# Automated Border Control (ABC) in the EU:
# Legal Aspects: Legality, Privacy and Data Protection

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# Structure

- ✓ What is ABC?;
- ✓ Brief overview of external border control in the EU;
- ✓ Privacy and Data Protection implications and risks of automation of border control;
- ✓ Recommendations for ABC.

# Automated Border Control (ABC)

- ✓ What is ABC (scope and processes)? No formal definition adopted yet, despite growing number of national ABC programmes:

***"ABC means a fully automated system which authenticates the travel document, establishes that the traveler is the rightful holder of the document, queries border control records and on this basis automatically verifies the conditions governing entry laid down in Article 5(1)."***

*(Smart Borders Package, Proposed amendment No. 562/2006 (COM (2013) 96 final))*

- ✓ How is it regulated?

The Schengen Borders Code regulates manual border control. Smart Borders Package Proposal includes ABC for Third Country Nationals (TCNs) Registered Travelers.

# Legal Framework

**Border Control**

Schengen *acquis*

=> Schengen Borders Code: different passengers (EU/EEA/CH vs TCNs) and borders (air, land, sea);

=> SIS II; VIS; e-Passport Regulation; Smart Borders Package: EES and RTP;

=> case law;

=> national specifications;

=> soft law (e.g. Schengen Handbook).

**Fundamental Rights**

=> Privacy;

=> Data Protection;

=> Non-discrimination (e.g. disabled persons; trusted vs. non-trusted travelers);

=> Vulnerable groups (e.g. human trafficking; minors and children; asylum seekers; refugees).

| | Persons enjoying URFM | TCNs |
|---|---|---|
| **Minimum check:** | Establishment of identity:<br>Travel document: validity, authenticity, lost/stolen/misappropriated/invalidated | |
| **National**<br>**+**<br>**European databases (SIS II, …)** | Non-systematic check → genuine, present and sufficiently serious threat to the internal security, public policy, international relations of MSs or threat to the public health in national and European databases. | Thorough check → entry and exit, verification:<br>-Visa or residence permit (where applicable) + entry and exit stamps:<br>-Purpose of entry;<br>-Point of departure and destination;<br>-Means of subsistence;<br>-Alerts for refusal of entry (SIS II Reg.);<br>-Check in databases on persons;<br>-Stamping obligation;<br>-Additional docs, cfr. Annex I SBC.<br>On exit (mandatory):<br>-Valid travel document;<br>-No threat to public policy, internal security, etc.;<br>-Optional Valid visa or residence permit; duration of stay not exceeded; SIS II on persons and objects.<br>*Smart Borders Package would allow certain TCNs to use ABC if they are RTs and if EES is adopted.* |

# Future Differences: Manual vs automated check: EU/EEA/CH

| Manual Border Control | Automated Border Control |
| --- | --- |
| Visual comparison of passenger with photo on passport; | **Automated** verification of live **biometrics** with passport chip data or against databases; |
| Non-systematic check in databases on persons: discretion of border guard. | Algorithm for non-systematic check in databases on persons? Fair? |

Document check in ABC to remain similar to manual check.

# Data Protection Implications

Growing number of databases in AFSJ, e.g. SBP to add two more.

Storage = interference, S& Marper, par.67

Articles 8 ECHR and CFREU

Centralized or decentralized storage: RTP/interaction with e-Gate

Biometric data: contains sensitive info. From facial recognition to fingerprints (see RTP in SBP).

***"When the introduction of the system, in view of all the instruments already available, does not provide additional value, the concept entails unnecessary processing of data."***

*(CBP, 27 May 2004, z2003 – 1529)*

# Data Protection Implications

- ✓ Compatible (re) – use of passport chip of EU citizens?

*"In any case, checking whether fingerprints match is **not done systematically** but depending on contingencies, for example, if the check on the basis of the facial image alone and of the data in the passport **does not eliminate all doubt as to the authenticity of the passport and/or the identity of the holder.**"*

*(Par. 57, AG Mengozzi opinion in Schwarz, C – 291/12)*

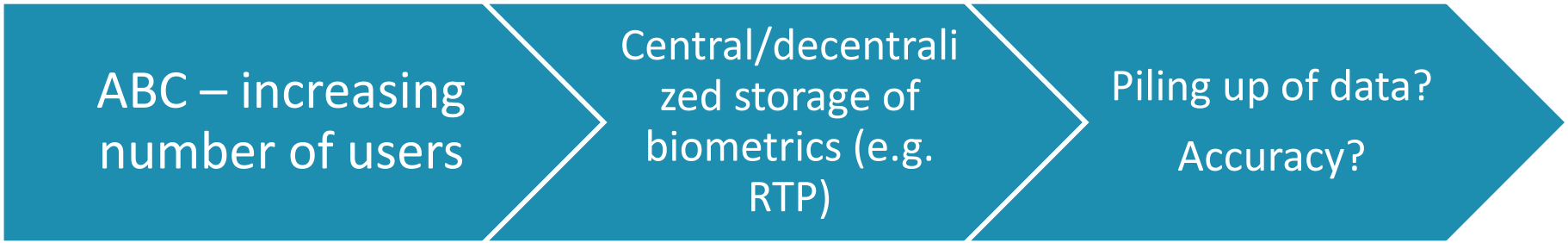
- ✓ Verification vs Storage:

*"However, it should be borne in mind that Article 1(2) of Regulation No 2252/2004 does not provide for the storage of fingerprints **except within the passport itself** …"*

*(Par. 60, Schwarz judgment, C – 291/12)*

=> But central storage still achieved through RTP databases.

# Data Protection Risks?




- ABC in the future may integrate also certain TCNs, see RTP in Smart Borders Package => could lead to increased number of stored data;

*"… that the method [fingerprint matching] is not wholly reliable is not decisive."*

*(Schwarz, C – 291/12, par. 43)*

=> Consequences for individuals?

# Data Protection Risks?

**(Central) Storage**

- Biometric data not deleted after crossing the border and creation of some RTP databases (also in the RTP in Smart Borders Package)?
- Circumvention of Regulation 2252/2004?

**Interoperability**

- Between databases created in the context of ABC and other (e.g. police) databases. See proposed EES, RTP and VIS, SIS II, etc.
- Biometrics become universal (interconnection) key.

**Law-enforcement access**

- EURODAC example: innocent persons under general suspicion. Proposed EES. Function creep?
- Consequences of mismatches?

# Recommendations for ABC

Legal basis with safeguards for passengers: regulate collection and usage of biometric data on the basis of a PIA. Clearly regulate the process, e.g. in case of mismatch at e-Gate, or access by law-enforcement authorities.

Technical guarantees (e.g. through Privacy by Design) for non-storage of (biometric) data , unless based on a law. Security measures and Privacy by Design, e.g. encryption if data still stored.

Transparency to passengers: 1. Details about the processing of their data; 2. How they can exercise their rights. 3. Who to turn to in case of abuse.

# Conclusion

ABC changes the nature of identity checks at borders.

The process relies on automated processing of biometrics, which entails certain privacy and data protection risks.

To mitigate them, a legal basis needed, which regulates the process, delimits the lawful use of biometrics, includes safeguards to travellers to prevent arbitrariness, and gives transparency to all concerned.