

## Public Consultation on the Smart Borders Package

Fields marked with \* are mandatory.

### Questions to all contributors

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\* You are responding this questionnaire as:

- An individual
- A public authority
- An organisation (non-governmental, civil society organisation, academia, research, social partner, interest group, consultancy, think-tank...)
- A carrier, transport or tourism operator, or a transport infrastructure operator

\* Contributions received from this survey will be published on the European Commission's website (for further information, please consult the privacy statement). Do you agree your contribution being published?

- Yes, your contribution may be published under your name (or the name of the entity you represent)
- Yes, your contribution may be published but should be kept anonymous (without your name or the name of the entity you represent)
- No, you do not want your contribution to be published. Your contribution will not be published, but it may be used internally within the Commission for statistical and analytical purposes

### Questions to organisations (non-governmental and civil society organisations, academia, research bodies, social partners, interest groups, consultancies, think tanks...)

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#### 1. About your organisation

\* Name of your organisation:

European Digital Rights (EDRi)

\* Address of your organisation:

20 Rue Belliard, 1040, Brussels

\* Email address of your organisation:

brussels@edri.org

\* Is your organisation registered in the Transparency Register of the European Commission and European Parliament?

Yes

No

\* If yes, what is your registration number (numbers only)?

1631190514406

## 2. The use of biometric identifiers

\* The 2013 legislative proposal on the Entry/Exit System requires visa-exempt non-EU citizens entering the Schengen area for a short stay to give 10 fingerprints at the border crossing if they are not registered in the Entry/Exit System — either because it is their first visit or because the data retention period has expired since their last visit.

Travellers who hold a visa will have given fingerprints when applying for it, so would not need to have their fingerprints taken again at border crossings.

The 2013 legislative proposal on the Registered Traveller Programme requires non-EU citizens applying for the programme to give four fingerprints. They would give these when submitting an application under the programme.

Both proposals exempt children under the age of 12 from the requirement to give their fingerprints.

In both cases, biometric identifiers (fingerprints) would be used to improve on identity and verification checks, e.g. to verify that the person crossing the border is the person to whom the passport was issued. The Commission is currently examining the feasibility of using other types of biometric identifiers (in particular photo/'facial image') for this purpose.

What kind of biometric identifiers would you prefer to be used?

No biometrics at all, only alphanumerical data (for example, your name, surname, and travel document number)

Fingerprints only

A combination of facial image and a limited number of fingerprints

Facial image only

\* Why? Please explain: (maximum 500 characters)

*Text of 1 to 500 characters will be accepted*

The collection of personal data, including biometric data, of all persons traveling to and from the EU is an interference with the right to privacy and does not meet the necessity principle. The Commission has yet to demonstrate clearly why the use of fingerprints in the SmartBorders is necessary, effective and proportionate and whether the system can operate without them. The issue of biometric databases has been the subject of debate in Member States eg. - the French High Court.

\* Do you think that the use of biometric identifiers could jeopardise or improve the reliability of border checks?

- Jeopardise
- Improve
- No opinion / Not sure

### 3. Process to accelerate border crossing for non-EU citizens

\* The 2013 proposal for the Registered Traveller Programme proposes setting up a programme to enable pre-vetted non-EU citizens to benefit from facilitations at borders. This will make it easier and quicker for these pre-vetted frequent travellers to cross borders. The Commission is analysing potential simplifications to this approach.

To what extent do you consider that there is a need for a process to accelerate border crossings by non-EU citizens at the Schengen area's external borders?

- To a great extent
- To some extent
- To a small extent
- Not at all
- I do not know

\* The 2013 proposal for the Registered Traveller Programme provides for a faster border crossing process for those travellers having submitted a specific application. Applicants for the Registered Traveller Programme would be subject to some specific checks when submitting their application. Participation in the programme would require the payment of a fee. For their subsequent journeys, accepted Registered Travellers would be exempt from part of the checks applicable at borders to non-EU citizens. At major external border crossing points equipped with automated border control gates, border checks would be performed using these infrastructures. Where no automated border control gates would be available, Registered Travellers would be able to use the lanes reserved for citizens of EU countries and Iceland, Liechtenstein, Norway and Switzerland.

Do you consider that this specific process to accelerate border crossings should be available for non-EU citizens?

- Yes
- No

\* Why? Please explain: (maximum 500 characters)

*Text of 1 to 500 characters will be accepted*

It is disproportionate to create a large database with sensitive data to speed up the queuing process. The European Commission initially suggested that by creating the Smart Borders system, it will help establish a migration policy based on hard evidence. However, the processing of personal data cannot be justified purely by generating statistics. Additionally EU large databases can be created only to support an established EU policy, which is not the case here in the case of migration policies

\* Another faster border crossing process could be envisaged for those travellers entering the Schengen area for a short stay and whose passport data and biometric identifiers had already been registered in:

- the Visa Information System for travellers holding a short-stay visa;

- the Entry/Exit System for visa-exempt travellers whose data has been registered during a previous journey, if the retention period has not yet expired.

These travellers would be able to benefit from a faster process without needing to submit any application. This process would be available at those border crossing points equipped with self-service kiosks. Some elements of the border checks (passport control, biometric verification, answering questions...) could be performed using self-service kiosks. The decision to authorise or refuse entry would be taken by a border guard who may also need to talk to the traveller for additional verifications.

Do you consider that the process to accelerate border crossings described above should be available for the two categories of travellers listed?

Yes

No

\* Why? Please explain: (maximum 500 characters)

*Text of 1 to 500 characters will be accepted*

The European Union has been developing a number of databases in order to ensure more effective border controls such as the VIS, SIS II or Eurodac. Before the building of yet another central IT system, the effectiveness of existing databases should be assessed. Furthermore, concerns for privacy and data protection have been overlooked.

\* If self-service kiosks are implemented, do you envisage any difficulties related to their use by travellers?

- Yes
- No
- I don't know

## 4. Data

\* The 2013 Entry/Exit System proposal sets a limit to how long data can be kept after its collection at the entry and exit of the Schengen area's external borders:

1) A maximum retention period of 181 days after exit (91 days if the traveller has been absent from the Schengen area for 90 days). This retention period enables enforcement of the rule authorising non-EU citizens to stay in the Schengen area during 90 days within any period of 180 days.

2) A data retention period of five years for a person who has overstayed (i.e. remains in the Schengen area beyond the authorised period of stay). This data retention period aims to support the identification of the person and the return to his/her country of origin.

The Commission is evaluating whether these retention periods should be adapted in its new proposal.

Concerning the data retention period for the Entry/Exit System for non-overstayers, would you be in favour of:

- A maximum data retention period of 181 days starting from the exit date. This period is sufficient to calculate the duration of authorised short stays in the Schengen area.  
A longer data retention period, to speed up border controls as a traveller returning to the Schengen area during the data retention period would not need to re-enrol under the Entry-Exit System, since his/her personal data is still stored in the system and can be reused.
- Other

\* Please explain: (maximum 1500 characters)

*Text of 1 to 1500 characters will be accepted*

According to ECtHR's case law the data retention period should be clearly defined and satisfy the 'necessary in a democratic society' test (S and Marper v United Kingdom). Furthermore, the data retention principle calls for data to be stored for the minimum amount of time. Therefore, the Commission should first identify a clear and precise objective for collecting data and then define an adequate retention period, which fulfils the requirements of the principle of necessity and proportionality. These principles were given practical meaning in cases C-293/12 and C-594/12 at the Court of Justice of the EU, in relation to the specific issue of telecommunications data retention. The Court indicated that the retention of that category of data constitutes a "particularly serious interference" with the fundamental rights to privacy and data protection. As stated by the EU Court - in line with the ECtHR - if such an intrusive measure as data retention was to be considered, the legislators would have the obligation to verify its "proportionality of the interference". Therefore, no data retention mandates should be approved until a credible, independent test, proving compliance with CJEU and ECtHR has been conducted.

\* Concerning the data retention period for the Entry/Exit System for people who overstay, would you be in favour of:

- A data retention of five years following the last day of the authorised stay
- A data retention longer than five years
- A data retention shorter than five years

\* Why? Please explain: (maximum 500 characters)

*Text of 1 to 500 characters will be accepted*

The determination of the length of a data retention period should not be left to the result of a public consultation but to comprehensive proportionality and necessity tests conducted by legal experts.

## 5. Law enforcement access to the Entry/Exit System data

- \* The 2013 Entry/Exit System proposal provides that the option for law enforcement authorities to access data will be evaluated two years after the system enters into operation. For its forthcoming revised proposal, the Commission is analysing whether law enforcement authorities should have access to the system, and if so, under which conditions. This analysis will address the necessity, appropriateness, and proportionality of this option and be accompanied by a fundamental rights impact assessment.

Would you favour granting law enforcement authorities access to the data stored in the Entry/Exit System for the purpose of preventing, detecting or investigating terrorist offences or other serious criminal offences? This access would be granted under strict legal prerequisites in full compliance with fundamental rights.

- Yes
- No
- Not yet. The issue should be evaluated two years after the implementation of the Entry/Exit System.
- No opinion / Not sure

- \* Please explain why: (You may tick more than one box)

- There is no need for such access
- Other

- \* Please explain: (maximum 500 characters)

*Text of 1 to 500 characters will be accepted*

The blanket collection and granting of access to data of all people traveling to/from EU area to the police or other LEA is a clear violation of the EU Charter on Fundamental Rights, as stated by the CJEU in the ruling of cases C-293/12 and C-594/12. To allow for such access there must be a clear relationship between the data whose retention is provided for and e.g. a threat to public security. An additional requirement is to minimize the personal and substantive scope of data retained.

\* If law enforcement authorities had access to the Entry/Exit System data, which of the following conditions should be implemented to mitigate the impact on fundamental rights and in particular on data protection? (You may tick more than one box)

Access should be limited to the prevention, detection or investigation of terrorist offences or other serious criminal offences.

There should be reasonable grounds to consider that the specific envisaged consultation of the Entry/Exit System data will substantially contribute to the prevention, detection or investigation of any of the terrorist or serious criminal offences in question.

Searches should only be possible in specific cases under clearly defined circumstances. The proposal should exclude searches on a systematic basis.

The data should be accessible for law enforcement purposes for a predefined limited period of time.

A court or an independent administrative body should verify in each case if the required conditions for consulting the Entry/Exit System for law enforcement purposes are fulfilled.

Access to the Entry/Exit System should only be possible if prior searches in more restricted databases (e.g. Member States' criminal databases) do not provide sufficient results.

No opinion / Not sure

Other

\* Please explain: (maximum 500 characters)

*Text of 1 to 500 characters will be accepted*

If LEA were to be granted access to retained data, such access would have to be for a specific purpose, on the basis of suspicion based on substantive evidence facts, for a limited period of time which is no longer as necessary for the aims of the retention and under the oversight of an independent court. The decision of the court should seek to limit access to the data and their use to what is strictly necessary.

## 6. Stamping



\* Currently, stamping the passport is the only method of indicating the dates and locations of entry and exit. The stamps are used by border guards and immigration authorities to calculate the duration of the stay of non-EU citizens and to verify compliance with the rules on short stay (authorised stay of 90 days within any period of 180 days). This calculation method is time-consuming and difficult, particularly for frequent travellers. In addition, maintaining the quality and security of stamps requires both resources and efforts, as they can be subject to counterfeiting and forgery.

The 2013 proposals provide for the abolishment of the stamping of passports of non-EU citizens crossing the external borders of the Schengen area. The Commission would like to gather views on the consequences of such abolition.

If stamps on passports were discontinued, would non-EU citizens need access to the information they currently provide (date and location of entry into/exit from the Schengen area)?

- Yes, to make sure during the stay in the Schengen area that the planned return date complies with the authorised stay in the Schengen area (90 days within 180 days).
- Yes, to plan any future trip(s) to the Schengen area and to ensure compliance with rules on the authorised period for a short stay (90 days within 180 days)
- Yes, to prove absences from the country of residence
- No
- No opinion / Not sure
- Other

## 7. Comments/other questions

\* Do you expect any other possible impacts of the Entry/Exit System or the Registered Traveller Programme on asylum seekers that should be taken into account? (maximum 1500 characters)

*Text of 1 to 1500 characters will be accepted*

The proposals of the Smart border package strengthen the current securitisation of EU policies. The proposal is fear-driven and fear-triggering at the same time, placing emphasis on a putative need to protect the EU from those coming from outside.

\* Do you expect any other possible impacts on those who may need to issue invitations, such as EU citizens, companies, organisations or associations located in the EU? (maximum 1500 characters)

*Text of 1 to 1500 characters will be accepted*

This falls outside EDRI's scope.

- \* If you have any other comments regarding the Smart Borders package or its impacts, please give further details (maximum 1500 characters).

*Text of 1 to 1500 characters will be accepted*

The Smart Borders package is a discriminatory, illegal, excessively expensive, unnecessary and an overly bureaucratic surveillance system. It is difficult to find a justification for believing that it just about border control and information sharing rather than, in its worst characterisation, a next step in the building of "Fortress Europe". By strengthening the surveillance of all foreigners and establishing grossly disproportionate technologies at its borders, the European Union is conveying a clear signal that migrants and third-country nationals are officially perceived as a threat to its security and domestic policy. In saying that this proposal will help deal with migration issues, the Commission is offering a rather simplistic solution for a very complicated legal, social and political issue. The Smart Borders package will have a far-reaching negative impact on the protection of human rights in the European Union. This measures in the proposal would be a clear infringement on the right to privacy under Article 8 of the EU Charter of Fundamental Rights and it will seriously affect Article 7 and 9. It does not meet the necessity principle, which could potentially justify the establishment of an Entry/Exit system and Registered Travellers Programme, nor is it proportionate to the scale of its impact on the limitation of fundamental rights.

## Contact

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