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Opinion 05/2013 on Smart Borders

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This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

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THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO PROCESSING OF PERSONAL DATA

set up by the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995,

having regard to the Art. 29, Art. 30(1)(c) as well as Art. 30(3) of the aforementioned Directive, and having regard to its Rules of Procedure

HAS ADOPTED THE PRESENT OPINION

Introduction

On 28th February 2013, the Commission presented proposals for an Entry Exit System (EES) and a Registered Traveller Programme (RTP) for the Schengen Area, collectively known as “Smart Borders”. A proposal for necessary alterations to the Schengen Borders Code was also presented.

The Entry Exit System proposal proposes a centralised storage system for entry and exit data of third country nationals (TCNs) admitted for short stays to the Schengen area, whether required to hold a Schengen visa or not. Rather than having passports stamped on entry to and exit from the Schengen Area, data relating to the identity of the visitor and length and purpose of stay will be entered in the system on entry and will be checked on exit, to ensure that the TCN has not exceeded the maximum permissible stay. A centralised system means that the EES data can be checked no matter where the TCN exits the Schengen Area. The primary purpose of the system is allegedly to counteract the problem of overstay in the Schengen Area of TCNs who originally entered for a short stay (max 90 days out of 180 days) on a valid visa or for a valid purpose. The EES proposal is for a system initially based on personal data needed for the identification of persons (which are referred to in the text only as “alphanumeric data”), with “biometric data” to be introduced after three years. After two years, there is to be evaluation on whether access should be allowed to law enforcement authorities and third countries.

The RTP proposes a registered traveller programme for frequent travellers to the Schengen Area, for example, business visitors. TCNs may apply for registered traveller status and benefit from faster border crossings. The RTP will be based on a central repository containing biometric data and a token containing a unique identifier held by the traveller.

The Article 29 Data Protection Working Party (WP29) reiterates the concerns expressed in its letter to Commissioner Malmström at the time of the publication of the Communication on Smart Borders.¹ WP29 still has reservations about the proposals from a data protection point of view. In particular, WP29 has serious concerns about whether the Entry Exit System meets the standards of necessity and proportionality necessary to justify its impact on the right to protection of personal data as set out in Article 8 of the EU Charter of Fundamental Rights.

This Opinion will focus primarily on the Entry Exit System, while also highlighting some specific data protection concerns regarding the Registered Traveller Programme. The primary aim of the Opinion is to analyse the Entry Exit system in terms of whether or not it meets the test of necessity and proportionality for justifying invasion of privacy. The second part of the Opinion will address some specific data protection concerns in both proposals.

¹ Letter from WP 29 to Commissioner Malmström on Smart Borders, 12/06/2012 Ref. Ares (2012) 707810 – 13/06/2012

Part I - Entry Exit System – Necessity Analysis

The EES would essentially create a new very huge database. Therefore, interference with the right to privacy needs to be justified in line with Article 8 of the EU Charter of Fundamental Rights.

1. Background - Aims and Context

WP29 has already recognised the need for integrated border management of the external borders of the EU and acknowledged that improving the management of migration flows and preventing irregular migration are legitimate purposes.² However, the added value of an EES to achieve these aims is not a sufficient test to prove necessity of the EES and its proportionality in terms of its impact on fundamental rights, including data protection and privacy. Interferences with private life must meet the threshold of being “necessary in a democratic society” and mere added value does not reach the standard of necessity in this context.

The scope of the EES should also be considered when assessing proportionality. How many border crossings into the Schengen area will the EES actually deal with? According to the Commission’s Impact Assessment, 73.5% of Schengen border crossings are either EU citizens or beneficiaries of Directive 2004/38/EC.³ The remaining 26.5% are divided between visa and non-visa holders. What is not made clear is whether these are short stay visitors or whether or not holders of long stay visas or other residence permits, who will not fall into the scope of the EES, are included in the figures. In other words, the EES will deal with a relatively small percentage (even if a huge number) of border crossings. This begs the question of whether the creation of such a large database is proportionate to the scale of the problems it seeks to address. In addition the same purpose of counteracting the problem of overstayers is one of the main purposes of another huge EU database, the Visa Information System (VIS). Recital 5 of the VIS Regulation is clear on this: “The VIS should also assist in the identification of any person who may not, or may no longer, fulfill the conditions for entry to, stay or residence on the territory of the Member States” Nothing is said in the Impact Assessment as to why VIS is not sufficient to pursue this purpose.

The scale of the problem of overstay which the EES (in complement with the VIS) purports to address should also be mentioned at this point. Estimates are that the extent of overstayers in the EU varies from 1.8 to 3.9 million, estimates available from the Clandestino Project.⁴ There are no reliable figures available, but a colloquial acceptance of the vastness of the overstay problem. It is of course problematic to base a large database on shaky evidence such as this. However, WP29 would also point out that this is no justification for the creation of a database in order to generate statistics to justify its own existence.

The purpose and methodology of this analysis is to interrogate the suitability of, necessity for and proportionality of the Entry Exit System including possible alternatives. In order to understand whether or not the EES meets the threshold of necessity, it is first necessary to set out its underlying aims and to set these in an overall policy context.

² Letter from WP 29 to Commissioner Malmström on Smart Borders, 12/06/2012 Ref. Ares (2012) 707810 – 13/06/2012

³ Impact Assessment accompanying the document *Proposal for a Regulation of the European Parliament and of the Council establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union* SWD (2013) 47 final, p.12

⁴ Ibid, p.12

Putting the aims of the proposal in context enables the testing of necessity and proportionality against three questions:

- Is the EES suitable to achieve a legitimate aim?
- Is an EES necessary, relative to its impact on fundamental rights including data protection and privacy, to achieve that legitimate aim?
- Are there alternatives available to achieve the same legitimate aim, without the same impact on fundamental rights including data protection and privacy, already in place?

1.1 Aims of EES

WP29 notes that, according to the Commission, the EES has four policy aims:

1) To improve efficiency of checks at Schengen border – the current system of stamps is cumbersome and time consuming for calculating length of authorised short stay. The Entry Exit System will also remove problems caused by inconsistency, illegibility and (possibly) fraud concerns about stamps in travel documents.

2) To combat overstay in the Schengen territory. Entry Exit system will allow an automatic notification if the TCN has not exited Schengen territory at the end of the authorised stay. The current stamping system only allows for calculation of authorised stay based on stamps, i.e. at Schengen border, or if TCN comes into contact with authorities in a Member State for some other reason. There is no way of knowing if stay has been exceeded if a person stays below the radar. (However such persons could be considered to be a real minority considering all the information already registered in the VIS on persons required to have short stay visas or transit visas).

3) Evidence – based policy making. By providing more accurate data on entries to the EU, where persons are coming from, and figures on overstay, this will help enhance policy making, in, for example, where to target new visa facilitation/waiver agreements.

4) Easier Returns – Entry Exit system will mean that irregular migrants, whose data is captured on entry in the EES, will remain identifiable for the purposes of return and will complement the VIS in this regard. This will remove the problem of TCNs destroying their travel documents once entered into the Schengen area.

1.2 Context

The aims of the EES have a policy context. A recognition of the fact that the EES sits alongside EU policy on migration and mobility helps in an assessment of whether or not it can fulfil its own aims. Context is important because it shows the motivations and problems that give rise to the proposals, but also opens up the possibilities for alternatives to the proposals which could achieve similar aims. The main policy context is the fight against illegal (irregular) migration and the need to promote effective return policies. A second policy context is the perceived need for more evidence based policy making, in terms of the fight against irregular migration and trafficking; and mobility policy, i.e. from which countries/regions to open up access to the EU based on visa facilitation and visa waivers.

Fight against illegal migration and effective return

There is, of course, a huge political impetus to combat illegal migration, including overstay. The Stockholm Programme⁵ sets out priorities of the Member States in terms of the fight against illegal migration and effective return. Creation of the EES is seen by MS as a priority as a complement to existing systems in integrated border management, while respecting data protection rules. The “Roadmap” on illegal migration, agreed in the DK Presidency, “EU Action on Migratory Pressures – A Strategic Response”⁶ echoes the same priorities.

In terms of the fight against illegal migration, the Stockholm Programme highlights the role of effective return. The EES should also be examined in the context of the EU’s readmission policy, and the general problems with effecting return decisions. In 2010, 226,000 returns were effectively carried out of 540,000 removal orders.⁷

Evidence-based policy making

One of the aims of the EES is to provide evidence for the making of decisions relating to the EU’s mobility policy – i.e. the opening up of visa-free travel to the EU to more third countries.

Similar statistical evidence in relation to Schengen visa applicants and holders will be available from the VIS.

The role that the EES may have in such a venture also has to be seen in the context of and compared to the key methodology which the EU has at its disposal for such decisions – the Global Approach to Migration and Mobility (GAMM)⁸. The GAMM provides a framework and specific operational tools (in particular the mobility partnership) in order to engage with third countries in relation to migration management in relation to return/readmission, capacity building to manage migratory flows, promoting specific legal migration channels, or assessing the potential candidacy of a third country for enhanced mobility opportunities towards the EU.

2 – The Necessity Test

Question 1 - Is the EES suitable to achieve its legitimate aims?

2.1 – Aim to achieve more efficient border crossings

The Commission has argued that the EES will make for more efficient border crossings by replacing the checking of multiple individual stamps, with consistent entries in a database. Considering that this will only apply where data on the person are not stored in the SIS or in the VIS, databases which are normally and easily accessible to border guards performing border checks, it is questionable whether this will make queues any faster, as, particularly on first entry across the Schengen border, the border guard will be required to enter a lot of data into the system.

⁵ *The Stockholm Programme – An Open and Secure Europe serving and protecting systems* OJEU 2010/c/115/01, sections 5.1 and 6.1.6

⁶ *EU Action on Migratory Pressures – A Strategic Response* Council Document 8714/12

⁷ Communication from the Commission to the European Parliament and the Council – Smart Borders – options and the way ahead COM(2011) 680 final, p.4

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *The Global Approach to Migration and Mobility* COM (2011) 743 final

It is argued that the EES will provide a consistent method of calculating short stay, rather than calculation derived from a range of different entry stamps. The consistent entries in the EES will remove the scope for doubt arising from a range of different entry stamps, sometimes illegible, and combat any fraudulent stamps used, although it is questionable why VIS would not be more used for this purpose. The usefulness of consistent centralised entries would, of course, depend on data quality – i.e. on accurate data being entered in the system in the first place, and on data being deleted as appropriate at the end of the retention period or in accordance with any change in circumstances of the traveller.

2.2 – Aim to combat overstay

i. Need for effective exit controls to counteract false notifications of overstay

WP29 wishes to emphasise that the entry/exit system must have a properly operating exit component in order to combat overstay effectively. If exit controls are not recorded fully and accurately, this will give rise to false notifications of overstay in the system, thus victimising innocent travellers. This is particularly critical at the land borders where, it would appear, due to the volumes and different types of transport used, that exit controls would be problematic. The Stockholm Programme noted that the implementation of an EES “at land borders deserves special attention and the implications to infrastructure and border lines should be analysed before implementation”⁹, which points to an awareness that creating an effectively operating system at land borders is key for the system to work and may pose significant challenges.

WP29 notes that there appears to be no international examples of comparable exit systems operating at a land border. The Commission Impact Assessment points to the problems with implementing the exit component of the US VISIT programme, noting that “The US Department of Homeland Security (DHS) stated that several more years are still needed to implement the technology because of the high costs, manpower and number of ways to exit the United States, in particular through its land borders.”¹⁰ The Commission counters this evidence in the Impact Assessment by stating that implementation problems such as these are not applicable to the Schengen area because “there exists a full and complete developed architecture and sufficient human resources at all border crossing points in both directions.”¹¹ This contradicts the earlier concerns expressed in the Stockholm Programme, and it appears that the Commission has no actual operational evidence of an exit system of comparable size and structure operating effectively at a land border.

ii. Scope of overstay problem

The scope of the actual overstay which the EES can hope to combat also needs to be questioned.

The Impact Assessment notes that it is “generally agreed”¹² that the greatest risk of overstay comes from individuals admitted legally for short stays. It must be observed in the context of combating overstay that all information regarding the visa status together with fingerprints and other information as provided for in the VIS Regulation and in the Borders Code of visa required nationals is already in the VIS and that consultation of the VIS is normal practice for border guards and many

⁹ *Stockholm Programme*, OJEU 2010/C/115/01, section 5.1, C/115/27

¹⁰ Impact Assessment accompanying the document *Proposal for a Regulation of the European Parliament and of the Council establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union* SWD (2013) 47 final, p.14

¹¹ *Ibid.*, p.15

¹² *Ibid.*, p.13

other authorities (immigration authorities and asylum authorities and authorities in charge for checks on foreigners on the territory).

The EES can, of course by definition, only regulate short stay. But are short stay visitors the only TCNs to cross the Schengen border? Obviously they are not and this is why the proposal exempts from the scope, TCNs who are beneficiaries of Directive 2004/38/EC and hold the appropriate residence card and holders of residence cards who are exempt under Article 2(15) of the Schengen Borders Code.

Is it the case that those admitted for long stays do not pose any risk of overstay? There is a risk of general assumptions that “high value” migrants like Blue Card holders or Researchers do not pose immigration risk. Students are also a long stay category and are often considered a risk of overstay.

Overstay can also result from abuse of derived rights under Directive 2004/38/EC. TCNs who lose their entitlement to derived rights, through, for example, breakup of the relationship with the EU national after a short period, can only really be tracked if they hand back the residence card.

WP29 does not wish to advocate that these categories of TCN should also be tracked through a large scale database! The purpose of the examples is to argue that there is potentially more to the overstay problem than the EES can ever attempt to address. EES is only one element to address the whole problem of overstay.

iii. Detection of overstay does not combat overstay as a problem

WP29 also wishes to emphasise that detection of overstay is not an end in itself. The EES on its own cannot combat overstay. The added likelihood of being caught may function as a deterrent to the deliberate overstayer, but this is weakened by the absence of accompanying measures to apprehend that overstayer. What is more likely is the danger that the overstay notifications in the EES may disproportionately affect innocent travellers – in terms of, for example, retention periods or need for deletion of data discussed in Part II of this Opinion.

2.3 Aim to help effective Return

The EES will be able to aid identification of those undocumented migrants who destroy their travel documents, who are not identifiable through the VIS. This raises two questions. Firstly, how much will the EES contribute to identity verification, when the VIS is already in place to carry out this function for Schengen visa holders? EES will contribute to identity verification for undocumented migrants who were not subject to a visa requirement. Considering that countries with a visa-free regime are considered less of an immigration risk, it is questionable how many EES entries will really be needed for identity verification of prospective returnees.

EES can only counteract a subsection of the readmission problem in terms of a contribution to identity verification. There is no guarantee that a person whose identity has been verified will actually be accepted back by the third country.¹³ There is little reliable data available on how many returns are effected via the EU Readmission Agreements. The survey carried out by the Commission for the Evaluation of Readmission Agreements showed a recognition rate varying from 50% to 80% for readmission requests for own nationals. However, the report states that the data available do not allow reliable conclusions about actual returns.¹⁴ If there is a gap between recognition rate and

¹³ Noted by the Meijers Committee in Opinion on Smart Borders, Ref: CM1307, p.2

¹⁴ Communication from the Commission to the European Parliament and the Council Evaluation of EU Readmission Agreements, COM (2011) 76 final, p.5

effective return in the EU Readmission Agreements, we can imagine that the situation can be a lot more ad hoc when it comes to bilateral arrangements. As noted earlier in this Opinion, there is a huge gap between removal orders and returns effected in the EU. As WP29 has already commented in its letter on the Communication on Smart Borders, this seems to point to a general problem in actually returning illegal migrants (including overstayers) than in identifying them in the first place. Even when taken into account that some removals cannot be effected for *non-refoulement* or other human rights reasons, the gap is too huge to be attributed wholly to a problem of identity verification. Caution should be urged in seeing the EES as a solution to problems with returning unidentified overstayers.

2.4 . Aim to have better information for evidence based policy making

Some useful data will emerge on migratory flows but similar data in relation to visa required nationals will also be available from the VIS.

Question 2 - Is an EES necessary, relative to its impact on fundamental rights including data protection and privacy, to achieve those legitimate aims?

The analysis under Question 1 calls into question whether the EES can be as effective in achieving its own stated aims as it is hoped. But even if it were accepted that the EES provided significant added value, the legal question arises if this can justify the invasion of privacy under Article 8 – EU Charter. WP29 is firmly of the view that the added value of the EES to achieving its stated aims does not meet the threshold of necessity which can justify interference with the rights under Article 8 – EU Charter. WP29 considers that the added value of the EES is not proportionate to the scale of its impact on fundamental rights in relation to each of its aims as follows:

More efficient border crossings: There is added value to having consistency on entry/exit data, but it is dependent on data quality in the system. A database with poor data quality poses huge risks of disproportionate sanctions against innocent travellers. In addition, it is clearly disproportionate to create a large scale database of personal data with the aim of having quicker queues.

The cost of the EES at 183 million euro development costs and 88 million euro annual operational costs (in addition to the cost of operating other systems such as SIS II and VIS) is also a factor to be considered when considering the gains to be had from faster border crossings. Is it really cost-efficient to invest at this level?

Possibility to combat overstay: There is some added value in that the EES will make it easier to be aware of the existence of overstayers in the Schengen Area. But this added value is seriously weakened by the fact that the EES cannot tackle the full range of the problem and even more so by the fact that the mere detection of overstay is not a means to apprehend the overstayer. The creation of this additional instrument in of itself will not add sufficient weight to satisfy the principle of necessity.

WP29 also has serious concerns about the potential for false or disproportionate entry bans resulting from overstay notifications from the EES. We welcome the acknowledgment in the Impact Assessment that “in case the entry/exit system notifies an overstay, this indication should not lead automatically to detention, removal or a sanction for the third country national.”¹⁵ WP29 emphasises

¹⁵ Impact Assessment accompanying the document *Proposal for a Regulation of the European Parliament and of the Council establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union* SWD (2013) 47 final, p.19

that entry bans or removal decisions must always be subject to an individual assessment of all the circumstances of the case, and that an effective remedy should be available.

Identity verification for undocumented migrants and contribution to effective return: There is some added value in the data that the EES will make available to identify undocumented migrants, but this added value is seriously weakened by the fact that similar data available in the VIS is likely to target a larger number of overstayers and the fact that identity verification in itself is not a means to effective return.

Evidence based policy making: WP29 considers it disproportionate to justify creation of a large database of personal data on the basis that one of its aims is to create better statistics for policy making. This view is supported by the fact that much similar data will be available from the VIS, and that the Global Approach to Migration and Mobility provides alternatives for informed policy making in this area.

Access for law enforcement authorities and third countries: WP29 notes that access of law enforcement authorities is subject to evaluation after two years. Obviously such an evaluation would require a new impact assessment taking the principles of necessity and proportionality into account. Yet it is worrying to see evidence that the proposal is taking law enforcement access as a given from the outset, by preparing itself technically for access by law enforcement authorities (Recital 11). If law enforcement access is taken as a given from the outset, the level of intrusiveness will be all the greater. WP29 would reiterate its principled objection that there should be no routine law enforcement access to an administrative database, containing the personal data of innocent travellers.

The fact that the Commission proposal introduces from the outset the obligation to include ten fingerprints also makes clear its full intention to allow law enforcement access in the end. To identify a TCN at the border for entry or exit purposes, or to verify identity in the street if in doubt about possible overstay, a maximum of four fingerprints (two of each hand, similar to the ePassport used across Europe) would be sufficient. The Commission proposal therefore does not meet the requirements of data minimisation and privacy by design, principles that are advocated by the same Commission in the light of the ongoing data protection reform. The only imaginable reason to collect and store ten fingerprints of TCNs from the outset, is to prepare a database that is suitable for searches of fingerprints for identification purposes where the TCN is not physically available, i.e. for law enforcement purposes.

Question 3 - Are there alternatives available to achieve the same legitimate aims, without the same impact on fundamental rights including data protection and privacy, already in place?

The view that the EES cannot meet the threshold of necessity is further substantiated by considering that alternatives exist to meet its stated aims. The section on Policy Context in this Opinion shows that an EES can only be one tool in a broad range of approaches to combat illegal migration.

The Commission Impact Assessment makes a statement as follows: “no other initiatives to combat irregular migration [...] are relevant either for reducing the number of overstayers or the possibilities for identifying or detecting them.”¹⁶ This was a direct reference to the Council document “EU Action on Migratory Pressures: A Strategic Response” but even in that narrow context needs to be challenged as a policy view.

¹⁶ Ibid., p.21

The EES will detect some overstay but not tackle any of the underlying causes. Taken on its own, it has no means to reduce the number of overstayers, other than perhaps functioning as a mild deterrent. There are tools already in existence which help to combat overstay in a holistic sense.

One such tool is the Employer Sanctions Directive¹⁷. It is recognised that illegal employment is a pull factor for illegal migration, and overstayers due to their lack of legal status are inevitably employed illegally. The Sanctions Directive provides a mechanism to combat the illegal employment sector, and it also provides a framework for Member States to conduct inspections of employers suspected of employing illegal migrants, thus providing an opportunity to apprehend overstayers.

Efforts to enhance legal migratory routes to the European Union also provide an alternative to illegal overstay. Information and awareness raising tools like the Immigration Portal help prospective migrants understand the real opportunities and challenges in migrating to the EU and may offer alternatives to a choice of overstay. The promotion of voluntary return and reintegration projects give some overstayers who want to return home a realistic option. All of these policy initiatives look at the broad picture behind the overstay and are functioning without an EES in place.

WP29 considers that the Global Approach to Migration and Mobility provides a policy framework and practical tools to achieve some of the EES stated policy aims, especially the need for evidence based policy making. Evidence based policy making can be achieved through the geographic priorities and tools of the GAMM. How is data from an EES to influence policy making when it has already been decided at a policy level to concentrate partnership efforts in the first instance with countries in the European Neighbourhood, through the mobility partnership, while keeping a watchful eye on priority countries farther afield using the Common Agenda for Migration and Mobility tool? The GAMM also provides the opportunity for a much deeper assessment of a country's suitability and willingness to take on the responsibilities of a visa-free regime, through the operational experience gained from mobility partnerships, or through political dialogues within its framework.

It would appear to WP29 that there are much richer alternatives available to help in both reducing overstay and deciding the EU's visa liberalisation policy than tracking travellers in an EES system. In particular it would seem that a significant proportion of the problems identified are already being dealt with by VIS. Therefore existing alternatives such as VIS are not being fully exploited.

WP 29 accepts that each of these alternatives may not tackle the whole problem. However it is WP29's view that, given the above analysis, the EES is not proportionate or a legitimate response to meet the aims identified.

Part II - Specific data protection concerns in the EES and RTP

Introduction of biometrics

Introduction of biometrics after three years is a given in the EES proposal and is not subject to re-evaluation after a certain period. It is disappointing that the introduction of biometric data will not be subject to evaluation. As already noted in our letter to Commissioner Malmström, WP29 considers that biometric data should only be introduced after an evaluation of the system after some years of operation. This evaluation would provide a factual basis of whether the objectives could also be achieved without the collection of biometric data.

¹⁷ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals OJ EU L/168/24

Article 20 - Retention Period

WP29 emphasises that data retention should be retained for as long as is necessary to effect a legitimate purpose. Thus EES entries are in general retained for six months, the maximum period during which a TCN can enter for a short stay of up to 90 days. For overstayers, the retention period is five years. No evidence is given for the need for this extension of the retention period. A blanket retention period of 5 years for overstayers is disproportionate.

Article 21 – provision to delete data

In this provision, the onus is on the data subject to arrange and provide evidence for data or an overstay alert to be deleted from the EES, if they acquire a legal right to stay, if they were forced to overstay due to an unforeseeable event or if data is incorrect. In particular, if the data subject acquires the legal right to stay under the conditions of another national scheme, EU Directive or under Directive 2004/38/EC, the need to apply for data deletion in the EES may not occur to the data subject. This situation of change of circumstances could arise frequently and give rise to huge problems of false alerts. It is advisable that some sort of mechanism of providing information to the data subject on this requirement is provided at the time that the data subject receives the alternative legal permission to stay in the Member State. A Recital should be included in the Proposal to raise awareness in Member States of this issue.

This could be a very significant problem regarding TCNs who apply for residence permission under Directive 2004/38/EC. Such persons are currently required to have their passports stamped under the Schengen Borders Code, until such time as they receive the residence card under the Directive. It follows therefore that these TCNs will be recorded in the EES on the same basis, but with possible consequences (relating to the implications of a false overstay notification and five year retention period) reaching far beyond the recording of stamps in their passport. If they are subsequently successful in their application for a residence card, the data in the EES must be deleted, and the onus will be on the TCN to apply for this. Given, as the Commission already recognises, that beneficiaries of 2004/38/EC have a special status that must be protected¹⁸, WP 29 wishes to draw particular attention to the potential for false overstay notifications to disproportionately affect this group.

Article 27 – Data transfer to third countries in context of readmission

The Meijers Committee has already expressed concern about the “wide discretionary power left to the national authorities of the Member States with regard to the transfer of personal data from the EES to third countries”¹⁹ in the context of readmission under Article 27 of the proposal. One of the grounds for transfer is Article 26(1)(d) of 95/46/EC. It is questionable whether return of an overstay is “necessaryunder important public interest grounds” and whether the transfer of EES data is proportionate to achieve this. There needs to be more clarity sought as to the safeguards in place when data is transferred to third countries with clearly inadequate data protection standards. It is noteworthy that the Commission’s Statement in the Council minutes adopting the Council Conclusions on Readmission recognises that “EU readmission agreements must be implemented in

¹⁸ Impact Assessment accompanying the document *Proposal for a Regulation of the European Parliament and of the Council establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union* SWD (2013) 47 final, p.19 – “The measures protecting rights of travellers, including right to an effective remedy, must also take into account the privileged position of non-EU family members of EU citizens whose right to enter and to stay depend on the right of the respective EU citizen in accordance with Directive 2004/38/EC.”

¹⁹ Meijers Committee Opinion on the Smart Borders proposals, CM 1307, p.4

compliance with the Charter of Fundamental Rights.”²⁰ Where are the safeguards to ensure that member state authorities will comply with this?

A similar provision is contained in Article 31 of the VIS Regulation. It would be advisable to wait for evidence on how this works in practice.

Specific Safeguards

WP29 notes that no specific safeguards have been sought after, even though there is evident need: the EES architecture provides in Article 19 for access of all individual users to the central database containing data of all third country nationals admitted for short stays to the Schengen area, while the need-to-know principle – if applied - would request as a condition allowing the consultation of someone's personal data in the EES, either the inclusion of the data subject in question in the identified overstayers list (Article 10(2)), or the direct contact of the authority with a third country national admitted for short stay to the Schengen area. WP29 holds that taking into account either the available resources of the supervisory authorities (article 37 and 38), or the actual possibility to check records kept according to Article 30, provisions on specific data protection safeguards both for EES and RTP should be introduced.

Definitions

WP29 has concerns about the following definitions in the EES proposal:

Overstayer is defined as “does not fulfil or no longer fulfils the conditions relating to the duration of a short stay on the territory of the Member States”. The phrase “does not fulfil” can be interpreted as referring to an illegal migrant, rather than an overstayer. Overstayer should be defined as a person who “no longer fulfils the conditions relating to the duration of a short stay on the territory of the Member States.”

Biometric data is defined as fingerprints.

The definitions of identification (one-to-many check) and verification (one-to-one check) only make sense when linked to search using fingerprints (or biometrics in general).

Alphanumeric data – the definition must make clear and specify, at least in a recital, that alphanumeric data referred to in article 11 constitutes personal data as far as they contain information relating to an identified or identifiable natural person (the data subject) and that the definition of article 2 letter a) of Directive 95/46/EU applies, with all the necessary consequences in terms of lawfulness of processing of such data. In addition, it is suggested to include the wording “or in other systems such as VIS or SIS”, after “in the EES” in the first line of Article 12.

Registered Traveller Programme

WP29 is concerned that another central biometric database would be established. It is considered that it would be preferable to run a system which operates with biometric data in passports only, in order to avoid an additional database.

It is likely that also European citizens would be included in the database. That would be so because the participation in RTP-schemes in Third Countries requires, at least currently, the participation in

²⁰ Council Document 11260/11 Annex II

national schemes, as with Global Entry in the US. Therefore, a biometric database of European travellers would be established.

Discrimination risks

Care should be taken to ensure transparent vetting criteria are used to assess “low risk” travellers for the RTP. Dangers of discrimination when making distinctions between “low risk” and “high risk” (therefore somehow considered guilty without evidence) travellers should be avoided.

Conclusion

This opinion calls into question whether the EES can be effective in achieving its own stated aims. But even if it were accepted that the EES provided significant added value, it is concluded that the added value of the EES to achieving its stated aims does not meet the threshold of necessity which can justify interference with the rights under Article 8 – EU Charter. Furthermore, it is expressed that the added value of the EES is not proportionate to the scale of its impact on fundamental rights in relation to each of its aims, and that alternatives exist to meet its aims.

Done at Brussels, on 6 June 2013

*For the Working Party
The Chairman
Jacob KOHNSTAMM*