
Ethics of Border Security

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Table of Contents

Executive Summary.....	6
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Introduction.....	7
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1. Codes of Conduct	8
1.1 Ethics vs Law vs Codes of Conduct.....	8
1.2 Overview of EU Codes of Conduct used by Border Guards.....	10
1.3 Table 1. National Codes of Conduct used by Border Guards.....	11
1.4 Areas of Overlap between National Codes of Conduct.....	20
1.4.1 Respect for and protection of fundamental rights and freedoms.....	20
1.4.2 Non-discrimination or equal treatment of persons.....	20
1.4.3 Prohibition on torture or cruel, inhuman and degrading treatment.....	20
1.4.4 Confidentiality and respect for privacy.....	20
1.4.5 Incorruptibility.....	20
1.4.6 Reputational issues.....	20
1.4.7 Restraint in the use of force.....	21
1.5 Gaps between National Codes of Conduct and EU Documents.....	22

2. Ethical Issues Specific to Border Guarding.....	24
2.1 Introduction and List of Sources.....	24
2.2 Border Checks.....	25
2.2.1 First-line checks.....	26
2.2.2 Minimum Checks.....	26
2.2.3 Thorough Checks.....	26
2.2.4 Second-line Checks.....	27

2.2.5 Stamps.....	27
2.2.6 Visas.....	28
2.2.7 Questioning of travellers/responding to traveller questions.....	28
2.2.8 Recording of information.....	29
2.2.9 Fingerprinting and biometrics.....	29
2.2.10 Refusal of Entry.....	30
2.2.11 Detention.....	31
2.3 Border Surveillance.....	32
2.3.1 Authorised crossing points.....	32
2.3.2 Unauthorised border crossing.....	32
2.3.3 Risk analysis and profiling.....	35
2.4 Returns (removal)	35
2.5 Special Categories of Persons.....	36
2.5.1 Asylum seekers and refugees.....	36
2.5.2 Children.....	38
2.5.3 Missing persons.....	39
2.5.4 The victims of trafficking or exploitation.....	39
2.6 Corruption or Conflicts of Interest.....	40
2.7 Further Considerations: The Rights of Border Guards.....	40

3. Ethics and the Use of Technology at the Border.....	43
3.1 Introduction.....	43
3.2 Databases/Data-mining.....	43
3.2.1 Advance Passenger Information System.....	45
3.2.2 Passenger Name Record.....	46
3.2.3 Visa Information System.....	48

3.2.4 Registered Travellers Programme.....	49
3.2.5 Schengen Information System.....	49
3.2.6 Eurodac.....	51
3.2.7 Databases governed by the Prum Convention.....	52
3.2.8 Schengen Information System II.....	53
3.2.9 Entry Exit.....	53
3.3. Biometrics.....	54
3.3.1 Iris Recognition.....	55
3.3.2 Fingerprint Recognition.....	55
3.3.3 Face Recognition.....	56
3.4 Surveillance of Borders.....	57
3.4.1 Satellites.....	58
3.4.2 Unmanned Aerial Vehicles.....	59
3.4.3 Radar.....	59
3.4.4 Seismic Scanners.....	60
3.4.5 Magnetic Scanners.....	60
3.4.6 CCTV.....	60
3.4.7 Infrared Cameras.....	61
3.4.8 Smart Cameras.....	61
3.5 Substance and Weapon Detection Technology.....	62
3.5.1 Full Body Scanners.....	62
3.5.2 Explosives/Narcotics Detectors.....	63
3.5.3 Metal Detectors.....	63
3.5.4 Sniffer Dogs.....	63

4. APPENDIX I	64
4.1 Border Guarding: Legal and Illegal Entry Points	64
4.2 General Principles Relevant to Border Guarding at Legal Entry Points	64
4.2.1 Openness to travellers.....	64
4.2.2 Data-processing.....	64
4.2.3 Record-keeping.....	64
4.2.4 Conduct of questioning.....	65
4.2.5 Refusal of entry.....	65
4.2.6 Detention.....	65
4.2.7 Use of Force.....	65
4.2.8 Surveillance.....	65
4.2.9 Asylum seekers and refugees.....	65
4.2.10 Victims of trafficking and exploitation.....	65
4.2.11 Children.....	66
4.2.12 Missing persons.....	66
4.2.13 Receiving or handling money.....	66
4.3 General Principles Relevant to Border Guarding at Illegal Entry Points	66
4.3.1 The use of force.....	66
4.3.2 Openness	66
4.3.3 Record-keeping.....	66
4.3.4 Arrest and detention.....	66
4.3.5 Questioning.....	67
4.3.6 Children.....	67
4.3.7 Asylum and non-refoulement.....	67
4.3.8. Victims of trafficking and exploitation.....	67
4.3.9 Handling of Money.....	66

Ethics of Border Security

Executive Summary

1. EU Border Guard agencies operate under Codes of Conduct which specify the ethical principles that should guide their work. However, almost none of these Codes have been written with border guards in particular in mind. Rather, most are designed to apply to the police. Even those Codes written specifically for border guards ignore many of the ethically difficult tasks they perform.
2. The EU itself has legislated or proposed many ethical standards for many of the tasks BGs perform, but these are nowhere collected together in a single document. That is done here for the first time.
3. A range of technologies are available to border guards in the pursuit of their tasks. Indeed, the use of certain technologies is legally required. However, the fact that use is permitted or even required does not entail that the use of the technology is risk-free. On the contrary, many of these technologies may be intrusive, or risk casting false suspicion on innocent individuals. Border guards should be aware of these costs when using the technology.

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Introduction

This study provides border guards with an overview of the ethical issues that can arise from their work. It provides border guards with a guide to the ethical principles that can help to manage and resolve those issues. The study is divided into three parts. The first part is a survey and analysis of codes of conduct currently in use by border agencies in EU countries. It begins by giving a brief description of the aims and functions of codes of conduct. It then provides an overview of 23 border guard codes of conduct, highlighting their shared concerns and noting their differences. This comparative survey is first presented in a table and then discussed in more detail. The study concludes by identifying the both main areas of overlap and the gaps between the national codes of conduct and the Schengen Code and Handbook.

The second part of the study addresses these gaps by providing a comprehensive overview of the main ethical principles that relate to border guard practice. Most of these principles are entrenched in international and EU law, but some are drawn from national codes of conduct for border guards, and others have been articulated in non-binding EU policy documents. The source of each principle is clearly explained. The principles are organised by the area of border guard activity they regulate. For each area of border guard activity, the study identifies the ethical issues that might arise, illustrating these as far as possible with realistic examples. It then explains how the ethical principle requires or advises border guards to manage those ethical issues, giving examples of good practice.

The third part of this study provides an overview of the ethical issues arising from the use of detection and identification technologies by border guards. It also provides guidance for border guards on how these issues can be managed in accordance with EU laws and ethical commitments. For each technology currently used by border agencies, the study explains the ethical issues that may arise, illustrating these with realistic examples. It also provides an overview on the laws, regulations, and recommendations addressing these issues at the EU level. The sources it draws on include European law, European Commission communications and recommendations, European Parliament statements and commissioned research, statements of the European Data Protection Supervisor and reports of the Fundamental Rights Agency.

1. Survey of EU Codes of Conduct

This part is divided into three sections. The first explains in simple terms the distinction between ethics, law and voluntary codes of conduct adopted by different professional groups. The second section reviews codes of conduct used by border guards in EU and Schengen-associated countries. Areas of overlap and commonly included provisions are described. In the third section, gaps in these codes of conduct are indicated. The gaps are of two kinds. First, many codes are not specific to border guard activity and do not reflect precisely the Schengen Code and some of the emphases of the Schengen Handbook. Second, many codes do not reflect norms of international law and practice recommended for border guards by recent EU policy documents.

1.1 Ethics vs Law vs Codes of Conduct

Ethics is concerned with individual choices about right and wrong actions in a variety of contexts. Not all areas of our everyday conduct necessarily raise ethical questions but many do. In our personal lives we might face choices between being honest with our friends and not unduly upsetting them. Our professional lives may throw up a range of different moral challenges. Business people face conflicts between the goal of maximising profits and satisfying customers. Doctors sometimes have to choose between maximising the chances of a patient's recovery and enabling them to make decisions about their treatment for themselves. The ethics of border security applies principles to questions about entry to national and supranational territory. Some of the principles are to do with the fair privileges of citizenship and legitimate differences between decent treatment of citizens and non-citizens; other principles are to do with the special vulnerabilities of non-citizens if not granted entry; other principles again are to do with the treatment of illegal immigrants and the identification of traffickers and their victims

The ethics of border security should be contrasted with the law of border security, because ethics and law are distinct. Although laws are often consistent with ethical principles, there is no contradiction in the notion of an unjust or immoral law. Ethical standards can, for example, be used to criticize law.

In a democracy, the law operates as a series of rules amended over time by parliamentarians. Enforcement of the law resides with the government and its officials, but it is subject to the interpretation of legislation by an independent judicial system. Although law prohibits many actions which would clearly be immoral to perform, much immoral action is outside the scope of the law.

For example, lying to friends or family is usually immoral, but probably not illegal, at least under most circumstances. Codes of conduct lie somewhere between laws and ethical principles. First of all, they are voluntarily adopted. Second, and unlike ethics, they are not addressed to everyone, but only to people involved in a certain profession or trade. Third, violations are not always punished in the way that breaking the law is. Instead of being put in prison, someone who breaks a code of conduct may be excluded from a profession or face administrative sanction. Commonly, codes of conduct will be supervised by a non state organization, like a professional association, which hears complaints from clients. The non state organization can respond to complaints in ways that *resemble* judicial institutions, but with a range of penalties that mostly involve exclusion or fines rather than the loss of liberty. So codes of conduct are weaker than laws but with ethical content.

Some existing national codes of conduct for border guards within the Schengen area acknowledge the challenges of corrupt payments, the disclosure of secret information and the scope for disrespect of foreigners. International law acknowledges the special vulnerabilities of refugees and displaced persons as well as international obligations on state parties to treaties to help such people. National minorities are sometimes subject to discrimination in their home countries and at borders when they travel. Codes of conduct that stress impartiality indirectly address the risk of discrimination, and Schengen Handbook rules on refugees indirectly address other challenges, without necessarily indicating relevant good practice.

Existing codes of conduct for border guards sometimes differ between jurisdictions, and can conflict. There is also a problem of making codes of conduct for border guards specific to that role. Certain codes of conduct for border guards are addressed to all employees of an interior ministry, for example, even though the border guard role and other roles may differ. Often in Europe border guards are a branch of the police or military, operating by codes that apply to a much wider range of challenges than those faced at borders.

While codes of conduct are often addressed to members of a profession, they are also available to the public, so that clients of professionals know what behaviour they should be able to expect and what behaviour to complain about. Accordingly, codes of conduct are usually written in relatively simple language and are distributed to the public so that they can hold professionals to account. Sometimes codes explicitly spell out what the law requires or permits: for example, that gifts cannot ever be properly accepted by officials. Sometimes they draw on ethical principles to regulate behaviour not necessarily touched on in the law: for example, when they stipulate that officials should at all times respect the dignity and religious beliefs of others. As is the case with law they represent an attempt at codifying good behaviour through a series of explicitly stated rules. Yet

unlike the law they are not cases of top down direction from government but are rather typically cases of self regulation voluntarily adopted by a given profession.

1.2 Overview of EU Codes of Conduct Governing Border Guard Officials

This section surveys the codes of conduct used by border guard services in both Schengen and non-Schengen EU countries. Of the 23 countries that provided information, only Poland, Lithuania, and Latvia have codes of conduct specifically addressed to border guard officials. Finland has a Border Guard Act, a section of which is devoted to the regulation of border guard conduct. Both Bulgaria and Denmark use codes of conduct that apply to all officials of the ministry of the interior. The Netherlands uses a code of conduct for military officials.

All of the remaining codes of conduct examined are for the police more broadly. This is reflected in the kinds of ethical values and principles the documents emphasise. For example, most of the codes declare that the primary aims of the profession are the protection of security, property, law and order and the maintenance of peace. None of the codes mention the protection of borders.


There are only a few significant differences between the values and principles declared in the police codes of ethics, and the codes for border guards or military officials or civil servants more generally. Indeed, as is illustrated in Table 1, the majority of the codes reflect and confirm each others' ethical concerns. We have grouped these into seven main areas. *¹



These are:





- Respect for and protection of fundamental rights and freedoms
- Non-discrimination, or equal treatment of persons
- Incorruptibility
- Confidentiality and respect for privacy
- A prohibition on torture and cruel, unusual or degrading treatment
- Reputational issues
- Restraint in the use of force



¹ The first 3 of these areas are articulated in the Schengen Handbook



1.3 Table 1. National Codes of Conduct used by Border Guards







Flag	State	Type of document	Schengen documents			Incorruptibility	Confidentiality/ Privacy	Use of force	Reputation	Other
			Fundamental Rights/Dignity	Non-discrimination	Prohibition of inhuman and degrading treatments					
	Austria	Pamphlet on Prevention of Corruption for all public servants				v				Discretion; Transparency; Objectivity; Clear separation between private and working life.




 Belgium	Federal Police Code of Ethics came into force May 2006; info here is from introductory document about federal police	√ (p.10)							Integrity; flexibility; open-mindedness; customer-tailored service; pride (p.23) Loyalty to democratic institutions; honesty; restraint; 'service spirit' (p.10)
Bulgaria	Code of Ethics for Officials of Ministry of Interior	√ (pt.2.26)	√ (pt.2.25)	√ (pt.iv)	√ (Pt3)	√ Privacy (pt.2.24) confidentiality & data (pt.4)	√ Necessity and proportionality (pt.5)	√ No drunkenness	Pt. 1.7 Loyalty to institution; Limitations of rights of officials (Ch. 4, p. 11)
 Cyprus	Police Code of Ethics	√ (Art.2)	√ Assistance to all on Cypriot territory (Art.2)	√ (Art.5)	√ (Art.12)	√ respect for private life (Art.8)	Only necessary use of force (Art.6)		



	Czech Republic	Police Code of Ethics	√ (3.b, 3.e)	√ (3.c)	√ (Art.3e)	√ (3.h;3.i)	√ Confidentiality (3.g)			Accountability; responsibility
	Denmark	Legal code governing all government officials							√ Must behave in manner worthy of honour and confidence position demands	
	Estonia	Rules of Good Practices and Conduct of Police	√ 10.3	√ 10.3 (all people's rights)						Integrity, humanity, professionalism
	Finland	Border Guard Act (Declaration of Values)	√	√		√	√ Privacy		√ Act so as to maintain public trust even off duty	
	France	Code of Conduct of French National Police	√ (Art.11)	√ (Art.5)	√ (Art.10)	√ (Art.6)	√ Confidentiality (Art.11)	√ Must be necessary and proportionate (Art.9)		Officers can speak freely within limits of rules of professional confidentiality

										and secrecy; police must take measures to protect lives and health of those in custody
	Germany									
	Greece	Code of Police Ethics	√	√	√ (Art.3)	√ (Art.6)	√ Confidentiality and privacy (Art.2&4)		√ Not take part in activities when off duty that harm status of police (Art.6)	Special care for vulnerable groups, minors in particular (Art.5)
	Hungary	Code of Ethics of Police Profession	√ (Art.4)	√ (Art.4)	√ (Art.5)	√ (Art.2)	√ Professional secrecy (Art.9)	√ Only in exceptional circumstances (Art.3)	√ Not pursue activities incompatible with profession; exemplary private life (Art.12)	Empathy & humanity, help & protection; seek to remedy consequences of wrong decisions

	Iceland	Police Code of Ethics		✓ (Art.5)		✓ (Art.11, 13)	✓ Confidentiality and privacy	✓ Only when necessary (Art.8)	✓ Never cast doubt on objectivity	No unauthorised expression in media; minimise 'damage, loss or inconvenience'; International law; responsibility; police shall equally investigate evidence of guilt as well as evidence of innocence
	Italy	No Border Guards CoC. Police CoC. Professional Ethics as part of courses								

	Latvia	Code of Ethics for Border Guards	√ (Art.7.5)			√ (Art.12)	√ (Art.8)		√ Refrain from actions damaging reputation	Loyalty to institution
	Lithuania	Code of Conduct for Border Guards	Respect for rights and freedoms	√ (6.2)		√ (6.7)	√ Balancing public knowledge and confidentiality			Justice, fairness, responsibility,
	Luxembourg	Code of Police Values	√ Respect for fundamental rights (Art.3)	√ (Art.5)	√ (Art.11)	√ (Art.6)	√ Professional secrecy and discretion (Art.7)	√ Only when necessary (Art.11)		
	Malta	Uses the Schengen Border Code								
	Netherlands	Dutch Military Code of Conduct	√ Respect	√		√			√ Alcohol must never influence work	Team work; protection of the interests of the military even off duty,
	Poland	Code of Conduct for Border Guard Officers	√	√ Respects cultural and other differences		√			√ No activities that conflict with official duties	No party affiliation; No strikes; Does not publicize

										political opinions,
	Portugal	To be adopted soon								
	Romania	Police Ethics and Code of Conduct	√	√	√ (Art.18)	√ (Art.19)	√ Confidentiality with personal data (A.17)	√ Must be necessary and proportionate	√ Must behave in a civilised, polite, firm manner and avoid all conduct which could affect public trust	International law (Art.7)
	Slovakia	Code of Ethics of Police Force Members	√ Respectfulness	√ (Art.2)		√ (Art.5)				
	Slovenia	Code of Police Ethics	√ (Art.2)	√	√ (Art.2)	√ (Art.5)	√ Confidentiality			CoC adopted and amended by police trade union; ; responsibility; bravery; integrity

 Spain	Code of Ethics for Law Officers	√ Correct treatment	√		√ (1.c)	√ Professional secrecy (Art.5)	√ Respect physical integrity of arrestee		Full information provided
 Sweden	Core Values of Swedish Police	√ Respect	√ Equal value of everyone		√ (Art.11)				helpful and supportive
UK									
Ireland	National Police Service Standards	√	√		√ No personal gain	√ Confidentiality & privacy (Art.7)			Openness and accountability; establish and report all facts; necessity; challenge illegal and unethical behaviour; accept responsibility; Partnership with community
	Number of MS having	20	20	9	20	15	8	10	

		this provision in their CoC								
		Percentage of EU MS total - plus Iceland	71%	71%	32 %	71%	53%	28%	35%	
		Percentage of EU MS having Cocs (23)	87%	87%	39%	87%	65%	35%	43%	

1.4 Areas of Overlap between National Codes of Conduct

As can be seen from the table above, there is significant overlap in the provisions of many of the Codes of Conduct used by EU border guards.

1.4.1 Respect for and protection of fundamental rights and freedoms. Almost all of the codes state that officers must respect the rights of people. Some state that the protection of such rights is one of the primary aims of the police service. Some list these rights in detail, while others refer to the legal documents in which they are encoded, such as the European Convention on Human Rights. This concern is reflected in the Schengen Handbook, which states that “rights enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union must be guaranteed to any person seeking to cross borders.”

1.4.2 Non-discrimination, or equal treatment of persons. Many of the codes list the specific kinds of discrimination, such as racial, ethnic, or sexual discrimination, that are unacceptable. These are the kinds of discrimination outlawed by the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and other international human rights documents, such as the International Covenant on Civil and Political Liberties, and the Universal Declaration of Human Rights. The obligation to refrain from discrimination is also placed on border guards by the Schengen Handbook and Article 6(2) of the Schengen Borders Code.

1.4.3 The majority of the codes prohibit officers from engaging in **torture or cruel, inhuman and degrading treatment**. This prohibition is often expressed in a way that echoes EU legal provisions on fundamental rights and international human rights treaties such as those mentioned above. It is also restated in the Schengen Handbook.

1.4.4 Confidentiality and respect for privacy. This is stressed in all but 4 of the codes. Some of these include details about how data and information should be handled, while others simply state the need to respect the private life of individuals. Discretion and professional secrecy are related qualities promoted by a number of codes.

1.4.5. Incorruptibility is a value that is also articulated in nearly all of the codes of conduct examined, many of which give detailed explanations of what kind of behaviour is illegal and what kinds of conflicts of interest should be avoided or reported. Bribes are a central focus of the provisions on incorruptibility.

1.4.6 Reputational issues. The duties of officers to honour their profession and avoid bringing it into disrepute, and to maintain high standards of behaviour and conduct even when not on duty, are

emphasised in about half of the codes. Some of these specify particular kinds of conduct that should be avoided, such as drunkenness. Others stress the need to maintain public trust in the objectivity and integrity of the profession, which probably overlaps with the value of equal treatment.

1.4.7. About a third of the codes emphasise the importance of exercising **restraint in the use of force**, with many stating that force should be used only when necessary or only in exceptional circumstances and only to the extent that is proportionate with the goals of the action.

Other values articulated less often in the codes include honesty, integrity, impartiality (closely related to equal treatment), openness, professionalism and responsibility. The importance of building good relationships with the community is also mentioned by more than one code.

Some codes include unique duties or prohibitions. For example, the Polish code prohibits officers from engaging in political activities and strikes. None of the codes, including those directed specifically to border guards, mention the protection of borders or the enforcement of border regulations.

There are important areas of overlap between the values expressed most often in the national codes of conduct used by EU border guards and those articulated in EU legal documents relevant to border control, in particular the Schengen Borders Code and Schengen Handbook.² As illustrated above, most of the Codes emphasise the importance of respect for human dignity and non-discrimination. These are values strongly promoted by the Schengen Borders Code and the Handbook, as well as other EU documents related to border control, such as the 2010 EU Action Plan Implementing the Stockholm Programme, and the 2008 Updated Schengen Catalogue on External Borders Control, Return and Readmission.³ Respect for human dignity and equal concern for all are fundamental European and international values, which now govern all types of officials working in and with state institutions, including border guards. Similarly, the prohibition on torture and cruel, inhuman and degrading treatment is found in the Schengen Handbook, and all EU legal documents on fundamental rights and international human rights treaties and conventions.⁴ Given the importance of human dignity, non-discrimination, and the prohibition of torture, it is unsurprising that these three principles are articulated in most of the codes of conduct.

² The principle of non-discrimination is emphasised in Article 14 of the European Convention on Human Rights and in Article 21 of the Charter of Fundamental Right of the European Union. It is also expressed in Art.3 of the International Covenant on Civil and Political Liberties and Art.2 of the Universal Declaration of Human Rights.

³ *Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme*. Brussels, 20.4.2010 COM(2010) 171; and Updated Schengen catalogue on External borders control, Return and readmission - 3rd draft 15250/2/08, REV 2, LIMITE SCH-EVAL 85, COMIX 786.

⁴ Insert ref to HR documents

1.5 Gaps between National Codes of Conduct and EU Documents

The majority of the codes have significant gaps in the ethical areas that they regulate as they do not cover a number of important tasks specific to the guarding of borders. In the first place, they do not include a number of ethical principles and rules included in the Schengen Borders Code and Handbook, and the Updated Schengen Catalogue. These include the rights of refugees to non-refoulement⁵ (and, more specifically, the freedom of border guards to decide not to affix a stamp to a passport if this would cause ‘serious difficulties’ for a person), the right of individuals to a substantiated decision from an appropriate authority explaining the reasons why their entry into a territory has been refused (a right which imposes a heavier burden on border guards than the duty to provide citizens with full information imposed on police officers) and the European Union right to freedom of movement.

In the second place, they also do not include a number of important extra ethical principles and recommendations which are included in EU policy documents. These EU policy documents do not impose new legal obligations on border guards, but they do indicate the policy commitments of the EU in relation to border control. They also make recommendations and suggest best practices relating to ethical border control. In particular, they identify and address some ethical issues that arise in relation to activities of border control that are left out by either the existing codes of conduct or the Schengen Borders Code and Handbook, or both.

For example, neither the individual codes of conduct nor the Schengen Borders Code or Handbook mention ethical issues related to the prevention of human trafficking and illegal immigration. Neither do they mention the protection of children and the victims of trafficking (with the exception of the Greek code, which calls for special treatment of vulnerable groups, especially minors). The European Commission Action Plan on Trafficking⁶, the Updated Schengen Catalogue, and other relevant EU documents all point out that both children and the victims of trafficking are particularly vulnerable to exploitation and other forms of harm, and the point at which they cross a border is one opportunity to identify them and ensure that their rights are being protected.⁷

⁵ Updated Schengen Catalogue, part 2.

⁶ European Commission Action Plan on Trafficking (2005-9)

⁷ A recently published European Commission *Action Plan on Unaccompanied Minors* recognises that border guards have a role to play in such protection, and provides useful guidance to member states on how to deal with children crossing borders alone. According to the EU Charter of Fundamental Rights and the UN Convention on the Rights of the Child, ‘the best interests of the child’ must be the primary consideration in all action related to children taken by public authorities.⁷ It also provides

This and other ethical issues specific to border guarding are examined in more detail in the next section.

some guidance on best practice, for example, by recommending that “wherever unaccompanied minors are detected, they should be separated from adults, to protect them and sever relations with traffickers or smugglers and prevent (re)victimisation”. Further and more extensive guidance on best practice with regard to children has been provided by the UK Border Agency in their Code of Practice for Keeping Children Safe from Harm, which has governed the UKBA’s dealing with children since 2009.⁷ This document gives detailed and very useful guidance to border guards, such as the tone they should adopt when speaking to children, as well as how they should treat exceptional cases, such as babies being breastfed.

2. Ethical issues specific to border guarding

2.1 Introduction and list of sources

- “The aim of border control is to help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations.” (Schengen Border Code (6))

Border control covers both irregular and illegal entry, and legal entry. The first kind of border control is preventive policing and involves the apprehension of illegal migrants and traffickers at green and blue borders and will usually involve surveillance and patrolling activity of some kind; the second is also preventive policing, but at public and legal crossing points intended to receive travellers. In the second sort of border control, conditions usually exist for the orderly processing of normally co-operative persons; in the first sort of case, on the other hand, conditions can be much more dangerous both for border guards and migrants or trafficked people. Illegal entrants have fundamental rights. This means that rules are needed for transferring people from a point of interception to a point where their claims to enter can be processed in an orderly and fair way (see p.9).

In what follows, we have gathered together general ethical standards listed in the relevant EU documentation and have divided what they cover into six categories of border guard activity. The first relates to border checks. The second relates to border surveillance, including the surveillance of unauthorised border crossings. The third relates to return and readmission. The fourth lists standards relevant to the treatment of special categories of persons. The fifth addresses the issue of corruption. The sixth addresses the rights of border guards.

Most of the standards are minimal requirements that border guards must fulfil according to EU law. Some rules are recommendations that are not legally binding. Others are principles that recommend best practice-- that is, practice that goes beyond what is required to promote human rights or other values. Wherever the principles listed below take the form of recommendations or best practice rather than binding law, this is both highlighted in red and clearly noted.

The standards listed below have been drawn from the following documents:

1. National Codes of Conduct surveyed in Part 1.
2. Schengen Borders Code
3. Schengen Handbook
4. Updated Schengen Catalogue
5. EU Charter of Fundamental Rights
6. Universal Declaration on Human Rights
7. EU Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders. (2010/252/EU). April 2010.
8. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
9. Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)
10. DIRECTIVE 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
11. Council of Europe Committee of Ministers. 20 Recommendations on Forced Returns, 4 May 2005.

2.2. Border Checks

- “The main purpose of border checks at border crossing points is to verify that all persons crossing the border fulfil the entry conditions in the territory of the Schengen States.”
(Schengen Handbook 1.1)

All those who arrive at legal crossing points, whether or not they turn out to be illegal migrants,

“...have the right to be informed on the nature of the control and to a professional, friendly and courteous treatment, in accordance with applicable international, Community and national law.”
(Schengen Handbook 1.2)

2.2.1 First-line checks

In addition to carrying out border checks according to SBC, the goal for first-line checks should be to profile passengers and pick out suspicious persons for thorough second line checks. (**Updated Schengen Catalogue recommendation 43**). The prohibition on discrimination (Schengen Code 6.2; Schengen Handbook 1.2; CRF A.21) should be applied to the profiling process.

- Thorough second line checks for suspicious persons should not be triggered solely or primarily by a person's sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2.2.2 Minimum Checks

Freedom of the person is a fundamental right. In order to ensure it is respected, border guards should try to minimise the amount of time for which an individual is stopped or detained at the border to what is reasonable. This applies also to cases in which border guards are waiting for the results of searches for information to clarify an alert entered in the SIS.

- If it is not possible to obtain the information within a reasonable delay, the person in question must be allowed to enter the territory. (Schengen Handbook 6.3.1)

2.2.3 Thorough Checks

Because thorough checks involve questioning that may touch on personal issues, border guards should engage in the following efforts to ensure the right to privacy is respected.

- "Where facilities exist and if requested by the third-country national, such thorough checks shall be carried out in a private area." (Schengen Code 4)

Openness and accountability (both of which are values expressed in many national Codes of Conduct) require that border guards are identifiable by the individuals subject to thorough checks.

- "Upon request from the person subject to a thorough check, the border guard conducting the check should show him/her his/her service badge, must provide him/her with the service identification number and, if circumstances allow for it, give her/his name. The

provision of the name can be refused if there is any reason to assume that the border guard might be severely disadvantaged (for example, if he/she is threatened with retaliation). In this latter case, only the number of the badge and the name and address of his/her authority must be provided.” (Schengen Handbook 1.9. See also Schengen Code Art 7(5)⁸)

- “If a person requests information about the processing of his/her personal data in the SIS and about his/her access rights, the border guard should provide the person with the coordinates of the competent national authorities, including data protection authorities, where he/she can exercise his/her rights.” (Schengen Handbook 2.2.5)

2.2.4 Second-line checks

Openness on the part of border guards can help to ensure that people are informed of their rights and aware of their obligations.

- Third-country nationals subject to a thorough second line check shall be given information on the purpose of, and procedure for, such a check. (Schengen Code 5)

2.2.5 Stamps

Openness should also inform border-guard conduct when affixing stamps to the passports of third-country nationals.

- “Whenever possible, third-country nationals shall be informed of the border guard’s obligation to stamp their travel document on entry and exit, even where checks are relaxed in accordance with Article 8.” (Schengen Code 5)

When affixing a stamp in a passport may put someone’s fundamental rights at risk, a border guards may decide not to do so:

- “At the request of a third country national, and if the insertion of the entry/exit stamp might cause serious difficulties to the person, it can be affixed on a separate sheet. The sheet must be given to the third-country national.” (Schengen Handbook 4.4; Schengen Code 10.3)

⁸ “...the third-country national may request the name or service identification number of the border guards carrying out the thorough second line check, the name of the border crossing point and the date on which the border was crossed.”

2.2.6 Visas

Humanitarian considerations should be taken into account by border guards when deciding whether to issue a person with a visa at the border.

- “A third-country national falling within a category of persons for which it is obligatory to consult one or more of the central authorities of other Schengen States cannot, in principle, be issued with a visa at the border. Nevertheless, a visa may be issued at the border for such persons in exceptional cases, namely on **humanitarian grounds**, on **grounds of national interest** or on account of international obligations.” (Schengen Handbook 7.5)

2.2.7 Questioning of travellers/responding to traveller questions

The kinds of questions asked to travellers by border guards, and the way in which they are asked, can affect travellers’ dignity. The right to be treated with dignity is a fundamental one, enshrined in Article 1 of the Charter of Fundamental Rights. The Schengen Borders Code also explicitly requires that border control shall respect human dignity.⁹

- “Border guards should not interrogate the traveller as a potential criminal or illegal immigrant.” (Schengen Handbook 1.3)
- Questions should be asked with particular sensitivity when addressed to children, victims of trafficking and other people who may have been exploited or otherwise be vulnerable to exploitation, including when these are illegal immigrants.¹⁰
- “Questions posed by the traveller should not be considered as intrusive [or as suspicious]¹¹ and should be answered in a factual and polite manner.” (Schengen Handbook 1.3)

⁹ “Border checks should be carried out in such a way as to fully respect human dignity. Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued” (Schengen Borders Code, (7))

¹⁰ Illegal immigrants are included here because the Updated Schengen Catalogue recommends that illegal immigrants be interrogated: “Interrogation of all detected illegal immigrants should be carried out in order to identify routes, traffickers, facilitators and other relevant issues (e.g. to find out the price paid to facilitators to organise illegal crossings).” **Recommendation** 136.

¹¹ This reflects the requirement, noted above, that travellers should not be questioned as if they are criminals or illegal immigrants (Schengen Handbook 1.3).

2.2.8 Recording of information

It is important that border guards record what happens at borders in order to prevent illegal immigration and protect the internal security, public policy, public health and international relations of member states. Recording information also helps to ensure that people's rights are respected- including border guards' rights- that border guards are accountable, and that corruption is detected and prevented.¹²

- "At all border crossing points, all service information and any other particularly important information must be registered manually or electronically. The information to be registered must include, in particular:
 - the names of the border guard responsible locally for border checks and of the other officers in each team;
 - any relaxation of checks on persons;
 - the issuing, at the border, of visas and of documents in place of passports and of visas;
 - persons apprehended and complaints (criminal offences and administrative breaches);
 - persons refused entry (grounds for refusal and nationality);
 - the security codes of entry and exit stamps, the identity of border guards using the stamps at any given date or shift, as well as the information related to lost and stolen stamps;
 - complaints from persons subject to checks;
 - other particularly important police or judicial measures;
 - particular occurrences." (Schengen Handbook 11)

- Because the information recorded at the border may include personal data, it should be stored securely and only processed by, shared with or made available to authorised border guards or police.

2.2.9 Fingerprinting and other Biometrics

The right to privacy and personal data is a fundamental right, enshrined in articles 7-8 of the Charter of Fundamental Rights. Care must be taken to protect the right to privacy at borders because

¹² "Border checks [should be] monitored and recorded. These records could be used for criminal investigation purposes e.g. when prosecuting passengers for attempted bribery." (Updated Schengen Catalogue, recommendation for best practice, 159)

fingerprints¹³ and other biometric data¹⁴ are collected at borders and constitute personal data under the EU Personal Data Directive.¹⁵

2.2.10 Refusal of entry

The prohibition on discrimination requires that border guards should be able to demonstrate, if required, that any decision to refuse entry was made on legitimate grounds. It is also in accordance with the values of openness and accountability to inform people clearly of the reasons for which their entry has been refused. The principles expressed in the Schengen Code and Handbook reflect these concerns.

- “Entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision shall be taken by an authority empowered by national law. It shall take effect immediately.

The substantiated decision stating the precise reasons for the refusal shall be given by means of a standard form, as set out in Annex V, Part B, filled in by the authority empowered by national law to refuse entry. The completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision to refuse entry by means of that form.” (Schengen Borders Code 13(2))¹⁶

- “If a **person enjoying the Community right of free movement** is refused entry, the border guard must always provide the person with a written decision. The decision must be drafted

¹³ “Fingerprints of all fingers of every applicant for asylum of at least 14 years of age must be taken, in accordance with the national legislation of each Member State, and sent to the Eurodac Central Unit to make checks in the EURODAC system possible” (Schengen Handbook 10.4)

¹⁴ The Updated Schengen Catalogue recommends that all illegal immigrants should be registered, including biometric data: “Illegal immigrants should be registered before possible refusal of entry, removal or readmission measures. Including storing biometrics” (**Updated Schengen Catalogue, recommendation for best practice** 137) The SIS system also provides for the processing of biometric data: Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

¹⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

¹⁶ This is reaffirmed in the Schengen Handbook 6.4(a): “When refusing the entry to third-country nationals, the checking officer must: a) fill in a standard form for refusing entry substantiating the reason(s) for refusal, and give it to the third-country national concerned, who must sign the form and must be given a copy of the signed form.”

in such a way that the person concerned is able to comprehend its content and the implications. The decision must also include precise and full indication of the public policy or public security grounds on which the decision taken is based, unless this is contrary to the interests of State security. The decision must also specify the court or administrative authority with which the person concerned may lodge an appeal and the time limit for the appeal.” (Schengen Handbook 6.8)

Because people who are refused entry must be placed under supervision, or detained if necessary, both of which are situations which limit their liberty, the time between refusal of entry and return should be minimised as far as possible.

- “Third-country nationals to whom entry is refused must be returned to the place they came from or to their country of origin as quickly as possible, if the circumstances allow it.” (Schengen Handbook 2.2.2)

In the case of a person enjoying the Community right of free movement there should be no reason that return cannot take place at once:

- “The decision to refuse entry [to a person enjoying the Community right of free movement] must be performed immediately.” (Schengen Handbook 6.9)

People refused entry have a legal right to appeal. Information should be made available to them so that they are aware of this right and the means by which they can exercise it.

- “A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national.” (Schengen Borders Code Art.13.3)

2.2.11 Detention

Because, according to the Schengen rules and recommendations , border guards “must take all appropriate measures, based on local circumstances, in order to prevent third-country nationals refused entry from entering illegally (for instance, by ensuring that they remain in the transit area of

an airport, or by prohibiting them from going ashore in a seaport)¹⁷ they may have to restrict people's liberty by restraining them and detaining them. In all cases of detention:

- Persons refused entry being placed in specially designated facilities (which are intended only for them) should be kept under permanent supervision using technical or personal means. Facilities for such people must fulfil both security and social conditions. (Updated Schengen Catalogue, recommendation 39)

Because people seeking asylum are exercising their rights and not engaging in illegal activity, they should, if possible, be kept in separate facilities from those who have entered illegally.

- "Additional facilities should be available for asylum seekers" (Updated Schengen Catalogue, recommendation 40)

2.3 Border Surveillance

2.3.1 Authorised border crossing points

At authorised border crossings, video surveillance (CCTV systems) to profile passenger flow is used, for example, to select persons for second line checks. Respect for the right to privacy means that:

- "Storage of the images can be undertaken in accordance with the national data protection laws." (Updated Schengen Catalogue, best practice recommendation 48)

Third-country nationals are also subject to surveillance, which should be proportionate and based on evidence:

- "Surveillance of third-country nationals should be proportionate and planned according to risk analysis." (Updated Schengen Catalogue, recommendation 146)

2.3.2 Unauthorised border crossings

¹⁷ Schengen Handbook 6.1.2 and Schengen Borders Code Art.13.4

At unauthorised crossing points, surveillance is mainly used to prevent crime and to prevent and intercept people attempting to cross a border illegally.¹⁸ The use of force is sometimes necessary during such operations. For example, border guards may need to use force in self-defence if people on board intercepted vessels are armed and threaten or attempting to harm them or others. The use of force may also be necessary during search, seizure and arrest, and in order to successfully conduct a ship to a third country or Member State.¹⁹ This may occur often in zones in which cross-border criminals regularly operate.

The Updated Schengen Catalogue itself recommends that border guards take “all necessary measures to prevent the unauthorised crossing of the border”; to conduct ambushes to catch trafficked people and traffickers; and to stop people who have attempted to cross the border illegally and bring them to the border guard station. It also recommends that “[n]ecessary coercive measures” be used to intercept checked vessels at sea ([Updated Schengen Catalogue, recommendation 118](#)).

Requirements of necessity and proportionality in the use of force are common to nearly all Schengen national Codes of Conduct relevant to border guards:

- Border guards must use force only when necessary. The use of force should be proportionate to the aims of the task. (National Codes of Conduct, WP1)

Further rules specific to border surveillance in maritime operations are provided by the *EU Council Decision on surveillance of sea external borders*. These aim to protect fundamental rights but also to ensure the health and safety of persons intercepted and border guards. The health and safety of both intercepted persons and border guards can be at risk during operations to prevent crime, when both parties may be armed and force may have to be used. They may also be put at risk when surveillance operations involve search and rescue.

¹⁸ “The purpose of border surveillance is to prevent unauthorised border crossings, to counter cross-border criminality and to apprehend or take other measures against persons who have crossed the border illegally.” *EU Council Decision on surveillance of sea external borders*. Preamble, recital (1).

¹⁹ The activities in which force might be necessary at external sea borders are listed in the *EU Council Decision on surveillance of external sea borders*, 2.4(a-g)

Border surveillance operations can involve search and rescue activities if border guards come across a vessel that is found to be sinking, endangering lives, and the search and rescue team has not arrived. Sometimes vessels are deliberately sunk by those on board in order to force border guards to rescue them. Rescue activities are beyond the normal scope of border guard responsibility and can put border guards' health and safety at risk. Nevertheless, unless they actually increase the risk of injury or loss of life by doing so, border guards are required to try to rescue all people in distress at sea. The health and safety of both individuals and border guards should be ensured as a priority.

“1.1. Measures taken for the purpose of the surveillance operation shall be conducted in accordance with fundamental rights and in a way that does not put at risk the safety of the persons intercepted or rescued as well as of the participating units.

1.2. No person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle.²⁰ Without prejudice to point 1.1, the persons intercepted or rescued shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement.

1.3. The special needs of children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection and other persons in a particularly vulnerable situation shall be considered throughout all the operation.”

1.4. Member States shall ensure that border guards participating in the surveillance operation are trained with regard to relevant provisions of human rights and refugee law, and are familiar with the international regime on search and rescue.

II.1.1 Participating units shall provide assistance to any vessel or person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

²⁰ The principle of non-refoulement is stated in Article 19.2 of the Charter of Fundamental Rights.

II.1.4 The existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance.

In cases where, despite a ship being perceived to be in a state of emergency, the persons on board refuse to accept assistance, the participating unit should inform the Rescue Coordination Centre and continue to fulfil a duty of care, taking any measure necessary to the safety of the persons concerned, while avoiding taking any action that might aggravate the situation or increase the chances of injury or loss of life. ”

2.3.3 Risk analysis and profiling

In order to ensure that risk analysis and profiling is undertaken on the basis of sound evidence:

- Specialized and advanced courses should be developed for risk analysis and profiling
(Updated Schengen Catalogue, recommendation 30)

2.4 Returns (removal)

The participation of border guards in returns practice is usually limited to carrying out removals. Forced removals may involve detention, the use of force, and risks to the safety of all those involved in the process including border guards. Ethical principles regulating removals aim to protect the safety of all involved and to ensure that basic human rights are respected.

- “Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.” (EU Returns Directive 8.4)²¹

²¹ Further, compatible guidance is offered by the Council of Europe in its ‘Twenty Guidelines on Forced Returns’. See **Guideline 19. Means of restraint**: “1. The only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her.
2. Restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia, shall not be used.
3. Members of the escort team should have training which defines the means of restraint which may be used, and in which circumstances; the members of the escort should be informed of the risks

- “While respecting the dignity of the returnee, the safety of the other passengers, of the crew members, [of border guards escorting a returnee] and of the returnee himself/herself shall be paramount in the removal process. The removal of a returnee may have to be interrupted where its continuation would endanger this.” (CoE recommendations on forced returns, 17)
- “Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.” (EU Returns Directive 16)
- Removal operations should be carried out with due regard for human rights and human dignity.(Updated Schengen Catalogue Part 2. Recommendation 29)

2.5 Special Categories of Persons

2.5.1 Asylum seekers and refugees.

The right to asylum is a fundamental human right.²² Border guards have a key role in protecting that right because they are often the first person to whom the wish to claim asylum is expressed. Border guards also have a key role in observing the principle of non-refoulement, which prohibits forcibly returning refugees to countries where they may face persecution, as one of the priorities of the common migration policy.²³

- “A Member State may exceptionally decide not to refuse entry and let the third-country national enter into its territory on humanitarian grounds, on grounds of national interests or because of international obligations (for example, if a person asks for asylum or is otherwise in need of international protection)” (Schengen Handbook 6.2)

As the Schengen Handbook makes clear below, border guards do not need to hear the word ‘asylum’ in order to judge that a formal expression of a wish to claim asylum has been made. Any expression

linked to the use of each technique, as part of their specialised training. If training is not offered, as a minimum regulations or guidelines should define the means of restraint, the circumstances under which they may be used, and the risks linked to their use.”

²² Charter of Fundamental Rights Article 18. Universal Declaration on Human Rights, Article 14. (1)

²³ “[The] observance of basic rights and the principle of non-refoulement is one of the priorities of common migration policy.” Updated Schengen Catalogue, part 2.

of fear about what might happen if an individual is returned is sufficient to require border guards to offer the opportunity to claim asylum.

- “A third-country national must be considered as an applicant for asylum/international protection if he/she expresses – in any way – fear of suffering serious harm if he/she is returned to his/her country of origin or former habitual residence.

The wish to apply for protection does not need to be expressed in any particular form. The word “asylum” does not need to be used expressly; the defining element is the expression of fear of what might happen upon return. In case of doubt on whether a certain declaration can be construed as a wish to apply for asylum or for another form of international protection, the border guards must consult the national authority(-ies) responsible for the examination of applications for international protection.” (Schengen Handbook 10.1)

Sometimes it may seem obvious to a border guard that a wish to apply for asylum is made on grounds that are not genuine. For example, a border guard may be certain that an individual comes from a different, safer country than the place they claim to be from. Individuals may have destroyed the documents they have travelled with in order to conceal this. Even in such cases, the opportunity to apply for asylum must be provided in the same way as it would be to any other individual.

“All third-country nationals who express the wish to apply for asylum/international protection at the border (including airport and seaport transit zones) must be given the opportunity to do so. To this end, border authorities must inform the applicants, in a language they may reasonably be expected to understand, of the procedure to be followed (how and where to make the application), as well as of their rights and obligations, including of the possible consequences of not complying with their obligations and not cooperating with the authorities.

In order to avoid misunderstandings, and to be sure that applicants are adequately informed of their rights and obligations, as well as of the procedure, if an applicant for international protection does not have sufficient knowledge of the language spoken in the Member State concerned, the services of an interpreter must be called upon where necessary.” (Schengen Handbook 10.2)

- “Any application for international protection must be transmitted either to the competent national authority designated by each Member State for the purpose of its examination/processing or to the authority which is responsible for deciding whether to permit the applicant entry to the territory so that his/her application can be examined by the competent authority. No decision to return the applicant must be taken by the border guard without prior consultation with the competent national authority or authorities”. (Schengen Handbook 10.3)
- [This Code shall be applied so as to respect] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement (Schengen Borders Code (20))

2.5.2 Children

Children are vulnerable to exploitation and they also have rights and obligations that differ from those of adults. For these reasons border guards should take special care with them.

- Border guards shall pay particular attention to minors, whether travelling accompanied or unaccompanied (Schengen Borders Code Annex VII 6.1)
- In all their dealings with children, border guards should aim to act as far as possible in the best interests of the child. (EU Action Plan on Unaccompanied Minors; Charter of Fundamental Rights, 24.2)
- Border guards should always treat children first and foremost as children, rather than merely as, for example, illegal immigrants or asylum seekers. (EU Action Plan on Unaccompanied Minors)
- Children travelling with their families should not be separated from their families unless this is unavoidable. (Updated Schengen Catalogue, recommendation 3.3)
- In the case of accompanied minors, the border guard shall check that the persons accompanying minors have parental care over them, especially where minors are accompanied by only one adult and there are serious grounds for suspecting that they may have been unlawfully removed from the custody of the person(s) legally exercising parental

care over them. In the latter case, the border guard shall carry out a further investigation in order to detect any inconsistencies or contradictions in the information given. (Schengen Borders Code Annex VII, 6.2.)

- In the case of minors travelling unaccompanied, border guards shall ensure, by means of thorough checks on travel documents and supporting documents, that the minors do not leave the territory against the wishes of the person(s) having parental care over them. (Schengen Borders Code Annex VII, 6.3)
- Wherever unaccompanied minors are detected, they should be separated from adults, to protect them and sever relations with traffickers or smugglers and prevent (re)victimisation. (EU Action Plan on Unaccompanied Minors, recommendation 4.1)

2.5.3 Missing persons

- An adult person identified as reported missing must be asked for prior consent before informing the party who reported him/her as missing. (Schengen Handbook 2.2.3)

2.5.4 The victims of trafficking, crime, or exploitation

The importance of protecting victims of trafficking has been stressed in the Action Plan Implementing the Stockholm Programme, as well as the Updated Schengen Catalogue, which recommends, amongst other things, that border guards should be trained to identify the victims of trafficking so that they can be protected.²⁴ The Updated Schengen Catalogue also recommends that a distinction should be made between the victims of trafficking and illegal migrants, although it does not specify how this would translate into different kinds of treatment by border guards.²⁵

²⁴ Stockholm Programme: for unaccompanied minors see p.54; for illegal immigration see p.53; for trafficking see p.59. Updated Schengen Catalogue: for the treatment of minors see p.52 Section 9; for trafficking and for illegal immigration see **Recommendation 1 and Recommendation 12**, which states that the UN “Convention against Transnational Organized Crime and of its Protocols on trafficking of human beings and the smuggling of migrants by land, sea and air and trafficking in firearms, their parts and components and ammunition” should be implemented; that plans should be put in place “to tackle traffickers and to identify victims in cooperation with other relevant authorities; and most pertinently, that “training, targeted risk analysis, profiling and operational instructions for border guards to identify victims of trafficking of human beings” should be implemented.

²⁵ Ibid. **Recommendation 148**

According to the Updated Schengen Catalogue, border guard duties include the “recognition of victims of crime, human trafficking and exploitation” (Updated Schengen Catalogue, recommendation 148)

- Border guards should attempt, in the course of their duties, to identify unaccompanied children, persons who have been the victims of trafficking or exploitation, or whose psycho-physical conditions indicate that they might have undergone traumatic experiences and to ensure that their rights are protected. (Derived from Updated Schengen Catalogue, recommendation 12²⁶)
- Persons, whose psycho-physical conditions indicate that they might have undergone traumatic experiences, should be treated with special care and immediate access to medical and psychological help should be provided where possible. (Updated Schengen Catalogue, recommendation 3.7)

2.6 Corruption or conflicts of interest

Border guards have the power to grant or refuse people entry to a territory. This power can be abused, for example, if border guards accept favours or gifts from people in return for entry, or if they allow people to enter who have no legal right to enter, or if they withhold the right to enter from those who have a legal right to do so.

- Aside from their salaries, border guards should not accept money, gifts, or favours of any kind in return for any activity related to their work. (National Codes of Conduct)

2.7 Further Considerations: The Rights of Border Guards²⁷

While the safety of all people at border crossings is recognised as paramount in at least one EU document,²⁸ the rights of border guards are not explicitly commented upon anywhere. Yet

²⁶ The Catalogue recommends as best practice that Schengen parties should establish “[t]raining, targeted risk analysis, profiling and operational instructions for border guards to identify victims of trafficking of human beings.” (recommendation 12). It also recommends that the UN treaties and protocols on transnational crime and trafficking in humans should be implemented.

²⁷ The content in this final section is the result of a discussion between the authors and EU border guards at Frontex headquarters in Jan 2011. In that discussion a number of border guards expressed concern that their own rights may be at risk during the course of their work, especially in sea border surveillance.

sometimes in the course of their duties, the fundamental rights of border guard personnel might be threatened. In particular, border guards may be at serious risk of physical attack when carrying out border surveillance at unauthorised crossing points. For example, they may be heavily outnumbered by people attempting to cross illegally, people who may be armed and who may forcibly resist being conveyed to a particular port. In such cases border guards should not be required to engage in a confrontation until assistance is provided. At the same time, they should be permitted to use force to defend themselves if necessary.

- Border guards should have the right to defend themselves with necessary and proportionate force

Border guards also have rights related to their employment. These should protect the ability of border guards to do their job and ensure their colleagues do theirs in accordance with the law and binding ethical principles. Sometimes border guards may witness colleagues acting against these principles. In such cases channels for complaint should be available. But sometimes border guards may be required to work with units whose normal modus operandi is not compatible with law and ethical principles. In such cases there may be no one immediately available to complain to and it may be difficult for border guards to decide whether to fall in with the unethical practices of the unit or to stick to their principles.

- Border guards should also have a right to make substantiated complaints about the behaviour of colleagues to the proper authorities without fear of this prejudicing their career prospects.
- Border guards should have the right to work in an environment that enables them to respect and enjoy the legal and ethical rights associated with their position.

Rights related to border guards' employment should also ensure that border guards are fairly represented and defended if complaints against them are manufactured by individuals. For example, a border guard may be falsely accused of using unnecessary or disproportionate force against someone. Border guards should be supported by their employer to disprove such allegations.

²⁸ EU Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders. Annex. 1.1.

- Border guards should have a right to a fair hearing and representation by their employer if complaints against them are made either by colleagues or members of the public.

Appendix I is an abbreviated version of the standards presented in the body of Part 2.

Part 3: Ethics and the Use of Technology at the Border

3.1 Introduction

A range of technologies are permitted or even mandated for use by border guards in carrying out their duties. The use of many of these technologies is, nevertheless, inherently ethically problematic. Even when the use of technologies is ethically justified overall, it may come at a moral cost and may carry risks of error or misuse.

In the text that follows we list the kinds of technologies used for border security in Europe. These include databases and data-mining software, biometric, surveillance and detection technologies. We identify the relevant moral issues that border guards should take into account when using each of these kinds of technologies. In particular, with any technology which produces data which is then stored, the system transmitting and storing the information must be secure from any outside interference and border guards should not engage in practices that might make them insecure. Wherever possible, we support our identification of the moral issues by reference to statements made by authoritative EU sources.

Analysis of the ethical issues raised by technology used in border security draws on research undertaken in the EC funded FP7 security project DETECTER (Detection Technologies, Terrorism, Ethics and Human Rights). Other EC funded FP6 and FP7 projects concerning the ethics of security technology include HIDE (Homeland Security, Biometric Identification, and Personal Identification Ethics), INEX (Converging and conflicting ethical values in the internal/external security continuum in Europe) and FORESEC (Europe's Evolving Security: Drivers, Trends and Scenarios). Relevant EC-funded research in the Science in Society call includes RISE (Rising Pan-European and International Awareness of Biometrics and *Security* Ethics), ICTETHICS (An Interdisciplinary Approach for Addressing Ethical, Social and Legal Aspects of Information and Communication Technology), VALUE ISOBARS (The Landscape and Isobars of European Values in Relation to Science and New Technology), ETHICAL (Promoting International Debate on Ethical Implications of Data Collection, Use and Retention for Biometric and Medical Applications), PATS (Privacy Awareness Through Security Branding) and TECHNOLIFE (A Transdisciplinary Approach to the Emerging Challenges of Novel Technologies: Lifeworld and Imaginaries in Foresight and Ethics).

3.2 Substance and Weapon Detection Technology

The Schengen Borders Code requires that “Border guards shall, in the performance of their duties, fully respect human dignity” and that “Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures”²⁹

Detection technology may be more or less intrusive the more or less extraneous information it reveals to the border guard. Narrowly focussed detections of illegal substances are the least problematic.

An EC Green Paper on surveillance writes:

*“detection technologies are inherently intrusive into privacy or can pose a challenge to freedoms and rights. Therefore, each time when considering improvement and use of detection technologies, this aspect and the fundamental question of what the limitations of their intrusiveness should be, will have to be carefully analysed”.*³⁰

Specific Substance and Weapon Detection Systems

3.2.1 Full Body Scanners

Body scanners outputting an intimate image of the naked human body are highly invasive. Where they are used great care must be taken to minimise the intrusiveness to the traveller. Body scanners which output less detailed images or less information that is irrelevant to the specific task are much less intrusive. Also, scanners and detectors based on passive rather than active phenomena are inherently less intrusive and do not raise health questions for those being scanned or those operating the equipment.

An EU Parliament Resolution on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection states that their use should be strictly proportionate:

“The draft measure, far from being merely technical, has a serious impact on the right to privacy, the right to data protection and the right to personal dignity, and therefore

²⁹ Schengen Borders Code p 6

³⁰ http://regmedia.co.uk/2006/09/06/ec_surveillance_green_paper.pdf

needs to be accompanied by strong and adequate safeguards...[Members] consider, in this respect, that that all aviation security measures, including use of body scanners, should respect the principle of proportionality as justified and necessary in a democratic society”³¹

3.2.2 Explosives/Narcotics Detectors

These are minimally invasive, but may produce false positives.

3.2.3 Metal Detectors

These are minimally invasive, but may produce false positives.

3.2.4 Sniffer Dogs

Many will find the use of sniffer dogs distressing so border guards should take care to make sure any investigations making use of them maintain respect for the traveller as far as possible.

There are reports suggesting that sniffer dogs can also produce false positives.³²

3.3 Surveillance of Borders

For land borders the Updated Schengen Handbook recommends for ‘border surveillance and apprehension of illegal immigrants’ to be carried out ‘with mobile and fixed patrols supported by technical means’ including ‘night vision devices and thermal cameras...fixed camera and sensor alarm systems... portable infrared alarm/camera and other sensor systems...sniffer dogs in forest areas’. Best practice adds the use of helicopters and fixed wing aircraft.³³

At maritime borders the Updated Schengen Handbook recommends surveillance systems supported by “patrol vessels, helicopters, fixed wing aircraft”. Best Practice guidance supplements this with “radars, off shore patrol vehicles, camera surveillance systems” and by making use of an “integrated surveillance system”.³⁴

³¹ <http://www.europarl.europa.eu/oeil/file.jsp?id=5701312>

³² See for example Lisa Lit, Julie Schweitzer and Anita Oberbauer ‘Handler Beliefs Affect Scent Detection Dogs Outcomes’ in *Animal Cognition* Jan 2011 available at <http://www.springerlink.com/content/j477277481125291/fulltext.html>

³³ Updated Schengen Handbook p 36

³⁴ Updated Schengen Handbook p 37

The use of surveillance technology at legal border entry points is only moderately intrusive because it is understood that entry points are highly public places. However, there are many special areas at borders where travellers will be entitled to a much greater degree of privacy. Examples might include bathroom facilities, designated rest areas or facilities for worship.

Surveillance of public space can also be intrusive where it takes place in say, residential areas. Surveillance for border security of border towns should recognise this. The Updated Schengen Handbook recommends cooperation of border guards with the local population, with constant, regular contacts with the local populations treated as best practice.³⁵ Good relations and cooperation with the local population may be undermined if border guards do not show respect for their privacy.

Methods of surveillance which involve no detailed information such as an image or audio recording of the subject's behaviour raise no privacy issues.

In the case of airports the Updated handbook recommends that "The territory and perimeter of the airport should be surveyed using a camera system...Border guards should control system and have access to camera images... All data of the camera system should be recorded and information should be stored for appropriate time." Best practice adds to these recommendation the provision that data should be "available to the Border Guard and... used for crime investigation purposes, etc".³⁶

Specific Surveillance Systems

3.3.1 Unmanned Aerial Vehicles

Where used for surveillance purposes, unmanned aerial vehicles raise the privacy issues common to, for example, CCTV systems. The only difference lies in the potential to surveil a wider range of areas including some entitled to greater normative protection.

There are reports that the camera feeds from some unmanned aerial vehicles, like some other systems using wireless connections, are vulnerable to hacking. This potentially threatens the effectiveness of the surveillance and also deepens the nature of any intrusion.

³⁵ Updated Schengen Handbook p 37

³⁶ Updated Schengen Handbook p 38

Risks associated with any aircraft have to be taken into account when employed in areas where people are living.³⁷

3.3.2 Radar

Use of such sensors to trigger alerts not detailed enough to raise privacy issues.

3.3.3 Seismic Sensors

Use of such sensors to trigger alerts violates no privacy rights in itself.

3.3.4 Magnetic Sensors

Use of such sensors to trigger alerts violates no privacy rights in itself

3.3.5 CCTV

At legal entry points, the use of CCTV is expected, and people understand that these are highly public spaces, though a range of private spaces should also be anticipated and recognised.

Illegal border entry is reasonably subject to scrutiny whether surveillance is expected or not. Restraint should, however, be exercised in the case of areas close to borders where people are living.

A European Parliament study on CCTV highlights concerns, going on to make a series of recommendations:

“The introduction of CCTV, creates a profound asymmetry of power between the watcher and the watched: not only are citizens watched by an unknown and unseen eye whose gaze they can neither challenge nor avoid, but data about them is increasingly extracted and automatically processed, in ways they have not given their consent to or even have any knowledge. And the camera’s gaze does not fall equally on all citizens, often those deemed ‘suspect’ merely on the basis of appearance, rather than objective behaviour,

³⁷ For example in the UK the [Civilian Aviation Authority] has warned: ‘In the wrong hands or used irresponsibly in built-up areas, or too close to other people or property, [unmanned aerial vehicles] represent a very real safety risk... The CAA said it had contacted several manufacturers and distributors to explain the rules for using small, unmanned surveillance aircraft in the UK, as set out in the Air Navigation Order, and asked that this information be passed on to potential and existing customers“

<http://www.caa.co.uk/application.aspx?catid=14&pagetype=65&appid=7&mode=detail&nid=1919>

are subject to exclusion particularly from the semi-public space of the shopping mall and transportation facilities...citizens should be made aware that their presence in an area is subject to video surveillance. For then, in the knowledge they are being monitored by cameras, they can consciously decide how to conduct themselves...". The study goes on to recommend the following:

- "citizens should have the right to expect that their image will not be divulged to any third parties without their consent, except where this is exceptionally required for the prevention and detection of a specific crime;*
- citizens should have a right to be assured that systems are necessary, operating fairly and in accordance with the laws and administrative rules that govern their use. This requires that they be subject to independent licensing, audit and inspection and not just registration, and that the authorities have sufficient personnel to undertake their duties. The results of licensing and inspections should be made public."³⁸*

3.3.6 Infrared Cameras

The principles governing the use of infrared CCTV cameras are mainly the same as those governing the use of non- infrared CCTV cameras. The use at both legal and non-legal entry points should be proportional. Infrared CCTV cameras are only more intrusive than non infrared-CCTV because the surveillance may be more covert. Greater care may therefore need to be taken in monitoring of areas where people are entitled to some measure of privacy.

The EDPS writes in its guidelines on video:

"Introduction of 'high-tech video-surveillance tools' or 'intelligent video-surveillance systems' are permissible only subject to an impact assessment. They are also subject to prior checking. The EDPS will assess, case by case, the permissibility of the technique used and may impose, as necessary, specific data protection safeguards", including among these "infra-red or near-infrared cameras, thermal imaging devices and other special-use cameras that can capture images in the dark or under low-light conditions".³⁹

³⁸ <http://www.statewatch.org/news/2009/apr/ep-study-norris-cctv-video-surveillance.pdf> p 17-8

³⁹ http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/10-03-17_Video-surveillance_Guidelines_EN.pdf

3.3.7 Smart Cameras

Smart cameras make use of a range of algorithms to highlight items or events of interest. Some of these will be unproblematic, like those detecting whether there are people walking around in an area restricted to vehicles. Sometimes algorithms are used on the basis of a vague category of 'abnormal behaviour'. Such algorithms are derived by modelling the behaviour of the majority of whatever sample is available to the developers. The detection of abnormal behaviour thus runs the risk of drawing disproportionate attention to minorities.

The US National Research Council has elaborated on these dangers in relation to the use of such techniques for counter-terrorism:

"Although laboratory research and development of techniques for automated, remote detection and assessment of anomalous behavior, for example deceptive behavior, may be justified, there is not a consensus within the relevant scientific community... regarding whether any behavioral surveillance or physiological monitoring techniques are ready for use at all in the counterterrorist context given the present state of the science."⁴⁰

3.4 Biometrics

Biometric information is sensitive, and the process of gathering it will be found invasive by many. Because of its sensitive nature rigorous safeguards must be maintained against sharing such information more widely.

Biometric technology should not be treated as establishing identity infallibly and care needs to be taken to not to assume fraud on the part of those whose identity is initially queried by the technology. iris and fingerprint readers are more reliable than face recognition. In all cases there is a trade off between the false positive and false negative rate. In the context of border security, letting people through who should not be is likely to be considered less acceptable than innocent people having their identity questioned. If this is so, there is an increase in the rate at which technology will mistakenly indicate that a person is not who they say they are.

⁴⁰ 'Protecting Individual Privacy in the Struggle Against Terrorists A Framework for Program Assessment' National Research Council

In an EDPS comment on the VIS it is stated that:

“The EDPS recognises the advantages of the use of biometrics, but stresses the major impact of the use of such data and suggests the insertion of stringent safeguards for the use of biometric data.”⁴¹

Specific Biometric Systems

3.4.1 Iris Recognition.

Iris recognition is potentially highly reliable but this will vary between different models.

Some travellers will not be able to present an iris. This should not mean that they should be subjected to further attention to ‘compensate’

“The EDPS considers that the presence of some biometric data other than photographs alone, such as the case in point where biometric eye templates of both eyes are collected, presents specific risks to the rights and freedoms of data subjects. These views are mainly based on the nature of biometric data which is highly sensitive, due to some inherent characteristics of this type of data. For example, biometric data changes irrevocably the relation between body and identity, in that they make the characteristics of the human body ‘machine-readable’ and subject to further use. In addition to the highly sensitive nature of the data, the EDPS also notes that possibilities of inter-linkage and the state of play of technical tools may produce unexpected and/or undesirable results for data subjects. These risks justify the need for the data processing to be prior checked by the EDPS in order to verify that stringent safeguards have been implemented.”⁴²

3.4.2 Fingerprint Recognition

Fingerprint recognition is potentially highly reliable but this will vary between different models.

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http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2005/05-03-23_VIS_EN.pdf

⁴²

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Priorchecks/Opinions/2008/08-02-14_ECB_iris_scan_EN.pdf

It may be less reliable in the case of the elderly. Furthermore, some travellers will not be able to present fingerprints. This should not mean that they should be subjected to further attention to 'compensate'. As the EDPS explains:

*"The imperfections of fingerprint systems do not only concern younger children but also the elderly. It has indeed been demonstrated that accuracy and usability of fingerprints decrease as people grow older...and aspects of convenience and ergonomics are also especially relevant."*⁴³

*"the EDPS recalls that these exemptions should in no way stigmatize or discriminate those individuals who will be exempt, because of their age as a precautionary principle or because they present obviously unreadable fingerprints."*⁴⁴

3.4.3 Face Recognition

This technology is much less reliable than fingerprint and iris scanners. As a result, there is a probability of many false positives. As the EDPS notes, there are additional problems of reliability in the case of children:

*"Facial recognition of children (whether automated in the future or 'human') based on reference pictures that are a few years old is likely to be problematic. Even if the technology of facial recognition makes significant progress, it is very unlikely that software will be able to compensate for the effect of growth on children's faces in the near future. Therefore, it should be clarified in the VIS Regulation that photographs can only be used as a supporting element for the verification or identification of individuals as long as the technology of facial recognition is not reliable enough, bearing in mind that this is likely to be the case for children in a more distant future".*⁴⁵

43

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2008/08-03-26_Biometrics_passports_EN.pdf

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http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2008/08-03-26_Biometrics_passports_EN.pdf

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http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2006/06-10-27_CCI_EN.pdf

And, as the EDPS states, there may be issues related to the enjoyment of freedom of movement, which is a fundamental right:

“Liberty of movement: modern CCTV systems equipped with facial recognition and/or dynamic-preventive surveillance software in large, interconnected systems can track movements of people in vast areas. One should actually argue that the freedom of movement means the freedom to move not only in a physical sense, but also in a more fundamental sense –that is to say, the freedom to move without having inevitably to leave continued and/or frequent traces of one’s movement for the benefit of permanent ‘optic informers’.”⁴⁶

3.5 Databases/Data-mining

The main moral risk or cost that arises in the use of data mining programmes at the border is the possibility that such programmes will produce large numbers of what are known as false positives (people who present a positive match with the profile or target but are not in fact suspicious). When these data mining programmes identify a traveller as warranting further investigation this result should not by itself be treated as a likely indicator of ‘guilt’. Gathering and sharing information should always be done only insofar as it is necessary and proportionate to the specified task.

It is a recommendation of the European Parliament that "reliance by private or public bodies on computers to take decisions on individuals without human assessment should be allowed only exceptionally and under strict safeguards."⁴⁷

Furthermore, as data mining processes often rely on simplistic stereotyping of the target, the outcome of such searches may also be discriminatory.

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http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/Publications/Speeches/2009/09-06-19_Vienna_surveillance_EN.pdf

⁴⁷ European Parliament recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control (Recommendation J, 2008/2020(INI))

Such programmes may also be intrusive. In particular safeguards against unauthorised access to such information and rigorous barriers to inappropriate sharing of data gathered at the border will be of the highest importance.

Article 8 of the ECHR [European Convention of Human Rights] articulates the right to privacy:

“Right to respect for private and family life.

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.*⁴⁸

Article 14 of the ECHR articulates the prohibition on discrimination:

“Prohibition of Discrimination.

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*⁴⁹

European Commission Directive 95/46 states that:

*“Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.”*⁵⁰

⁴⁸ <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>

⁴⁹ <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>

⁵⁰ Article 15 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

The European Data Protection Supervisor (EDPS) claims that:

“there can be no doubt about the importance of a strong mechanism for the protection of fundamental rights of the citizen, and in particular privacy and data protection.”⁵¹

“many initiatives in the Area of freedom, security and justice rely on the use of personal data, and good data protection is crucial for their success. Respect of privacy and data protection is not only a legal obligation with an increasing recognition at EU level, but is also an issue which is crucial for European citizens, as shown by the results of the Eurobarometer (15). Moreover, restricting access to personal data is also crucial to ensure trust by law enforcement agencies.”⁵²

Specific Databases and Data-Mining Systems

3.5.1 Advance Passenger Information System

At airports the Schengen catalogue recommends the use of API where warranted by the risk assessment. Best practice is for such information to be handled by a crime intelligence officer.⁵³

Advance Passenger Information can be used for profiling purposes. Where this is the case, border guards must recognise the limitations of this technique, in particularly its vulnerability to error. While it could be ethical for profiling to be used as a basis for subjecting a traveller to an additional search it could never form a just basis for detention or refusal of entry. Such significant judgments require a much stronger evidential basis than are supplied by profiling techniques. This is also relevant to Interactive APIS systems, or Advance Passenger Processing, where the passenger data is communicated to border control agencies before a passenger boards for advice on whether the traveller should be allowed to continue. As previously emphasised, errors in data entry and name matching are common, so If this takes place without any possibility for correction of such errors

⁵¹ The European Data Protection Supervisor <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:276:0008:0020:EN:PDF>

⁵² The European Data Protection Supervisor <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:276:0008:0020:EN:PDF>

⁵³ Updated Schengen Handbook p 34

travellers are clearly greatly disadvantaged. Such ‘externalisation’ of the border is contentious and is regarded by some as at odds with respect for fundamental rights.⁵⁴

3.5.2 Passenger Name Record

Where passenger information supplied is used as a basis for profiling, border guards must recognise the limitations and error proneness of this technique. As previously emphasised, profiling might be used as a basis for subjecting a traveller to an additional search but it could never form a just basis for detention or refusal of entry, such significant judgments requiring a much stronger evidential basis than profiling techniques can supply.

The EDPS in its opinion on the Draft Proposal for a Council Framework Decision on the use of PNR states:

*“PIUs (Passenger Information Units) are thus entrusted with very sensitive processing of information”.*⁵⁵

An Article 29 Working Party Opinion states:

“It should speak for itself that any future PNR agreement should fully meet the conditions set out in the EU’s legal framework on privacy and data protection, both in the former first and the former third pillars. This means, among others, that the rights given to data subjects in both Directive 95/46/EC, Decision 2008/977/JHA and their national implementation should at least be ensured in all future PNR agreements. It should speak for itself that all rights attributed to the data subject should be exercisable in practice as well. Coherence should also be assured with both the future comprehensive

⁵⁴ For example the EU funded FP7 DETECTER project argues that practices of externalising the border violate member states’ commitment to the principle of non-refoulement in Deliverables D14.1 and D14.2 available at <http://www.detecter.bham.ac.uk/documents.shtml>; Similarly deliverables of the EU funded FP6 project CHALLENGE work package 13

http://www.libertysecurity.org/IMG/pdf_illegal_emigrants_cornelisse.pdf

⁵⁵

http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2007/07-12-20_EU_PNR_EN.pdf

EU framework on data protection and the future general EU-US agreement on the exchange of data in police and criminal justice cooperation. Furthermore, the agreements should respect the right of the protection of one's personal data as is laid down in the EU's Charter of Fundamental Rights, which has a binding legal status as of the entry into force of the Treaty of Lisbon".⁵⁶

A Fundamental Rights Agency opinion on the Proposal for a Council Framework Decision on the use of PNR data for law enforcement states:

"The processing of such personal data constitutes an interference with the right to respect for private life, under Article 8 of the European Human Rights Convention and Article 7 of the Charter of Fundamental Rights of the EU... Under the Proposal, PNR data can and would be used for 'profiling' purposes; this is actually among the very reasons why the PNR data are processed in the first place. Although PNR data as such does not qualify as sensitive data, the profiling of such data for law enforcement purposes can reveal a number of sensitive information about the individual, particularly when combined with information obtained from other sources. ...However, when law-enforcement authorities use broad profiles that reflect untested generalisations, their practices may constitute disproportionate interferences with fundamental rights. In particular, profiling based on stereotypical assumptions that persons of a certain 'race', national or ethnic origin, religion, intellectual disabilities or mental illness are particularly likely to commit crime may lead to practices that are incompatible with the prohibition of discrimination... the techniques using the profiling of PNR data must comply with a number of human rights guarantees, particularly the guarantees of nondiscrimination. Given that no information clearly confirms at this stage the efficiency and utility of profiling practices based on ethnicity, national origin or religion, such practices should be considered to constitute unlawful discrimination. Therefore, they should be explicitly banned".⁵⁷

3.5.3 Visa Information System.

⁵⁶ <http://www.dataprotection.ro/servlet/ViewDocument?id=723>

⁵⁷ http://fra.europa.eu/fraWebsite/attachments/FRA_opinion_PNR_en.pdf

Information concerning where a traveller has previously been denied a visa should not be shared beyond border guards dealing with the individual case except where provided for by law.

The EPDS has made the following comments on the VIS:

“The proposal will have a major impact on the privacy and other fundamental rights of individuals; therefore it is subject to a check against the data protection principles.”⁵⁸

“The EDPS recognises that the further development of a common visa policy requires an efficient exchange of relevant data. One of the mechanisms that can ensure a smooth flow of information is the VIS. However, such a new instrument should be limited to the collection and exchange of data, as far as such a collection or exchange is necessary for the development of a common visa policy and is proportionate to this goal.”⁵⁹

“The EDPS is aware that the law enforcement agencies are interested in being granted access to the VIS; Council Conclusions in this sense have been adopted on 7 March 2005. As the purpose of the VIS is the improvement of the common visa policy, it should be noted that routine access by law enforcement authorities would not be in accordance with this purpose. While, according to Article 13 of Directive 95/46/EC, such an access could be granted on an ad hoc basis, in specific circumstances and subject to the appropriate safeguards, a systematic access cannot be allowed.”⁶⁰

3.5.4 Registered Travellers Programme

‘White list’ databases such as these may carry outdated or mistaken information, so they should not be treated as foolproof. Furthermore, some have queried the justice of white list databases, suggesting that their use is in tension with the presumption of innocence. Border guards should certainly be careful to avoid using non registration with such a programme as suspicious in itself.

58

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2005/05-03-23_VIS_EN.pdf

59

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2005/05-03-23_VIS_EN.pdf

60

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2005/05-03-23_VIS_EN.pdf

Even though travellers have voluntarily opted to disclose the information involved, they are still entitled to rigorous safeguards against inappropriate access to this information.

A European Parliament resolution on proposals to introduce RTP and other new systems states:

“Moreover, the Parliament expresses doubts concerning the need for, and the proportionality of, the proposed measures (particularly given their expensive nature and the potential risks they pose for data protection).

The Parliament insists on a standard protocol for the use and exchange of biometric information in order to avoid divergences between different systems used by Member States. It also considers a "privacy by design" approach to be an essential feature of any development which risks jeopardising the personal information of individuals.”⁶¹

The EDPS expresses concern about the principle of a white list:

“The underlying assumption in the communications (especially in the entry/exit proposal) is worrying: all travellers are put under surveillance and are considered a priori as potential law breakers. For instance in the Registered Travellers system, only the travellers taking specific steps, through ad hoc registration and provision of detailed personal information, will be considered "bona fide" travellers. The vast amount of travellers, who do not travel frequently enough to undergo such a registration, are thus, by implication, de facto in the "mala fide" category of those suspected of intentions of overstay.”⁶²

3.5.5 Automated Border Crossing Systems

These make use of biometric information, thus raising two important issues. Because of the sensitivity of biometric information care must be taken in all data handling. Border guards must also

⁶¹ <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20070601FCS07345>

⁶² http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Comments/2008/08-03-03_Comments_border_package_EN.pdf

be careful not to over rely on assessments made by the systems in question, treating a mismatch in the system as sufficient for final rejection, as biometric technology is not foolproof.

3.5.5 Schengen Information System

On entry, border guards are required to check whether third country nationals fulfil the conditions for entry. This “shall include direct consultation of the data and alerts on persons and, where necessary, objects included in the SIS and in national data files and the action to be performed, if any, as a result of an alert”.⁶³ It is a condition of entry for third country nationals that there be no alert on the SIS marking them out for refusal of entry.

On exit, checks on third country nationals “may...comprise... consultation of alerts on persons and objects included in the SIS and reports in national data files”⁶⁴

The most ethically problematic aspects of the SIS arise from the storing of information indicating that travellers are suspected of involvement in serious crimes. Border guards should recognise the provisional nature and vulnerability to error of such reported suspicions. They should also recognise the limitations of the technology’s capacity to accurately match names and suspicions to actual individuals.

The Schengen Handbook specifies the need for further verification of suspicions in the case of:

“persons enjoying the Community right of free movement”, who “may only be refused entry on grounds of public policy or public security, i.e. when their personal conduct represents a genuine, immediate, and sufficiently serious threat affecting one of the fundamental interests of society... Consequently, even an alert in the SIS cannot be considered, in itself, as a sufficient ground for automatically refusing the entry of these persons; If the alert has been entered by another Schengen State, the border guard must take immediate contact...with the responsible authorities of the Schengen State that has entered the alert. The latter must check, in particular, the reason(s) why the alert was inserted and whether these reasons are still valid. This information must be transmitted without any delay to the authorities of the requesting Member State. On the basis of the

⁶³ Schengen Borders Code p 7.

⁶⁴ Schengen Borders Code p 7

information received, the competent authorities will make an assessment based on the criteria explained above. On that basis, the border guard will admit or refuse entry to the person in question. If it is not possible to obtain the information within a reasonable delay, the person in question must be allowed to enter the territory. In this case, the border guards, as well as the other competent national authorities, can make the necessary verifications after the person entered the territory and take afterwards, where necessary, the appropriate measures.”⁶⁵

Even where say, detention of individuals wanted for questioning is mandated by regulations governing border guard use of SIS, this should not be undertaken with excessive force, however serious the offenses in question.

Such reported suspicions are highly sensitive information and sharing of such information must be rigorously restricted to those provisions made in legislation.

The EPDS offers some proposals for such provisions:

“The authorities with access to SIS data are defined for each alert. In principle, a double test is applied for granting access to the SIS data: access must be granted to authorities in full compliance with the general purpose of the SIS and with the specific purpose of each alert...The authorities with access to the SIS data have a de facto use limitation for these data, since they can in principle only have access to them to perform a specific action. However, some accesses provided for in the new proposals are not consistent with this logic: indeed, they aim at providing the authority with information, but not at allowing it to identify a person and take the action foreseen in the alert. More specifically, this concerns:

- access to immigration data by asylum authorities;*
- access to immigration data by authorities in charge of granting refugees status;*
- access to alerts on extradition, discreet surveillance and stolen documents for seizure for Europol;*
- access to data on extradition and localisation for Eurojust.”⁶⁶*

⁶⁵ Schengen Handbook p 40

⁶⁶

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2005/05-10-19_SISII_EN.pdf

3.5.6 Eurodac

This system records information that is sensitive for two reasons: firstly because fingerprint data is a biometric, secondly because it records applications for asylum. Safeguards against inappropriate access must be rigorously enforced.

The EDPS in a comment on legislation granting police access to the Eurodac database states:

“to be valid, the necessity of the intrusion must be supported by clear and undeniable elements, and the proportionality of the processing must be demonstrated. This is all the more required in case of an extensive intrusion in the rights of individuals constituting a vulnerable group in need of protection, as foreseen in the proposals.”⁶⁷

3.5.7 Databases governed by the Prüm Convention:

Under the Prüm Convention member states are granted knowledge of records held by other member states on DNA, fingerprints and vehicle information of suspected persons. Biometric information such as DNA and fingerprint data is inherently highly sensitive, and furthermore the information that a person is suspected of involvement in crime is also highly sensitive. The dangers of errors in data entry and name matching need to be appreciated by Border Guards. They must also bear in mind that criteria for inclusion in these databases will vary across member states.

DNA and fingerprinting, though potentially highly reliable, are not foolproof and Border Guards must bear in mind the possibility of false positives.

Given the sensitive nature of the information unauthorised access needs to be rigorously safeguarded against. As the EDPS argues:

“Furthermore, the use of different languages and of different legal concepts may affect the accuracy in the exchanges of data between countries with different legal traditions. Therefore, the EDPS invites the legislator to properly take into account the scale of the

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http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2009/09-10-07_Access_Eurodac_EN.pdf

system when further discussing the current initiative, by ensuring that the increase in the number of participating Member States does not entail a decrease in effectiveness. In particular specific formats for communication of data, also taking into account the language differences, should be established in the implementing rules, and the accuracy of the data exchanges should be constantly monitored...

In the same perspective, the EDPS recommends that awareness is raised, in particular among law enforcement operators dealing with DNA comparisons and searches, about the fact that DNA profiles are not unique identifiers: even full matches in a certain number of loci do not exclude the possibility of false matches, i.e. the possibility that a person is wrongly linked to a DNA profile. Indeed, DNA-profiles comparisons and searches are subject to possible errors at different stages: the scarce quality of the DNA samples at the moment of collection, possible technical errors in the DNA analysis, input errors, or just because a chance match occurs in the specific loci considered in the comparison. With regard to the last point, the error rate is likely to be higher when the number of loci diminishes and when the database expands...A similar reasoning can be applied with regard to the accuracy of fingerprints matching...

DNA (and fingerprints) databases should be precisely circumscribed, since they can contain, depending on the Member States, DNA profiles or fingerprints of different kinds of data subjects (criminals, suspects, other people present on the crime scene, etc.). In spite of these differences, the current initiative does not circumscribe the kinds of databases that will be used by each Member States, and declarations to this effect are not yet included in the Annex. Therefore, matches can occur between DNA and fingerprint data relating to non homogeneous, and often non relevant, categories of data subjects.”⁶⁸

3.5.8 Schengen Information System II

This proposed system also records sensitive biometric information for which rigorous safeguards against unauthorised access will be required.

68

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2007/07-12-19_Prüm_implementation_EN.pdf

“the Directive and the Regulation [establishing SIS II], in so far as they deal with processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must be interpreted in the light of fundamental rights. This also follows from the case law of the European Court of Justice”⁶⁹

3.5.9 Entry Exit

The information that this proposed programme would store on travellers movements and their biometric information requires safeguards against unauthorised access.

“The EDPS emphasises that a decision to introduce such a complex and privacy-intrusive system should only be taken on the basis of a specific impact assessment providing concrete evidence and information on why such a system is necessary and why alternative solutions based on the existing systems could not be envisaged.”⁷⁰

69

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2005/05-10-19_SISII_EN.pdf

⁷⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:355:0016:0023:EN:PDF>

4. APPENDIX I

4.1 Border Guarding: Legal and Illegal Entry

It is well known that border guards have responsibilities in two radically different kinds of context: (1) legal entry points used openly by travellers who generally have travel documents and are willing to co-operate with border guards who are checking their credentials; (2) illegal entry points used secretly by people being trafficked or migrating illegally, often in very large groups in dangerous conditions. The two contexts may call for very different responses. For example, the use of force of any kind and in any proportion is expected to be exceptional in context (1); in context (2), on the other hand, the resort to force, albeit under a requirement of proportionality, may be more common. This may also be true of detention. Although some principles are appropriate to both contexts, we provide separately guidance appropriate to (1) and (2)

4.2 General Principles Relevant to Border Guarding at Legal Entry Points

4.2.1 Openness to Travellers

All travellers have a right to be informed, in a language they can reasonably be expected to understand and in a manner that is polite and respectful, of both the nature of any control they are subject to and their rights in relation to that control.

4.2.2 Data Processing

All recording, processing, storage, sharing and accessing of data should be undertaken by authorised individuals and with respect to the privacy laws of the relevant state.

4.2.3 Record Keeping

Border guard units must record all service information and other important information, not only to prevent illegal immigration and protect the internal security, public policy, public health and international relations of member states, but also to ensure that people's rights are respected, that border guards are accountable, and that corruption is detected and prevented.

4.2.4 Conduct of Questioning

Border guards should pose questions in a way that respects the dignity of all travellers, especially vulnerable groups, and should not interrogate the traveller as a potential criminal or illegal immigrant.

4.2.5 Refusal of Entry

Entry may only be refused by a substantiated decision stating the precise reasons and grounds in law for the refusal. Border guards should provide individuals refused entry with authoritative evidence of that decision and with information about their rights to appeal and how to exercise them.

4.2.6 Detention

People should be detained as a last resort, only for as long as is absolutely necessary, and in conditions appropriate to their particular circumstances.

4.2.7 Use of Force

Border guards must use force only when necessary. The use of force should be proportionate to the aims of the task.

4.2.8 Surveillance

Surveillance of travellers should be proportionate and planned according to risk analysis.

4.2.9 Asylum Seekers and Refugees

Border guards should respect and protect the right of individuals to seek asylum and should apply the principle of non-refoulement, protecting people against their return to places where their lives or freedoms could be threatened.

4.2.10 Victims of Trafficking and Exploitation

Border guards should attempt, in the course of their duties, to identify persons who have been the victims of trafficking or exploitation and to ensure that their rights are protected. The victims of trafficking should be treated with special care.

4.2.11 Children

Border guards should both treat children first and foremost as children, rather than merely as, for example, illegal immigrants or asylum seekers. They should act as far as possible in the best interests of the child.

4.2.12 Missing Persons

An adult person identified as reported missing must be asked for prior consent before informing the party who reported him/her as missing.

4.2.13 Receiving or Handling Money

While on duty border guards should handle money only when it is an object for seizure or use in criminal proceedings. Verification of sufficient means of subsistence should not require border guards to handle money.

4.3 General Principles Relevant to Border Guarding at Illegal Entry Points

4.3.1 The use of force

Suspects should be apprehended using minimum force.

4.3.2 Openness

Suspects should be taken safely from a point of apprehension to a collection point at which they can be informed of their rights in a language that they could reasonably be expected to understand.

4.3.3 Record-keeping

At collection points record keeping must be as rigorous as possible to protect border security, protect rights and prevent corruption.

4.3.4 Arrest and detention

Suspects should be arrested and detained in accordance with international law and conditions of detention should conform to international law

4.3.5 Questioning

Methods of questioning suspects should conform to international law, and should take account of the vulnerability of suspects due to medical condition, or age.

4.3.6 Children

Children in particular must be treated first and foremost as children, not illegal immigrants or asylum seekers.

4.3.7 Asylum and non-refoulement

Border guards should respect and protect the right of individuals to seek asylum, once they are safely brought to a collection point, and should apply the principle of non-refoulement, protecting people against their return to places where their lives or freedoms could be threatened.

4.3.8. Victims of trafficking and exploitation

Border guards should attempt, in the course of their duties, to identify persons who have been the victims of trafficking or exploitation and to ensure that their rights are protected. The victims of trafficking should be treated with special care.

4.3.9 Handling of Money

While on duty border guards should handle money only when it is an object for seizure or use in criminal proceedings. Verification of sufficient means of subsistence should not require border guards to handle money.