



Briefing

Preparing the ground for “smart borders”: EU action on “overstayers”

Zakeera Suffee, July 2015

Unprecedented numbers of people have crossed the Mediterranean Sea during the first half of 2015. [1] With 1,800 people drowned whilst attempting the journey, [2] much attention has focused on the EU response including the ramping up of search and rescue efforts, [3] coercive fingerprinting [4] and most recently proposals for an EU wide quota system for resettlement programmes. [5]

Meanwhile, quiet preparations for the EU’s ambitious “smart borders” proposals are ongoing. This will require the fingerprinting of all non-EU residents entering the Schengen area, and is made up proposals for an Entry/Exit System intended to detect visa “overstayers”; a Registered Traveller Programme for the vetting of selected individuals before they arrive at EU borders; and proposals for relevant legal amendments to the Schengen Borders Code.

Recently, the Council, the Commission and the Member States have been paying particular attention to how overstayers are detected and dealt with by the authorities, in order to inform the development of the Entry/Exit System (EES). If the EES is set up as planned, it will involve the abolition of ink-on-paper passport stamps and their replacement with digital records. However, a recent questionnaire shows that all 28 states that responded think the best way to detect overstayers is through examining stamps.

This questionnaire is one of two EU examinations of the situation regarding overstayers that have taken place this year. In early 2015, information on overstayers was gathered through a joint police operation codenamed ‘Amberlight’:

[1] UNHCR, ‘[Mediterranean crossings in 2015 already top 100,000](#)’, 9 June 2015

[2] ‘[Why is EU struggling with migrants and asylum seekers?](#)’, *BBC News*, 10 June 2015

[3] ‘[Migrants crisis: EU triples search and rescue funding](#)’, *BBC News*, 23 April 2015

[4] ‘[Fingerprinting by force: secret discussions on "systematic identification" of migrants and asylum seekers](#)’, *Statewatch News Online*, March 2015

[5] Ian Traynor, ‘[Germany presses for quota system for EU migrant distribution](#)’, *The Guardian*, 23 April 2015; Lucie Bednářová *et al.*, ‘[Many EU countries say “no” to immigration quotas](#)’, *EurActiv*, 8 June 2015

"The aim of the activity "AMBERLIGHT 2015" is to move towards intensified border checks... [and] seeks to gather information on "overstayers" (third country nationals) at external air borders." [6]

These checks were carried out from 1 to 14 and 18 to 30 April 2015. The operation sought to discover:

"[W]hether third-country nationals depart from the Member States where they overstayed or from another one in order to conceal the violation. Furthermore, FRONTEX does not know which Member States' visas are mostly detected in overstay cases and does not collect data on profile of overstayers."

Amberlight followed the controversial Mos Maiorum operation, another 'information-gathering' exercise in which 19,000 irregular migrants were apprehended. [7] Under the auspices of the Latvian Presidency, 28 countries participated in Amberlight, and the "results include 825 incident reports on 1409 overstayers detected and 3 impostor cases" [8]

The results of Amberlight will likely serve the same purpose as the questionnaire issued to the Member States: to "[optimise] the provisions on overstayers included in the draft Regulation establishing the Entry/Exit System."

Background: Smart Borders and the Entry/Exit System

Alongside the migration crisis, the issue of gathering information on those making regular border crossings into the EU is becoming more pertinent. A move towards almost-totally digitised information-gathering and processing has been in the pipeline for some time in the form of the "smart borders" proposals.

In 2011 the European Commission published a document entitled 'Smart borders – options and the way ahead'. [9] In 2013 three legislative proposals were published, addressing:

- a Registered Traveller Programme to allow for the vetting of certain travellers before they arrive at EU borders;
- an Entry/Exit System to collect data (including fingerprints) on all non-residents entering the Schengen area, and to better detect overstayers; and
- amendments to the Schengen Borders Code.

According to the European Parliament Research Service, the EES:

"[W]ould replace the current procedure of manually stamping the passports of third-country nationals when entering and exiting the Schengen area. Currently, there are no electronic tools to verify or share this information." [10]

[6] ['Smart borders? Operation AMBERLIGHT: "Overstaying" in the EU: a problem for internal security'](#), *Statewatch News Online*, March 2015

[7] Italian delegation, ['Final report on Joint Operation "MOS MAIORUM"'](#), 5474/15, 22 January 2015

[8] European Commission, ['Seventh biannual report on the functioning of the Schengen area'](#), COM(2015) 256 final, 29 May 2015

[9] European Commission, ['Smart borders – options and the way ahead'](#), COM(2011) 680 final, 25 October 2011

[10] European Parliament Research Service, ['Smart Borders package'](#), 24 April 2015

Despite the proposals being heavily criticised for their fundamental rights implications and costs, [11] [12] the Commission, Council and Member States are dedicated to the system, which includes the gathering of biometric data (ten fingerprints) *“to improve the management of border crossings;... [and] have the lowest possible impact on waiting times at border crossings.”* [13]

The EES is supposed to *“fully replace stamping functionalities”* at a time when security issues are a priority on the EU agenda. Discussions have already taken place on the purported law enforcement benefits of the EES:

“The Commission has already acknowledged, in the impact assessment for the 2013 proposal, that the data generated at entry/exit could be of use to law-enforcement authorities in the fight against terrorist offences and serious crime in specific cases.” [14]

Nevertheless, a document produced by the Latvian Presidency on the “consequences of the abolition of the stamping [of passports]” shows Member States’ concerns over digitising passport stamps. Ink-on-paper stamps are currently highly-valued by national authorities:

“Concerns were raised on the impact of the abolition of the stamping of travel documents, especially with regard to the daily duties of immigration/police and municipal/social services within the territory of a state, consulates and ILOs. A clear link was identified regarding the need to define access rights policy to the systems for various stakeholders.” [15]

The Latvian Presidency called on the Commission to: *“specifically address the need to facilitate travel by means of a user-friendly and easily accessible system to be used for the calculation of the duration of a stay”*.

A number of other issues have been raised, including:

- the transfer of historical data on a third country national;
- the need for a *“harmonised procedure in case of failure of the national or central EES”*, and
- the *“need to examine the possibility for an automated system (module) for separating third country nationals who are family members (who enjoy the right to free movement and thus are exempt from stamping/registration in the EES) from other third country nationals (who undergo a thorough check and entered into the EES).”*

[11] European Parliament Parliamentary questions, [‘Answer given by Mr Avramopoulos on behalf of the Commission’](#), E-008118/2014, 3 February 2015

[12] Vildana Sulić Kenk, Janez Križaj, Vitomir Štruc, Simon Dobrišek, [‘Smart Surveillance Technologies in Border Control’](#), European Journal of Law and Technology: Vol 4, No 2 (2013)

[13] Agustín Díaz de Mera García Consuegra, [‘Working Document on the Entry/Exit System \(EES\) to register entry and exit data of third-country nationals crossing the EU Member States’ external borders’](#), European Parliament Committee on Civil Liberties, Justice and Home Affairs

[14] See articles from *Statewatch News Online*: [‘Smart borders: “no sufficient evidence” to justify law enforcement access to proposed Entry/Exit System travel database’](#) (September 2014); [‘Smart borders: Member States seek to make law enforcement access compatible with data retention ruling’](#) (August 2014); [‘Member States reassert support for law enforcement access to proposed new Entry/Exit System’](#) (October 201)

[15] Presidency, [‘The consequences of the abolition of the stamping’](#), 1 April 2015, 7592/15

Overstayers in the EU

The definition of “overstayers” used by the Council covers “*third-country nationals who have exceeded the authorised period of stay, most of them being short-stay visa holders.*” [16]

A document written by the Latvian Presidency of the Council argues that the development of the EES brings with it a need for "harmonised" law and sanctions due to “*shortcomings in existing legal procedures and the practical processing of such cases at the level of the European Union*”.

This is based on an “*upward trend of overstay detections inland or at exit points,*” with the Latvian Presidency particularly concerned about: “*cases when migration provisions are not respected in one Member State and third-country nationals try to leave the EU area via other Member State*”¹⁷.

There are no restrictions, or legal instruments stating that a third country national, or any migrant must leave from the Member State they entered, and the document recognises that it is very difficult to predict such cases: “*in those cases migrants have genuine travel documents and presumably some proportion do not intend to overstay at the actual moment of entering the EU*”

Findings of questionnaire on overstayers

Earlier this year, a questionnaire distributed by the Latvian Presidency aimed to:

“[C]ollect information on practices followed by Member States in overstay cases...as it could contribute to optimising the provisions on overstayers included in the draft Regulation establishing the Entry/Exit System.” [18]

Of the 28 countries to reply [19] (24 Member States along with Iceland, Liechtenstein, Norway and Switzerland), four particular observations can be made from their responses.

1. Exit stamps are considered the most efficient way to detect overstay cases;
2. Information gathered by private companies is in some countries used to detect overstayers;
3. Penalisation of overstayers can take place without explicit warning, including for children aged 14 and up; and
4. The use of other databases such as SIS II and VIS in detecting overstayers.

The questionnaire also found that overstaying is detected less in cases when “*a large volume of passengers impedes extended controls that would prevent overstaying.*”

[16] European Union, ‘[Overstayers in the EU: methodology of gathering statistics; preventative measures; penalties](#)’, 5194/15, 22 January 2015

[17] ‘[Smart borders? Operation AMBERLIGHT: "Overstaying" in the EU: a problem for internal security](#)’, *Statewatch News Online*, March 2015

[18] Presidency, ‘[Overstayers in the EU](#)’, 8744/15, 20 May 2015 and ‘[Overstayers in the EU](#)’, 8744/15 ADD 1

[19] Belgium, Bulgaria, the Czech Republic, Germany, Estonia, Greece, Spain, France, Croatia, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Poland, Romania, Slovenia, Slovakia, Finland, Sweden, Iceland, Liechtenstein, Norway and Switzerland.

1. Exit stamps are most efficient way to detect overstay cases

“All Member States which replied mentioned that the most effective way to detect overstay is by analysing entry/exit stamps. The majority of Member States [Bulgaria, Greece, Croatia, Cyprus, Latvia, Lithuania, Romania, Slovakia, Finland] use the national entry-exit system to monitor length of stay.”

Nevertheless, despite the efficiency of ink-on-paper stamps, the EES requires abolishing them in favour of digital records.

Other methods of detection were also stated in responses, such as with Latvia, Slovenia and Slovakia, who:

“[R]eported that they also use Schengen calculator, recommended by the Commission to control length of stay. [Bulgaria, Latvia, Lithuania, Romania, Norway and Switzerland] also noted the importance of immigration control within the country.”

With only three Member States stating that they use the Schengen Calculator, [20] the general recommendation in the summary document regarding this point suggests that:

“The Schengen calculator should be increased so that it becomes a common tool (best practice) for Member States and travellers. It should be explored how to improve this calculator on the basis of Member States' experiences.”
[21]

The Commission is already planning to use money from its Internal Security Fund to improve the Schengen calculator: “Upgrading / maintenance of the existing IT tool calculating the short stay in the Schengen area or developing a new calculator” is part of a €2.3 million collection of contracts. [22]

With respect to the EES, the recommendations suggest that:

“[W]hen preparing the new proposals for the EES and the RTP, to specifically address the need to facilitate travel by means of a user-friendly and easily accessible system to be used for the calculation of the duration of a stay.”

National EES are used “effectively” in nine cases. [23] The need for a Europe-wide EES is neither mentioned nor requested in the responses of these groups. Typical responses include that given by Latvia:

“The most effective way to detect overstayer is analysis of entry stamp, national Entry-Exit system and calculator, recommended by the Commission. The way to detect overstayers inland is activity of the

[20] A Schengen calculator is [available online](#).

[21] Presidency, ‘[Overstayers in the EU](#)’, 8744/15, 20 May 2015

[22] European Commission, ‘[Annual Work Programme for 2015 for support to Union actions and emergency assistance under the Internal Security Fund - Borders and Visa](#)’, C(2015) 3413 final, 26 May 2015

[23] Bulgaria, Greece, Croatia, Cyprus, Latvia, Lithuania, Romania, Slovakia, Finland.

Immigration structural units, who implement intensified control of the holders of short time entry visas.”

No further detail is provided on what “intensified control of the holders of short time entry visas” entails.

2. Information-gathering on overstayers by private companies

In 15 Member States, [24] information on overstaying individuals comes from:

“[S]tate institutions (immigration control, employment checks by the authorities, police, educational institutions, prisons, hospitals and others) as well as from the private companies (carriers, hotels, rent of car services etc.).”

In particular, Bulgarian authorities require:

“A person providing hotel services or their employee has to immediately register an accommodated foreign citizen in a special register. The information on accommodated foreign citizens is provided daily by this person to the service for administrative control of foreign citizens or the local Mol department.”

Similarly, Latvian legislation states that “in case of accommodation of foreigners, it is necessary to fill in certain inquiry regarding the stay”.

This is also the case for Croatia, the newest member of the EU, with what would seem to be a reference to undercover agents:

“Aliens Act regulates that state bodies, legal and natural persons shall immediately notify the police administration or police state if they learn that a foreigner is staying or working in the Republic of Croatia illegally unless they have an obligation of keeping a secret in accordance with special legal provisions”.

Most of the 15 countries specify that information can come from private companies autonomously. In Greece, for example, car rental shops, air carriers and hotels have been known to share such information in the past without state intervention. In Norway such information can also be received from hospitals.

Currently however, it is only Bulgaria and Latvia in which there is a legal requirement for private companies to provide information. 11 countries [25] from the 28 stated that they neither receive nor request information on overstayers from external authorities.

The document summarising the questionnaire asserts this to be “firm ground for further action”.

3. Penalisation without explicit warning, including for children over 14

[24] Bulgaria, Germany, Estonia, Greece, France, Croatia, Cyprus, Latvia, Lithuania, Malta, Austria, Poland, Romania, Iceland and Norway.

[25] Belgium, Czech Republic, Germany, Spain, France, Luxembourg, Hungary, Slovakia, Slovenia, Finland, Switzerland.

In many cases overstayers are exempt from penalisation if one of the following things can be proved:

- health problems (the person concerned could not exit in time due to stay in hospital or illness);
- loss of travel document (issue of new travel documents needs to be arranged); or
- *force majeure* (e.g. flight delay).

However, no Member States log these reasons in their statistics. Other reasons for overstay include:

- Third country nationals (TCNs) with short-stay visas (individually limited duration of residence) do not understand when they have to exit because the validity of the visa does not correspond to the authorised residence period;
- TCN visa holders and visa exempt TCNs could not calculate the authorised 90 days within the 180-day period correctly (if not otherwise agreed bilaterally);
- family reasons (willing to stay longer with family members);
- employment (clandestine); and
- loss of travel document (issue of new travel documents needs to be arranged).

In nearly all countries, *“some overstay cases relate to errors in the manual calculation of duration of residence (this might be admitted in case of really short overstay, and other well-founded reasons)”*. Nevertheless, these reasons can be disregarded if a superior officer deems it appropriate to impose a penalty. [26]

Penalties for overstaying range from small, medium and heavy fines [27] to complete entry bans. [28] In 16 countries [29] fines for overstay are laid down in national legislation. The level of the fines varies and as the summary denotes: “there are no common practices in this field”.

Imprisonment can be an alternative to a financial penalty, as is the case for Austria, Germany and Switzerland. It applies to all persons “over 14 years of age” in the German case. Latvia also considers 14 an age at which it is appropriate to penalise people.

Five countries [30] do not impose any sanctions.

The Working Party summary asserts that migrants seeking to overstay could take advantage of the discrepancies in penalties:

[26] Bulgaria, Czech Republic, Estonia, Greece, France, Latvia, Hungary, Malta, Austria, Poland, Romania, Slovenia, Slovakia, Finland, Sweden, Iceland and Switzerland.

[27] Austria imposes a fine up to €7,500.

[28] With regard to entry bans Spain, France, Croatia, Cyprus and Sweden take into consideration only overstay committed in their country. Germany, Estonia, Latvia, Hungary, Malta, Austria, Poland, Slovenia, Slovakia, Finland, Norway and Switzerland evaluate all conditions of overstay in order to take a decision on issuing an entry ban. The Czech Republic, Greece and Iceland partially (case by case) take into consideration overstay committed in other Member States.

[29] Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Cyprus, Latvia, Lithuania, Hungary, Poland, Romania, Slovakia, Finland and Sweden.

[30] Belgium, Spain, Slovenia, Iceland and Liechtenstein.

“Member States implement sanctions differently, which could facilitate that a third-country national adapts his/her modus operandi to exit through a Member State not imposing an appropriate sanction.”

Responses from the questionnaire shows that despite these penalties, there are very few official information campaigns, [31] and very little information available except from on the websites of “competent authorities” and leaflets which inform people of the risks of overstaying.

The summary document does however stress that *“information is provided to third country nationals during the visa issuing process at consulates and representations.”* [32]

Only in one country (Romania) was civil society providing information on the risks, and only one country (Iceland) mentioned information prepared in another language (English).

4. The use of other databases, such as the Schengen Information System (SIS)

SIS, now formally known as the second-generation SIS (or SIS II) is used by Member States' authorities to issue and search for alerts on wanted persons or objects. It is *“the largest database for public security in Europe,”* [33] containing over 56 million alerts.

The document summarising the responses to the questionnaire outlines the “slight” differences in the usage of SIS, concluding that “a more common approach could be agreed in these cases.” 11 countries register refusals of entry in the SIS, however there is no question regarding whether countries check or cross reference the SIS database. In addition to this, on being asked whether other Member States are consulted in the decision-making process on overstaying cases, “there is no systematic information exchange between Member States”.

Conclusion

The move towards harmonised national penalties and procedures for detecting and reporting overstayers seems to be an inevitable feature of the development of the EES. These developments should also be seen in a wider context: the ongoing attempts to ensure the digital capture of the fingerprints of all asylum seekers and irregular migrants in the EU; [34] the attempt to have air passenger data handed to law enforcement authorities for analysis and profiling (the proposed EU PNR Directive [35]); the potential transfer of national powers to European level on drawing up “safe countries of origin” for asylum; [36] and the other initiatives the EU and its Member States are undertaking to deal with the migration crisis.

The multiple efforts to ensure ever-greater capture, storage and sharing of information suggest that people on the move are increasingly seen as a threat that needs to be regulated and managed through high-tech surveillance combined with “on-the-ground” information-gathering and police operations. All of these initiatives pose significant challenges to fundamental rights, in different ways. The fact that they are, for the most part, discussed and prepared in secret only adds to the concerns that they raise.

[31] Romania creates national campaigns in cooperation with civil society organisations.

[32] Belgium, Germany, Estonia, Cyprus, Malta, Austria, Poland, Iceland.

[33] euLISA, [‘Report on the technical functioning of Central SIS II and the Communication Infrastructure, including the security thereof and the bilateral and multilateral exchange of supplementary information between Member States’](#), June 2015

[34] Zak Suffee, [‘Coercive measures or expulsion: Fingerprinting migrants’](#), March 2015

[35] [‘Travel surveillance: PNR by the back door’](#), *Statewatch News Online*, October 2014

[36] [‘Migration crisis: EU discussing common list of “safe countries of origin” and resettlement programmes’](#), *Statewatch News Online*, 14 July 2015

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