



Committee of the Regions

CIVEX-V-042

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OPINION

Smart Borders Package

THE COMMITTEE OF THE REGIONS

- welcomes the fact that the Member States and the Commission are given joint responsibility under the new Schengen evaluation mechanism, so that the system is no longer purely intergovernmental, which could help to offset the shortcomings and build mutual trust; it likewise welcomes the fact that this is being extended to all aspects of the Schengen acquis, including the absence of controls at internal borders, so as to prevent illegal checks undermining the principle of free movement of persons;
- recognises that collection of a substantial amount of personal data, including biometric data, creates particular tension between these systems and fundamental rights, especially the rights to privacy and protection of personal data, which require strict purpose limitation for these systems and checks on their necessity and proportionality;
- notes the opinion of the European Data Protection Supervisor (EDPS), which has criticised the Smart Borders package, disputing its necessity and proportionality, as there is no reliable evidence justifying the need for new systems. In particular, the EDPS feels that the EES constitutes interference in the right to privacy; at stake is the cost-effectiveness of the system in financial terms and in relation to fundamental rights;
- regrets that the multi-level governance dimension is not taken into sufficient consideration in the EU political debates on the Schengen area, while for the subsidiarity principle to be implemented properly more systematic integration of the local and regional dimensions is required;
- calls for greater involvement of local and regional authorities and of the Committee of the Regions, to ensure a bottom-up approach in these areas, helping to ensure that the experience and concerns of local and regional authorities are taken into account in the various phases of the EU decision-making process, in particular regarding the reintroduction of internal border controls, the efficiency and added value of EU financing and the multi-level governance component of the Smart Borders package;
- notes that EU financing for external border management focuses on security, neglecting the issue of fundamental rights, and therefore calls for local and regional authorities to be given a greater role in defining the EU's budgetary priorities in the field of border management and the funding of immigration and asylum policy, ensuring that financial resources are channelled into the border infrastructure and services that most need support in this area;

Rapporteur: António Costa (PT/PES), Mayor of Lisbon

Reference documents

Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union
COM(2013) 95 final - 2013/0057 (COD)

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 as regards the use of the Entry/Exit System (EES) and the Registered Traveller Programme (RTP)
COM(2013) 96 final - 2013/0060 (COD)

Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme
COM(2013) 97 final - 2013/0059 (COD)

Opinion of the Committee of the Regions – Smart Borders Package

I. GENERAL RECOMMENDATIONS

THE COMMITTEE OF THE REGIONS

General comments

1. welcomes the recent adoption of the Schengen Governance package, comprising the new evaluation mechanism for verifying the application of the Schengen acquis¹ and the common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances²;
2. acknowledges that the proper functioning of the Schengen area is dependent on mutual trust and Member States' ability to carry out surveillance of external borders in line with the common rules;
3. welcomes the fact that the Member States and the Commission are given joint responsibility under the new Schengen evaluation mechanism, so that the system is no longer purely intergovernmental, which could help to offset the shortcomings and build mutual trust; it likewise welcomes the fact that this is being extended to all aspects of the Schengen acquis, including the absence of controls at internal borders, so as to prevent illegal checks undermining the principle of free movement of persons;
4. underlines that any reintroduction of checks at internal borders must be subject to a coordination at EU level in order to prevent unilateral decisions which could jeopardise totally free movement of persons in an area without internal borders;
5. considers that migration flows at external borders do not in themselves constitute a threat to public policy or internal security that could justify the reintroduction of internal border checks;
6. points out that, in the event of pressure building up at a Member State's external border, the principle of European solidarity requires all European and national technical and financial support measures to be brought to bear, along with assistance from EU bodies such as FRONTEX and EASO;
7. welcomes measures to ensure stricter border control , better law enforcement , contribute to the fight against terrorist offences and other serious criminal offenses and reduce illegal migration;

¹ COM(2011) 559 final.

² COM(2011) 560 final.

8. therefore considers that the temporary reintroduction of checks at internal borders in response to persistent, serious deficiencies in external border surveillance must be framed by an objective evaluation process and only be permitted as an exceptional measure taken as a last resort;
9. calls for local and regional authorities to be fully involved in identifying and evaluating persistent, serious deficiencies in external border control, in order to ensure that any reintroduction of checks at internal borders is the result of a proper assessment of the situation on the ground, based on a variety of sources of information and with input from different stakeholders;
10. recognises the importance of surveillance of the EU's external borders as a way of ensuring not just security but also mobility within the EU³;
11. welcomes the recent adoption of the European External Border Surveillance System (EUROSUR), which is a mechanism for reinforcing external border control through the sharing of operational information and cooperation between national authorities carrying out external sea and land border surveillance and with FRONTEX, stresses that the prevention of loss of lives at sea must be the key target of this mechanism in addition to its role in detecting illegal immigrants and increasing internal security by preventing cross-border crimes, such as trafficking in human beings and drug smuggling;
12. warns, however, that this system must not jeopardise protection of human rights or prevail over the right to asylum or the right to protection against *refoulement*, which are enshrined in Articles 18 and 19(2) of the Charter of Fundamental Rights⁴;
13. is concerned at the trend towards winning back discretionary powers in "Europeanised" sectors such as free movement, particularly a recent proposal by certain Member States to introduce extensive possibilities for restricting the right to free movement, which is an essential element of EU citizenship;
14. reiterates that the free movement of persons in an area without internal borders is one of the fundamental principles of the EU and one of the EU's most tangible and significant benefits for the public, which must not be jeopardised;
15. believes that it is in the overall context of the operation of the Area of Freedom, Security and Justice that the Smart Borders package should be assessed, with its proposals for regulations to: establish an Entry/Exit System (EES) to register entry and exit data of third country

³ See the Opinion of the Committee of the Regions on the Stockholm Programme – rapporteur: Anna Terrón i Cusi, [OJ C 79, 27.3.2010, point 52](#).

⁴ In this connection, see also the Opinion of the Committee of the Regions on The global approach to migration and mobility – rapporteur: Nichi Vendola.

nationals⁵; establish a registered traveller programme (RTP)⁶; and amend the Schengen Borders Code in order to allow the two systems to be implemented⁷;

II. POLITICAL RECOMMENDATIONS

Specific comments on the Smart Borders package

16. recognises the importance of new technology in ensuring efficient border management and coping with the substantial increase in the number of external border crossings while ensuring secure border surveillance, as is already the case in several Member States;
17. notes that the EES is intended to replace the current system of manual entry and exit passport stamps with the electronic registration of the time and place of entry and exit of third country nationals admitted for short stays to the Schengen area (up to three months), allowing automatic calculation of authorised stays;
18. welcomes the RTP's highly commendable aim of facilitating external border crossing for frequent, pre-vetted and pre-screened travellers who are third country nationals, by shifting to automated border control systems, facilitating entry into the European area for frequent, *bona fide* travellers;

Comments on the implications of the Smart Borders package for fundamental rights

19. expresses its concern at the creation of the EES and the possible implications for fundamental rights, especially in terms of personal data protection⁸;
20. recognises that collection of a substantial amount of personal data, including biometric data, creates particular tension between these systems and fundamental rights, especially the rights to privacy and protection of personal data, which require strict purpose limitation for these systems and checks on their necessity and proportionality;
21. stresses its support for a high level of protection of personal data, and its concern at the exponential growth of digital information on private individuals resulting from the development of information and communication technologies⁹;

5 COM(2013) 95 final.

6 COM(2013) 97 final.

7 COM(2013) 96 final.

8 Opinion of the Committee of the Regions on The Stockholm programme: Challenges and opportunities in view of a new multi-annual programme on the EU area of freedom, security and justice, [OJ C 79, 27.3.2010, point 56](#).

9 Opinion of the Committee of the Regions on The Stockholm programme: Challenges and opportunities in view of a new multi-annual programme on the EU area of freedom, security and justice, [OJ C 79, 27.3.2010, page 37](#).

22. warns that, in terms of the principle of non-discrimination and personal data protection, the proposed systems constitute grounds for serious concern in view of the implications they have for fundamental rights, particularly those of third country nationals and asylum-seekers trying to enter the EU;

Comments on the added value, necessity and proportionality of the Smart Borders package

23. believes that, as both of the Smart Borders package systems involve large-scale collection of data, including biometric data, it must be demonstrated that they are necessary, legitimate and proportionate and that their objectives cannot be achieved with less intrusive, cheaper systems;
24. notes the opinion of the European Data Protection Supervisor (EDPS), which has criticised the Smart Borders package, disputing its necessity and proportionality, as there is no reliable evidence justifying the need for new systems. In particular, the EDPS feels that the EES constitutes interference in the right to privacy; at stake is the cost-effectiveness of the system in financial terms and in relation to fundamental rights¹⁰;
25. notes that the European Parliament, the Article 29 Working Party and the majority of civil society representatives have also expressed doubts as to the necessity and added value of the EES¹¹;
26. recognises that the necessity and proportionality of establishing an EES in particular are controversial issues, as there is no irrefutable proof that they will be effective in achieving the proposed objectives of efficient border management, combating illegal immigration or stepping up the fight against serious forms of organised crime;
27. notes that the main objective of the EES is to identify third country nationals who enter the Schengen area legally, with or without a short-term visa, and stay longer than the authorised period. To this end, the authorised period of stay is calculated electronically and an alert is sent to the national authorities concerning overstayers, with a view to intercepting illegal immigrants and repatriating them;
28. believes that the EES's added value in terms of achieving this objective is not clear, as the existence of an alert regarding the illegal presence of an individual is based on the assumption that people who enter the EU with a short-term visa or without a visa are required to leave it within a maximum of three months, without taking into consideration particular

¹⁰ Opinion of the European Data Protection Supervisor of 18 July 2013, published in https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2013/13-07-18_Smart_borders_EN.pdf. See also European Data Protection Supervisor (2008), Preliminary comments on the proposal on the Smart Borders package, 3 March 2008, p. 4, published at <http://www.edps.europa.eu>. See, also, the EDPS Opinion on the Stockholm Programme, [OJ C 276, 17.11.2009, point 71](#).

¹¹ Commission Staff Working Document – Impact Assessment accompanying the document Proposal for a Regulation establishing an entry/exit system (EES), SWD(2013) 47 final, Brussels, 28.2.2013.

circumstances such as an application for asylum or the regularisation of a person's presence under national law;

29. notes that the analysis of the necessity and proportionality of the EES is even more necessary, as there is no detention for unauthorised residence. The system would only be able to detect unauthorised immigrants when they leave the Schengen area, which makes the EES "little more than an extremely expensive mechanism for gathering migration statistics"¹²;
30. notes that the EES is not able to detect immigrants who regularise their presence under asylum legislation or national immigration laws. These people run the risk of being illegally detained following an EES alert based on an automated calculation of the period of stay, which does not take into account this kind of circumstance;
31. considers that the question of the speed of checks also needs to be raised in relation to the EES, as it requires a large amount of alphanumeric and biometric data to be collected. This will increase waiting time for travellers at border checks, with a negative impact on cross-border mobility that will not be effectively offset by the RTP. The question could also arise as to whether the costs of the RTP are proportionate to the small number of people that the Commission believes will benefit from it each year (5 million - i.e. 0.7% of the total estimated number of people who cross external borders each year, which is around 700 million)¹³. The existence in some countries of frequent-traveller programmes shows that they can be implemented without an EES. Several Member States are already operating automated control systems for EU citizens carrying biometric passports;
32. points out that the issues of the proportionality and legitimacy of these systems should also be examined in terms of their high costs, estimated at EUR 1 100 million, to be covered by EUR 4 600 million from the Internal Security Fund over the 2014-2020 period. Points out that this amount is far higher than the Commission's 2008 estimate, with, moreover, no guarantee that it will be enough, as stated by the EPDS¹⁴;
33. reiterates its doubts as to whether the considerable investment in border surveillance is the most effective way of significantly combating illegal immigration in the long term¹⁵;
34. recognises that a cost-benefit analysis must also take into consideration the high costs and administrative burdens that these systems could entail for Member States with only a small number of travellers crossing external borders;

12 Bigo, Didier, Carrera, Sergio et al (2012), Evaluating current and forthcoming proposals on JHA data bases and a smart borders system at EU external borders, study commissioned by the European Parliament, p. 37.

13 Commission Staff Working Paper - Impact Assessment, Accompanying document to the Proposal for a Regulation establishing a Registered Traveller Programme, SWD(2013) 50 final, Brussels, 28.2.2013.

14 European Data Protection Supervisor (2008), Preliminary comments on the proposal on the Smart Borders package, 3 March 2008, p. 4, published at <http://www.edps.europa.eu>.

15 Opinion on EU financial instruments in home affairs – rapporteur Samuel Azzopardi, CdR12/2012, point 47.

Role of the regions and local authorities in phasing in an integrated external border management system

35. considers that the coherence of a European approach to external border surveillance involves various levels and entails a number of challenges for national border authorities, who work together with different regional and local players;
36. regrets that the multi-level governance dimension is not taken into sufficient consideration in the EU political debates on the Schengen area, while for the subsidiarity principle to be implemented properly more systematic integration of the local and regional dimensions is required;
37. calls for greater involvement of local and regional authorities and of the Committee of the Regions, to ensure a bottom-up approach in these areas, helping to ensure that the experience and concerns of local and regional authorities are taken into account in the various phases of the EU decision-making process, in particular regarding the reintroduction of internal border controls, the efficiency and added value of EU financing and the multi-level governance component of the Smart Borders package;
38. calls on those responsible for implementing the Schengen Borders Code locally to promote training and awareness-raising campaigns on European legislation on borders and citizens' rights, in order to involve local and regional authorities and the main stakeholders on the ground, foster mutual trust and prevent a detrimental impact on the area of free movement and on fundamental rights;
39. points out that local and regional authorities can play a key role in promoting multi-level protection of fundamental rights¹⁶, including at internal and external EU borders;
40. notes that EU financing for external border management focuses on security, neglecting the issue of fundamental rights, and therefore calls for local and regional authorities to be given a greater role in defining the EU's budgetary priorities in the field of border management and the funding of immigration and asylum policy, ensuring that financial resources are channelled into the border infrastructure and services that most need support in this area;
41. therefore suggests a stricter requirement for national governments to consult local and regional authorities when programming EU financial support in these areas;
42. reiterates its call for greater consolidation of the role of local and regional authorities in the areas of migration and asylum "in accordance with their competences in the national context,

¹⁶ See the Opinion of the Committee of the Regions on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, [OJ C 9, 11.1.2012](#).

by means of instruments which allocate Union funds to them, without the intervention of central government authorities"¹⁷;

43. considers that the EES and RTP entail a gradual transfer of powers concerning surveillance and the use of data collected by national authorities to EU bodies, which has subsidiarity implications;
44. for this reason, calls for more consultation of local and regional authorities and of the Committee of the Regions on the design of these systems, given the impact on cross-border regions and the fact that local understanding of border management may be different from the interests guiding central or national authorities, which are more concerned with the national security dimension than with facilitating cross-border traffic, which is a concern in cross-border regions;

Recommendations on the Smart Borders package

45. urges the European Parliament and the Council to carry out a proper, exhaustive cost-benefit analysis on the EES and the RTP, which is imperative at a time of economic recession and budgetary austerity, as well as a similar assessment of the necessity, proportionality and effectiveness thereof, before proceeding with the relevant negotiations;
46. calls on the European Parliament and the Council, if they proceed with the EES, to put in place safeguards to prevent alerts that could lead to the illegal detention of people whom the system detects as being present illegally, whereas, in reality, they have obtained a residence permit in a Member State and therefore have the right to free movement within the European area without internal borders;
47. points to the need, at a time of budgetary austerity, to ensure that any system put in place is interoperable with existing national systems so as not to jeopardise their operation or waste national investment already made;
48. recommends that steps be taken to put in place strong guarantees of non-discrimination and sufficient safeguards regarding the right to data protection, privacy and access to effective legal redress for third country nationals, particularly so as to prevent undue repatriation resulting from a false alert issued by the EES;
49. if these systems are implemented, suggests mounting training measures focusing on the rights of individuals and awareness-raising campaigns targeting professionals at national, regional and local levels, in particular regarding the risks and right/wrong ways of implementing the systems, thus helping to avert illicit, discriminatory use.

¹⁷ Opinion of the Committee of the Regions on The global approach to migration and mobility, 96th plenary session, 18-19 July 2012.

II. RECOMMENDATIONS FOR AMENDMENTS

Amendment 1 COM(2013) 95 final

Article 8

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
Each competent authority authorised to access the EES in accordance with this Regulation shall ensure that the use of the EES is necessary, appropriate and proportionate to the performance of tasks of the competent authorities.	Each competent authority authorised to access the EES in accordance with this Regulation shall ensure that the use of the EES is necessary, appropriate and proportionate to the performance of tasks of the competent authorities <u>and respects all relevant EU and national provisions on personal data protection.</u>

Reason

It is important to establish the respect of the relevant data protection legislation by the 'competent authorities' as a "general principle" of this regulation.

Brussels, 28 November 2013

The President
of the Committee of the Regions

Ramón Luis Valcárcel Siso

The Secretary-General
of the Committee of the Regions

Gerhard Stahl

III. PROCEDURE

Title	Opinion on the Smart Borders Package
References	COM(2013) 95 final COM(2013) 96 final COM(2013) 97 final
Legal basis	Articles 70, 77 and 307(1) of the TFEU
Procedural process	Optional referral
Date of Commission letter	18 April 2012
Date of President's decision	14 March 2013
Commission responsible	Commission for Citizenship, Governance, Institutional and External Affairs (CIVEX)
Rapporteur	António Costa (PT-PES), mayor of Lisbon
Analysis	24 May 2013
Discussed in commission	8 July 2013, Bolzano, Italy
Date adopted by commission	24 September 2013
Result of the vote in commission	Unanimous
Date adopted in plenary	29 November 2013
Previous Committee opinions	Opinion on the Stockholm Programme, CdR 201/2009 fin ¹⁸ Opinion on the Action plan implementing the Stockholm programme CdR 170/2010 fin ¹⁹ Opinion on The EU internal security strategy, CdR407/2010 fin ²⁰ Opinion on The global approach to migration and mobility, CdR9/2012 fin ²¹ Opinion on EU financial instruments in home affairs, CdR12/2012 fin ²² Resolution of the Committee of the Regions on Dealing with the impact and consequences of revolutions in the Mediterranean ²³ .
Date of subsidiarity monitoring consultation	N/A

18 [OJ C 79, 27.3.2010.](#)

19 [OJ C 42, 10.2.2011, p. 49](#)

20 [OJ C 259, 2.9.2011, p. 70.](#)

21 [OJ C 277, 13.9.2012, p. 6.](#)

22 [OJ C 277, 13.9.2012, p. 23.](#)

23 [OJ C 192, 1.7.2011.](#)