

EUROPEAN UNION SMART BORDERS: AN EXAMINATION OF ITS STRUCTURAL IMPACTS ON HUMAN RIGHTS VERSUS NATIONAL SOVEREIGNTY NEEDS

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ABSTRACT

This paper provides a brief overview of Smart Borders (SB), a border check system originally proposed by the European Commission. Drawing on assessments from EU border security experts, it examines the functionality of the SB border check system, areas for reform and the imputed structural impacts on human rights that new innovations entail. Issues arising from the SB's implementation and development are discussed and its systemic implications for human rights are identified. At the theoretical level, an implicit thesis emerges that a basic tension exists between balancing EU border security needs and challenges to nation state sovereignty, on one hand and fundamental human rights as expressed in the freedom of movement, on the other. Thus, the paper is intended to provide a content analysis of the newly introduced package of Smart Borders and it is considered to be stepping stone to further research into the modification and subsequent development of the Smart Borders program. As such, it offers up only a critique and broad suggestions for measures for further consideration.

Key Words: Smart borders, Border checks, Human rights, The Schengen area, Reform.

1. Introduction

Central to the EU integration process is the establishment of the free movement of persons, goods and services, and the abolition of internal border controls within the Schengen area as well as the simplification of EU's external border crossing. The abolition of internal EU border controls has created the basis for the gradual dissolution of the existing barriers between European nations. This has created, in turn, a process resulting in an even closer Europe. Politically speaking, the project has become a singular, global phenomenon, with barrier-free internal borders within the Schengen area. While member states have accepted the idea of free movement of people, the adoption of concrete measures for the abolition of border controls has, also, posed several difficulties arising from the challenges to national sovereignty and the rights of the individual member states involved in this integration process.

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1.1. Research problem

The main purpose of this study is to examine the legal implications of newly adopted Smart Borders (SB) package and its impacts on travelers and immigrants entering the EU. What are the relative trade-offs stemming from modernized, time-saving border checks versus increased surveillance and the impacts of each on their lives? The expected contribution of the SB may be diminished by the fact of systematic intervention into a domain of human rights. The strict border control and better organized law enforcement should not be achieved at the expense of protection of human rights and fundamental freedoms.

1.2. Research question

The main research question of this study is how does the SB package resolve the issue of over stayers in European Union and what is the implication of such initiative to the right to privacy?

1.3. Research methodology

This paper will outline and assess an actual border management transformation in European Union based on using state-of-the-art technology. The paper will examine the content analysis and functionality of the Smart Border check system, areas for reform and the imputed structural impacts on human rights that new innovations entail. The main focus of this paper will be centered around the discussion of the use a new tools offered by the European Commission such as Exit-Entry System to resolve the immigration problems and their anticipated impact on human rights protection guaranteed by the EU Charter (Charter of Fundamental Rights of the European Union, 2000) and other related documents.

1.4. Objectives of the study

This study aims to evaluate the legal aspect of the Data Protection Directive to determine whether the Entry-Exit System fits to the Directive, and in doing so, to the European legal standards regarding data protection. This will be done by assessing the following:

1. E.U. Border management transformation
2. Smart Borders package
3. Entry-Exit System
4. Impact on human rights protection

2. Literature Review

The existing literature on Smart Borders contribution to EU immigration issue is not very extensive in findings. The majority of the studies conducted, so far, are descriptive studies. Absent are criticisms and theoretical approaches that address the wider importance of a SB regime. While some authors discussing the concept of SB in the context of establishing the perimeter alongside the border ([Koslowski, 2005](#); [Brady, 2012](#)), others rather analyze an innovative, digital departure in border management ([Haye & Vermeulen 2012](#); [Masse, 2016](#), [Aremu, 2020](#), [Silahtaroglu, & Vardarler, 2016](#)). Authors agree that the opening of the new discourses of border security and security in general may potentially squeeze out the space for considerations of human rights ([Amoore, et al, 2008](#), [Karim et al., 2018](#); [Hobbing, 2005](#)). In the context of the EU that is even more problematic ([Jones, 2014](#)). Technologies and processes employed at the Smart Borders require a thorough analysis of its impact on the area of data protection ([Roson, 2018](#), [Fadahunsi & Barake, 2018](#), [Hobbing, 2006](#), [Jacolbia, 2016](#)). Some take a different position as they discuss the SB impact, not only on data protection, but also on mobility. It is interesting to notice that some authors using an approach to separate technical from legal and political issues associated with smart borders and, in particular, Justice and Home Affairs databases ([Bigo, et al., 2012](#)).

3. Border Management Transformation

An increasingly globalized world has raised the issue of maintaining the security and encouraging the trade as the great challenge to border management. The current European Union with 7,400 kilometers land borders and 57,800 sea borders (Council of the European Union doc. 18666/11 ADD 1, 7.) tries to keep the concept of Borders as Gates in place despite the fact of increasing migration trends. Economic prosperity relies on the free movement of goods and people, but if those flows are not monitored and controlled the result can be smuggling, trafficking and illegal migration; and with these comes organized crime. The real challenge is to reconcile these contradictions. In addition, some assert that the year 2015 may be remembered as the year of the greatest movement of people fleeing conflict since the end of the Second World War ([Alkopher & Blanc, 2017](#); [Hoffmann-Riem, 2006](#)). Likewise, airport traffic across the EU can be expected to reach 720 million by 2030 Agreeing to European Commission data. These projections suggest that Europe will likely remain the single, largest tourist and destination for migrants in the world, for some time to come. As

existing capacity is insufficient to accommodate the anticipated growth in traffic flow of entrants, increased delays can also be expected at border crossings.

4. Smart Borders

Increased traffic flows through EU's external borders require greater resource commitments and infrastructure capacity to carry out effective border control. Current economic and financial crises mitigate against individual member states capacities to provide sufficient manpower and border infrastructure resources. As a result, greater attention has turned to redesigning the existing border management system and introducing a new generation of technological fixes for border control. European Commission announced its first intention to create a Smart Borders in 2008. Increased numbers of foreign travelers arriving in the EU portend increases in unauthorized migration ([Lehtonen & Aalto, 2017](#); [Janjević, 2003](#); [Miller, 2011](#)). This concern prompted heads of states at a June 2011 meeting of the European Council to request the Commission to step up efforts in finding that technological solutions for the EU consideration. In February 2013, the Commission adopted three proposals as part of the first SB package. The SB package consisted of three legal proposals, found in EES, RTP , and an amendment to the Schengen Borders Code and can be seen as part of a more global EU policy on border control and migration management. Support for the implementation and deployment of these proposals can be seen in the Stockholm program. The legal basis for their introduction is found in articles 74, 77 of the T.F.EU where the European Parliament and Council can enact these regulatory measures through regular legislative procedure. The strategic viewpoint will suggest that the SB initiative represents an innovative departure in border management. Aimed at improving management and traffic control at EU entrances and exits, the current border check system and associated technology are being upgraded and strengthened to improve both security and traffic throughput. Despite its refreshing and advanced approach, in February 2014, the Package faced a lot of criticisms from European Parliament and the Council who voiced technical, operational and cost concerns, as well as important data protection concerns.

In a response to those concerns, the Commission subsequently initiated a Proof of Concept exercise consisting of two steps: first a Technical Study and a Cost Study to identify the options and solutions to implement Smart Borders, followed in the course of 2015 by a Pilot Project led by eu-LISA. On 6 April 2016, the Commission introduced the revised Smart Borders Package. The second Smart Borders Package composed of only two elements: the

Entry/exit system and Proposal amending the Schengen Borders Code. The Commission has decided to withdraw its RTP Proposal.

4.1. Entry/Exit System (EES)

The 2016 Entry/Exit (EES) Proposal comes along with other EU founded research projects such as ABC4EU or FastPass. The main aim is to improve the management of the EU external borders which means addressing border check delays and improving the quality of border checks for third country nationals (TCN) including the special treatment of irregular immigration to reduce the phenomenon of overstaying.

Third country nationals are legally bound by the length of their authorized stays within a member state's territory. If they over extend their authorized stays, they become overstayers, by default. TCNs overstaying authorized stays constitute the largest category of overstayers in the EU Some European Commission members contend has become a modus operandi for TCNs seeking EU residence.

Current mechanisms used by the EU are inadequate for detecting overstayers within the Schengen area. This is because the Schengen and Visa Information Systems were mainly designed to focus on the entry, detection of criminal activity and verification of identity of entrants to the Schengen area. In retrospect, these mechanisms essentially minimize the impacts of border checks.

Since the departure dates at the external borders are not recorded, there is no systemic way of detecting TCN over stayers. Given these and other practical considerations, (e.g. illegible stamps on travel documents), border guards are not able to accurately determine an individual's length of stay. Moreover, member states lack a means to share any collected data. The existing system for controlling authorized stay consists of stamping documents and manually calculating time stayed; these means are fundamentally inadequate for border and immigration services needs. Accurate calculation of time spent in places covered under Schengen is time consuming and slows down traveler mobility. The present system lacks sufficient directives on how to proceed in cases where the traveler's passport has been lost, substituted or damaged.

More to the point, current EU regulations lack reliable mechanisms for the effective monitoring of TCN residence periods. To address these short comings, the European Commission proposed that border guard should create a file in the EES database, where the personal data of the traveler will be stored instead of stamping his passport. The file is stored

in the central database of the EES and is accessible by border control guards of all Member States. The European Commission proposed that only alphanumeric data (i.e. name, sex, date of birth, nationality, type and passport number) be registered and stored (COM (2011) 680 final, 9). At subsequent crossings, only entry and exit information would be registered, after establishing that the individual's file has been duly registered in the EES. The new IT based system will automatically calculate the duration of permitted stay replacing the current manual system. An integral part of this is an electronic check-in/check-out system required of third country nationals. Upon entrance, automated verification that will provide fast and accurate verification of how many days remain in a short stay and improve risk assessment for potential overstaying. At the exit, inputted data will automatically verify legal residence and determine whether a third country national has overstayed the authorized period. With a centralized and interoperable database system, data on overstayers would become available to designated national authorities who subsequently, would be able to take appropriate measures in dealing with overstayers, including penalties and expulsion.

An issue arose as to whether the data should be stored for a six month period or five years as in the case of VIS (Visa Information System). The compromise solution states that the data will be kept six months. The exception is for data on overstayers and in that case, data will be stored for a period of five years. However, 5 year data storage requirement for overstayers could be problematic. The unconditional implementation of data storage retention period of five years can lead to disproportionate restrictions on personal freedom of movement. In practice, individuals who exceed their permitted stay in the EU won't be able to re-enter the EU for a period of no less than five years.

4.2. Amendments to the schengen borders code

The introduction of Smart Borders requires amendments to the existing Schengen Borders Code. Previously, existing proposals for amendments to the Schengen Borders Code need to be acted on separately. Some proposed legal and technical changes, such as those found in Article 2, introduce additional definitions to EES. Changes to (Article 5 (2)) third country national registration requirements and exceptions in the EES can be placed in a previous category.

The main target of the 2016 Proposal Amending the Schengen Borders Code is to address the issue of overstayers. In that respect the Proposal has the aim to introduce the technical changes that result from the 2016 EES Proposal into the Schengen Borders Code. This means

to ensure in particular the recording in the EES of refusals of entry of third country nationals, the fall-back procedures for the EES and the interoperability between the EES and the VIS (Opinion 06/2016).

5. Impact on Human Rights

The European Parliament voted on 25 October 2017 to finally adopt the Entry/Exit System (EES) and amendments to integrate it into the Schengen Borders Code. However, several stakeholders, among them; the European Data Protection Supervisor; the Fundamental Rights Agency have expressed concerns about the risks to human rights.

The European Union is recognized for its commitment to respect of human rights and fundamental freedoms. In this context, employing a utilitarian, technical solution cannot be justified, if it violates fundamental human rights. The EES proposal shouldn't violate the provisions of the EU Charter of Fundamental Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and Data Protection Directive. Any encroachments on fundamental rights in a democratic society must be within good reason and in compliance with the Article 52(1) of the EU Charter and principle of proportionality (COM(2013) 95 final, 11). As the introduction of SB includes the creation of a personal data base which various actors can access, it is important to put mechanisms in place that prevent any possible abuses that violate personal data protection rights. The collected data must be relevant to the purpose collected and stored no longer than necessary. Justification of collection, storage and processing of personal data is based on whether it serves legitimate aims and is proportional to the need.

The digitalization of EU border management presents new challenges because of the ethical dimensions involved with protecting human rights. The idea of having a single, centralised database represents a significant risk of the violation to privacy and data protection, due to the amount of data stored, the risk of unauthorised access to the data, and the lack of robust data protection safeguards in the proposal.

European Directive on data protection do not permit the use of personal data for unspecified, unauthorized purposes. Additional limits placed on data storage time ensure its use for intended purposes, only. Once these purposes are accomplished, the data are erased or alternately, rendered anonymous. The only exemptions are where data are used for historical, statistical or scientific research purposes, providing safeguards are in place.

If the data are to be used for other than intended purposes, additional justifications and legal authorizations are required. This involves a process where appropriate authorities are notified; documentation is provided upon request; the data controller has reviewed the request, and the data subject has been advised. The EDPS also requires an impact analysis on the proposed use to avoid violating data protection practices ([Stefano Bertozzi, 2008](#); [Thwaites, 2003](#)).

The EES is designed to be implemented and used for law-enforcement purposes after a 2 year evaluation period for impacts. The purpose of the ESS program is to improve border control and detect overstayers within the Schengen territory. Data protection measures portend problems for ESS implementation as the additional law-enforcement applications violate current restrictions on purposes, specified use practices and time restrictions defined under current data protection law provisions. Given that EES changes potentially violate these data protection measures, any planned changes will need to address data protection practices. This could mean that plans for EES will need to be scrapped and changed.

6. Conclusion

The European integration process, notwithstanding economic, global pandemic and other crises, is experiencing a difficult period characterized by a lack of solidarity, democratic legitimacy and problems in external EU border management. Announcements about increasing the number of TCN entering the Schengen area, has compelled officials in Brussels to consider reforms of border security measures that can be applied to EU's external borders. Smart Borders can be construed, in technocratic senses, as revitalizing Brussel's central authority and decision-making capacities. Officials in Brussels are attempting to solve issues, themselves, and bypass member states' concerns. However, the Smart Borders package is not enough, in itself, to guarantee the requisite level of political coordination for addressing potential delays or disruptions to its implementation. European institutions will need more executive and supervisory powers to manage the current EU crisis. If this doesn't happen, implementation of announced reforms within the Schengen zone may be suspended for an indefinite time.

The Entrance/Exit System (EES), in all likelihood, won't be any more effective in deterring unauthorized immigration for several reasons. First, the largest share of illegal immigrants in the EU are third country nationals who have legally entered and over-stayed their residency visas. The EES can detect overstayers or potential ones when they cross external borders, but those who have already legally entered and remaining within the Schengen area aren't easily

identified. Even if the EES could generate a list of overstayers for national authorities, it wouldn't be able to assist in locating them for apprehension, as they lack up-to-date information as to TCN whereabouts within the Schengen territory.

If the aim of establishing the EES system is to combat unauthorized immigration into the Schengen zone, then questions arise as to the goal's feasibility. TCN personal data collection necessitates further review because of potential violation of privacy rights in personal data protection that are guaranteed under Articles 7 and 8 of the EU's Charter of Fundamental Rights. Other unexamined issues arise from ESS identity data sharing with third countries or international organizations including the UN. Articles 7 and 8 of the Charter address, respectively, what constitutes private information and how it will be treated. A determination needs to be made whether there are legitimate grounds for violating data protection rights. Three year data storage exceeds EU laws safeguarding personal information. There are no provisions for insuring anonymity of TCN data during any time of its storage. Retaining personal data on TCNs for 3 years is highly intrusive, notwithstanding the need to identify and monitor overstayers and individuals with entry bans. Under certain conditions, longer periods of data storage may be justifiable in cases where data is used to prevent, detect and investigate terrorism or other offenses. In such cases, effective measures should be employed where fundamental rights are safe-guarded while carrying out crime detection and prevention investigations. Restated, a reasonable balance needs to be maintained between guaranteeing fundamental rights to data protection while addressing increased security demands and surveillance for criminal activity. Data on departing TCNs should be retained only in so much as it is for the express purposes of combating terrorism and other serious crimes.

The European Commission's EES proposal contains provisions for the long-term monitoring of third country nationals (TCNs) following approved stays for 90 days. Questions arise as to what rules will apply to TCNs who have visas or have been granted residence for periods more than a 90 days. TCN visa violators will likely receive automatic visa application rejections in the future. For instance, if a Schengen visa is applied for by a TCN visa violator where data has been stored in an EES central database for a five year period, the violation would lead to an immediate rejection of his visa application without taking into account any other important considerations.

In closing, challenges arising from changes in EU border check systems underscore the constant tension between balancing security and sovereignty needs of EU member states with fundamental individual freedoms such as freedom of movement.

This paper has argued that the introduction of electronic technological innovations in the Smart Borders program represents a positive step forward in furthering EU border security aims, even with the identified weaknesses and current misgivings about threats to fundamental human rights to mobility.

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