



Position Paper House of Representatives of the States General in The Netherlands with regard to EU proposals regarding Smart Borders

Introduction

The European legislation package on Smart Borders is currently in a 'vacuum phase'. The previous proposal will be withdrawn, and a pilot study is currently taking place in a considerable number of EU member states. A new EU proposal will be put forward in early 2016.

In view of the technical nature of the proposals, the importance of the House being well-informed and the ability to provide focused input on new developments in this dossier, it was decided to appoint a rapporteur on Smart Borders. This rapporteur, Member of Parliament Attje Kuiken (PvdA), has been and will be gathering in-depth information during 2015 about the background and outcomes of the technical study conducted by the European Commission; will be getting informed about the progress and outcomes during the pilot phase; and is maintaining contact with the rapporteurs in the European Parliament. Discussions are also planned with parties concerned as to the advantages and disadvantages of the European Commission's plans regarding Smart Borders.

On the basis of the information gathered, the rapporteur will provide input to the European Commission prior to new EU legislative proposals regarding Smart Borders being issued, and she can formulate a treatment recommendation for the standing committee on Security and Justice in the House of Representatives as soon as the new EU proposal on Smart Borders is published, which is expected to be in early 2016. In the meantime, she will provide regular reports to the standing committee on Security and Justice regarding the activities carried out.

History

European Commission's proposal

The European Commission published a legislation package on 'Smart Borders' on 28 February 2013. This package included a number of regulations, which would have an immediate effect in EU member states once adopted by the Council of Europe and the European Parliament. The package involved measures under which travellers from non-EU countries would be able to enter the EU more quickly, partly through the use of new technology. Foreign citizens who travel regularly to the EU would be eligible for simplified border checks, on condition that they have been screened and subjected to a security investigation in advance. The introduction of an entry and exit system was also included for registering where and when the external EU border is passed. The permitted length of stay would be calculated electronically instead of manually, and national authorities would be warned if the permitted length of stay has expired and no exit has been registered. To date, these checks have taken place by means of stamps in passports. Under this system, people who stay longer in a country than permitted by their visa could be tracked down more easily.

The purpose of the legislation package is to improve European external border control (in particular to combat illegal immigration) and to expedite border crossings for registered and screened travellers. This objective would largely be realised through the introduction of two ICT systems, a European entry and exit system (EES) and a Registered Travellers Programme (RTP). It is possible that additional objectives will be added in the coming years, for example pertaining to law enforcement, in order to be



able to combat transnational immigration offences. The new system will also make it easier to combat terrorism and serious crime.

In the original proposal regarding the RTP, it was proposed to register four fingerprints. Travellers would be registered for five years and the stored fingerprints could be reused (for 59 months) on submission of a new application. The data would only be accessible to border officials.

For the EES, the original proposal was to store ten fingerprints in order to enable accurate verification and identification and to guarantee the availability of sufficient data in all cases. The data retention period in normal cases was six months and in the case of overstayers, five years. Two years after coming into force, the EES was to be evaluated, in which context particular attention would be given to the question of whether law enforcement authorities could be given access to these data. Pursuant to article 7 of the proposed EES regulation, each member state would designate which authority – such as border, visa and immigration authorities – would be given access to the EES to enter, amend, remove or consult data.

At that point in time, 13 member states already had their own entry and exit system for gathering alphanumeric data on travellers. In all these member states, the system was accessible for border control and law enforcement purposes.

An indicative amount of €1.1 billion had been reserved from the European Fund for internal security over a period of eight years for the development and management of the EES and the RTP together. The costs for the national governments had also been included in these costs. After eight years, the subsequent operating costs of the systems would be borne by the member states. What the exact costs would be was not yet clear.

These proposals had already been announced in the Communication 'Preparing the next steps in border management in the European Union' of 13 February 2008. In June 2011, the Council of Europe called for rapid progress to be made in the area of Smart Borders. In response to this, the European Commission published a Communication on 25 October 2011 on the implementation options for the EES and the RTP.

Parliamentary scrutiny reserve

On 23 April 2013, the House of Representatives entered a parliamentary scrutiny reserve with regard to this Smart Borders package, in view of the importance of its far-reaching consequences. This means that the Government cannot take any irreversible steps in the European Council of Ministers until a general debate has taken place in the House specifically concerning this proposal.

During the discussion of the current EU proposals on Smart Borders in a general debate on the scrutiny reserve on 16 May 2013, the majority of the Members of Parliament expressed the following concerns:

- concerns regarding the effectiveness of the instrument and questions about the possibility of linking systems (VIS, API, SIS, Eurodac) and joint introduction of the RTP and EES;
- concerns regarding the costs of the project and the importance of making decisions on the basis of a proper understanding of the costs (build in a go/no-go moment);
- concerns regarding privacy aspects, in connection with law enforcement and criminal investigation authorities' access to fingerprints, and the data retention period;
- concerns regarding the feasibility of implementation for member states.



The following agreements were concluded regarding provision of information by the government:

- 1. The House must be informed prior to all decision moments (legal, technical, financial) in a timely manner so that a debate can take place in the House, if necessary;*
- 2. The Cabinet will make efforts in Brussels at Council level to build in a go/no-go moment between each of the various decision moments;*
- 3. During the negotiations in the Council working group, SCIFA, COREPER and the Council, the House must be kept informed in writing of the draft positions agreed, accompanied by an opinion of the Cabinet, both during the first and second reading, on inter alia the following points:*
 - a. costs;*
 - b. linking between systems;*
 - c. access by law enforcement and criminal investigation authorities;*
 - d. joint introduction of the RTP and EES;*
 - e. points which affect the feasibility of implementation for member states.*
- 4. The House must be informed about the quick scan of the costs and benefits of the EU proposals on Smart Borders.*

Withdrawal of the Smart Borders package

During the initial discussions on the Smart Borders package, it became apparent that both the Council of Europe and the European Parliament still had many concerns regarding technical, operational and cost aspects, in particular concerning the feasibility of the proposed new systems and their characteristics. In order to investigate these matters further, the European Commission commenced a 'proof of concept' exercise, consisting of two parts:

1. A technical study by the European Commission, which focused on demonstrating the best and most promising options and solutions. This study was completed in October 2014 and consists of a technical study and a cost study.
2. A pilot project, being implemented by the EU-LISA agency, which focuses on ascertaining the practical feasibility of the options and solutions arising from the technical study. This pilot project involves simulating real-life situations at the external borders, which are then tested. Participation in the test is voluntary. Seventeen border check points in 12 different member states are participating in the pilot project, including Schiphol. The pilot project will be completed in the autumn of 2015.

On 3 December 2014, the European Commissioner for Migration, Home Affairs and Citizenship, Mr Avramopoulos, announced in a speech to the European Parliament that the current Smart Borders package would be withdrawn, and would be replaced with new proposals based on the results of the 'proof of concept' exercise. These proposals will be published in early 2016.

Wishes with regard to the new Smart Borders proposals

The House attaches great importance to building in go/no-go moments between the various decision moments, also with regard to the new EU proposals in respect of the RTP and EES. A critical assessment will be made, in particular regarding the decision about go/no-go moments, of the points below in particular.



Data retention

Data storage:

The shorter the length of time personal data can be stored, the better this is from a privacy protection perspective. Limiting costs, reducing the number of administrative tasks for travellers and security considerations are some of the reasons to consider a longer data retention period. The original proposal suggested that personal data be stored for a period of five years. Privacy experts are arguing for the shortest possible retention period, of a maximum of six months. Implementation experts are arguing for a longer data storage period, and it can be expected that a compromise period of two to three years will be reached. A period of five years is currently still preferred in the debate regarding PNR. In order to monitor privacy, the European Parliament is arguing for the establishment of an independent supervisor.

Biometric data:

In the context of security, combining facial recognition and fingerprint data offers the best guarantees. Facial recognition is difficult in a moving train, however, and on some external borders it can be difficult to take fingerprints in very cold weather. Various pilot schemes are currently under way which look at both the reliability of the various systems and the time it takes to check biometric data. The final report will be ready at the end of November.

Stamps in passports:

In addition to the discussions concerning the retention and use of biometric data, discussions are also taking place regarding the continued use, or discontinuation, of physical passport stamps in Europe.

Position House of Representatives:

- Keeping the retention period for personal data as short as possible, while of course taking into account the objectives of the systems.
- Gathering the minimum possible biometric data to ensure a reliable check, also taking into account the rate of circulation and costs.

Access to data

In the original RTP proposal, the data could only be accessed by border officials. With respect to the EES, it would be assessed after two years whether law-enforcement authorities could be given access to these data. On the grounds of article 7 of the proposed EES regulation, each member state would designate which authority – such as border-, visa- and immigration authorities – would be given access to the EES to enter, amend, remove or consult data. In all the member states already working with an entry and exit system, the system is accessible to border control and law enforcement purposes.

Position of the House of Representatives:

- Acquiring greater clarity regarding the intended objectives and proven effects of granting law enforcement authorities access to entry and exit systems.
- Emphasising the importance of the protection of civil rights.
- Gaining further insight into how this will relate to other developments, such as the introduction of PNR.

Linking between systems

Questions have repeatedly been asked in the House of Representatives as to whether, if new systems are selected in the context of Smart Borders, this should be a single integrated system or two separate systems. Under the new proposal, it seems very unlikely that a single integrated system will be preferred, but rather two ICT systems, a European EES and RTP. There also appears to be a broad consensus about this.



Position House of Representatives:

- focusing primarily on the desirability of the Smart Borders package, the costs involved and the final details.

Costs

It is not yet known what the exact costs of this system will be at European and at national level. In the original proposals from 2013, the European Commission budgeted the total costs of the EES and RTP at €1.1 billion for a period of eight years. That is the development and management costs of the systems. The costs for national governments were also included in these costs. The total costs have already been reserved in the Multiannual Financial Framework in the Internal Security Fund (ISF). After eight years, the subsequent operating costs of the systems would be borne by the member states.

The quick scan into the costs and benefits of these proposals, drawn up by the Government in April 2014, showed that, on the basis of the original proposals, the European costs for developing the EES and an RTP were estimated at €791 million at the time, assuming that the initial development costs would be incurred in 2015, and including costs at national level. Within the framework of the national part of the EU Internal Security Fund, €30.7 million has been made available for the Netherlands from the estimated European costs. The Netherlands can spend 40% of this amount on the implementation costs for both proposals. The Cabinet also expects to receive approximately €3.8 million in fees. It will be possible to finance part of the costs from these resources. The Cabinet concluded that it was currently not possible to obtain a fully quantified picture of both proposals for the Netherlands.

Position House of Representatives:

- Obtaining a clear picture of the exact costs, both at European and at national level.
- The system costs must be kept as low as possible, and will be taken into particular consideration in the decision on whether or not to support the Smart Borders package.