary of the Impact Assessment](#)).

On 6 April 2016, the Commission adopted a revised legislative proposal for Smart Borders. The revised legislative proposal for Smart Borders includes: a [Regulation for the establishment of an Entry/Exit System](#) ([annexS](#)) and a [proposed amendment to the Schengen Borders Code to integrate the technical changes needed for the Entry/Exit System](#) ([annex.](#))

