House of Commons

Home Affairs Committee

The E–Borders Programme

Third Report of Session 2009–10

HC 170

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The E–Borders Programme

Third Report of Session 2009–10

Report, together with formal minutes and written evidence

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The Home Affairs Committee

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and its associated public bodies.

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Committee staff

The current staff of the Committee are Elizabeth Flood (Clerk), Eliot Barrass (Second Clerk), Elisabeth Bates (Committee Specialist), Sarah Petit (Committee Specialist), Darren Hackett (Senior Committee Assistant), Ameet Chudasama (Committee Assistant), Sheryl Dinsdale (Committee Assistant) and Jessica Bridges-Palmer (Select Committee Media Officer).

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Key Facts

— The precursor to the e-Borders programme began to operate in November 2004

— The e-Borders programme aims to capture data on 60% of all international passengers and crew by December 2009

— e-Borders is supposed to cover 95% of all international passengers and crew by December 2010

— Heathrow Airport alone handled 60.4 million international passengers in the twelve months October 2008–September 2009

   UK seaports handle 22.9 million international ferry passengers pa

— The Port of Dover handled 2.3 million lorries carrying freight to and from the UK in 2008

— The e-Borders programme is expected to cost the taxpayer £1.2 billion

— It is estimated that the programme will cost airline operators about £100 million pa

1 Introduction

1. In the mid to late 1990s, successive UK governments decided to abandon the paper-based system of embarkation controls on passengers. With the growth of political interest in determining the extent of migration, and increased fears over terrorism and other serious cross-border crime, the Government decided to institute a system to gather information electronically on all travellers entering or leaving the UK, whether by air, sea or rail—the e-borders programme. Work on the e-borders programme began in 2003.

2. In the autumn of 2008, TUI Travel (acting on behalf of the charter airline industry in general) contacted us arguing that the programme was being rushed into place without proper consideration of the operational requirements on the travel industry. We were unable to consider the issue at that stage, but in June 2009, when our work programme allowed, we asked whether the company still had significant concerns about the programme and were told that not only they but many other sectors of the travel industry had a variety of concerns about the implementation of the scheme. A representative sample of the companies involved was therefore invited to give oral evidence to us on 30 June: TUI Travel, representing the chartered airlines industry, the Chamber of Shipping, the Port of Dover and Eurostar.[1] We subsequently took evidence from Lin Homer, Chief Executive of the UK Border Agency (UKBA).[2] We received written evidence from these witnesses and also from the Board of Airline Representatives UK (BAR UK); the British Air Transport Association (BATA); the airlines bmi, Flybe and Virgin Atlantic; and the Royal Yachting Association. A number of other companies and organisations wrote to us associating themselves with the comments made by these witnesses. We also visited the Ports of Dover and Calais to look at the current configuration of these ports, and in particular the juxtaposed border controls. We wish to thank all those who provided evidence and who arranged the visit for their help in enabling us to understand this complicated project.

Outline of the e-Borders programme

3. The e-Borders programme provides for electronic collection and analysis of information on all passengers entering or leaving the UK from carriers (including airlines, ferries and rail companies). UKBA says this will allow them to:

> significantly strengthen the security of the United Kingdom by:
>
> - identifying in advance passengers who are a potential risk;
>
> - telling us who plans to cross our border;
>
> - checking travellers against lists of people known to pose a threat;
>
> - provide background checks to other agencies; and

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1   This oral evidence and most of the written evidence received in the course of this inquiry have been published together as *The E-Borders Programme: Oral and Written Evidence*, HC 817 of Session 2008–09

2   Lin Homer's oral evidence has been published with another Report of the Home Affairs Committee, *The work of the UK Border Agency*, Second Report of Session 2009–10, HC (hereafter referred to as 'Work of UKBA evidence')

- compile a profile of suspect passengers and their travel patterns and networks;

enable us to focus staff resources better to:

- stop passengers most likely to pose a risk; and

- allow the vast majority of passengers to pass through our border more quickly; and

- improve our ability to arrest criminals and people who break our immigration rules, and prevent them from returning to the United Kingdom;

automate processes to enable us to deal with the forecast 50% increase in passenger numbers over the next 10 years;

help identify those who avoid paying tax by claiming to be resident outside the United Kingdom; and

provide more accurate information on migration to and from the United Kingdom, allowing us to plan public services more efficiently.[3]

Responsibility for the e-Borders programme lies with UKBA (which has recently been merged with the border-related section of HM Revenue & Customs) and the police. On its website in June 2009, UKBA claimed to be "working closely with the travel industries, whose support is crucial to the programme's success."

The legislative framework and the data to be collected

4. The Immigration, Asylum and Nationality Act 2006[4] created powers for the UKBA and the police to obtain passenger, crew and service data from carriers in advance of all movements into and out of the United Kingdom and a duty for the border agencies to share that data among themselves. The requirements on carriers were set down in more detail by five statutory instruments in 2007 and 2008.[5] These commenced the powers; extended the powers to cover Channel Tunnel trains; specified the data that can be requested by the UKBA and the police; specified the data that must be shared between the border agencies; and brought the code of practice regarding data sharing into force.

5. The legislation defines two types of data: mandatory data, which must be collected and supplied when requested at particular times; and additional data which must be supplied only to the extent that the carrier knows the data. It is mandatory to provide certain types of data when passengers and crew have boarded and are ready for departure, and no one

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3   UKBA's website: http://www.ukba.homeoffice.gov.uk/managingborders/technology/eborders/

4   Sections 32 to 38.

5   The statutory instruments are: the Immigration, Asylum and Nationality Act 2006 (Commencement No 7) Order 2007; the Channel Tunnel (International Arrangements and Miscellaneous Provisions) (Amendment) Order 2007; the Immigration and Police (Passenger, Crew and Service Information) Order 2008; the Immigration, Asylum and Nationality Act 2006 (Duty to Share Information and Disclosure of Information for Security Purposes) Order 2008; and the Immigration, Asylum and Nationality Act 2006 (Data Sharing Code of Practice) Order 2008.

else can join them. The mandatory data for passengers and crew comprise service information (for example number, name of carrier, departure and arrival points) and the travel document information (TDI) which are the data held in the machine readable zone of the passport or identity document. (TDI is known in the airline industry as advance passenger information data or API.) This information can be requested on more than one occasion; but if the request is made before boarding, the information needs to be provided only to the extent to which it is known to the carrier.

6. The additional data are other passenger information (OPI), which airlines call passenger name record data (PNR). This is information collected for a carrier's own commercial purposes and includes details such as the passenger's name, address, telephone numbers, ticketing information and travel itinerary. This information need only be provided to the extent to which it is known to the carrier, regardless of when it is requested.

7. Border agencies must share specified travel information with one another where it is likely to be of use for immigration, HM Revenue & Customs, or police purposes. They may also disclose this information to the security and intelligence agencies, if the information is likely to be of use for certain security purposes. The sharing of this information is covered by a code of practice which sets out what data may be shared, the ways in which and purposes for which it may be shared and the safeguards that must be applied.[6] In particular it highlights that the data must be handled and shared in compliance with the European Convention on Human Rights and the Data Protection Act 1998. The code of practice also sets out the sanctions which may be imposed on staff for the misuse of data.

Precursor programme: Semaphore

8. Project Semaphore was the e-Borders operational pilot launched in November 2004 on selected routes. It enabled the UK authorities to monitor the movements of passengers before they left or arrived in the United Kingdom. UKBA considers it very successful, listing on its website a variety of cases where people suspected of criminal activity or illegal immigration have been arrested or detained as a result of the project.

9. The joint border operations centre (JBOC), established in January 2005, is the operational centre of Project Semaphore. Staffed by officers from the UKBA and the police, JBOC is responsible for providing detailed information to border agencies about passengers who are suspected of crime or who are of other interest to the agencies. JBOC is evolving into the e-Borders Operations Centre (EBOC), which will, according to the UKBA's website, enable UKBA "to create travel histories for passengers".

Timetable for implementation of e-Borders programme

10. According to UKBA's website at the time of writing, the timetable for implementing the e-Borders programme is:

> 2009: the e-Borders operations centre, the National Border Targeting Centre (NBTC) starts operating;

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6   *Code of Practice on the management of information shared by the Border and Immigration Agency, Her Majesty's Revenue and Customs and the Police* brought into force on 1 March 2008

December 2009: e-Borders aims to collect details of 60% of all international passengers and crews from a range of carriers and to check that 60% against lists of people who are of interest to authorities;

December 2010: e-Borders aims to collect details of 95% of passengers and crews;

April 2011: UKBA starts to "activate modernised entry methods" at UK ports;

July 2012: improvements including an ability to give clearance to passengers who are already on a train;

March 2014: e-Borders is fully operational, covering all international travellers using all UK ports, including matching passengers' arrivals to their departures.

Need for co-operation of foreign governments and border authorities

11. Because carriers bringing passengers to the UK will be required to gather the TDI/API from their customers, they need to organise their operations outside the UK in such a way as to achieve this. There are two major problems. One is logistical—whether foreign port authorities are both willing and able to re-organise their facilities to enable the carriers to obtain the required information from passengers. The other is legal—there are concerns that the collection of the data required by UKBA may be contrary to the data protection laws of some countries, and it may also be in breach of EU data protection law. We discuss this legal problem more fully in paragraph 40 below.

12. UKBA recognises the role played by foreign governments in the scheme but its published information merely says: "We will market e-Borders widely internationally. We will address any issues in requesting data from certain countries on an individual basis through established communication channels".[7]

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7   UKBA's website: http://www.ukba.homeoffice.gov.uk/managingborders/technology/eborders/

2 Problems faced by carriers

Airlines

13. As already mentioned, the difficulties faced by carriers in implementing the e-borders programme were first brought to our attention by the airline industry. TUI Travel's written evidence to us highlighted a number of technical areas where developments had gone awry, noting in particular changes in UKBA's requirements and timetables. Some of the more serious problems listed were:

- the lessons learned from the pre-cursor Semaphore project had not been fed through to the contractors responsible for the e-Borders Programme, Trusted Borders. In particular, the airline industry had advised against the development of any IT system that did not comply with industry norms. However, the computer systems developed by Trusted Borders did not meet industry standards and practices. This situation was complicated by the fact that individual carriers had different IT systems. As a result, the industry had lost trust in the service provider;[8]

- delays in the timetable meant the scheme was supposed to be going live during the peak holiday period rather than the quieter winter months. The gradual roll-out of the programme was supposed to begin in October 2008 and conclude by the end of 2009, but repeated delays meant 'go live' was finally started on 13 May 2009—though completion was still set for the end of 2009, thus severely curtailing the plan and making it impossible to sort out any teething problems in the off season;[9]

- UKBA was continuing to give inconsistent instructions on when and how data should be transmitted by carriers, whether per passenger or in batches, with the result that some airlines had invested in developing systems to meet one requirement only to have UKBA change its instructions (see example below);[10]

- UKBA had originally said that for chartered flights, where it was known that the same group of passengers who had left the UK together would be returning together, the data from the outbound flight could be used for the inbound one. This was important for those running charter flights that used small, often seasonal, airports with only manual check-ins, some of which had no computer facilities at all. UKBA had subsequently changed its advice, stating that airlines would have to send the data anew from the overseas airport, without making it clear how the airlines were supposed to do so in the absence of any computer connections;[11]

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8   Ev 20, para 2

9   *Ibid.,* para 1

10   Ev 21, para 4 and Q 83 (TUI Travel)

11   Ev 20, para 5 For a more detailed explanation of the difficulties, see Ev 43 (TUI Travel) and Qq 91–92

- because roll-out was being approved carrier by carrier, some airlines were expected to have the trouble and expense of setting up the e-Borders systems earlier than their competitors on the same routes;[12]

- carriers had been told that the programme would produce benefits for them and their passengers: these benefits had been at best delayed and at worst would not happen at all (for example, 'expedited clearance' was promised for passengers, whereas the requirement to carry out passport checks on all passengers had led to longer queues, with a delay of 25 minutes being considered acceptable by the Home Office);[13] and

- a number of EU Member States and the European Commission were questioning whether it was legal to capture the data that the programme required.[14]

The airline bmi gave an example of the way requirements had changed. It noted that the Regulatory Impact Assessment published with the Immigration, Asylum and Nationality Act 2006 stated that carriers would be required to provide the API (mandatory data) in respect of all passengers travelling to and from the UK "at the time of departure" and the OPI (additional data) only in respect of passengers travelling to the UK, and also "at the time of departure".[15] However, since June 2008 these requirements have been changed several times. By June 2009, airlines were being told that, instead of transmitting data once at the time of departure, they would have to transmit data several times before and after the scheduled departure time, and the OPI would have to be transmitted for journeys from, as well as to, the UK.[16]

14. TUI praised the early stages of the programme, saying that the consultation process had been handled well, with the airlines fully engaged even to the point of being included in meetings with prospective suppliers as part of the procurement process. However, implementation of the programme had become "farcical, with the industry being unclear of what the required deliverables are some four weeks after go-live".[17]

15. Other airline operators echoed these complaints. Virgin Atlantic Airways commented:

> "After the success of the Semaphore pilot it was expected that e-Borders would smoothly follow thus allowing the Home Office to receive the data they required with immediate effect and with minimal technical changes required by carriers … as the general infrastructure was already in place."

However, the e-Borders programme had, in effect, started from scratch with different operational and IT requirements. The result was that in the summer of 2008 the Home Office had had to intervene to allow carriers more time to change their systems to the unique standards required by Trusted Borders.[18] Virgin Atlantic Airways and other

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12   Ev 21, para 7

13   *Ibid.*, para 8

14   Ev 20, para 3

15   Para 29 of the Regulatory Impact Assessment

16   Ev 39

17   Ev 20

18   Ev 23

operators also emphasised the difficulties caused by last minute changes in requirements leading to wasted work and nugatory expenditure, the squeezing of the timetable for implementation of the programme, the requirement to 'go live' in the peak summer period, the inequality of treatment of different carriers (with some forced to implement the programme much earlier than others) and the lack of benefits for passengers or carriers.[19]

16. We asked TUI whether the airline industry had alerted UKBA to the difficulties they faced, and we were told:

> "we have put it to the Government, we have met ministers and put our concerns to ministers, we have written to the Home Office, to the e-borders directors. We have made these points, yet we are still being pressured on a daily basis to deliver today".[20]

It was therefore rather surprising when Lin Homer, Chief Executive of UKBA, told us a week later: "I think they [the major carriers] would say we have been involved with them and working well with them. I am not going to say they are happy with us all the time".[21] In support of this, she cited the successful operation of the pilot, Project Semaphore, and the fact that UKBA was unaware of any problems having arisen in relation to the data transmitted by about 100 carriers in June 2009 in the first phase of the roll-out of e-Borders.[22] She was unaware that, for example, Virgin Atlantic still had serious concerns about the programme, and that these were identical to the concerns of what she described as "a limited number of people", some of whom operated routes intended to be tackled later in the programme.[23] However, Lin Homer emphasised to us that she and her team were ready and willing to meet any carriers to discuss their problems and, in particular, she stated "we are not rolling out over the peak period".[24]

17. Given that it was by then July and the peak holiday period was imminent, we decided to wait until the end of the season to ask the carriers what had actually transpired. We therefore wrote at the beginning of October to all those who had given written evidence, asking them to:

> Describe any problems that may have occurred because of the requirement to 'go live' on the project in the peak summer travel months

> Update us on whether UKBA has provided the reassurance you sought on the compatibility of its requirements with the EU treaties and legislation, and with legislation and/or constitutional provisions in other EU Member States

> Tell us what UKBA's response has been to your concerns that the roll-out of the project carrier by carrier and route by route will undermine the competitiveness of those carriers chosen to adopt the system first

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19   Ev 23 (Virgin Atlantic), Ev 27–28 (Flybe), Ev 28–29 (BAR UK), Ev 38–41 (bmi), Ev 41–42 (BATA)

20   Q 75

21   Q 106

22   Ev 43

23   Work of UKBA evidence, Qq 108 and 105

24   Work of UKBA evidence, Q 102

> Update us on whether UKBA has yet given clear instructions about the requirement to collect in-bound data at airports where only manual check-in exists
>
> Provide us with any information you may have on any increased costs caused to operators by the compressed timetable for roll-out due to the delayed start, and by the changes in the instructions given by UKBA on the operational details of the programme
>
> Tell us whether UKBA have now provided operators with sufficient clarity about exactly what information is required, how it is to be dispatched (per passenger or as a batch) and technical connectivity standards

We also asked whether the discussions they had held with UKBA and the selected supplier over the previous three month had given them more confidence that UKBA and the supplier understood and were responding positively to their concerns about the programme.

18. BAR UK reported: "recent meetings have been far more productive than for many months, as a result of which the tone of them has been eased".[25] This view was shared by BATA, bmi, TUI Travel and Virgin Atlantic, who said that, following their evidence session with us, UKBA had "fully accepted the operational and practical difficulties" that would have arisen from implementing TDI data collection during the peak summer travel months and had accordingly agreed not to enforce the requirement to transmit the data in that period.[26] However, BAR UK said that some of its members already required to transmit data had experienced a loss of passengers to competitors not so required, and it continued to express concerns that further staged roll-out would again disadvantage the pioneer companies.[27]

19. As far as the airlines' other difficulties are concerned, it appears there has been progress in dealing with the problem of airports with only manual check-in facilities, and there is now an agreed timetable with UKBA, though TUI noted practical difficulties in providing the data exactly when UKBA requires.[28] In addition, UKBA has accepted the airlines' arguments about the desirability of allowing more flexibility in technical areas such as data transmission formats and the development of appropriate interfaces.[29] In general, the changes have not caused extra costs for the airlines, not least because the final specification will provide an industry standard method of connectivity and at least some airlines have not incurred costs from the changes in specification as "we did not have sufficient information to inform our system supplier in the first instance".[30] Moreover, there is now clear information as to what information is required from airlines, and when and how it

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25 Ev 49

26 Respectively Ev 50, Ev 51, Ev 57, Ev 2 – the last being attached to this Report

27 Ev 50

28 Ev 57

29 Ev 50, Ev 51–52 and Ev 56

30 Ev 56 (Flybe)

should be transmitted. However, some airlines had already made investments in complying with previous advice.[31]

20. TUI Travel concluded:

> There do remain concerns relating to the continued roll-out of the e-Borders programme, but we believe that the eventual recognition by UKBA that it would have been foolhardy to push roll out during the summer, plus their willingness to provide the flexible connectivity that airlines had sought has changed the discussion from being adversarial to that of collaborative working.[32]

21. **We are delighted that the airlines' lack of confidence in the e-Borders programme appears to be diminishing as a result of a more positive engagement by UKBA. Without attributing this change entirely to our intervention, we note that the airlines had been raising their concerns with UKBA for at least a year before our inquiry and we cannot but conclude that the subsequent swift response of UKBA was a result of political interest in this technical area.**

22. **We asked UKBA who was in charge of the programme and for how long they had held this responsibility. Lin Homer said that she had overseen it for a year when she took up her post as Chief Executive, and she had then handed over the position of senior responsible official to her Director of Border Force, Mr Brodie Clark.[33] However, these very senior people do not have day-to-day responsibility for managing the programme, and we understand that turnover amongst those who work more or less full-time on the project has been frequent.[34] We suspect that this instability may have played a significant part in the breakdown of communications between UKBA and the carriers. It may also have led to the perception that UKBA had been 'captured' by its chosen provider and lost sight of what was reasonable and practicable. We hope that there will be greater continuity among the senior officials responsible for day-to-day management of the programme in future.**

Maritime sector

23. It was always intended that implementation of the e-Borders programme would be staged, with the airline industry first, as it operates in a way more conducive to the collection of data required by the programme. The maritime sector was scheduled for a later start, and rail was added as an afterthought. Despite this, the maritime sector was engaged in discussions at an early stage of the process. However, the overwhelming sense we received from our maritime witnesses was that, far from laying strong foundations on which they would be able quickly to build a practical system, the talks had made little progress and, indeed, had in some respects gone backwards. The net result was that they were further from being able to implement the programme now than they had been in 2006.

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31   Ev 52 (bmi)

32   Ev 59

33   Work of UKBA evidence, Q 97

34   Ev 28, para 3 and Ev 52

24. At present ferry and port operators do not collect the mandatory passenger information that the e-Borders programme requires. Ferry companies do not have Passenger Name Records into which the data required by the e-Borders programme could be inserted. Their principal concern has been to obtain booking information on vehicles, in order to reserve space on the vehicle deck; passenger details are subsidiary.[35] Tickets are purchased by vehicle, with even the number of passengers being a secondary consideration, and there are currently no facilities for registering the required information from individual passports online before the passengers start their journey. Furthermore, a significant proportion of ferry business is conducted on a 'turn-up-and-go' basis, with no pre-booking (for example, all freight on the Dover-Calais routes travels without pre-booking—well over 1,000,000 lorries a year[36]—as does 10%-20% of tourist traffic); and, in the case of coaches, it is the coach company that books the space on the ferry and sells its tickets to the passengers: passenger names and numbers are not known until the vehicle arrives at the ferry terminal.[37]

25. The Chamber of Shipping argued that the basis of the e-Borders programme was "long-haul aviation where all passengers travel as pedestrians with individual tickets" in contrast to ferry travel "where most passengers are in groups in vehicles". It noted that the two trials undertaken at ferry ports under Project Semaphore were unsuccessful, one for technical reasons and the other had to be suspended repeatedly because it caused traffic congestion and delays.[38]

Juxtaposed controls

26. An added complexity in relation to both ferry traffic and rail traffic between the UK, France and Belgium is the development of juxtaposed border controls. These controls are based on bilateral agreements between the countries that enable specified personnel to carry out immigration and customs checks on passengers and freight in one another's countries. The result is, for example, that passengers pass through French passport control before boarding a ferry to France in Dover.[39]

27. Early discussions with the predecessor organisation to UKBA (in February 2006) were conducted on the basis that, where passengers passed through the UK's border control checkpoint before reaching the ferry operator's check-in, as is the case in Calais, then UKBA would collect the passport data for the e-Borders programme. This undertaking was confirmed in a draft position statement by the e-Borders team in December 2006.[40] In the summer of 2008, however, UKBA changed its mind and put the responsibility for collecting the data on the ferry operators, despite the fact that UKBA swipes passengers' passports anyway and in Calais UKBA officials will have swiped the passports moments

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35   Q 5

36   The Port of Dover overall handles 2.3 million lorries a year, the majority of which take the Dover-Calais route.

37   Qq 14, 30 and 45, Ev 16–18 and Ev 32–33

38   Ev 46–47

39   A car booked onto a ferry from Dover to Calais passes, in this order: French frontier police, Kent police plus UKBA officials (who intercept only some vehicles, on the basis of intelligence), the international security checkpoint administered by the Department of Transport, and finally check-in with the ferry operator.

40   Ev 31–32

before the ferry operators are required to swipe them again. The Chamber of Shipping and Dover Harbour Board believed that "the principal reason for abandoning the earlier commitment is that it does not fit into the contract signed between the Home Office and [its contractor] Trusted Borders".[41]

28. As with the specifications for the airlines, this is just one of several significant changes made by UKBA to the requirements imposed on carriers in the last 18 months.[42]

29. **We do not understand why it is thought necessary for the ferry operators to send to UKBA the same information from every passenger's passport as UKBA's own officials have done minutes beforehand. If the argument is that, having passed passport control, a vehicle or individual might be found not to have a valid ticket and be turned back or held for a later ferry, then surely in these—presumably fairly infrequent cases—the UK border control official could be informed by the operator that a particular vehicle or passenger was not going to be carried on that ferry. Ferry operators anyway have to send a manifest of their passengers on each sailing, for health and safety reasons. This could be used as the checklist against which the information from the swiped passports is compared—in much the same way as for airlines, which are unable to produce a final list of their passengers until boarding is completed and the plane is ready to depart.**

30. The Chamber of Shipping told us it was concerned that no systems for the registration of data by passengers booking in advance have been developed and, even if they were to be established, "the provision of passport data could not be made compulsory at time of booking" so there would be no incentive on passengers to provide that information early.[43] The net result, the industry fears, would be delays and congestion in the ferry terminals as the ferry operators had to scan in all the passport information at check-in. A trial in March 2007 showed that scanning four passports for a car would add 20 seconds to the dwell time at check-in. This may not appear long, but it represents an increase of between 50% and 80%, which would increase congestion at peak periods significantly.[44] Moreover, the ports would have to be reconfigured and, in some cases, extended to build the necessary vehicle-holding facilities to cope with the extra time that vehicles would have to spend in port. The ferry operators and Port of Dover doubted that UKBA had even considered the possible need to rebuild parts of the port to accommodate e-Borders, regarding it simply as an IT project.[45] Even if rebuilding were possible, the port operators thought it likely there would be major traffic jams on approach roads at times of peak freight and/or coach demand.[46]

31. We visited Dover and Calais at the beginning of September—and therefore after the peak holiday season—to view current border operations in these busy ports. We were impressed by the huge volume of freight traffic and the rapidity and efficiency with which the ferry and port operators and UKBA officials dealt with the flow—an efficiency made all the more necessary by the fact that the Port of Dover occupies the small area of land at the

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41   Ev 32 and Q 50

42   Ev 32–36

43   Ev 16, para 7(c)

44   Ev 17, para 7(d), Ev 49 and Q 46

45   Ev 53

46   Ev 18, paragraphs 4 and 6

base of a cliff, so its capacity for expansion is severely constrained. **Anything that significantly slows down transit through the Port of Dover will result in congestion in the port that will overflow into the town, and, in severe cases, onto the approach roads such as the M2.**

32. The Chamber of Shipping concludes:

> No practicable method of capturing ferry passengers' passport data has yet been identified—and, in the absence of a defined process, no work has been done to develop a system to support it. Progress is effectively now suspended pending resolution of the legal questions, which will determine what is or is not permitted. There is no prospect of e-Borders going live in relation to ferry traffic, as the UKBA contends it will, by the end of next year.[47]

33. UKBA's response to these problems is to state, for example, that:

> Vehicle carriers have the option of specifying conditions of carriage to coach operators (as well as their other customers) in order to encourage the early provision of data in a manner and time frame that suits their needs.[48]

UKBA has also put forward a 'vehicle-centric' model for processing vehicles under e-Borders (using automatic numberplate recognition to retrieve the pre-notified passport data for the vehicle passengers),[49] but UKBA still intends to check and possibly to scan the passport of everyone at its check-points, so the only part of the process affected would be a slightly speeded up ferry check-in for such passengers, which may not be motive enough for pre-notification of passport data.

34. **It is difficult to see how customers could be motivated to provide information in advance when, for each passenger, inputting data electronically is more of a chore than waiting for a passport to be swiped, and there is no easy way of fast-tracking those who have complied through the port: for example, the only way of ensuring everyone on a coachload of passengers had provided their data before arrival at port would be to check each of them against a list, which is not much of an incentive. The alternative— that ferry companies would no longer operate turn-up-and-go—is something that UKBA itself has stated that it does not want to see.[50]**

35. **There appears to be complete stalemate between the maritime sector and UKBA. We do not understand why UKBA cannot accommodate some of the practical suggestions made by the ferry and port operators, such as transmitting data from the juxtaposed UK border control in Calais rather than the ferry check-in desk, or putting a requirement to collect passenger data onto coach companies rather than the ferry operators (we are aware that the latter would require amending legislation, but it would be similar to the transfer of responsibility for cargo from the ferry companies to hauliers, which has already occurred). The problem of the configuration of the Port of**

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47 Ev 17, para 10

48 Ev 33

49 Described fully in Ev 36

50 Work of UKBA Evidence, Q 120

Dover also requires co-operation rather than confrontation, and we urge the involvement of the Department of Transport in practical discussions, given the potential for serious consequences elsewhere on the road network. If the only solution in Dover is the rebuilding of facilities, UKBA must recognise that its present timetable for implementation of the programme is not feasible.[51]

Railways

36. Many of the difficulties highlighted in relation to the maritime sector apply also to railways, including the vexed question of operating with shorter check-in times and more cramped check-in facilities than the airports, and the challenge of operating the e-Borders scheme in the context of juxtaposed border controls. Eurostar estimates that the delays to passengers from the need to scan passport details would significantly reduce the 40 minute journey time savings made possible as a result of the Government's investment in the Channel Tunnel High Speed Link.[52]

37. However, the fact that the Channel Tunnel and the services through it are simply part of a Europe-wide rail network poses additional problems, which are likely to multiply after January 2010 when the whole of the European rail network opens to competition, so a number of rail companies could soon be running services through the Channel Tunnel.[53]

38. At present, it is possible to buy tickets for Eurostar services at a large number of railway stations and other outlets with no facility for recording passport details, or even passenger names. It is not even necessary to show a passport to book a ticket. It would therefore be difficult and very expensive to try to arrange for travellers to provide detailed passport information electronically at the same time as booking.[54]

39. Eurostar stops at intermediate stations, and it is not clear whether, and if so, how, checks can be made on the passports of passengers embarking and disembarking at the intermediate stops. It also means that the data of passengers might have to be transmitted repeatedly.[55]

40. It is not clear whether the national railways of France and Belgium would be breaking their national laws in providing the information required by the programme. According to Eurostar, French law only allows French carriers (such as the French railway company, SNCF) to collect and transmit data for services to and from countries outside the EU. Moreover, under national law, neither SNCF nor its Belgian equivalent, SNCB, has the power to require passengers to produce passports or identity cards: only police and customs staff at international stations have this authority. Finally, both SNCF and SNCB require assurance from their national data protection authorities that they would not be acting illegally if they transmitted data to a third party, such as UKBA.[56] The German Data

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51 Qq 54–57 and 65–66

52 Q 104

53 *Ibid.*

54 Q 108

55 Ev 24–25

56 *Ibid.* and Ev 42, Qq 104 and 110 Ferry companies have a similar problem in respect of their operations in France: see Q 32

Protection Agency has already stated that processing data in the manner required by e-Borders would be prohibited by national law.[57]

41. Like the maritime sector, Eurostar has been suggesting to UKBA that the existence of juxtaposed controls where passports are scanned could provide a solution to the difficulties of those who have been unable or unwilling to provide passport details in advance.[58] Eurostar UK Ltd (the UK partner in the jointly-owned operation) also developed a proposal for passengers to provide their TDI online, in the terminal or via manual check-in counters in the UK. Eurostar noted that similar systems could be developed in France and Belgium, if SNCF and SNCB agreed and the legal issues could be overcome.[59]

42. When we asked in October what progress, if any, had been made in tackling Eurostar's difficulties, they told us that there had been a further meeting with UKBA officials on September, at which the officials made it clear they thought Eurostar was ready to 'go live' with the programme, and noted that they were "now" examining the legal issues in France. Eurostar categorically denied to us that it was ready to go live: neither the operational nor the legal problems have been solved.[60]

43. **It is obvious that the e-borders programme will have to be adapted to meet the needs of the railway sector, which is part of a much more integrated transport network, with many more embarkation points, than airlines and ferries—especially in view of the hopes of making it easier to travel seamlessly from major cities outside London to Continental Europe and from major European cities direct to the UK. It is also clear that UKBA has only just started to consider the difficulties posed by national data protection regulations and national laws to protect citizens against the spread of state powers beyond a tightly defined cadre of officials. UKBA cannot impose one-size-fits-all requirements on such different sectors as planes, ferries and railways. It would be more productive if, instead of trying to do so, they adapted their requirements more closely to how each sector actually operates. In the case of railways, the unique problem is that of intermediate stops. It is not at all clear to us what is supposed to happen in relation to e-Borders if, for example, a passenger boards a train at Brussels but decides to disembark in France instead of travelling through the Channel Tunnel—or, indeed, to stay on the train instead of disembarking in France.**

E-Borders and the EU

44. All our witnesses expressed concerns about whether the e-Borders programme was compatible with EU law, and in particular the principle of free movement of people. The EU Directive cited by UKBA as a basis for its project relates to the transport of passengers by air over the EU's external borders. Moreover, the carriers were concerned that other EU countries to which their services travelled were increasingly questioning the legality of

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57   Ev 44

58   See, for example, Ev 56 and Qq 104 and 122

59   Ev 27

60   Ev 56

requiring their citizens to provide data, rather than simply producing a form of identification (passport or ID card) before they were allowed to travel to the UK.[61]

45. Repeated requests to UKBA over several years for reassurance that the European Commission considered the programme legal in so far as it interfered with freedom of movement met with the responses that "e-Borders is entirely compatible with all relevant national law" and "The UK has retained the ability under EU law to control its frontiers, including the ability to verify the right of EEA nationals to enter the UK".[62] However, as we have seen, UKBA still does not know whether its requirements are compatible with French national law—and maybe other countries' laws—and the right to verify is accomplished by checking passports or ID cards at borders, and does not necessarily imply the requirement to provide data in advance as a condition of travel.

46. Given the repeated assurances that the European Commission knew all about the programme and was content that it was legal, we asked Lin Homer in July to provide the carriers with sight of a letter from the Commission confirming this.[63] We are still waiting.

47. This issue is central to the programme. We therefore sought independent legal advice about EU law in this area. We were informed that, because the e-Borders programme can have the effect of stopping an EU citizen from entering or leaving an EU Member State, this does amount to an obstacle to the free movement of people in EU terms. The question then was whether the obstacle was justified. We were told that the question had to be considered in the context of free movement of persons being a fundamental freedom of the EU, derived directly from the EC Treaty and not solely from EU legislation, and a defining trait of the internal market. This right is most recently implemented by Directive 2004/38/EC, the Citizens' Rights Directive. Previous judgments of the European Court of Justice have established that the Court regards this right as very broad in scope[64] and the Directive itself states that restrictions to such free movement on the grounds of public policy, public security or public health "should be based exclusively on the personal conduct of the individual concerned". This, as summed up in one judgment, means that the restrictions:

> must be regarded **not as a condition precedent to the acquisition of the right of entry and residence** but as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty. **It does not therefore justify administrative measures requiring in a general way formalities at the frontier other than simple the production of a valid identity card or passport.**[65] [our emphasis]

48. **We conclude that it is only in exceptional cases, based exclusively on the conduct of the individual concerned rather than as part of a blanket requirement, that an EU Member State can impose any requirement other than simple production of a valid**

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61   See in particular Ev 36–38; also Qq 32, 36 and 104, Ev 17, para 9, Ev 20, para 3, Ev 25–26, Ev 53 and Ev 55

62   Ev 17, para 8, and Ev 37–38

63   Q 114

64   Case C 33/07 *Jipa*; See also Joined Cases C 482/01 and C 493/01 *Orfanopoulos and Oliveri*

65   Case C 157/79 *Regina v Stanislas Pieck*

identity document to restrict the entry into or exit from that Member State of an EU citizen.[66] The e-Borders programme is therefore, as far as we can ascertain, likely to be illegal under the EU Treaty.

49. Despite constant reassurances to the contrary, we have seen no proof that UKBA's predecessors held serious discussions with the European Commission about the e-Borders programme. More recent and frequent efforts by a variety of carriers to clarify these legal issues with UKBA have met with no success. We suspect that UKBA has only recently started to take these issues seriously, possibly as a result of setbacks such as the forced postponement of the programme in relation to air routes to Germany because of national legislation. This is not good enough. UKBA is imposing expensive requirements on the private sector in the name of urgent public good apparently without having confirmed that the requirements are lawful. UKBA must urgently seek an authoritative opinion from the European Commission on this issue, and must make it a priority to discuss all data protection problems with the relevant national bodies.

50. UKBA must report the results of these discussions to us by, at the latest, the end of February. In the meantime, any proposals to extend 'go live' to further intra-EU routes must be put on hold.

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66   Case 67/74 *Bonsignore v Köln* taken together with Case C 48/75 *Royer*

Conclusions and recommendations

Airlines

1. We are delighted that the airlines' lack of confidence in the e-Borders programme appears to be diminishing as a result of a more positive engagement by UKBA. Without attributing this change entirely to our intervention, we note that the airlines had been raising their concerns with UKBA for at least a year before our inquiry and we cannot but conclude that the subsequent swift response of UKBA was a result of political interest in this technical area. (Paragraph 21)

2. The very senior people, formally in chare of e-Borders do not have day-to-day responsibility for managing the programme, and we understand that turnover amongst those who work more or less full-time on the project has been frequent. We suspect that this instability may have played a significant part in the breakdown of communications between UKBA and the carriers. It may also have led to the perception that UKBA had been 'captured' by its chosen provider and lost sight of what was reasonable and practicable. We hope that there will be greater continuity among the senior officials responsible for day-to-day management of the programme in future. (Paragraph 22)

Juxtaposed Controls

3. We do not understand why it is thought necessary for the ferry operators to send to UKBA the same information from every passenger's passport as UKBA's own officials have done minutes beforehand. If the argument is that, having passed passport control, a vehicle or individual might be found not to have a valid ticket and be turned back or held for a later ferry, then surely in these—presumably fairly infrequent cases—the UK border control official could be informed by the operator that a particular vehicle or passenger was not going to be carried on that ferry. Ferry operators anyway have to send a manifest of their passengers on each sailing, for health and safety reasons. This could be used as the checklist against which the information from the swiped passports is compared—in much the same way as for airlines, which are unable to produce a final list of their passengers until boarding is completed and the plane is ready to depart. (Paragraph 29)

Maritime Sector

4. Anything that significantly slows down transit through the Port of Dover will result in congestion in the port that will overflow into the town, and, in severe cases, onto the approach roads such as the M2. (Paragraph 31)

5. It is difficult to see how customers could be motivated to provide information in advance when, for each passenger, inputting data electronically is more of a chore than waiting for a passport to be swiped, and there is no easy way of fast-tracking those who have complied through the port. The alternative—that ferry companies would no longer operate turn-up-and-go—is something that UKBA itself has stated that it does not want to see. (Paragraph 34)

6.   There appears to be complete stalemate between the maritime sector and UKBA. We do not understand why UKBA cannot accommodate some of the practical suggestions made by the ferry and port operators, such as transmitting data from the juxtaposed UK border control in Calais rather than the ferry check-in desk, or putting a requirement to collect passenger data onto coach companies rather than the ferry operators. The problem of the configuration of the Port of Dover also requires co-operation rather than confrontation, and we urge the involvement of the Department of Transport in practical discussions, given the potential for serious consequences elsewhere on the road network. If the only solution in Dover is the rebuilding of facilities, UKBA must recognise that its present timetable for implementation of the programme is not feasible. (Paragraph 35)

Railways

7.   It is obvious that the e-borders programme will have to be adapted to meet the needs of the railway sector, which is part of a much more integrated transport network, with many more embarkation points, than airlines and ferries. It is also clear that UKBA has only just started to consider the difficulties posed by national data protection regulations and national laws to protect citizens against the spread of state powers beyond a tightly defined cadre of officials. UKBA cannot impose one-size-fits-all requirements on such different sectors as planes, ferries and railways. It would be more productive if, instead of trying to do so, they adapted their requirements more closely to how each sector actually operates. In the case of railways, the unique problem is that of intermediate stops. It is not at all clear to us what is supposed to happen in relation to e-Borders if, for example, a passenger boards a train at Brussels but decides to disembark in France instead of travelling through the Channel Tunnel—or, indeed, to stay on the train instead of disembarking in France. (Paragraph 43)

E-Borders and the EU

8.   We conclude that it is only in exceptional cases, based exclusively on the conduct of the individual concerned rather than as part of a blanket requirement, that an EU Member State can impose any requirement other than simple production of a valid identity document to restrict the entry into or exit from that Member State of an EU citizen. The e-Borders programme is therefore, as far as we can ascertain, likely to be illegal under the EU Treaty. (Paragraph 48)

9.   Despite constant reassurances to the contrary, we have seen no proof that UKBA's predecessors held serious discussions with the European Commission about the e-Borders programme. More recent and frequent efforts by a variety of carriers to clarify these legal issues with UKBA have met with no success. We suspect that UKBA has only recently started to take these issues seriously, possibly as a result of setbacks such as the forced postponement of the programme in relation to air routes to Germany because of national legislation. This is not good enough. UKBA is imposing expensive requirements on the private sector in the name of urgent public good apparently without having confirmed that the requirements are lawful. UKBA must urgently seek an authoritative opinion from the European Commission on this

issue, and must make it a priority to discuss all data protection problems with the relevant national bodies. (Paragraph 49)

10. UKBA must report the results of these discussions to us by, at the latest, the end of February. In the meantime, any proposals to extend 'go live' to further intra-EU routes must be put on hold. (Paragraph 50)

Formal Minutes

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Tuesday 15 December 2009

Members present:

Rt Hon Keith Vaz, in the Chair

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Mr James Clappison	Gwyn Prosser
Mrs Ann Cryer	Bob Russell
David T C Davies	Mr Gary Streeter
Mrs Janet Dean	Mr David Winnick
Patrick Mercer	

Draft Report (The E-Borders Programme), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 50 read and agreed to.

Resolved, That the Report be the Third Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 5 January at 11.00 am

List of written evidence

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2007–08

First Report	The Government's Counter-Terrorism Proposals	HC 43
Second Report	Bulgarian and Romanian Accession to the EU: Twelve months on	HC 59
Third Report	Security Industry Authority	HC 144
Fourth Report	Work of the Committee in 2007	HC 226
Fifth Report	A Surveillance Society?	HC 58 (HC 1124)
Sixth Report	Domestic Violence, Forced Marriage and "Honour"-Based Violence	HC 263 (HC 1165)
Seventh Report	Policing in the 21st Century	HC 364
Special Report	Unauthorised Disclosure of Draft Report	HC 196

Session 2006–07

First Report	Work of the Committee in 2005–06	HC 296
Second Report	Young Black People and the Criminal Justice System	HC 181 (Cm 7217)
Third Report	Justice and Home Affairs Issues at European Union Level	HC 76 (HC 1021)
Fourth Report	Police Funding	HC 553 (HC 1092)

Session 2005–06

First Report	Draft Corporate Manslaughter Bill (First Joint Report with Work and Pensions Committee)	HC 540 (Cm 6755)
Second Report	Draft Sentencing Guideline: Robbery	HC 947
Third Report	Draft Sentencing Guidelines—*Overarching Principles: Domestic Violence* and *Breach of a Protective Order*	HC 1231
Fourth Report	Terrorism Detention Powers	HC 910 (Cm 6906)
Fifth Report	Immigration Control	HC 947 (Cm 6910)
Sixth Report	Draft Sentencing Guideline: Sexual Offences Act 2003	HC 1582