



**PORTUGUESE PARLIAMENT**  
**EUROPEAN AFFAIRS COMMITTEE**

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## **Opinion**

### **COM (2016) 194**

**Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011.**

### **COM (2016) 196**

**Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System.**

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ASSEMBLEIA DA REPÚBLICA

**PORTUGUESE PARLIAMENT**

FOREIGN AFFAIRS AND PORTUGUESE COMMUNITIES COMMITTEE

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Report

**COM (2016) 194 final**

**Author:**

Paula Teixeira da Cruz

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**Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011.**



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# Opinion

## **COM (2016) 194**

**Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011.**

## **COM (2016) 196**

**Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System.**

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## **PART I – INTRODUCTORY NOTE**

In accordance with Article 7 of Law No 43/2006 of 25 August 2006 which governs the monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union, with amendments as introduced by Law No 21/2012 of 17 May 2012, as well as the analysis methodology for European initiatives approved on 8 January 2013, the European Affairs Committee received the following legislative proposals:

- **COM (2016) 194 - Proposal for 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** and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011.
- **COM (2016) 196 - Proposal for a Regulation** of the European Parliament and of the Council amending Regulation (EU) 2016/399 **as regards the use of the Entry/Exit System.**

## **PART II - RECITALS**

### **1. Context and Aims**

In February 2013, the Commission tabled a package of legislative proposals on Smart Borders to modernise the Schengen area's external border management. Since then, technical, financial and operational concerns on certain aspects of the design of the systems have been voiced. In light of these concerns and obstacles to the modernisation of the Schengen area borders, the Commission has now launched a legislative package consisting of the two Proposals for Regulation being analysed herein, with the aim of establishing a new Entry/Exit System which will accelerate, simplify and reinforce registration procedures at borders for non-EU citizens entering and leaving European territory. The improvement of external borders management is vital to ensure internal security and reinforce the fight against terrorism and organised crime.

Specifically, the proposal for a Regulation COM (2016) 194 seeks to establish the new Entry/Exit System and the proposal for a Regulation COM (2016) 196 concerns the technical changes required to use the new system. Both proposals change the Schengen acquis and are revisions of the legislative proposals of 2013.

### **2. Analysis of the Content of the Proposals**

The proposal for a Regulation COM (2016) 194 establishing the new Entry/Exit System has the following content:

- A sole system is proposed for the entire Schengen area border;
- The EES will apply to all third country nationals entering the Schengen area for short stays (up to 90 days within a 180 day period), exempt from the visa obligation or otherwise, or with travel visas valid for a maximum period of one year;



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- The system will register the name, type of travel document and biometric data, as well as the date and place of entry or departure. This registration seeks to facilitate the entry of bona fide travellers, detain overstayers and identify undocumented persons travelling in the Schengen area. The EES will also record refusals of entry of third country nationals falling within its scope;
- Interoperability is ensured between the EES and VIS in order to achieve more efficiency and rapidity at border checks.
- With regard to biometric identifiers a combination of four fingerprints and facial image is suggested;
- The EES replaces the old system of stamping passports.
- Personal data registration is reduced to 26 items, and safeguards will be established for personal data protection in accordance with European rules. The maximum retention time for registered information is 5 years;
- The facilitation of border crossings is provided through the implementation of self-service systems and e-gates. The use of e-gates is optional for Member States.
- There will be a harmonised legal basis for the establishment of national Registered Travellers Programmes by Member States, on a voluntary basis.
- Member States' law enforcement authorities and Europol will have access to the EES, under strictly defined conditions.

The proposal for a Regulation COM (2016) 196 which sets out measures for the technical integration of the rules for the new Entry/Exit System (EES) has the following characteristics:

- Additional definitions are included, i.e. 'the Entry/Exit System (EES)', 'self-service systems', 'e-gates' and 'Automatic Border Control systems'.
- With regard to the registration of border entries, the requirement is included to check the authenticity of all travel documents which have a data storage device using valid certificates;
- The possibility is provided for Member States to introduce national facilitation programmes, on a voluntary basis.
- The requirement to introduce travellers' data when entering or leaving the Schengen area is reinforced. Fall-back procedures are provided in case of failure of the EES.
- The requirement to stamp third country national travel documents is eliminated. However, it continues to be possible, when provided for in national legislation, to stamp the travel documents of third country nationals who hold residence permits;
- Registration will be made of entry refusal for third country nationals who have been refused entry for short stays or for stays under travel visas.
- As this involves the updating of the Schengen acquis, the provisions of the Regulation shall not apply to the United Kingdom or Ireland.

Taking into consideration the provisions of this proposal, the following issues require analysis:

**a) The Legal Basis**



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Both proposals have their legal basis in Article 77(2) of the Treaty on the Functioning of the European Union on checks of persons crossing external borders.

The proposal for a Regulation COM (2016) 194 establishing the new EES system also has a legal basis in Articles 87(2) and 88(2) of the TFEU concerning access by national authorities and Europol to the EES System, under strictly defined conditions.

As the proposal for a Regulation COM (2016) 196 amends the Schengen Borders Code, it also has a legal basis in Article 62(1) and (2) of the Treaty which formed the European Community.

***b) The principle of subsidiarity***

Bearing in mind that the aim of the legislative proposals under analysis is to establish a common system with standardised rules for Schengen area borders, it has been concluded that only through European action will such an aim be achieved.

With regard to proportionality and considering that the proposal involves measures which require the registration of personal data, it is stated that 'all the safeguards and mechanisms required for the effective protection of the fundamental rights of travellers particularly the protection of their private life and personal data will be foreseen and implemented', and as such, it does not exceed what is necessary for the implementation of the action on a European level.

**PART III - OPINION OF THE AUTHOR MEMBER OF PARLIAMENT**

The author and member of parliament hereby expresses his opinion on this initiative.

**PART IV - OPINION**

In light of the recitals above and taking into consideration the reports of the competent committees, the European Affairs Committee is of the opinion that:

1. As the aims of the proposal for a Regulation are to harmonise the functional and regulatory architecture of Schengen area borders, thus requiring trans-national implementation, Member States are not able to act alone and European level action is required.
2. With respect to the initiative under analysis, the scrutiny process is concluded.

Palácio de S. Bento, 22 June 2016



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**The Author, Member of Parliament**

(Illegible Signature)

**(Vitalino Canas)**

**The President of the Committee**

(Illegible Signature)

**(Regina Bastos)**

**PART VI - ANNEX**

- Report of the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees;
- Report of the Foreign Affairs and Portuguese Communities Committee
- Report of the National Defence Committee.



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**COMMITTEE FOR CONSTITUTIONAL AFFAIRS, RIGHTS,  
FREEDOMS AND GUARANTEES**

**REPORT**

**COM (2016) 194 - final proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011**

**I. Preliminary note**

Under the provisions of Article 7(2) of Law No 43/2006 of 25 August 2006, amended by Law No 21/2012 of 17 May 2012 on the *'Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union'*, the European Affairs Committee requested the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees to issue a report on COM (2016) 194 final - Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011.

The aim of this report is to analyse the observance of the principle of subsidiarity, in accordance with Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of the European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU).

**II. The subject, content and motivation of the initiative**

COM (2016) 194 final refers to the proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011

The proposal for a Regulation came about after the Commission tabled a package of legislative proposals in 2013 on Smart Borders to modernise the Schengen area's external border management. The package consisted 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 entering the Schengen area, (2) a Regulation for a Registered Traveller





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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 existence of the and RTP.

After the conclusion of preparatory work on the legislative package, and in light of the relevant developments since 2013 which changed the political, legal and institutional framework, the Commission decided the following: to revise its 2013 proposal for a Regulation for the establishment of an Entry/Exit System (EES); revise its 2013 proposal for Regulation amending the Schengen Borders Code to integrate the technical changes that result from the new proposal for a Regulation establishing an Entry/Exit System (EES); and withdraw its 2013 proposal for a Regulation for a Registered Traveller Programme (RTP).

The current (revised) proposal for a Regulation establishing an Entry/Exit System in the EU is considered necessary to meet the following challenges:

1. Address border check delays and improve quality of border checks for third country nationals;
2. Ensure systematic and reliable identification of 'overstayers';
3. Reinforce internal security and the fight against terrorism and serious crime.

As such, this Regulation establishes an 'Entry/Exit System' (EES) for the recording and storage of information on the date, time and place of entry and exit of third country nationals crossing the external borders of the Member States, for the calculation of the duration of their stay, and for the generation of alerts to Member States when authorised periods for stay have expired.

The system also allows for the recording of the date, time and place of refusal of entry of third country nationals whose entry for a short stay (or on the basis of a touring visa) has been refused as well as the authority of the Member State which refused the entry and the reasons for the refusal.

This Regulation also lays down the conditions under which Member States' designated law enforcement authorities and the European Police Office (Europol) may obtain access for consultation of the EES for the purposes of the prevention, detection and investigation of terrorist offences or of other serious criminal offences.

This Regulation is expected to enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

○ **The Legal Basis**

Article 77(2)(b) and (d)<sup>1</sup> of the Treaty on the Functioning of the European Union is considered

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<sup>1</sup> Article 77(1). The Union shall develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

(b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

(c) the gradual introduction of an integrated management system for external borders.

(2). For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

(a) the common policy on visas and other short-stay residence permits;

**(b) the checks to which persons crossing external borders are subject;**

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

**(d) any measure necessary for the gradual establishment of an integrated management system for external borders;**

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. (...)

4. (...)



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the appropriate legal basis for further specifying the measures on the crossing of the external borders of the Member States and developing standards and procedures to be followed by Member States in carrying out checks on persons at such borders.

Furthermore, the proposal is based on Article 87(2)(a), allowing access for law enforcement purposes, and on Article 88(2)(a), to allow Europol access, both under strict conditions. These two additional legal bases providing for access by law enforcement authorities and Europol to EES data require the same ordinary legislative procedure which applies through Article 77(2)(b) and (d).

○ **Subsidiarity principle**

Under Article 77(2)(b) of the Treaty on the Functioning of the European Union, the Union has the power to adopt measures relating to the checks on persons and efficient monitoring of the crossing of external borders of the Member States.

Considering that this proposal will establish a centralised system through which Member States will cooperate and which requires common architecture and rules of operation.

And that, furthermore, it will establish rules applicable to external border checks and system access, more specifically for law enforcement, which will be uniform for all Member States.

For the purposes of the provisions of Article 5(1) and (2) of the Treaty of the European Union (TEU) and in Article 69 of the Treaty on the Functioning of the European Union (TFEU), as well as of Protocol No 2 on the application of the principles of subsidiarity and proportionality, it can be seen that aims may only be achieved on a European Union level.

It is therefore concluded that the proposal in question is in compliance with the subsidiarity principle.

### **III - Conclusions**

In light of the above, the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees concluded as follows:

- a) That COM (2016) 194 final - Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011 does not breach the principle of subsidiarity.
- b) That this report be sent to the European Affairs Committee.



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Palácio de S. Bento, 25 May 2016

The Rapporteur, Member of Parliament

(Illegible signature)

*(Sara Madruga da Costa)*

The President of the Committee

(Illegible signature)

*(Bacelar de Vasconcelos)*



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**THE COMMITTEE FOR CONSTITUTIONAL AFFAIRS, RIGHTS,  
FREEDOMS AND GUARANTEES**

**REPORT**

**COM (2016) 196 final - Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the use of an Entry/ Exit System**

**I. Preliminary note**

Under the provisions of Article 7(2) of Law No 43/2006 of 25 August 2006, amended by Law No 21/2012 of 17 May 2012 on the *'Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union'*, the European Affairs Committee requested the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees to issue a report on COM (2016) 196 final - Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on the use of the Entry/Exit System.

The aim of this report is to analyse the observance of the principle of subsidiarity, in accordance with Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of the European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU).

**II. The subject, content and motivation of the initiative**

The proposal under analysis seeks to amend Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), with a view to creating an Entry/ Exit System (EES).

This proposal replaces the previous proposal submitted by the Commission in 2013 and includes the technical changes made to the Schengen Border Code arising from the new proposal for a regulation to establish the Entry/Exit System (EES), particularly the registration in the EES of entry refusals for third-country nationals, new items on alternative procedures in the event of EES breakdown and interoperability between the EES and the Visa Information System (VIS).

The main proposed amendments concern:

Introduction of additional definitions of the EES, self-service system, e-gate and Automated



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Border Control (ABC) system (Article 2); third-country nationals for whom data shall be entered into the EES and derogations thereof (Article 6(a)); authenticity check of the chip in travel documents containing an electronic storage medium (Article 8(2)), on entry and exit, for third country nationals, verification of the validity of the travel document by consulting the relevant databases and, in particular, the SIS; the Interpol database on stolen and lost travel documents; and national databases containing information on stolen, misappropriated, lost and invalidated travel documents; information to the traveller on the maximum number of days of the authorised stay, having regard to the results of the consultation of the EES (Article 8(9)); presumption of an irregular stay in the absence of the appropriate records in the EES and possibilities of rebuttal (Article 12).

This Regulation is expected to enter into force on the twentieth day following that of its publication.

- **The Legal Basis**

Article 77 (2) (b) of the Treaty on the Functioning of the European Union, as the proposal lays down provisions on border checks of persons crossing the external border.

This proposal amends Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), which is the codified version of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006, which was based on the equivalent provisions of the Treaty establishing the European Community, i.e. Articles 62(1) and (2)(a).

- **Subsidiarity principle**

Article 77 empowers the Union to develop a policy with a view to 'ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders' and 'carrying out checks on persons and efficient monitoring of the crossing of external borders'.

The objective of this proposal is to make the necessary amendments to the Schengen Borders Code for the establishment of an EES.

For the purposes of the provisions of 5(1) and (2) of the Treaty of the European Union (TEU) and Article 69 of the Treaty on the Functioning of the European Union (TFEU), as well as of Protocol No 2 on the application of the principle of subsidiarity and proportionality, it can be seen that the objectives of this Regulation cannot be sufficiently achieved by the Member States acting alone but may be more suitably achieved due to its size and scope on a Union level. It is therefore concluded that the Union may implement such measures, the proposal for which is in compliance with the principle of subsidiarity.



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**III - Conclusions**

In light of the above, the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees concluded as follows:

- a) That the COM (2016) 196 final - Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System does not breach the principle of subsidiarity;
- b) That this report be sent to the European Affairs Committee.

Palácio de S. Bento, 25 May 2016

The Rapporteur, Member of Parliament  
(Illegible signature)  
(*Sara Madruga da Costa*)

The President of the Committee  
(Illegible signature)  
(*Bacelar de Vasconcelos*)



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Report

COM (2016) 194 final

Author:

Paula Teixeira da Cruz

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Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011.



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**PART I – INTRODUCTORY NOTE**

Under the provisions of Article 7(2) of Law No 43/2006 of 25 August 2006, in the wording given by Law No 21/2012 of 17 May 2012 on the 'Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union', the European Affairs Committee sent the Foreign Affairs and Portuguese Communities Committee COM (2016) 196 Final - **'Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011'**, for them to analyse and issue this report.

**PART II - RECITALS**

**1. Context of the Proposal**

As can be seen in the European initiative under analysis herein, in February 2013, the Commission tabled a package of legislative proposals on Smart Borders to modernise the Schengen area's external border management. The package consisted 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 entering 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, and
- 3) A Regulation amending the Schengen Borders Code<sup>1</sup>, in order to take into account the existence of the EES and RTP<sup>2</sup>.

During the first examination of the package, which was completed in February 2014, the co-legislators voiced technical, financial and operational concerns on certain aspects of the design of the systems. However the preferred policy options proposed in 2013 (i.e. centralised systems based on biometrics) were not questioned. The European Parliament (EP) referred the proposal to its Committee on Civil Liberties, Justice and Home Affairs (LIBE). It did not issue a legislative resolution on the proposals.

In order to further assess the technical, organisational and financial impacts of the proposed policy options, the Commission initiated, with the support of both co-legislators, a so-called 'proof of concept' exercise consisting of two stages:

- A Commission-led Technical Study on Smart Borders (hereinafter 'The Technical Study')

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<sup>1</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (Codification) OJ L 77, 23.3.2016, p. 1.  
<sup>2</sup> COM(2013) 95 FINAL, COM(2013) 97 FINAL and COM(2013) 96 FINAL.



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published in October 2014<sup>3</sup>, and

- A testing phase led by eu-LISA on the impact of the use of various biometric identifiers on the border control processes (hereinafter 'the pilot project') for which a report was published in November 2015<sup>4</sup>.

Based on the findings of the Technical Study, the results of the pilot project, the technical discussions with co-legislators and stakeholders as well as a public consultation<sup>5</sup>, the Commission prepared a detailed Impact Assessment which is accompanying this proposal. This Impact Assessment builds on the Impact Assessments<sup>6</sup> accompanying the 2013 proposals, and focuses on elements of the 2013 proposals where modifications are proposed, notably:

- a) the architecture of the system;
- b) biometrics to be used;
- c) the use of process facilitators;
- d) the retention of data and;
- e) access by law enforcement authorities.

On the basis of these extensive preparations, the Commission has considered necessary improvements and simplifications to the 2013 proposals. The Commission has decided to:

- Revise its 2013 proposal for a Regulation for the establishment of an Entry/Exit System (EES);
- Revise its 2013 proposal for Regulation amending the Schengen Borders Code to integrate the technical changes that result from the new proposal for a Regulation establishing an Entry/Exit System (EES);
- Withdraw its 2013 proposal for a Regulation for a Registered Traveller Programme (RTP).

### **Rationale for the establishment of an EU Entry/Exit System**

As explained in the Impact Assessment, the establishment of an EU Entry/Exit System is considered necessary to address the following challenges:

#### **1. Addressing border check delays and improving quality of border checks for third country nationals**

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<sup>3</sup> Technical Study on Smart Borders, European Commission, DG HOME, 2014. [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-andvisas/smart-borders/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-andvisas/smart-borders/index_en.htm)

<sup>4</sup> Final Report of the Smart Borders Pilot Project, eu-LISA, December 2015. [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/index_en.htm)

<sup>5</sup> [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting\\_0030\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting_0030_en.htm)

<sup>6</sup> SWD(2013) 47 final and SWD(2013) 50 final.



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Passenger flows at the external borders of the European Union have been growing and will continue to increase in the future. The total number of regular border crossings in 2025 is forecast to rise to 887 million, of which around one-third are expected to be by third country nationals travelling to Schengen countries for a short-term visit. While 'minimum checks' are performed on EU citizens and persons enjoying the right of free movement, third country nationals crossing the Schengen area external borders are subject to 'thorough checks' made today manually at borders (both at entry and exit).

The Schengen Borders Code has no provisions on the recording of travellers' cross border movements into and out of the Schengen area. As a general rule, third country nationals have the right to enter for a short stay of up to 90 days within any 180 day period. 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 third country nationals and to verify if someone is overstaying. These stamps can be difficult to interpret: they may be unreadable or the result of counterfeiting. Similarly, it is difficult for consulates having to process visa applications to establish the lawfulness of previous visas on the basis of stamps present in the travel document. As a result, the whole procedure is considered error prone and not always systematically implemented.

The introduction of the EES will ensure:

- Precise information, rapidly delivered on demand to border guards during border checks, by replacing the current slow and unreliable system of manual stamping of passports; this will allow for both a better monitoring of the authorised stay as well as more efficient border checks;
- Information to border guards on refusals of entry of third country nationals and will allow for refusals of entry to be checked electronically in the EES;
- Precise information to travellers on the maximum length of their authorised stay;
- The possibility for automated border controls for third country nationals under the supervision of the border guards in accordance with the conditions foreseen in Article 8(d) of the revised proposal to amend the Schengen Borders Code.

## **2. Ensuring systematic and reliable identification of 'overstayers'**

Irregular immigrants include both persons who crossed the borders irregularly – usually not at an official border crossing point - and the so-called "overstayers": persons having legally entered the EU at an official border crossing point but who stayed after their entitlement to do so expired. The EES addresses this category of irregular migration. As border crossings by third country nationals are currently not registered, it is not possible to establish lists of overstayers.

The introduction of EES will:

- Provide precise information on who is overstaying their authorised stay, which will support controls within the territory and allow to apprehend irregular migrants more efficiently;
- Support the identification of irregular migrants; by storing biometrics in the EES on all persons not subject to the visa requirement, and taking into account that the biometrics of visa holders are stored in the VIS, Member States' authorities will be able to identify any



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undocumented irregular migrant found within the territory that crossed the external border legally; this will in turn facilitate the return process;

- Allow for an evidence-based approach through the analysis generated by the system. In the case of visa policy for instance, the EES will provide precise data on whether there is a problem with overstayers of a given nationality or not, which would be an important element when deciding whether to impose or lift visa obligations on a third country in question.

### **3. Reinforcing internal security and the fight against terrorism and serious crime**

Criminal activities such as trafficking in human beings, people smuggling or the smuggling of illicit goods involve numerous border crossings, which are facilitated by the absence of registration of the border crossings of the third country nationals concerned. Likewise, terrorist organisations and radicalised individuals can benefit from the absence of registration of border crossings. Controls of third country nationals at external borders involve identity checks and searches against various databases of known persons or groups posing a threat to public security that should be either apprehended or denied entry to the territory.

However, if a third country national destroys his/her official documentation once inside the Schengen area, it can be very difficult for law enforcement authorities to identify that person in case he/she is suspected of a crime or is a victim of crime.

The introduction of EES will:

- Support the reliable identification of terrorists, criminals as well as of suspects and victims;
- Provide a record of travel histories of third country nationals including crime suspects. It would thus complement the information available in the Schengen Information System.

### **2. Legal Basis, subsidiarity and proportionality**

The European initiative points out that the legal basis of the revised proposal is Article 77(2)(b) and (d) of the Treaty on the Functioning of the European Union. Article 77(2)(b) and (d) constitutes the suitable legal basis to better specify the measures relating to the crossing of the external borders of the Member States and to define the rules and procedures to be observed by the Member States when carrying out checks on persons at their borders. Article 77(2)(b) and (d) constitutes the legal basis for establishing the EES. Furthermore, this revised proposal is based on Article 87(2)(a), allowing access for law enforcement purposes, and on Article 88(2)(a), to allow Europol access, both under strict conditions. These two additional legal bases providing for access by law enforcement authorities and Europol to EES data require the same ordinary legislative procedure which applies through Article 77(2)(b) and (d).

### **Subsidiarity principle**



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The proposal considers that under Article 77(2)(b) of the Treaty on the Functioning of the European Union, the Union has 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 current EU provisions on the crossing of the external borders of the Member States need to be modified to take into account that there are currently no reliable means to monitor the travel movements of third country nationals admitted for a short stay given the complexity and slowness of the current stamping obligation, which is insufficient for allowing Member States' authorities to assess the authorised stay at the border check of the traveller or at checks within the territory and the very limited value of national systems for such purposes in an area without internal border control.

In order to increase the efficiency of migration flow management, it is thought convenient to provide information on who has been refused entry into EU territory, on who is on EU territory and who complies with the maximum allowed short stay of 90 days within 180 days, on nationalities and groups (visa exempt/required) of travellers overstaying and to support random checks within the territory to detect irregularly staying persons.

A common regime is also considered necessary in order to establish harmonised rules on the records of refusals of entry, cross border movements and monitoring of authorised short stays for the Schengen area as a whole.

Therefore, this objective of the proposal cannot be sufficiently achieved by the Member States acting alone.

A revision of the 2013 EES proposal is also required in order to allow law enforcement access to data in the EES for the purpose of the fight against terrorism and serious crime and ensure a high level of internal security. This objective cannot be sufficiently achieved by the Member States acting alone, since such an amendment can only be proposed by the Commission.

### **Proportionality principle**

Article 5 of the Treaty on the European Union states that action by the Union shall not go beyond what is necessary to achieve the objectives of the Treaty. The form chosen for this EU action must enable the proposal to achieve its objective and be implemented as effectively as possible.

The proposed initiative constitutes a further development of the Schengen acquis in order to ensure that common rules at external borders are applied in the same way in all the Member States which have abolished controls at internal borders. It creates an instrument providing to the European Union information on how many third country nationals enter and leave the territory of the EU, which is indispensable for sustainable and evidence based policy making in the field of migration and visa. It also grants access to the EES to law enforcement authorities, which is a timely, accurate, secure and cost-efficient way to identify visa exempt nationals who are suspects (or victims) of terrorism or of a serious crime and to enable them to consult the travel history of both visa holder and visa exempt third country nationals who are suspects (or victims) of such crimes.

The proposal which conception is driven by the privacy by design principles 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



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function and meet its objectives, which seems vague to us. In addition, all the safeguards and mechanisms required for the effective protection of the fundamental rights of travellers particularly the protection of their private life and personal data will be foreseen and implemented.

The European initiative considers that further processes or standardisation on an EU level will not be necessary to ensure the operation of the system.

The preferred option is also proportionate in terms of costs, taking into account the benefits the system will provide to all Member States in managing the common external border and progressing towards a common EU migration policy.

The proposal therefore complies with the proportionality principle

### **Fundamental rights**

The proposed Regulation has an impact on fundamental rights, notably on right to dignity (Article 1 of the Charter of Fundamental Rights of the EU); the prohibition of slavery and forced labour (Article 5 of the Charter); right to liberty and security (Article 6 of the Charter), respect for private and family life (Article 7 of the Charter), the protection of personal data (Article 8 of the Charter), right to asylum (Article 18 of the Charter) and protection in the event of removal, expulsion or extradition (Article 19 of the Charter), the right to non-discrimination (Article 21 of the Charter), the rights of the child (Article 24 of the Charter) and the right to an effective remedy (Article 47 of the Charter).

The prohibition of slavery and forced labour as well as the right to liberty and security are positively affected by the implementation of an EES. A better and more accurate identification (through the use of biometrics) of third country national crossing the external border of the Schengen area supports the detection of identity fraud, human being trafficking (particularly in the case of minors) and cross border criminality and thus contributes to improving the security of the citizens present in the Schengen area.

Concerning the right to protection of personal data, the proposal contains safeguards as regards personal data, in particular access thereto, which should be strictly limited only to the purpose of this Regulation and to the competent authorities designated therein. Safeguards as regards personal data also include the right of access to or the right of correction or deletion of data. The limitation of the retention period of data referred to above in Chapter 1 of the explanatory memorandum also contributes to the respect for personal data as a fundamental right.

The proposal provides for access to the EES for the prevention, detection or investigation of terrorist offences or other serious criminal offences for the purposes of identification of third country nationals crossing the external borders and for the purpose of accessing data on their travel history. As stipulated by Article 52(1) of the Charter, any limitation to the right to the protection of personal data must be appropriate for attaining the objective pursued and not going beyond what is necessary to achieve it. Article 8(2) of the European Convention of Human Rights also recognises that interference by a public authority with a person's right to privacy may be justified as necessary in the interest of national security, public safety or the



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prevention of crime, as it is the case in the current proposal. The ECJ has also recognised<sup>7</sup> that the fight against terrorism and serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques and hence, access to personal data granted for those specific purposes could be justified if considered necessary.

The proposal provides for access to the EES for the prevention, detection or investigation of terrorist offences or other serious criminal offences for the purposes of identification of third country nationals crossing the external borders and for the purpose of accessing data on their travel history. Access to the EES for identification purposes should only be possible where a prior search has been conducted in national databases without success and, in the case of searches with fingerprints where a prior search has been conducted in the automated fingerprint verification system under Decision 2008/615/JHA. Although data exist in the VIS on visa holders, neither data on visa exempt nationals or data on travel movements are available in any other EU database.

Access to EES data for law enforcement purposes may only be granted for the prevention, detection or investigation of criminal offences or other serious criminal offences as defined in Council Framework Decisions 2002/475/JHA on combating terrorism and 2002/584/JHA on the European arrest warrant and only if it is necessary for a specific case. Moreover, designated law enforcement authorities may only request access to EES data if there are reasonable grounds to consider that such access will substantially contribute to the prevention, detection or investigation of the criminal offence in question. Such requests are verified by a designated law enforcement authority in order to check whether the strict conditions for requesting access to the EES for law enforcement purposes are fulfilled.

Furthermore, the proposal also lays down strict data security measures to ensure the security of personal data processed and establishes supervision of the processing activities by independent public data protection authorities and documentation of all searches conducted. The proposal also states that the processing of all personal data carried out by law enforcement authorities on the EES once they have been extracted is subject to Council Framework Decision 2008/977/JHA.

The proposal establishes strict access rules to the EES system and the necessary safeguards. It also foresees the individuals' rights of access, correction, deletion and redress in particular the right to a judicial remedy and the supervision of processing operations by public independent authorities. Therefore, the proposal fully complies with the Charter of Fundamental Rights of the European Union, in particular as regards the right to the protection of personal data, and is also in line with Article 16 TFEU which guarantees everyone the right to protection of personal data concerning them.

### **3. Analysis of the Initiative**

In accordance with the European initiative under analysis here, the scope of the new Entry/Exit System includes border crossings by all third country nationals visiting the Schengen area for a short stay (maximum 90 day period in any period of 180 days), both visa-required and visa-

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<sup>7</sup> Court of Justice Judgement of 8 April 2014 in attached cases C-293/12 and C-594/12, Digital Rights Ireland Ltd and others, EU:C:2014:238, No 51.



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exempt travellers, or eventually, on the basis of a touring visa<sup>8</sup> (up to one year).

The law adds that family members of EU citizens enjoying the right of free movement or of third country nationals who enjoy the same rights of free movement equivalent to those of Union citizens and who do not yet have a residence card should be registered in the EES but are not subject to the short stay rule, and that checks on this category shall be carried out in accordance with Directive 2004/38/EC<sup>9</sup>. Such family members in possession of a residence card referred to in Directive 2004/38/EC are excluded from the EES.

The system will collect data and register entry and exit records with the view to both facilitating the border crossing of bona fide travellers, and better identifying overstayers. The EES will also record refusals of entry of third country nationals falling within its scope.

The main differences between this modified proposal and the 2013 proposals are:

**The architecture of the system:** only one system is proposed, the Entry/Exit System. The connection of the national border infrastructures to the EES central system will be done through a National Uniform Interface which will be identical for all Member States, and will allow the use of the existing national Entry/Exit Systems. However, data from the central system cannot be copied into these existing national EES.

**Interoperability** is ensured between the EES and VIS in order to achieve more efficiency and rapidity in border checks. To this effect, a connection will be established between the central systems of the EES and the VIS and direct access between them will be regulated for specific purposes. This will reduce the duplication of personal data processing in accordance with the 'privacy by design' principle.

**Biometric identifiers:** while the 2013 EES proposals relied on ten fingerprints, the revised EES proposals suggest a combination of four fingerprints and the facial image as biometric identifiers introduced from the start of operation of the EES. This choice will allow for sufficiently accurate verifications and identifications, considering the expected size of the EES, while keeping the amount of data to a reasonable level and at the same time speeding up border controls and enabling a wider use of self-service systems at border crossing points. The four fingerprints are used at enrolment to check if the third country national was already registered in the system, while the facial image allows for a quick and reliable (automatic) verification at subsequent entry that the individual subject to the border control is the one already registered in the EES.

**Personal data protection:** there is a significant reduction in the volume of personal data recorded in EES: 26 data items are to be recorded in EES instead of 36. The right of access, rectification and deletion of personal data are clearly defined and safeguarded. The European Data Protection Supervisor and the national data protection authorities will be in charge of supervision for data processing.

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<sup>8</sup> Should a touring visa be established in accordance with the proposal submitted by the Commission for a Regulation of the European Parliament and of the Council establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 562/2006 and (EC) No 767/2008 [COM(2014) 163 final]

<sup>9</sup> Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.





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**Data retention period:** The retention time for stored data is five years. The five year data retention period reduces the re-enrolment frequency and will be beneficial for all travellers, while allowing the border guard to perform the necessary risk analysis required by the Schengen Border Code before authorising a traveller to enter the Schengen area. For the border guard the systematic deletion of the EES record after 181 days as proposed in 2013 would have removed any trace of the third country national's recent history of entries and exits from the Schengen area which is required for a risk analysis. It would be a regression of useful information compared to what the border guard currently uses: consulting stamps in a travel document gives in many cases information that stretches over a period of several years. A longer data retention period is thus necessary to allow the border guard performing the necessary risk analysis requested by the Schengen Border Code before authorising a traveller entering the Schengen area. The processing of visa applications in consular posts also requires analysis of the travel history of the applicant to assess the use of previous visas and compliance with the conditions of stay. The abandoning of passport stamping will be compensated by a consultation of the EES. The travel history available in the system should therefore cover a period of time which is sufficient for the purpose of visa issuance.

The longer data retention period will reduce the re-enrolment frequency and will be beneficial for all travellers as the average border crossing time will decrease as will the waiting time at border crossing points. Even for a traveller entering the Schengen area only once, the fact that other travellers being already registered in the EES will not have to re-enrol will reduce the waiting time at the border.

A longer data retention period will also be necessary to allow for facilitation at border crossing by using process accelerators and self-service systems. Facilitation is dependent on the data registered in the system. A shorter data retention period would reduce the group of travellers that can benefit from such facilitation and thereby undermine the stated objective of EES to facilitate border crossing.

For non-EU family members of EU citizens who fall within the scope of the present Regulation, each entry/exit record shall be kept for a maximum period of one year after the last exit. Their individual file should be kept for five years so as to enable the family member to benefit from the facilitation for border crossing.

For overstayers not yet found at the end of the data retention period, following a national decision, an alert based on the EES data can be created in the Schengen Information System, based upon a national decision, before deletion of the EES data.

**The facilitation of border crossings:** the approach for facilitation is based on the implementation of self-service systems and e-gates, which will allow third country nationals to initiate the procedure for border clearance, to be completed by providing additional information to the border guard on request. The use of these accelerators (introduced in the proposal amending the Schengen Borders Code) is optional for Member States, open to most travellers and does not require the development of any new system.

In addition there will be a harmonised legal basis (again introduced in the amendments to the Schengen Borders Code) for the establishment of national Registered Travellers Programmes by Member States, on a voluntary basis.



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**Law enforcement access:** from the start of operations, Member States' law enforcement authorities and Europol will have access to the EES, under strictly defined conditions. The EES will contain reliable data on entry and exit dates of third country nationals falling within the scope of the EES that can be of decisive importance in individual law enforcement files, to which access should be given in accordance with the purpose of the instrument and with respect for data protection rules.

The access to VIS data for law enforcement purposes has already proven its usefulness. Member States have reported cases of people who died violently and whose identification was only possible through accessing the VIS. Other cases reported are related to human trafficking, terrorism or drug trafficking for which the access to VIS data allowed the investigators to make substantial progress.

**The costs:** in the 2013 proposals, 1.1 billion EUR was set aside as an indicative amount for the development of an EES and an RTP. For the revised proposal, based on the preferred option of a single EES system including the law enforcement access, the amount needed has been estimated at EUR 480 million.

This revised proposal for a Regulation establishing an EES constitutes the core instrument of the legal framework of the EES. It also contains consequential amendments to existing EU legislation (i.e. to Regulation (EU) No 1077/2011<sup>10</sup>, to Regulation (EC) No 767/2008<sup>11</sup> and to the Convention implementing the Schengen Agreement). A complementary proposal to amend the Schengen Borders Code as regards the use of the system as part of the border management process is presented in parallel with this proposal.

<b>PART III - OPINION OF THE AUTHOR MEMBER OF PARLIAMENT</b>
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Personal data protection does not seem to be guaranteed and access thereto is not clearly defined.

It should also be noted that data interconnection seem excessive, allowing use in terms which require greater oversight.

<b>PART IV – CONCLUSIONS</b>
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1. Under the provisions of Article 7(2) of Law No 43/2006 of 25 August 2006, amended by Law No 21/2012 of 17 May 2012 on the '*Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union*', the European Affairs Committee sent the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees a report on COM (2016) 194 final - Proposal for a Regulation

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<sup>10</sup> Regulation of the European Parliament and of the Council (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

<sup>11</sup> Regulation of the European Parliament and of the Council (EC) No 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation)



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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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011.

2. Given the nature of the matter in question and the importance it has both for Portugal and the European Union, close monitoring of future developments is proposed with regard to measures relating to this initiative.
3. This initiative respects the principles of subsidiarity and proportionality.
4. The Foreign Affairs and Portuguese Communities Committee thus concludes the appraisal of this initiative and in accordance with Law No 43/2006 of 25 August 2006 this opinion shall be sent for due purposes to the European Affairs Committee.

Palácio de S. Bento, 31 May 2016

The Author, Member of Parliament  
(Illegible signature)

(Paula Teixeira da Cruz)

The President of the Committee  
(Illegible signature)

(Sérgio Sousa Pinto)



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Report  
COM (2016) 196 final

Author:  
Paula Teixeira da Cruz

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Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 2016/399 as regards the use of the Entry/Exit System.



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**PART I – INTRODUCTORY NOTE**

Under the provisions of Article 7(2) of Law No 43/2006 of 25 August 2006, amended by Law No 21/2012 of 17 May 2012 on the *'Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union'*, the European Affairs Committee sent to the Foreign Affairs and Portuguese Communities Committee COM (2016) 196 final – **'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 2016/399 as regards the use of the Entry/Exit System'**, for purposes of analysis and issue of this report.

**PART II - RECITALS**

**1. Context of the Proposal**

As can be seen in the European initiative under analysis herein, this proposal seeks to amend Regulation of the European Parliament and of the Council amending Regulation (EU) No 2016/399 of 9 March 2016, establishing the Union code on border crossings (Schengen Border Code)<sup>1</sup>. The amendments are required in order to create and Entry/Exit System (EES), the legislative proposal for which is submitted simultaneously.

It is important to note that in February 2013, the Commission submitted a package of measures on smart borders which consisted of three proposals:

- 1) a proposal for 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 entering the Schengen area;
- 2) a proposal for 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 proposal for a Regulation amending the Schengen Borders Code, in order to take into account the existence of the EES and RTP<sup>2</sup>.

The Commission then decided to revise its 2013 proposal for a Regulation for the establishment of an Entry/Exit System (EES); revise its 2013 proposal for Regulation amending the Schengen Borders Code to integrate the technical changes resulting from the new proposal for a

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<sup>1</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), (Codified version) OJ L77 of 23.3.2016, p1,

<sup>2</sup> Respectively, COM(2013) 95 FINAL, COM(2013) 97 FINAL and COM (2013) 96 FINAL



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Regulation establishing the Entry/Exit System (EES) and withdraw its 2013 proposal for a Regulation for a Registered Traveller Programme (RTP).

This proposal therefore replaces the previous 2013 proposal<sup>3</sup> and includes the technical changes made to the Schengen Border Code arising from the new proposal for a Regulation to establish the Entry/Exit System (EES), particularly the registration in the EES of entry refusals for third-country nationals, new items on alternative procedures in the event of EES breakdown and interoperability between the EES and the Visa Information System (VIS). This new proposal takes into account the results of European Council and Parliament negotiations.

## **2 Legal Basis, subsidiarity and proportionality**

The initiative under analysis falls within the scope of Article 77 (2) (b) of the Treaty on the Functioning of the European Union, as the proposal lays down provisions on border checks of persons crossing the external border.

This proposal amends Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), which is the codified version of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006, which was based on the equivalent provisions of the Treaty establishing the European Community, i.e. Articles 62(1) and (2)(a).

### **Subsidiarity principle**

As noted in the initiative, Article 77 empowers the Union to develop a policy with a view to 'ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders' and 'carrying out checks on persons and efficient monitoring of the crossing of external borders'. Therefore, with regard to the subsidiarity principle, this proposal respects the limits laid down in these provisions. The objective of this proposal is to make the necessary amendments to the Schengen Borders Code for the establishment of an EES. This objective cannot be achieved by the Member States acting alone as only the Union may amend a legislative act of the Union (Schengen Borders Code).

### **Proportionality principle**

In accordance with the text of the initiative under analysis, Article 5(4) of the Treaty on the European Union states that action by the Union shall not go beyond what is necessary to achieve the objectives of the Treaty. The form chosen for this EU action must enable the proposal to achieve its objective and be implemented as effectively as possible.

Establishment of the Schengen Borders Code in 2006 had to be done in the form of a regulation so as to ensure that it was applied uniformly in all Member States implementing the Schengen acquis. As the proposed initiative – the amendment of the Schengen Borders Code –

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<sup>3</sup> COM(2013)96 FINAL



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constitutes an amendment to an existing regulation, this may only be achieved through a regulation. With respect to the content, this initiative is limited to amending the existing regulation and is based on the strategic guidelines therein. The proposal therefore respects the proportionality principle. The question relates to the application of the regime.

### **3. Analysis of the Initiative**

The main amendments proposed refer to the following points:

- The introduction of additional definitions to the EES, self-service systems, e-gates and to Automatic Border Control systems (ABC) (Article 2).
- Third-country nationals for whom data shall be entered into the EES and derogations thereof (Article 6a);
- Authenticity check of the chip in travel documents containing an electronic storage medium (Article 8(2))<sup>4</sup>;
- On entry and exit in the case of third country nationals, verification of the validity of the travel document by consulting the relevant databases and, in particular, the SIS; the Interpol database on stolen and lost travel documents; and national databases containing information on stolen, misappropriated, lost and invalidated travel documents. If their travel document contains a facial image recorded in the chip, verification of the recorded facial image, except for third country national whose entry or exit is subject to a registration in the EES (Articles 8(3)(a)(i) and 8(3)(g)(i));
- On entry, for third country nationals, authenticity check of the chip data in residence permits containing an electronic storage medium and verification of the validity of the residence permits and long stay visas in SIS and other relevant databases (Article 8(3)(a)(ii));
- On entry and exit, verification of the identity and/ or identification of a third country national admitted for a short stay{or on the basis of a touring visa} by consulting the EES and, where applicable, the VIS (Articles 8(3)(a)(iii) and 8(3)(g)(iv));
- Verification on entry and exit, by consulting the EES, that a third country national has not already exceeded the maximum duration of authorised stay in the territory of the Member States and, verification at entry, by consulting the EES, that third country nationals holding a single or double entry visa have respected the maximum number of authorised entries (Articles 8(3)(a)(iii), 8(3)(g)(v) and 8(3)(h)(ii));
- For visa holders [or persons holding a touring visa], on entry, verification of the authenticity, territorial and temporal validity and valid status of the visa (touring visa) and, if applicable, of the identity of the holder of the visa, by consulting the Visa Information System (VIS) (Article 8(3)(b));
- Possibility to use the EES for identification purposes at the external borders (Article 8(3)(i))

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<sup>4</sup> Should Article 8(2) only apply to persons benefiting from free movement under Union law, in accordance with proposal COM(2015) 670 final, should verification be expressly provided for in Article 8(3) and apply to third country nationals.





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- Information to the traveller on the maximum number of days of the authorised stay, having regard to the results of the consultation of the EES (Article 8(9));
- The use of automated border control systems:
  - for EU/EEA/CH citizens and third country nationals who hold a residence card (Article 8(a));
  - for third country nationals who hold a residence permit (Articles 8b);
- Use of self-service systems and e-gates for persons whose border crossing is subject to a registration in the EES (Articles 8(c) and 8(d));
- Introduction of national facilitation programmes that can be established by Member States on a voluntary basis (Article 8(e));
- Obligation of entering data into the EES even in the event border checks are relaxed (Article 9(3));
- Fall-back procedures to be followed in case of technical impossibility to enter data in the Central System of the EES or in case of failure of the Central System of the EES (Article 9(3)(a));
- Indications/pictogram for ABC systems, self-service systems and e-gates (Article 10(3)(a));
- Deletion of the obligation to systematically stamp on entry and exit the travel documents of third country nationals admitted for a short stay. Where expressly provided under its national legislation, possibility for a Member State to stamp on entry and exit the travel documents of third country nationals holding a residence permit issued by that same Member State (Article 11);
- Presumption of an irregular stay in the absence of the appropriate records in the EES and possibility of rebuttal (Article 12);
- Transitional period of six months after the EES has started operations and transitional measures to cover those cases where a third country national whose border crossing is subject to a registration in the EES has entered the territory of the Member States and has not yet exited it before the entry into operations of the EES (Article 12(a));
- Registration in the EES of data on third country nationals whose entry for a short stay (or on the basis of a touring visa) has been refused (Article 14(2));
- Change to Annexes III, IV and V;
- Deletion of Annex VIII.



**PORTUGUESE PARLIAMENT**  
FOREIGN AFFAIRS AND PORTUGUESE COMMUNITIES COMMITTEE

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PART III - OPINION OF THE AUTHOR MEMBER OF PARLIAMENT

The author would like to note that this proposal may jeopardise the application of the proportionality principle and that the presumption set out in Article 12 creates delicate problems of proof, especially taking into account that rebuttal may require the provision of documents which in general travellers do not carry with them.

PART IV - CONCLUSIONS

1. Under the provisions of Article 7(2) of Law No 43/2006 of 25 August 2006, amended by Law No 21/2012 of 17 May 2012 on the *'Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union'*, the European Affairs Committee sent the Foreign Affairs and Portuguese Communities Committee a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 2016/399 as regards the use of an Entry/Exit System.
2. Given the nature of the matter in question and the importance it has both for Portugal and the European Union, close monitoring of future developments is proposed with regard to measures relating to this initiative.
3. This initiative respects the principles of subsidiarity and proportionality. With regard to proportionality, of particular importance is its application, and as such, this cannot be wholly ensured.
4. The Foreign Affairs and Portuguese Communities Committee thus concludes the appraisal of this initiative and in accordance with Law No 43/2006 of 25 August 2006 this opinion shall be sent for due purposes to the European Affairs Committee.

Palácio de S. Bento, 31 May 2016

The Author, Member of Parliament  
(Illegible signature)

(Paula Teixeira da Cruz)

The President of the Committee  
(Illegible signature)

(Sérgio Sousa Pinto)



**PORTUGUESE PARLIAMENT  
NATIONAL DEFENCE COMMITTEE**

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**PORTUGUESE COMMUNIST PARTY  
PARLIAMENTARY GROUP  
VOTING DECLARATION  
RELATING TO OPINIONS ON:**

**COM (2016) 194 Final - Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011.**

**COM (2016) 196 Final - Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System.**

**COM (2016) 290 Final – Proposal for a Regulation of the European Parliament and of The Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement**

The Portuguese Communist Party (PCP) does not agree with any of the assumptions or content of the different proposals. Under the guise of fighting terrorism and taking advantage of the legitimate feeling of insecurity caused by recent attacks in Europe, a PNR Directive has been approved, an identification record of passengers, which had already been rejected by the European Parliament in 2013.

Under the pretext of ‘fighting terrorism’, the rapid implementation of a system is advocated as a means of preventing and avoiding terrorist attacks.

The proposal provides for the creation of passenger profiles which allow potential suspects of illegal acts to be identified through the requirement by Member State airlines to provide data, for a period of five years. In practice, any citizen, European or otherwise, travelling within the EU is immediately considered to be a suspect, allowing profiles to be created on trade union members, political activists, etc., far beyond the fight against terrorism.

Furthermore, the measure contains aspects of concern as they constitute limitations on freedom and essential guarantees.

Those who proclaim themselves to be defenders of freedom are the first to plan the stifling of rights, freedoms and personal guarantees.

We condemn terrorism, all forms of terrorism, including State terrorism. However, the response to terrorism is not achieved by more militarism, more interference from the EU and USA and renewed and reinforced security measures but rather by fighting the deeper causes of terrorism – political, economic and social – and by defending the values of freedom, peace, democracy, sovereignty and independence of states and solidarity between peoples.



**PORTUGUESE PARLIAMENT  
NATIONAL DEFENCE COMMITTEE**

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Palácio de São Bento, 7 June 2016

**The Member of Parliament  
Carla Cruz**



**PORTUGUESE PARLIAMENT  
NATIONAL DEFENCE COMMITTEE**

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**Report  
COM (2016) 194 final**

**Rapporteur:  
Marco António Costa**

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**COM (2016) Final - Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011 (2016).**



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**PORTUGUESE PARLIAMENT  
NATIONAL DEFENCE COMMITTEE**

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**PART I – INTRODUCTORY NOTE**

Under the provisions of Law No 43/2006 of 25 August 2006 on the *'Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union'*, the European Affairs Committee sent the National Defence Committee a 'proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011 (2016)', accompanied by working documents (SWD (2016) 114 final), (SWD (2016) 115 final) and (SWD (2016) 116 final) for analysis and issue of this report.

**PART II – RECITALS**

**1. Explanatory Statement**

1. COM (2016) 194 final is a communication from the European Parliament and Council on Protocol (No 2) of the European Union Treaty and the Treaty on the Functioning of the European Union concerning the principles of subsidiarity and proportionality (2016).
2. The Commission proposal presents a prospective analysis of EU policy with regard to immigration and international protection based on the developments of 2016. The increase in the flow of travellers at EU external borders is used as the basis for a sustained immigration policy achieved through more accurate information on travellers.
3. Several points are set out which, according to the proposal, can be satisfied by establishing an Entry/Exit System in the EU: Address border check delays and improve quality of border checks for third country nationals; ensure systematic and reliable identification of 'overstayers'; reinforce internal security and the fight against terrorism and serious crime.
4. According to the proposal, the introduction of the EES will support the reliable identification of terrorists, criminals as well as of suspects and victims. It will also provide a record of travel histories of third country nationals including crime suspects, thus complementing the information available in the Schengen Information System.
5. The proposal further sets out the need to implement a common regime in order to establish harmonised rules for all Member States on the records of refusals of entry, cross border movements and monitoring of authorised short stays for the Schengen area as a whole. The aim is to revise a package of three legislative proposals submitted in 2013 on smart borders in order to modernise the management of external borders.
6. During the first examination of the package in 2014, the co-legislators voiced technical, financial and operational concerns on certain aspects of the design of the systems. However the preferred policy options proposed in 2013 were not questioned.
7. In reply to these concerns, the Commission initiated a 'proof of concept' exercise, the conclusions of which, and further to discussions with co-legislators and stakeholders,



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resulted in an impact assessment and the introduction of amendments to the Regulation in question.

8. The main proposed amendments to the package in relation to 2013 on smart borders concern:
  - The architecture of the system: only one system is proposed, the Entry/Exit System. The connection of the national border infrastructures to the EES central system will be done through a National Uniform Interface which will be identical for all Member States, and will allow the use of the existing national Entry Exit Systems.
  - Interoperability is ensured between the EES and VIS: in order to achieve more efficiency and rapidity at border checks. To this effect, a connection will be established between the central systems of the EES and the VIS and direct access between them will be regulated for specific purposes.
  - Biometric identifiers: the proposal presented suggests a combination of four fingerprints and the facial image as biometric identifiers. This will allow more accurate identification and greater speed in border checks. It will also allow wider use of self-service systems at border crossings.
  - Personal data protection: there is a significant reduction in the volume of personal data recorded in EES. The right of access, rectification and deletion of personal data are clearly defined and safeguarded. The European Data Protection Supervisor and the national data protection authorities will be in charge of supervision for data processing.
  - Data retention period: In accordance with the proposal, the retention time for stored data is five years when the 2013 proposal provided for systematic deletion of the EES record after 181 days. The justification relates to the verification by border guards of the risk analysis required by the Schengen Borders Code, while also facilitating border crossings.
  - The facilitation of border crossings: self-service systems and e-gates will be implemented allowing third country nationals to initiate the procedure for border clearance, to be completed by providing additional information to the border guard.
  - Law enforcement access: both Member States' law enforcement authorities and Europol will have access to the EES. The EES will contain reliable data on entry and exit dates of third country nationals falling within the scope of the application of the EES.
  - The costs: in the 2013 proposals, 1.1 billion EUR was set aside as an indicative amount for development while for the new proposal costs are estimated at EUR 480 million.

## 2. Principles of subsidiarity and proportionality

After analysis of the proposal for a Regulation of the European Parliament and of the Council establishing the EES and considering the need to assess its compliance with the principles of subsidiarity and proportionality, the following conclusions have been reached:

1 – The European Union has the capability to develop policies with a view to ensuring:

- a) The checking of persons and effective surveillance of the crossing of external





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borders (Article 77(1)(b) of the TEU);

- b) Progressively introduce an integrated management system for external borders (Article 77(1)(b)(c) of the TEU).

2 - The European Parliament and Council have the express powers, in accordance with the ordinary legislative process, to adopt measures on:

- a) The checks to which persons crossing external borders are subject (Article 77(2)(b) of the TEU);
- b) Any aspect required for the progressive introduction of a management system for external borders (Article 77(1)(b)(d) of the TEU);

3 – The Regulation proposes to create a system to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of EU Member States.

4 – This Regulation is based on the need to fight terrorism, technological obsolescence and the poor reliability of the mechanisms for issuing visas and entry permits, still based on mechanical procedures liable to incorrect readings or forgery.

5 – Considering the configuration of the Schengen Area and the abolition of internal borders within the European Union – see the provisions of Article 77(1)(a) and the corresponding legislative powers attributed to the European Parliament and Council by Article 77(2)(e) - it can be stated that these bodies of the European Union should ensure that security is not affected by the free movement of third country nationals crossing the external border of a Member State.

6 – The setting up of a European record of this nature is suitable for the achievement of EU policies and the European Parliament and Commission are competent in this regard.

7 – The right that all persons have to personal data protection should also be taken into account (Article 16(1) of the TEU), and it is the responsibility of the European Parliament and the Council, in accordance with the ordinary legislative process, to establish rules to protect people in the management of such data by Community bodies and Member States (Article 16(2) of the TEU).

8 – However, it is noted that competence for such matters is shared between the European Union and the Member States (Article 4(1) and (2)(j) and Articles 3 and 6 *a contrario sensu*, all of the TEU).

9 – The fact that this involves shared competence places particular focus on the subsidiarity principle.



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10 - The proposal for a Regulation completes the creation of a European record, fed by information supplied by Member state authorities, which they can then consult, under specific conditions. It is clear that the creation of such a system cannot be achieved by Member States acting alone and is only possible on an EU level, and as such, the proposed Regulation does not breach the subsidiarity principle.

11 – With respect to Article 5 of the TEU, laying down that Union action shall not exceed that necessary to achieve the aims of the treaties, the initiative notes that it is a new development of the Schengen acquis seeking to ensure the uniform implementation of common rules at external borders in all Member States which have abolished internal border checks. It takes the form of a regulation so as to ensure uniform implementation in throughout the Union.

12 – Furthermore, all rights to personal data privacy and the fundamental rights of travellers are ensured.

13 – Finally, the proposal does not exceed that strictly required with regard to European action to achieve the defined aims and further standardisation processes are not required to ensure the operation of the system. It is also proportionate in terms of costs, taking into consideration the advantages provided for common external border management. As such, it respects the proportionality principle.

### **PART III - OPINION OF THE RAPPORTEUR MEMBER OF PARLIAMENT**

The rapporteur is not required to give an opinion on the matter in question.

### **PART IV - CONCLUSIONS**

In light of the above, the National Defence Committee has decided the following:

- 1 - Acknowledge COM (2016) 194 final - Proposal for 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 and determining the conditions for access to the EES for law enforcement purposes amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011 (2016), accompanied by documents (SWD (2016) 114 final), (SWD (2016) 115 final) and (SWD (2016) 116 final).
- 2 - Verify compliance with the principles of subsidiarity and proportionality.
- 3 - The appraisal of this initiative is thus concluded and in accordance with Law No 43/2006 of 25 August 2006, this opinion shall be sent for due purposes to the European Affairs Committee.



**PORTUGUESE PARLIAMENT  
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Palácio de S. Bento, 31 May 2016

The President of the Committee

(Illegible signature)

*(Marco António Costa)*



**PORTUGUESE PARLIAMENT  
NATIONAL DEFENCE COMMITTEE**

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Report  
**COM (2016) 196 final**

**Author:** Member of Parliament  
Vitalino Canas

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**PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) 2016/399 as regards the use of an Entry/ Exit System.**



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### **PART I – INTRODUCTORY NOTE**

Under the provisions of Article 7(2) of Law No 43/2006 of 25 August 2006, in the wording given by Law No 21/2012 of 17 May 2012 on the 'Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union', on 6 May 2106, the European Affairs Committee sent the National Defence Committee a 'proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 2016/399 as regards the use of an Entry/Exit System, for them to analyse and issue this report.

### **PART II – RECITALS**

#### **1. Explanatory Statement**

Regulation (EU) No 2016/399 of 9 March 2016, establishing the Union code on border crossings (Schengen Border Code)<sup>1</sup> lays down the conditions, criteria and detailed rules on the crossing of external borders of Member States.

The initiative states that border guards may carry out checks on third country nationals in accordance with Regulation (EU) 2016/399, including verification of the identity and/or identification of the third country national as well as verification that a third country national has not already exceeded the maximum duration of authorised stay in the territory of the Member States and, verification at entry, by consulting the EES, that third country nationals holding a single or double entry visa have respected the maximum number of authorised entries.

This proposal seeks to amend Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), and that these changes are required with a view to creating an Entry/ Exit System (EES).

According to the working document accompanying the initiative under analysis, it is necessary to change the Regulation due to: a) the growing number of border crossings in the Schengen area (it is estimated that by 2025, around 300 million third country nations will be crossing these borders) causing delays in border checks; b) the fact that the current control of authorised period of stay of Third Country Nationals is unreliable, slow and not systematically applied (complexity and slowness of current requirement to stamp travel documents); c) the current border control process does not allow overstayers to be identified systematically, easily and in a reliable manner. This is caused by a lack of reliable information on irregular immigration and problems relating to return (lack of means and modern technologies); and d) the need to continue the fight against international criminality, terrorism and other security threats.

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<sup>1</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (Codification) OJ L 77, 23.3.2016, p. 1.



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In February 2013, the Commission submitted a package of measures on smart borders. However, the Commission decided to revise its 2013 proposal for a Regulation for the establishment of an Entry/Exit System (EES), revise its 2013 proposal for Regulation amending the Schengen Borders Code to integrate the technical changes resulting from the new proposal for a Regulation establishing an Entry/Exit System (EES) and withdraw its 2013 proposal for a Regulation for a Registered Traveller Programme (RTP).

Therefore, this proposal replaces the 2013 proposal and includes the technical changes made to the Schengen Border Code arising from the new proposal for a regulation to establish the Entry/Exit System (EES), particularly the registration in the EES of entry refusals for third-country nationals, new items on alternative procedures in the event of EES breakdown and interoperability between the EES and the Visa Information System (VIS), taking into consideration the results of European Parliament and Council negotiations.

The initiative notes that because the EES means the abolition of stamping, the establishment of this system opens the possibility to introduce an automation of border control operations for third country nationals admitted for a short stay (and eventually, on the basis of a touring visa)<sup>2</sup>. The conditions to use the automated border control systems nevertheless differ depending on the category of travellers (EU/EEA/CH citizens, third country nationals holding a residence card, third country nationals holding a residence permit or a long-stay visa or third country nationals admitted for short stay respectively) and each procedure shall be regulated separately.

During a transitional period of six months after entry into operation, border guards will have to take into account stays in the territory of the Member States within the six months preceding the entry or exit of persons by checking stamps in travel documents and entry/exit data recorded in the EES. Such course of action will enable verification of whether a person has been admitted for a short stay in the territory of the Member States in the six months preceding the entry into operation of the EES. Furthermore, it is necessary to provide specific provisions for persons who have entered the territory of the Member States and have not yet exited before the start of system operations. In these situations, the last entry shall also be recorded in the EES when they leave the territory of the Member States.

Taking into account the different situations in the Member States and at different border crossing points within the Member States concerning the number of third country nationals crossing the borders, Member States should be able to decide whether and to what extent to make use of technologies such as automated border control systems, self-service kiosks and e-gates. When using such technologies, it should be ensured that entry and exit checks are carried out in a harmonised way at the external borders and that an appropriate level of security is ensured. In addition, the tasks and roles of the border guards when making use of such technologies need to be defined.

The document further underlines that '... Member States should also be able to establish national facilitation programmes on a voluntary basis to allow pre-vetted third country nationals

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<sup>2</sup> Should a touring visa be established in accordance with the Proposal submitted by the Commission for a Regulation of the European parliament and of the Council establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 562/2006 and (EC) No 767/2008 [COM(2014) 163 final]



## PORTUGUESE PARLIAMENT NATIONAL DEFENCE COMMITTEE

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to benefit at entry from derogations to the thorough checks. When using such national facilitation programmes, it should be ensured that they are established in a harmonised way and that the appropriate level of security is guaranteed.'

With regard to the consequences of the various protocols annexed to the Treaties and of the association agreements concluded with third countries, the document states that the proposal under analysis builds on the Schengen acquis in that it concerns the crossing of external borders. The consequences for the various protocols and association agreements therefore have to be considered. Consequently, with regard to Denmark, in accordance with Articles 1 and 2 of Protocol No 2 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen acquis, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Regulation whether it will implement it in its national law. 'With respect to Ireland, the proposal states that this Regulation constitutes a development of the provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC<sup>3</sup>; Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.' With respect to the United Kingdom, the proposal notes that 'this Regulation constitutes a development of the provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC<sup>4</sup>, the United Kingdom is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

As regards Iceland and Norway, the proposal states that 'this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis<sup>5</sup> which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC<sup>6</sup>.'

As regards Switzerland, the document states that '...this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis<sup>7</sup> which fall within the area referred to in Article 1, point A of Council Decision 1999/437/EC<sup>8</sup> read in conjunction with Article 3 of Council Decision 2008/146/EC.' With regard to Liechtenstein, '...this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of

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<sup>3</sup> Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20).

<sup>4</sup> Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ L 131, 1.6.2000, p. 43).

<sup>5</sup> OJ L 176 of 10.7.1999, p. 36

<sup>6</sup> Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis (OJ L 176, 10.7.1999, p. 31).

<sup>7</sup> OJ L 53, 27.2.2008, p. 52

<sup>8</sup> Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis (OJ L 176, 10.7.1999, p. 31).





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the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU20.'

### 2. Legal Basis, subsidiarity and proportionality

The initiative expressly notes that Article 77(2)(b) of the Treaty on the Functioning of the European Union applies as the proposal establishes provisions for border checks on persons crossing external borders.

The proposal also amends Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), which is the codified version of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006, which was based on the equivalent provisions of the Treaty establishing the European Community, i.e. Articles 62(1) and (2)(a).

According to the initiative under analysis, Article 77 '...empowers the Union to develop a policy with a view to 'ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders' and 'carrying out checks on persons and efficient monitoring of the crossing of external borders'. As such, the proposal respects the limits laid down by these provisions.

The proposal seeks to make the necessary amendments to the Schengen Borders Code to establish the EES and this aim may not be achieved by Member States acting alone and only the Union may amend Union legislation (the Schengen Borders Code). The proposal thus respects the subsidiarity principle.

Article 5(4) of the Treaty on the European Union states that the content and form of action by the Union shall not go beyond what is necessary to achieve the objectives of the Treaty. The initiative notes that the establishing of the Schengen Borders Code in 2006 was required to be in the form of a regulation so as to ensure that it was applied uniformly in all Member States implementing the Schengen acquis. It further adds that the proposed initiative – the amendment of the Schengen Borders Code – constitutes an amendment to an existing regulation which may only be achieved through a regulation.

With respect to the content, this initiative is limited to improving the existing regulation and is based on the strategic guidelines therein. The proposal therefore, respects the proportionality principle.

### Analysis of the Initiative

The proposal under analysis amends the following rules:

In **Article 2: Definitions**, the following points 22, 23, 24 and 25 are added:



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Additional Definitions

**Point 22:** Definition of the new 'Entry/Exit System (EES)';

**Point 23:** Definition of the 'self-service system';

**Point 24:** Definition of 'e-gates';

**Point 25:** Definition of 'Automated Border Control system (ABC)'.

The proposal includes a new **Article 6(a): Third country nationals for which data shall be entered into the EES** providing for third country nationals admitted for a short stay [or for a stay on the basis of a touring visa] into the Schengen area being registered on the EES;

The same requirement is added for third country nationals whose entry for a short stay has been refused (or under a touring visa), providing exceptions for: 1) third country nationals holding a residence permit who are members of the family of a Union citizen, or third country nationals enjoying the right of free movement even if they are not accompanying or joining the Union citizen or a third country national enjoying the right of free movement; nationals of Andorra, Monaco and San Marino; third country nationals who are exempt from border controls or the obligation to cross external borders only at border crossing points and during the fixed opening hours; third country nationals benefitting from facilitation of border crossing and holders of a valid local border traffic permit for their border.

With regard to **Article 8: Border checks, the proposal adds to No 2** the requirement to check the authenticity of all travel documents containing an electronic storage medium (chip) using valid certificates. It further develops the provisions of **Article 8 3(a)(i)** on the requirement by border guards to verify on entry that the third country national is in possession of a document which is valid for border crossing and which has not expired. It is therefore expressly set out that the validity and authenticity of the travel document will be checked by consulting the relevant databases, (in particular the Schengen information system, the Interpol database on stolen and lost travel documents and national databases containing information on stolen, misappropriated, lost and invalidated travel documents). If the third country national holds an electronic travel document which contains a facial image recorded in the chip, the verification of the facial image recorded in the chip is foreseen. It should be noted that the proposal provides for an exception for third country nationals whose entry is subject to a registration into the EES and who hold an electronic travel document where the verification of the facial image stored in the chip of the travel document should be carried out when getting registered into the EES or when registering a new electronic passport in the EES (e.g., in case of expiry of an old passport). In addition to this verification, the travel document and biometric data of the person will be stored in the ESS and used in the verification/identification of the person at subsequent border crossings; **No 3(a)(ii)** states that the verification that the travel document is accompanied, where applicable, by the requisite visa or residence permit. Regarding residence permits, the obligation to check the authenticity of the residence permit that contains an electronic storage medium using valid certificates has been added. In addition, the validity of residence permits or long stay visas shall be verified by consulting the Schengen Information System and other relevant databases.



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With regard to **No 3(a)(iii)** which regulates the obligation to carry out a verification and/or an identification of those third country nationals whose entry or whose refusal of entry is subject to a registration in the EES using biometric identifiers. Such verification and/ or identification shall be carried out in accordance with Article 21 of Regulation establishing the EES.

A new subparagraph is provided in **No 3(a) – (iii)(a)** the obligation to check the stamps in the passport to verify whether the third country national entering the Schengen area has not yet exceeded the maximum duration of authorised stay has been replaced by the requirement to consult the EES. In the same vein, because of the abolition of stamping, the EES will also need to be consulted to check whether third country nationals holding a single or double entry visa have respected the maximum number of authorised entries.

**Paragraph 3(b)** refers to the use made of VIS for verification at external borders. Because of the interoperability between the EES and the VIS and the possibility to use automated border control means at external borders, the VIS should provide information to the border guards not only on the authenticity but also on the territorial and temporal validity and on the status of the visa (or the touring visa) via a hit/no hit answer. In addition, in accordance with the EES proposal, this paragraph reflects the fact that the identity of visa holders will not be systematically verified against the VIS. In certain cases, the identity of visa holders will be verified against the EES, using their facial image.

**Paragraph 3(g)(i)** concerning the obligation for border guards to verify at exit that the third country national is in possession of a document valid for crossing the border is developed. Indeed, as regards the verification of the validity of the travel document, a consultation of relevant databases (and in particular, the Schengen Information System; the Interpol database on stolen and lost travel documents; and national databases containing information on stolen, misappropriated, lost and invalidated travel documents) is expressly foreseen. In addition, if the third country national holds an electronic travel document which contains a facial image recorded in the chip, the verification of the facial image recorded in the chip is foreseen. An exception is foreseen for third country nationals whose entry is subject to a registration into the EES and who hold an electronic travel document. Indeed, for this category of persons, the verification of the facial image stored in the chip of the travel document should be carried out when getting registered into the EES or when registering a new electronic passport in the EES (e.g., in case of expiry of an old passport). Further to that verification, the travel document and the biometrics of the person will be stored in the EES and will be used for the verification/identification of the person at subsequent border crossings.

The proposal provides for a new **3(g)(iv)**, which regulates the obligation to carry out a verification and/or an identification of those third country nationals whose exit is subject to a registration in the EES by using biometric identifiers. Such verification and/ or identification shall be carried out in accordance with Article 21 of Regulation establishing the EES. As a result, for visa holders already registered into the EES, their biometrics can be verified against the EES or, where applicable, against the VIS.



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It also amends **No 3(g)(v)**, where the obligation to check the stamps in the passport to verify whether a third country national leaving the Schengen area has not yet exceeded the maximum duration of authorised stay has been replaced by the requirement to consult the EES.

Paragraph **(3)(h)(ii)**, which considered optional to check whether a third country national leaving the Schengen area had exceeded the maximum duration of authorised stay - is deleted. Indeed, with the EES this verification becomes compulsory.

The proposals adapts **No 3(i)**, to foresee the possibility to also use the EES in addition to the VIS to identify any person who may not fulfil, or who may no longer fulfil, the conditions for entry, stay or residence on the territory of the Member States.

The proposal **adds (9) to Article 8**, which foresees the obligation for border guards to inform third country nationals about the maximum number of days of the authorized stay within the Schengen area as set out in the EES and, if applicable, in the VIS.

The proposal also introduces new articles, **Nos 8(a), 8(b), 8(c) and 8(d)** so as to foresee a harmonised automation of border checks for different categories of travellers. The entry and exit conditions for the travellers concerned as such remain unchanged.

With regard to **Article 9, Relaxation of border checks**, the existing text is adapted to the establishment of the EES. The obligation to always enter the data of the traveller into the EES while entering or exiting the Schengen area is highlighted. Even in situations of relaxation of border check procedures the registration in the EES shall be carried out.

The new Paragraph **3(a)** foresees the fall-back solutions in case of technical impossibility to enter data in the Central System of the EES or in case of failure of the Central System of the EES, which includes the storage of data in the National Uniform Interface, where possible, or otherwise the local storage of data. Where possible, the consultation of the Visa Information System for the verification of the identity of visa holders shall be ensured.

A new Paragraph **3(a) is added Article 10**, so as to consider separate lanes and information on signs to take account of the introduction of ABC systems, self-service systems and e-gates. In order to have a harmonised approach, Member States shall use in those situations the signs contained in Annex III Part D.

The new **Article 11, Stamping of the travel document**, deletes the systematic stamp on entry and exit travel documents of third country nationals admitted for a short stay.

However, where expressly provided under national legislation, the new Article 11 foresees the possibility, for each Member State to stamp on entry and exit the travel document of those third country nationals holding a residence permit issued by that same Member State. The practical arrangements of that stamp are set in Annex IV.



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The proposal adapts the provisions of **Article 12, Presumption as regards fulfilment of conditions for duration of stay**, where stamping will be replaced by an electronic record in the EES.

The proposal amends the provisions of **Article 12(a): Transitional period and measures**, which establishes a transitional period of six months after the EES has started operations. During this transitional period, border guards will have to take into account the stamps affixed into the travel documents as well as the data recorded into the EES (No 1). In cases where a person has entered the territory of the Member States prior to the start of operations of the EES and has not yet exited it before the entry into operations of the system. In that case, when the person exits, the individual file of the person will be recorded into the EES and the date of that last entry will be entered in the entry/exit record so as to have a "completed" entry / exit record (No 2).

With regard to **Article 14: Refusal of entry, No 2**, now foresees that data on third country nationals whose entry for a short stay [or for a stay on the basis of a touring visa] has been refused shall be registered in the EES and in **No 3**, the correction of the data inserted into the EES is expressly foreseen where an appeal concludes that a decision to refuse entry was ill-founded.

The proposal alters **Annex III: Model signs indicating lanes at border crossing points**, where the signs contained in annex III are completed by adding new signs for the use of ABC lanes.

In **Annex 4: Affixing stamps**, the existing text is adapted to the establishment of the EES. With the new system, it is laid down that: 1) the stamps to be affixed by all Member States in cases of refusals of entry, 2) when expressly provided under national legislation, the stamps that a Member State could affix on entry and exit on the travel document of those third country nationals holding a residence permit issued by that same Member State.

In **Annex V, Part A: Procedures for refusing entry at the border**, the existing text is adapted to the establishment of the EES, modifying **No(1)(b)** and now concerns those categories of persons whose data on refusal shall be registered into the EES. The obligation to affix an entry stamp on the passport by the border guard is maintained. Paragraph **1(d)** is also modified and now concerns those categories of persons whose data on refusal shall not be registered into the EES and that require an entry stamp on the passport as well as a record of the refusal of entry in a national register.

**Annex VIII** is deleted

It should be noted that the amended proposal has no impact on the European Union budget.



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**PART III - OPINION OF THE AUTHOR MEMBER OF PARLIAMENT**

The author is not required to give an opinion on the matter in question.

**PART IV – CONCLUSIONS**

1. Under the provisions of Article 7(2) of Law No 43/2006 of 25 August 2006, amended by Law No 21/2012 of 17 May 2012 on the 'Monitoring, appraisal and pronouncement by the Portuguese Parliament as part of the construction process of the European Union', the European Affairs Committee sent the National Defence Committee a proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System.
2. This initiative respects the principles of subsidiarity and proportionality.
3. The Commission thus concludes the appraisal of this initiative and in accordance with Law No 43/2006 of 25 August 2006 this opinion shall be sent for due purposes to the European Affairs Committee.

Palácio de S. Bento, 31 May 2016

The Author, Member of Parliament  
(Illegible signature)

(Vitalino Canas)

The President of the Committee  
(Illegible signature)

(Marco António Costa)