

Inception impact assessment			
TITLE OF THE INITIATIVE	Revised proposal for (a) regulation(s) establishing an EU Smart Borders System ¹ .		
LEAD DG – RESPONSIBLE UNIT	DG HOME/B3	DATE OF ROADMAP	06/2015
<p>This indicative roadmap is provided for information purposes only and is subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.</p>			

A. Context and problem definition

- (1) What is the political context of the initiative?
- (2) How does it relate to past and possible future initiatives, and to other EU policies?
- (3) What ex-post analysis of existing policy has been carried out? What results are relevant for this initiative?

In February 2013, the Commission tabled a Smart Borders package consisting of three proposals: (1) a Regulation for an Entry/Exit System (EES) for the recording of information on the time and place of entry and exit of third country nationals travelling to the Schengen area, (2) a Regulation for a Registered Traveller Programme (RTP) to allow third country nationals who have been pre-vetted to benefit from facilitation of border checks at the Union external border, (3) a Regulation amending the Schengen Borders Code in order to take into account the establishment of the EES and RTP. By February 2014 the Council finished its first examination of both the EES and RTP proposals.

During those discussions in 2013 the Council and the European Parliament (EP) voiced data protection-related, technical, operational and cost concerns, mainly related to the overall feasibility of the proposed new systems and of some of their features.

In order to further assess the technical, organizational and financial impacts of the various possible ways to address these issues, the Commission subsequently initiated – with the support of both Member States and the EP - a proof of concept exercise aimed at identifying options for implementing the Smart Borders Package. This exercise consists of two stages:

1. A Commission-led Technical Study aimed at identifying and assessing the most suitable and promising options and solutions. Based on this Study, the options and solutions to be tested through a testing-phase project were to be identified by the end of 2014.
2. A testing phase to be entrusted to the Agency for the Operational Management of large-scale IT Systems in the area of Freedom, Security and Justice (eu-LISA), aimed at verifying the feasibility of the options identified in the Technical Study and validating the selected concepts for both automated and manual border controls. The Commission was requested to submit a report on the outcome of the testing phase project to the European Parliament and the Council by the end of 2015.

In parallel other important elements of the two proposals such as access to the EES for law enforcement purposes (which was in the 2013 proposals envisaged to be considered after two years of operation of the system), the consequences of the suppression of the passport stamping at entry and exit are continued to be discussed in the Council.

The European Council in its Strategic guidelines adopted in June 2014 stressed that "the Schengen area, allowing people to travel without internal border controls, and the increasing numbers of people travelling to the EU require efficient management of the EU's common external borders to ensure strong protection. The Union must mobilise all the tools at its disposal to support the Member States in their task. To this end: Integrated Border Management of the external borders should be modernised in a cost efficient way to ensure smart border management with an entry-exit system and registered travellers programme and supported by the new Agency for Large Scale IT Systems (eu-LISA).

The Commission has announced both in the European Agendas on Security and on Migration its intention to present the revised Smart Borders proposal by the beginning of 2016.

The Smart Borders system will determine how checks shall be carried out at the border, and therefore require

¹ The word 'system' is used without prejudice to the outcome of the considerations on the architecture of Smart Borders (see section C, option 1)

technical adaptations in the Schengen Borders Code (SBC). The 2013 proposal amending SBC will be reviewed and if necessary a revised proposal will be made. No separate Impact Assessment is needed for this, as the amendment of the Schengen Borders Code derive directly from the Smart Borders revised proposal.

In addition, the Smart Borders revised proposal will contain consequential amendments to the Internal Security Fund (ISF)-Borders Regulation and the eu-LISA founding Regulation, to enable eu-LISA to execute the tasks foreseen.

What are the main problems which this initiative will address?

(1) The passenger flows at the external borders of the European Union have been growing and will continue to increase in the future. According to the Study the forecasts predict an increase of border crossings for the Schengen countries of approximately 28% by 2020 and 57% by 2025. The total number of border crossings in 2025 is estimated at 887 million of which 302 are by third country nationals (TCN) (Visa Exempt and Visa Holders) with a total of 76 million TCN travellers. TCNs crossing the Schengen Area external border are subjected to 'thorough checks', whilst minimum checks are the rule for EU citizens and persons enjoying the right of free movement. The Schengen Borders Code requires that thorough checks are made at borders manually (both at entry and exit) and does not allow the use of modern technologies for automating processes for third country nationals. To manage these increasing flows of travellers, while remaining compliant with the existing Schengen Borders Code Regulation, Member States would have no choice than to increase the number of border guards and enlarge the border crossing point infrastructures. This would conflict with both space and financial resources constraints.

(2) Irregular migration into the EU poses a challenge to every Member State. In terms of absolute numbers the vast majority are made up of "overstayers": persons having legally entered the EU but who stayed after their entitlement to do so expired. As reported in the 2013 EES Impact Assessment, conservative (and by now somewhat outdated) estimates of the number of irregular immigrants within the EU vary between 1.9 to 3.8 million according to the results of *Clandestino*, an EU-sponsored project implemented by the International Centre for Migration Policy Development. The Schengen Borders Code stipulates that TCNs have, as a general rule, the right to enter for a short stay of up to 90 days within any 180 day period. There are however no provisions on the recording of travellers' cross border movements into and out of the Schengen area. Currently the stamping of the travel document indicating the dates of entry and exit is the sole method available to border guards and immigration authorities to calculate the duration of stay of TCNs and to verify if someone is overstaying. The time a TCN has spent in the Schengen area is calculated based on the stamps which are however often difficult to interpret; they may be illegible or the target of counterfeiting. Exact calculation of time spent in the Schengen area on the basis of stamps in the travel documents is thus both time-consuming and difficult.

Who will be affected by it?

- Member States' border authorities, visa/immigration authorities and the authorities competent for carrying out checks within the territory
- Third country nationals crossing the external borders of the Member States of the EU for short stays; third country nationals travelling regularly to the EU for short stays; third country nationals residence permit holders.

EU citizens crossing the external border are not affected.

Is EU action justified on grounds of subsidiarity? Why can Member States not achieve the objectives of the proposed action sufficiently by themselves? Can the EU achieve the objectives better?

No Member State is able to build up a common, interoperable Entry/Exit system alone. The entry conditions in the Schengen area and border checks for third-country nationals are harmonised through EC law. Schengen countries are committed to maintaining common EU borders and common standards for border controls. Any measures relating to border control would therefore have to apply to the Schengen area without internal border controls where TCNs are able to travel freely within it. As persons may enter the Schengen area at a border crossing point in a Member State where a national register of entries/exits is used, but exit at a border crossing point where no such system is used, no action can be achieved by the Member States acting alone but only at EU level.

Likewise, no Member State is able to build up a common, interoperable facilitation programme alone. One individual Member State's decision to grant access either to its own form of facilitation programme or an EU-wide facilitation programme would have an impact on all Schengen countries. The entry conditions and border checks for TCNs are harmonised through EU law. A common regime is needed to establish harmonised rules on facilitated border crossings for third country nationals so that the facilitation applies at all Schengen border crossing points without separate vetting and without decreasing security. Therefore the objectives of the revised proposal cannot be sufficiently achieved by Member States.

B. Objectives of the initiative

What are the main policy objectives?

The main policy objectives of the revised proposal are similar to those underlying the proposals 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 – COM(2013) 95 final of 28.2.2013 and the proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme (COM (2013) 97).

The main policy objectives of the Smart Borders system are to improve the management of external borders and the fight against irregular migration; to enhance the efficiency of border checks through monitoring of the rights to authorised stay at entry and exit; to improve the assessment of the risk of overstay; to identify and detect overstayers (also within the territory) and to enable national authorities of the Member States to take appropriate measures including to increase the possibilities for return; to support evidence based EU migration policy making; to facilitate the crossing by TCNs of EU external borders through a semi-automated or automated system. Should law enforcement authorities be granted access to the system, an additional policy objective would be to contribute to the fight against terrorism and serious crime, in line with the provisions in VIS and Eurodac.

Do the objectives imply developing EU policy in new areas?

No new policy in new areas will be developed. The revised proposal foreseen is part of the continuous development of the Integrated Border Management Strategy of the European Union.

C. Options

- (1) What are the policy options (including exemptions/adapted regimes e.g. for SMEs being considered?)
- (2) What legislative or 'soft law' instruments could be considered?
- (3) How do the options respect the proportionality principle?

(1) Based on the results of the Commission's Technical Study, the outcomes of the testing phase entrusted to eu-LISA and past and ongoing consultations of a wide range of stakeholders, a series of policy options will be considered, including on its financial implications, with the 2013 proposals as the baseline scenario. This analysis will reflect where appropriate the past experiences and potential synergies with the existing large scale IT systems and the solutions they provide, notably with a view to contributing to reducing costs and increasing the efficiency of the Smart Borders system.

- (i) **The architecture:** how can the Smart Border system be most effectively and efficiently built?

The 2013 proposals foresaw separate EES and RTP systems. The study has compared advantages and inconveniences of building EES and RTP separately or as one single system. Two options will be considered:

- a) Separate EES and RTP systems (*2013 proposal*)
- b) One single EES/RTP system

- (ii) **Biometrics:** what biometric identifier(s) are required for the adequate functioning of the Smart Border system?

The 2013 proposals mention fingerprints as the sole biometric identifier (10 fingerprints for EES and 4 fingerprints for RTP). The technical study and the testing phase produce evidence on the feasibility of further options. The following options will be considered:

- a) Fingerprints only (*2013 proposal*)
- b) Fingerprints and facial image combined
- c) Facial image only

- (iii) **Facilitation of border crossing:** how can the process of border crossing be facilitated for regular third country national' travellers? The 2013 proposals suggest setting up an RTP programme for pre-vetted TCNs. The technical study considers potential simplifications to this approach. The following options will be considered:

- a) RTP (*2013 proposal*)
- b) RTP with on-line registration

c) The use of process accelerators (e.g.: use of self-service kiosks)

(iv) **Retention time for the storage of data:** what is the necessary and proportionate retention period required for an adequate functioning of the Smart Border system, taking into account the purpose of the system? The 2013 proposals foresee for EES data a retention period of maximum 181 days (which constitutes the absolute minimum retention period in order to verify that an individual has not stayed in the Schengen area more than 90 days during the last 180 days, as envisaged by the Schengen Borders Code) and of a 5 years retention period of data in case of the overstay. For RTP data, the proposed retention period is 5 years after the end of RT status.

The following options will be considered:

- a) an EES data retention period of 181 days (5 years for over-stayers) and a RTP data retention period of 5 years (*2013 proposal*)
- b) A reduction of data retention periods
- c) An extension of data retention periods

(v) **Access for law enforcement purposes to the EES data:** should law enforcement authorities have access to the system, and if yes under which conditions? The 2013 proposals mention that the option of access for Law Enforcement Authorities will be evaluated two years after the entering into operation of the system. Option to consider:

- a) Evaluation after two years (*2013 proposal*)
- b) Law Enforcement Access as secondary objective from the start
- c) No Law Enforcement Access

(2) The revised proposal will be (a) draft Regulation(s). 'Soft law' instruments would not be sufficient to tackle the existing problems to regulate the data collection, storage and processing systems and provide adequate guarantees for fundamental rights.

(3) Considering that the privacy by design concept, the right to personal data protection and the data set minimisation are principles sustaining the proposed options, all the options respect the proportionality principle. Furthermore, while the initiative would have a financial cost for the Union, the benefits the system will provide to all Member States but also to TCNs crossing the Schengen external borders is also taken into account.

D. Initial assessment of impacts

What are the benefits and costs of each of the policy options?

The benefits and costs set out in the 2013 Impact assessments will be updated and where necessary revised. The Commission's Technical Study provides detailed costs analyses of the different options under discussion.

Could any or all of the options have significant impacts on (i) simplification, (ii) administrative burden and (iii) on relations with other countries, (iv) implementation arrangements? And (v) could any be difficult to transpose for certain Member States?

(i) The automatic calculation of stay and signalling of overstays will simplify border checks at the external border of the EU. Semi-automation and automation of border crossings will also accelerate and simplify border checks.

(ii) The Smart Borders system will on the one hand increase the operational burden at border crossing points, since biometric data of TCNs will need to be enrolled (the importance of this increase is however directly dependant of the type of biometric identifier that will be chosen). On the other hand, the burden would also decrease as border guards would not need to calculate the time spent in the Schengen area based on the stamps in a third country national's travel document. Semi-automation and automation of border crossings would also decrease the burden on border guards.

(iii) The introduction of an EU Smart Borders system will directly affect citizens of third countries, and will therefore need to be well explained and communicated, including in the framework of migration dialogues. At the same time it should be noted that many third countries already have, or are working towards, similar systems. There is therefore a considerable common ground at the global level that modernisation of border management systems is important and of shared interest. By establishing a state of the art system (including in respect of data protection considerations) the EU can lead the way.

(iv) and (v) The proposed Smart Borders system will be used and implemented by all Schengen states. The

system may imply important adaptations of border management procedures, in particular at land borders.
<p>(1) Will an IA be carried out for this initiative and/or possible follow-up initiatives?</p> <p>(2) When will the IA work start?</p> <p>(3) When will you set up the IA Steering Group and how often will it meet?</p> <p>(4) What DGs will be invited?</p>
<p>(1) Yes.</p> <p>(2) April 2015.</p> <p>(3) April 2015. It will in principle meet on a monthly basis.</p> <p>(4) DGs BUDG, JUST, GROW, MOVE, JRC, SG, LS, DIGIT, HS, EEAS and TAXUD.</p>
<p>(1) Is any option likely to have impacts on the EU budget above € 5m?</p> <p>(2) If so, will this IA serve also as an ex-ante evaluation, as required by the Financial Regulation? If not, provide information about the timing of the ex-ante evaluation.</p>
<p>1) Yes, this is the case for all sets of options: 791 million euro has been earmarked in the Internal Security Fund. This ceiling will be sufficient for the development and entering into operation of the system. Depending on the set of options that will eventually be proposed, a lower amount may be sufficient.</p> <p>2) The IA will serve as an ex-ante evaluation</p>

E. Evidence base, planning of further work and consultation

<p>(1) What information and data are already available? Will existing IA and evaluation work be used?</p> <p>(2) What further information needs to be gathered, how will this be done (e.g. internally or by an external contractor), and by when?</p> <p>(3) What is the timing for the procurement process & the contract for any external contracts that you are planning (e.g. for analytical studies, information gathering, etc.)?</p> <p>(4) Is any particular communication or information activity foreseen? If so, what, and by when?</p>
<p>(1) The previous Impact Assessments carried out for the proposals adopted in February 2013 will be used as well as the Commission's Technical Study for Smart Borders of October 2014.</p> <p>(2) The testing phase implemented by eu-LISA will provide further information on the feasibility of the technical options that are proposed. Further information will be gathered by November 2015 internally, through public and targeted consultations as well as possibly through external contractors.</p> <p>(3) No external contracts are foreseen.</p> <p>(4) No additional communication or information activity is foreseen.</p>
Which stakeholders & experts have been or will be consulted, how, and at what stage?
Technical meetings and informal discussions will be held with Council, EP and EDPS, civil society, with Member States experts, and with carriers/transport/tourism operators in March, April and if necessary in subsequent months, as necessary. A public consultation will also be carried out.