

**Policy Department C
Citizens' Rights and Constitutional Affairs**



PROPOSED NEW EU BORDER CONTROL SYSTEMS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS



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Directorate-General Internal Policies
Policy Department C
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BRIEFING PAPER

Résumé:

This briefing paper will focus in particular upon:

- the concept and architecture of the Entry/Exit system and how it could be embedded in the current EU framework; what would be if any the synergies with the other databases, especially VIS; and the similarities and differences with the US-VISIT system.
- an analysis of the two other measures proposed by the Commission (*bona fide* traveller and Electronic System of Travel Authorisation (ESTA) and comparative approaches
- the potential added value of these envisaged measures

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1. INTRODUCTION

This briefing paper will focus in particular upon:

- the concept and architecture of the Entry/Exit system and how it could be embedded in the current EU framework; what would be if any the synergies with the other databases, especially VIS; and the similarities and differences with the US-VISIT system.
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2. CONCEPT AND ARCHITECTURE OF THE ENTRY-EXIT SYSTEM

The concept architecture of the entry-exit system depends in particular upon whether the entry-exit system will apply *only* to third-country nationals subject to a visa requirement ('visa nationals'), or whether the system will also apply to third-country nationals not subject to a visa requirement ('non-visa nationals').

It is assumed that the system would not apply to EU citizens, since the Commission's communication does not address that issue expressly and it is highly doubtful whether including EU citizens within the scope of the system would be compatible with EU free movement law. It is also assumed that the entry-exit system would not apply *only* to non-visa nationals.

If the system applies to visa nationals only, it will be closely related to the Visa Information System (VIS), which will be established over the next few years pursuant to the VIS Regulation, which was adopted on 23 June 2008. There is not yet any agreed start date for launch of the VIS, although the Council conclusions of Dec. 2005 on roll-out of the VIS specify that the VIS should be fully rolled-out within two years of its launch, starting with the consulates in North Africa and the Near East. Article 48 of the VIS Regulation provides for the Commission to decide on further regions for roll-out in accordance with comitology rules, although the Regulation itself sets no legal deadline for completion of the roll-out. The Commission's communication assumes that an entry-exit system would only be established after the VIS is fully rolled out.

The entry-exit system for visa nationals could function either as a separate system or as an extension of the VIS. If it is a separate system, however, the separate database would either have to replicate some of the data in the VIS or link to certain categories of the data in the VIS, in particular (but not only) if the entry-exit system used biometrics (presumably the same biometric data as the VIS). If the entry-exit system does use biometrics, the replication

of the same biometric data for similar purposes in a different database would be a unnecessary expense.

The existence of separate databases would entail complications for the users of the system (national authorities applying immigration law), who would have to check and examine two separate sources of data. It would also entail complications for the persons affected by the system, who would have to make separate applications for information and appeals for the correction of data, et al, in the event of disputes.

The European Data Protection Supervisor has suggested that there should be separate databases, because the two systems will have separate purposes: the VIS is intended for the application of a common visa policy, while the entry-exit system would concern the prevention of illegal immigration. But one of the main goals of a common visa policy is the prevention of illegal immigration. More precisely, when considering visa applications in the context of the common visa policy, consulates will obviously be interested not only in the data which would be generated by the current VIS, but also in the data which would be generated by the entry-exit system. This is because the latter information would indicate whether or not a visa applicant had overstayed in the past, which the consulates would assess as part of their determination as to whether an applicant was likely to overstay in future. In fact, consulates might conceivably pay *more* attention to the entry-exit data than the current VIS data when making a decision on applications.

While the entry-exit data would particularly be used as regards identifying persons on the territory who have overstayed their visa, the current VIS would be used for ascertaining the identity of such persons as well, in particular if the person concerned no longer had any documents (Art. 20 of the VIS Regulation). Therefore there seems to be no particular reason to establish an entry-exit database separately from the VIS, as regards visa nationals.

The entry-exit system for visa nationals could therefore be developed by amending the VIS Regulation to store further categories of data: the date and place of crossing the external borders on entry and exit. This could be set out in a new Article 14a of the VIS Regulation.

The issue would be more complex as regards the use of the VIS (as extended to include an entry-exit system) at border posts in the context of an entry-exit system. While Article 18 of the VIS Regulation provides for the use of VIS data by border guards, it does not require the guards to use the system. A requirement to use the system can only be established by means of amending the Schengen Borders Code. While the Commission has proposed an amendment to this end (COM (2008) 101), the proposal would only require the use of the VIS at entry, not exit. Moreover, the legislation has yet to be adopted or agreed, and the draft position of both the Council and the EP suggests (in different ways) that the obligation to use the VIS in all cases of entry should not be absolute. Moreover, the Council and the EP both accept that the use of the VIS on exit should not be mandatory. In comparison, the 'status quo' referred to in the impact assessment assumes that the VIS is already in mandatory use for both entry and exit.

While legally it would be simple to amend the Schengen Borders Code further to require border guards to enter the relevant data into the VIS (or a separate database) on entry and on exit, it may be questioned whether this would be easily achievable operationally. The gap between the actual status quo once the current VIS is operational and the status quo assumed by the impact assessment suggests that the Commission has not correctly assessed the costs of introducing an entry-exit system in its impact assessment.

This point is more cogent when the proposed entry-exit system is compared to the US-VISIT system. As observed by the European Data Protection Supervisor, the US system has been successfully rolled out to entry points, but not to exit points, despite several years in operation and considerable expense, and its complete roll-out to exit points does not appear imminent. The Commission's impact assessment does not address the issue of the difficulties faced by the US system in practice. It goes without saying that unless it is fully rolled out to all exit points, an entry-exit system has limited utility. It should also be recalled that the EU has more border crossing points than the USA. In fact, in the absence of an obligation to use the current VIS on exit, it is possible that some Member States may not install the infrastructure to use the VIS at some exit points. If that is the case, the Commission's assumed status quo would again fail to assess fully the costs of introducing an entry-exit system, since there would be an obligation upon Member States to install infrastructure at all exit points in order to ensure the full functioning of the system.

Another issue is how the entry-exit system will address the issue of exemptions from the visa requirement. At present there are mandatory exceptions to the visa requirement set out in Regulation 539/2001 (as amended) for:

- the holders of border traffic cards pursuant to the EC border traffic Regulation;
- school pupils living in *any* Member State (i.e. including Member States not fully applying the Schengen acquis), travelling on school excursions, if that Member State applies a 1994 EU Joint Action on this issue; and
- recognised refugees and stateless persons resident in any Member State and holding a travel document issued by that Member State.

The optional exceptions apply to:

- the holders of diplomatic passports, service/official passports or special passports;
- civilian sea and air crew;
- specified persons providing emergency and rescue assistance;
- the civilian crew of ships in international waters;
- the holders of *laissez-passeurs* issued by some intergovernmental organisations to their officials;
- school pupils living in a non-Member State whose nationals are not subject to a visa requirement, travelling on school excursions;
- recognised refugees and stateless persons resident in living in a non-Member State whose nationals are not subject to a visa requirement, who hold a travel document issued by that State; and

- specified persons travelling within the framework of NATO or Partnership for Peace arrangements.

Moreover, Member States may *impose* a visa requirement on nationals of States whose nationals are not normally subject to that requirement, if those persons are within one of the first five categories listed above, or if they carry out a paid activity during their stay.

Furthermore, outside the scope of the visa list Regulation, there are further exemptions from the visa requirement for holders of diplomatic passports pursuant to the EC's visa facilitation treaties with Russia, Ukraine, Moldova and Western Balkans states (OJ 2007 L 129, 332 and 334, in force 2007 and 2008).

EC free movement legislation (Directive 2004/38) requires an exemption from the visa requirement for all family members of EU citizens who would otherwise be subject to it, if they hold a 'residence card'. This legislation applies to all Member States, ie including those not participating fully in the Schengen *acquis*.

A further complication is the separate issue of exemptions from the obligation to provide biometric information (fingerprints and photographs) as part of the visa application process. The VIS Regulation does not set out exemptions from the obligation from visa applicants to supply biometrics. Exemptions will, however, be set out in separate legislation, which is currently being negotiated, but which has not yet been agreed. The proposed legislation (COM (2006) 269) specifies that there should be a mandatory exemption for children under 6 years old and for persons who are not able to provide fingerprints, and an optional exception for holders of the holders of diplomatic passports, service/official passports or special passports. The Commission argues that the latter exception is consistent with the optional exception from the visa requirement in the visa list Regulation, but then if a person is not subject to the visa requirement, then he or she should not be required to supply biometrics in the first place.

The VIS Regulation provides that the VIS shall indicate a distinction between cases where fingerprints could not be supplied for factual reasons and cases where they could not be supplied for legal reasons. Statistics will be kept on the numbers of persons within these categories, as well as the number of such persons refused a visa. The Regulation also provides for alternative methods of searching the VIS where the fingerprints of the visa holder cannot be used.

Another issue is the relationship between the entry-exit system and the rules on exemptions from border checks and from stamping of documents at the borders. There are five optional exceptions in the Schengen Borders Code from the obligation to cross borders at specified points:

- in connection with pleasure boating or coastal fishing (see further Annex VI to the Code);

- for seamen going ashore to port where their ships dock, or in adjacent municipalities (see further Annex VII to the Code);
- where there are ‘requirements of a special nature’ (not further defined), for individuals or groups, provided that the persons concerned have the relevant national permits and that there is no conflict with public policy or internal security;
- in the event of an ‘unforeseen emergency’; and
- ‘where exceptionally, there is a requirement of special nature’, in the context of a local border traffic scheme.

The last exception is set out in the separate Regulation on local border traffic rules (Art. 15(1)(c) of that Regulation).

It is not expressly clear whether the ability to cross borders (legally) other than at official crossing points during official opening times means as a consequence that persons using this facility will not be subject to border checks, and that their travel documents will not be stamped. However, this is likely to be the consequence. Equally it is hard to see how crossing in these circumstances could be registered in the entry-exit system.

There are also several exceptions from the obligation for third-country nationals to be subject to ‘thorough’ border checks (upon entry) in the Schengen Borders Code. First of all, family members of EU citizens, as well as the citizens of countries enjoying equivalent rights (and their family members) can only be subject to a ‘minimum check’ on the validity of their travel documents and on the presence of signs of counterfeiting or falsification.

Also, border checks may be ‘relaxed’ in cases of ‘exceptional and unforeseen circumstances’, which is deemed to refer to cases of ‘unforeseen’ traffic flows which cause waiting times to become ‘excessive’ and no further resources are available to address the problem (Article 8 of the Code).

Annex VI to the Code also provides for simplified border checks, or for the waiver of border checks, as regards cruise ships, pleasure boats and coastal fishing. Annex VII to the Code: exempts Heads of State and members of their delegation from border checks; provides for random checks only on aircraft crew who are known to border guards; permits exemption from border checks for seamen (as a general rule, under certain conditions); and permits random checks only on well-known cross-border workers, and possibly ‘other categories of regular cross-border commuters’.

As for stamping of documents at the borders, which is also relevant to the application of an entry-exit system, the rules are also set out in the Schengen Borders Code (Article 10).

First of all, the exceptional possibility allowed for in the Borders Code to cross borders (legally) other than at official crossing points during official opening times (see above) is likely to mean as a consequence that the travel documents of persons using this facility will not be stamped, although this is not expressly set out in the Borders Code.

Logically, an exemption from border checks (see above) must also mean that documents will not be stamped.

The Code provides for an obligation to stamp the travel documents of third-country nationals, both on entry and exit. This applies even if border checks are relaxed (Article 8(3) of the Code), so in such cases the border guards would essentially be ‘rubber-stamping’ the travel documents in the colloquial sense of the term.

However, there are several exceptions. The travel documents of family members of EU citizens, as well as the citizens of countries enjoying equivalent rights (and their family members) can only be stamped if those persons do not have a ‘residence card’ (these are the same circumstances in which a visa obligation would apply, although the document stamping obligation applies *both* to visa nationals *and* to non-visa nationals who do not have a residence card).

Next, six further exceptions from the stamping obligations are set out in Article 10 of the Code:

- for Heads of State and dignitaries whose arrival has been announced in advance;
- for pilots and aircraft crew;
- for seamen who only visit Member States’ territory when their ship puts in to a port of call;
- to the crew and passengers of cruise ships who are exempt from border checks; and
- to the travel documents of nationals of Andorra, Monaco and San Marino (who are in any case exempt from visa requirements); and
- ‘exceptionally’, at the request of an individual, if the stamp would cause difficulties for that person; in that case, a record will still be kept on a separate sheet.

The absence of an entry stamp leads to a presumption that the person has entered or stayed on the territory illegally, and should be expelled, but that presumption can be rebutted (Article 11 of the Code). Presumably this applies only where a person’s documents should be subject to the stamping requirement, but this is not expressly spelled out.

While the issue of visa exemption is only relevant to visa nationals, the issues as regards border crossing at authorised times and places, relaxation of checks and relaxation of stamping obligations are also relevant to non-visa nationals. So is the issue of exemption from providing biometric information – provided that the entry-exit system used biometrics as regards non-visa nationals.

It seems difficult to foresee implementing an (EU-wide) entry-exit system at the borders of Member States which are not yet fully implementing Schengen, because those Member States will not presumably have access to the Visa Information System and there seems no justification to

extend an EU-wide entry-exit system to a Member State which is not a full participant in the Schengen free movement regime.

As regards non-visa nationals, the entry-exit system would require EU-wide registration of data for the first time. This would either take the form of a separate database (which could include the data on visa nationals, if this is not included in the VIS), or an adjunct to the VIS – with the proviso that not all the information in the current VIS will be collected as regards non-visa nationals. If the entry-exit system for non-visa nationals includes biometrics, this will entail a considerable cost of storage of the data, whereas there would be a very limited additional cost of storing the extra entry-exit data for visa nationals as compared of the status quo – because biometric data will already be stored in the VIS. It is not clear how this cost has been factored into the Commission's impact assessment.

At one point the Commission suggests that non-visa nationals would have to provide biometric information at consulates. This differs from the US-VISIT system, where the information is provided at entry points. Clearly the cost implications, and the impact upon travel, would be different if there were an obligation for non-visa nationals to provide biometric information at consulates.

There is no precise indication of whether the increased waiting time for non-visa nationals to cross the external borders would be operationally feasible, in particular as regards exit checks (taking account of the US experience).

The fundamental problem as regards non-visa nationals is that the Commission's impact assessment does not sufficiently offer convincing reasons for the extension of an entry-exit system to this group of persons as regards the principal reason for developing the entry-exit system: the prevention and control of irregular migration. At several points in the impact assessment, the Commission states that non-visa nationals make up a small proportion of illegal immigration. Indeed, that is not surprising, because if non-visa nationals made up a large proportion of illegal immigrants, the Council would be likely to amend the visa list as a consequence, considering that combating illegal immigration is one of the main purposes of the visa list (see the preamble to Regulation 539/2001).

More precisely, one of the annexes to the impact assessment lists the top 15 countries whose nationals were apprehended on the territory of the Member States as irregular migrants for several years until 2006. Romania is listed first among these countries for most of these years, and Bulgaria is also listed. However, these two countries' nationals could no longer be considered as irregular migrants since accession to the EU in 2007 – and these two countries were the *only* non-visa countries among the top 15 states generating irregular migration. This proves the Commission's assertion that non-visa nationals do not raise many issues as regards irregular migration – and profoundly undercuts the argument for applying the entry-exit system to them.

As for the links with other EU immigration databases and measures, the entry-exit system would have few if any links with the current version of Eurodac, which has entirely different purposes and contains more limited categories of data in respect of more limited categories of persons. The position might be different if the legislation relating to Eurodac were amended. But the

Commission has yet to make such proposals, and so obviously they have yet to be adopted by the Council and the EP.

As for the Schengen Information System (and the future SIS II), this issue is linked to the recently-agreed returns Directive. The EU-wide entry ban provided for in the returns directive is implicitly linked to the SIS and SIS II, and will likely be explicitly linked to it in future. It would be possible to provide for links between overstaying of individuals, which would be documented by the entry-exit system, and the obligation to issue a return decision under the returns directive as well as an entry ban under the Directive and SIS/SIS II. However, this raises questions about the uniform definition and consequences of overstaying, and the appeal rights and substantive arguments against a definition of overstaying, as discussed below.

3. OTHER NEW PROPOSALS

The Commission's communication addresses two other proposed measures: the creation of a registered traveller system and an electronic travel authorisation system. Since the latter proposal will be subject to a further assessment by the Commission next year, this briefing paper assesses only the first proposal, and only in respect of third-country nationals, since EU citizens will not be covered by any entry-exit system.

A registered traveller programme has the potential to ensure that any roll-out of an entry-exit system is considerably less effective (by means of reducing the need for additional border guards) and has considerable less impact on waiting times at the border. It might be useful to examine whether such a system would be of particular use as regards exit controls. The system would offer relatively little to non-visa nationals – unless they are made subject to the entry-exit system.

However, in order to make such contributions, a registered traveller programme would have to be available to significant numbers of third-country nationals. At the very least it should include in scope all those who have made journeys to the EU in recent years without overstaying, if there are no other reasons for rejecting their application to participate in the programme. As the Commission points out, there would be no need for such a system at some border points – but there would be considerable need for it at others.

In addition to providing for the grounds for registration and revocation, such a system would need to provide for appeals against refusal to register or against revocation of registration, as well as notification and motivation of non-registration. Since there would be a registered travellers' database, rules on data protection would have to be developed. There would also need to be rules to determine which Member State was responsible for registration –unless Member States are willing to let applicants apply to any Member State. Perhaps such rules should be added to the proposed Visa Code once adopted, if the system only applies to visa nationals. If the system also applies to non-visa nationals, then separate legislation and a separate database would be required.

It is not clear if the impact assessment has fully assessed the various costs that would be incurred by the creation of such a system – and the extent to which these costs would offset the cost of developing an entry-exit system.

4. POTENTIAL ADDED VALUE

The proposed measures would clearly add value (as regards the entry-exit system) by means of identifying quickly persons who have overstayed and (as regards the registered traveller system) by speeding up border crossing times and (probably) offsetting the costs of the entry-exit system. The entry-exit system would add little or no value as regards combating terrorism, as the impact assessment admits, because the records of entry and exit would not in themselves identify persons responsible for terrorism or other serious crime (any more than the information in the current VIS would). However, if a person who entered the Schengen territory subsequently was suspected of involvement in a terrorist offence, the entry-exit system would provide the limited facility of providing information as to whether (and if so, when and where) the suspect has exited the Schengen area, if the suspect has exited that territory legally.

Similarly, the entry-exit system would be of limited use as regards *locating* the persons who have overstayed. However, it would have the limited facility of ‘narrowing down’ authorities’ search for overstayers, by enabling their quick identification and by excluding people who have left on time from the need to search for them – therefore saving authorities’ time. It is also possible, as the impact assessment indicates, that an entry-exit system could have a deterrent effect – although as it also admits, some overstayers might decide not to leave at all in order to avoid sanctions. It is also possible that a greater number of potential irregular migrants might decide simply to enter illegally rather than to apply for visas. Irregular immigration would in that case be deflected from overstayers to irregular entrants – who are obviously not registered at all in any system.

The Commission’s impact assessment does not indicate how many persons are likely to be detected on the territory or refused entry at the border or refused visas as a result of an entry-exit system. Such estimates are crucial to assessing the added value of such a scheme. As the EDPS has pointed out, the US system has led to 1300 refusals at the border, at the cost of \$1.5 billion. This amounts to a cost of over \$1 million per refused entrant – although it is possible that the US system has had other results as regards the objectives of immigration control.

Any decision to introduce an entry-exit system would also risk retaliation, in particular from non-visa countries, which would impact upon the travel of EU citizens to those countries. The Commission’s impact assessment does not examine this prospect in detail.

The Commission’s impact assessment pays little, if any, regard, to the issue of international protection, as a legitimate ground why a person might overstay. In general, any proposal for an entry-exit system would have to address the issue of harmonisation of the concept of ‘overstay’ and its consequences, in particular since the consequences of overstay have been partly harmonised in the context of the returns directive and the SIS/SIS II. It would also have to

address the grounds for excusable overstay (including applications for international protection and humanitarian grounds) and the connected procedural rights of the persons concerned by an entry-exit system and/or a registered traveller system. A full assessment of these proposals cannot be made without a full consideration of the options regarding these issues.