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**REPORT 11/2013 BY THE JOINT COMMITTEE FOR EU AFFAIRS, DATED APRIL 9, 2013, ON THE COMPLIANCE OF THE PRINCIPLE OF SUBSIDIARITY BY THE FOLLOWING PROPOSALS:**

- FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING AN ENTRY/EXIT SYSTEM (EES) TO REGISTER ENTRY AND EXIT OF DATA OF THIRD COUNTRY NATIONALS CROSSING THE EXTERNAL BORDERS OF THE MEMBER STATES OF THE EUROPEAN UNION [COM (2013) 95 FINAL] [2013/0057 (COD)] {SWD (2013) 47} {SWD (2013) 48} {SWD (2013) 49},**
- FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A REGISTERED TRAVELLER PROGRAMME [COM (2013) 97 FINAL] [2013/0059 (COD)] {SWD (2013) 50} {SWD (2013) 51} {SWD (2013) 52},**
- 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)].**

### **BACKGROUND**

**A.** The Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty of 2007, in force since December 1st, 2009, establishes a procedure allowing national parliaments to verify European legislative initiatives' compliance with the subsidiarity principle. The said Protocol has been developed in Spain by Act 24/2009, of December 22, amending Act 8/1994, of May 19. In particular, new articles 3 j), 5 and 6 of Act 8/1994 are the legal basis for this report.

**B.** The Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit of data of third country nationals crossing the external borders of the Member States of the European Union; the 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 and the Registered Traveller Programme (RTP); and the Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme (RTP); have been adopted by the European Commission and conveyed to national parliaments, which have a deadline of eight weeks to verify the subsidiarity check of the



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initiative, being the deadline April 26, 2013, for the first Proposal and April 29, 2013 for the other two.

**C.** The Bureau and the Spokespersons of the Joint Committee for EU Affairs agreed on March 6, 2013, to examine the said European legislative initiative, appointing to that end as Rapporteur MP Mr Rubén Moreno Palanques, and requesting the Government the report envisaged in section 3 j) of Act 8/1994.

**D.** The Government has conveyed three reports. The report concerning COM (2013) 95 final states that the proposal complies with the principle of subsidiarity, given that the Union is entitled to adopt measures concerning the conduction of checks of individuals and efficient monitoring of the external borders of the Member States.

**E.** The Government's report concerning initiative COM (2013) 96 final also states that the proposal complies with the principle of subsidiarity. This is due, in the first place, to the fact that article 77 of the Treaty on the Functioning of the European Union (TFEU) empowers the Union to conduct a policy aimed at: «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». Moreover, the purpose of this proposal is to adopt the amendments required by the Schengen Borders Code (SBC) in order to establish an Entry/Exit System (EES) and a Registered Traveller Programme (RTP). This objective cannot be adequately attained if Member States act individually, since only the Union is entitled to amend an Union act in force (in this case, the SBC).

**F.** Finally, the Government report on the initiative COM (2013) 97 states that the proposal of the Commission complies with the principle of subsidiarity since the Union is entitled to adopt measures concerning the checks on persons and the efficient monitoring of the crossing of external borders of Member States (art. 77 TFEU). The decision to establish a common regime for the whole of the Schengen area allowing to implement harmonized measures to facilitate the crossing of borders to registered travelers is an objective which cannot be attained by Member States individually.

**E.** The Joint Committee for EU Affairs, in its meeting held on April 9, 2013, adopted the following:

### OPINION

**1.-** Article 5 (1) of the Treaty on the European Union indicates that “*the use of Union competences is governed by the principles of subsidiarity and proportionality*”, and adds in Article 5 (3) of the same Treaty that “*under the principle of subsidiarity, in*



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*areas which do not fall within its exclusive competence, the Union shall only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.*

2.- Out of the examined proposals, the one amending Regulation (EC) No 562/2006 as regards the use of the Entry/Exit System and the Registered Traveller Programme (RTP [COM (2013) 96 final], is based on article 77, paragraph 2, of the TFEU, since this proposal lays down provisions on border checks applicable to individuals crossing external borders. Regulation (EC) No 562/2006 of the European Parliament and of the Council, dated March 15, 2006, establishing an Union Code of provisions for the crossing of borders by individuals (Schengen Borders Code), is based on equivalent provisions of the Treaty establishing the European Economic Community, namely its article 62, paragraph 1, and paragraph 2, letter a).

3.- The legal basis of the other two regulations establishing a EES to register the entry/exit of data of nationals of third countries crossing the external borders of the European Union Member States [COM (2013) 95 final], and a RTP [COM (2013) 97 final], is to be found in article 74 and article 77, paragraph 2, letters b) and d) of the Treaty on the Functioning of the European Union. Article 77, paragraph 2, letters b) and d) provides the necessary legal basis to specify in greater detail the measures concerning the crossing of the Member States external borders and to develop the provisions and procedures to be applied by Member States when conducting checks on persons at the said borders. Article 74 provides the necessary legal basis for the establishment and maintenance of the EES and the RTP, as well as for the procedures ruling information exchange among Member States, thus guaranteeing cooperation among competent authorities of Member States and between the said authorities and the Commission in those fields envisaged in Title V of the Treaty.

4.- The potential of new technologies in the field of integrated border management (IBM) led the Commission to suggest in 2008 the establishment of an EES for the electronic entry and exit records of third-country nationals admitted for a short stay, a proposal which was supported by the Stockholm Program adopted by the European Council in December 2009 and promoted by the Council itself in 2011, under the package “Smart Borders”, including the works on the legislative proposals related to the EES and the RTP, presented jointly with the one modifying the CFS, with the aim of including the functioning of the two new systems as part of the external borders management systems. These proposals do not affect customs controls, namely, checks on goods.

5.- The SBC was adopted on March 15, 2006, establishing the conditions, criteria and detailed provisions ruling checks in external border crossing points and efficient monitoring of external borders. According to its article 7, cross border movement at



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external borders shall be subject to check. Citizens of the European Union (EU) and other beneficiaries of the right to free movement according to Union Law (i.e. members of the family of Union citizens) crossing external borders shall be subject to minimum checks in order to establish their identities on the basis of the production or presentation of their travel documents. All other third country nationals, however, shall be subject on their entry to a detailed examination including the verification of the purpose of the stay, verification that the third country national has sufficient means of subsistence and that he/she intends to return to his/her country of origin, as well as its search in the Schengen Information System (SIS) and in the national databases. Such checks shall be carried out by border guards by means of an interview to the traveller and the control of necessary documents, as well as the confirmation of the reservation of accommodation and plane/ferry/train return ticket. The border guard must also monitor the authorized stay in the Schengen area, calculating to that end the stamps printed on the travel document.

**6.-** Having said this, there are no provisions in the Schengen Borders Code on the recording of travellers' cross border movements. Currently, stamping the travel document is the sole method to indicate the dates of entry and exit which can be used by border guards and immigration authorities to calculate the duration of the stay of a third-country national in the Schengen area, which shall not exceed 90 days within a period of 180 days. Other measures and tools available at border crossing points, such as databases (SIS and the Visa Information System – VIS), the consultation of which is compulsory at entry, but not at exit, are not intended for the purpose of recording border crossings and do not provide for this functionality. The main purpose of the VIS is to permit the verification of the visa application history and, at entry, to verify whether the person presenting the visa at the border is the same person to whom the visa has been issued.

**7.-** There are currently no electronic means to check where and when a third-country national has entered or left the Schengen area. Difficulties in monitoring the authorised stay of third country nationals are also caused by the use and quality of the stamps (e.g. readability, lengthy process of calculating the stay, forgery and counterfeiting).

**8.-** For these reasons, there is no consistent EU-wide record of entries and exits of travellers to and from the Schengen area and thus no reliable means for Member States to determine if a third-country national has exceeded his/her right to stay. Thirteen Member States (Bulgaria, Estonia, Spain, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Portugal, Rumania, Slovakia and Finland) run their own national entry/exit systems collecting alphanumeric data of travellers. All 13 Member States give access for border management as well as law enforcement purposes. To the extent that a person lawfully exits the same Member State through which he or she entered, an overstay would be detected by these systems. Beyond that, the possibilities for using such systems to detect overstayers are none, as entry and exit records cannot be matched



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when persons leave the Schengen area through another Member State than the one from which they entered and in which their entry was recorded.

**9.-** Reliable data on the number of irregular immigrants currently staying in the EU does not exist either. Conservative estimates of the number of irregular immigrants within the EU vary between 1.9 and 3.8 million. It is generally agreed that a clear majority of irregular immigrants are so-called over stayers, i.e. persons who have entered legally for a short stay, with a valid visa when required, and then remained in the EU after their authorised stay expired. In terms of apprehensions of irregular immigrants in the EU the total for 2010 (EU 27) was 505.220, which shows in comparison to the above estimate that only a small proportion of over stayers is apprehended. In case third country nationals destroy their documentation once they have entered the Schengen area it is very important for the authorities to have access to reliable information to establish the identity of such persons.

**10.-** In this sense, it is proposed to set up a EES to improve the management of the external border and the fight against irregular migration, by providing a system that will:

- Calculate the authorised stay of each traveller; this includes at entry, in case of a traveller having visited the Schengen area frequently, to quickly and precisely calculate how many days there are left of the maximum of 90 days within 180 days; at exit, to verify that the traveller has respected the authorised stay; and within the territory, in relation to carrying out checks on third-country nationals, to verify the legality of their stay;
- Assist in the identification of any person who may not, or may no longer, fulfil the conditions for entry to, or stay on the territory of the Member States; this concerns notably persons who are found during checks within the territory not in possession of their travel documents or any other means of identification.
- To support the analysis of the entries and exits of third-country nationals; this includes notably getting a precise picture of travel flows at the external borders and the number of overstayers, eg. by nationality of travelers.

**11.-** The expected impact of the system is further assessed and detailed in the impact assessment and can be summarised as follows:

- Providing precise information in a rapid way 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 authorized stay as well as more efficient border checks;
- Providing precise information to travellers on the maximum length of their authorised stay;



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- Providing precise information on who is overstaying their authorised stay, which will support controls within the territory and to apprehend irregular migrants;
- 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 undocumented irregular migrant found within the territory that crossed the external border legally; this will in turn facilitate the return process;
- The analysis generated by the system will allow for an evidence-based approach to e.g. visa policy, as the EES will provide precise data on whether there is a problem with over stayers of a given nationality or not, which would be an important element when deciding whether to impose or lift, as the case may be, the visa obligation on the third country in question;
- By abolishing the manual element of stamping of passports from border checks it becomes possible to provide for fully automated border controls for certain third-country nationals, under the conditions laid down in the proposal for a Registered Traveller Programme presented in parallel with this proposal.

**12.-** On the other hand, the current provisions in force applicable to third country nationals can be deemed uniform, bearing in mind that the same checks apply regardless of any differences in risk between different travellers or their frequency of travel. This is because current legislation does not allow for exceptions to the principle of thorough border checks except for those categories of third-country nationals that are specifically mentioned in the SBC or in the Local Border Traffic Regulation such as Heads of States, cross-border workers and border residents. Only a very small minority of persons crossing the external border are able to benefit from the above-mentioned exceptions: approximately two million equivalent to 0,2 % of total passenger flows. This number can be expected to remain largely constant, with a marginal increase due to an increased take up of local border traffic regimes. By the end of 2010, 110.000 local border traffic permits were issued by Member States.

**13.-** As regards the previous paragraph, it is proposed to establish a RTP, which, together with the EES, will substantially improve the management and control of travel flows at the border by reinforcing checks while speeding up border crossings for frequent, pre-vetted non EU travellers. Taking into account the foreseen increase in passenger flows at the external borders, an alternative border check procedure should be offered for frequent third-country travellers. In practice the RTP would work at the border the following way: a registered traveller would be issued a token in the form of a machine-readable card containing only a unique identifier (i.e. application number), which is swiped on arrival and departure at the border using an automated gate. The gate would read the token and the travel document (and visa sticker number, if





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applicable) and the fingerprints of the travellers, which would be compared to the ones stored in the Central Repository and other databases, including the Visa Information system (VIS) for visa holders. If all checks are successful, the traveller is able to pass through the automated gate, thus crossing the border without any human intervention. In case of any issue, the traveller would be assisted by a border guard. Facilitation of border crossings would take place also during the manual border checks as border guards would not need to ask the "additional" questions from the registered traveler such as the destination of travel and existence of sufficient means of subsistence.

**14.-** The establishment of an Entry/Exit System (EES) with or without biometrics which would record entries and exits of third-country nationals for short stays at the external borders would be the precondition for allowing full automation of the border checks for registered travelers as described above. The EES would allow the elimination of the obligation to stamp the travel document foreseen under the Schengen Borders Code as the manual stamping would be replaced by automatic recording and calculation of stay. Once the stamping obligation has disappeared, consultation of the EES would become mandatory at the external border to ensure that the third-country national has not exceeded his/her legal entitlement of stay in the Schengen area. This consultation could be done automatically using the Machine Readable Zone of the travel document or fingerprints.

**15.-** To be more precise, the purpose of the modification of Regulation (EC) No 562/2006 of the European Parliament and of the Council, dated March 15, 2006, establishing the SBC, is to adapt it to the two new systems proposed for the modernisation of the external borders control, namely the EES and the RTP, analysed on a simultaneous basis in this report. In turn, the Regulation establishing an EES to register the entry and exit data of third country nationals crossing the external borders of the Member States of the European Union intends to create an EES and establish a legal basis for the development and implementation of the technical system; to define the purpose, the functionalities and responsibilities for use of the EES; and to confer on the Agency for the operational management of large-scale information systems in the area of freedom, security and justice (the Agency), the development and operational management of the central system. Concerning the Regulation establishing a RTP, its objective is to establish the procedures and conditions for access to the RTP, to define the purpose, the functionalities and responsibilities for a token-Central Repository as a system for the storage of data on registered travellers and, to confer on the Agency the development and operational management of the Central Repository and the definition of technical specifications for a token.

**16.-** The RTP together with the EES will improve management and control of travel flows at the border substantially by reinforcing checks while speeding up border crossings for frequent, pre-vetted non EU travellers. Spain, one of the Member States with important external borders and a considerable number of people crossing them, is



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interested in this system and is in favor of developing the EES and the RTP. However, it has also expressed the need to comply with certain requirements, being the most important one the police access to the new data bases, an issue which is not settled in the proposal of the Commission.

**17.-** When examining the compliance of the examined legislative initiatives with the principle of subsidiarity, we must bear in mind that according to 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 Members 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. The information 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 should be available to increase the efficiency of migration management. A common regime is needed in order to establish harmonised rules on the records of cross border movements and monitoring of authorised stays for the Schengen area as a whole, so that the facilitation applies at all Schengen border crossing points without separate vetting and without decreasing security. Therefore, the objective of the proposal cannot be sufficiently achieved by the Member States. As concerns the proposal to introduce the necessary amendments in the CFS to establish an EES and a RTP, only the Union can modify a Union act in force (in this case, the CFS).

**18.-** As regards the principle of proportionality, 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 Schengen Member States. It creates an instrument providing the European Union with 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. Furthermore, it 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 function and meet its objectives. It 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





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progressing towards a common EU migration policy. The proposal therefore complies with the proportionality principle.

**19.-** As regards the legal instrument chosen, the present proposal will set up a centralised system through which Member States cooperate with each other, something which requires a common architecture and operating rules. Moreover it will lay down rules on border checks at the external borders which are uniform for all Member States. As a consequence, only a Regulation can be chosen as a legal instrument.

**20.-** As regards fundamental rights, the Regulation concerning the EES has an impact on fundamental rights, notably on the protection of personal data (Article 8 of the Charter of Fundamental Rights of the EU), right to liberty and security (Article 6 of the Charter), respect for private and family life (Article 7 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 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 therein designated competent authorities. Safeguards as regards personal data also include the right of access to or the right of correction or deletion of data.

**21.-** As regards the regulation on the RTP, it may have an impact on fundamental rights, notably on the protection of personal data (Article 8 of the Charter of Fundamental Rights of the EU) and right to an effective remedy (Article 47 of the Charter). The proposal contains safeguards, in particular under Articles 15 and 16 in cases the access granted to the RTP is refused or revoked, which provide for the right to an effective remedy, and under Articles 48 and 49 concerning the right of information, access, correction and deletion concerning the data used for the purpose of the Regulation which also include the right to an effective remedy as provided for under Article 51.

**22.-** Concerning budgetary implications of the examined proposals, the one on the amendment of Regulation (CE) No 562/2006 has no implications in itself for the EU budget. Concerning those on the EES and the RTP, financial support is to be provided within the next multi-annual financial framework (MFF), through the Internal Security Fund (ISF) for the period 2014-2020, which would cover not only the costs of central components for the entire MFF period (EU level, both development and operational cost) but also the development costs for the national Member States components of these two systems, within the resources available. Providing financial support for national development costs would ensure that difficult economic circumstances at national level do not jeopardise or delay the projects. This includes the costs at national level related to hosting the IT systems, the space for hosting the end-user equipment, and the space for operators' offices, as well as the costs related to hardware and software licenses. Once the new systems would be operational, future operational costs in the Member States could be supported by their national programmes. It is proposed that



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Member States may use 50% of the allocations under the national programmes to support operating costs of IT systems used for the management of migration flows across the external borders of the Union. These costs may include the cost for the management of VIS, SIS and new systems set up in the period, staff costs, service costs, rental of secure premises etc. Thus, the future instrument would ensure continuity of funding, where appropriate.

23.- This proposal is based on the Schengen acquis, since it concerns the crossing of external borders. Therefore, we have to bear in mind the consequences for the several protocols annexed to the Treaties and association agreements held with third countries such as Denmark, Ireland and the United Kingdom; Bulgaria, Rumania and Cyprus; Iceland and Norway; Switzerland and Liechtenstein, whose situation is described in the recitals of the proposals.

### CONCLUSION

**For the aforementioned reasons, the Joint Committee for EU Affairs, considers that the Proposals for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register Entry and Exit of Data of Third Country Nationals crossing the external borders of the Member States of the European Union; and a Registered Traveller Programme; and the subsequent Proposal for a Regulation amending Regulation (CE) No 562/2006 as regards the use of the two aforementioned ones, namely, the Entry/Exit System (EES) and the Registered Traveller Programme (RTP), comply with the principle of subsidiarity laid down in the Treaty on the European Union in force.**