Identification and surveillance at EU external borders – Legal issues

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25 August 2015

ISBC 2015, Karlsruhe, Germany

The work has been supported by the FastPass Project. The research leading to these results has received funding from the European Union Seventh Framework Programme (FP7/2007-2013) under grant agreement nr 312583. This publication only reflects the author's view and the European Union is not liable for any use that may be made of the information contained therein. All document contained therein cannot be copied, reproduced or modified in the whole or in the part for any purpose without written permission from the FastPass Coordinator with acceptance of the Project Consortium.
Main points

Border Control and Surveillance
- Focused mainly on people’s cross-border movements.
- EU regulatory framework (e.g. Schengen Borders Code, EUROSUR).

Technology
- More and more advanced. Biometrics used more widely.

Fundamental Rights: privacy and data protection
- Affected by technologies and policies.
- How technologies can be FR compliant?

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Biometrics and Border Control in the EU

According to the Schengen Borders Code, the border guard should establish the identity of every passenger on the basis of their travel document (number of checks with the TD).

Passengers enjoying the Union right to free movement (mainly EU/EEA/CH) undergo only a minimum check, which should be “rapid and straightforward.”

Most third-country nationals (TCNs) undergo a thorough check, e.g. visa holders have their visas inspected; interview and stamping.

Currently, only visa holders obliged to have their fingerprints matched (against the VIS).

Case of asylum seekers and refugees (EURODAC).
Biometrics at borders: Data Protection and Privacy Concerns

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

Centralized or decentralized storage.

Storage = interference, S& Marper, par.67

Articles 8 ECHR and CFREU and Directive 95/46/EC

Biometrics: Still undefined.

Contains sensitive/unique info (S & Marper). From facial recognition to fingerprints (see Smart Borders Package).

Processing of personal data = interference with data protection.

Data Retention Judgment, C-293/12 and C-594/12, par. 36
Challenges

Biometric identity verification at borders, e.g. via ABC: Legitimate purpose?

- Data minimization: Multiple biometrics and raw biometrics
- Accuracy: Effective ness, Consequences of mismatch es
- Transparency and Misuse: Control by data subjects, Function creep, Surveillance

Spill – over effect: automation of one part of the (border control) process could lead to automation of the rest: automated behavior analysis during border control. Intrusion, transparency of logic, and consequences on individuals. Role of Border Guards?

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Possible Data Misuse?

(Central) Storage

- (Biometric) data not deleted after crossing the border and/or creation of some RTP databases (also in the RTP in Smart Borders Package).

Interoperability

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

Law-enforcement access

- EURODAC, EES: innocent persons under general suspicion. Function creep?
- Consequences of mismatches? Discrimination (selected groups treated as suspect) and surveillance.

“It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime.” (Data Retention Directive, C-293/12 and C-594/12, par.58)
Recommended Measures

On policy and organisational level

- Proper legal basis for the selected data processing, e.g. through ABC, when the data processing would be necessary and proportionate.
- Purpose limitation.
- Transparency policies.
- Procedures for exercise of data protection rights.

On technical level

- Data deletion as soon as data not necessary.
- Security measures and access control.
- Data quality.
Border Surveillance

The EUROSUR Regulation on surveillance of sea and land borders and pre-frontier area:

- Purposes.
- Exchange of personal data should be exceptional and respect the EU data protection framework.
- Rights of asylum seekers and refugees. Non-refoulement.

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Use of technologies at the border should be well balanced and deployed with proper legal basis, if proven necessary and proportionate and with sufficient safeguards commensurate with risks.

**Fundamental rights of travelling people:** least intrusion into their privacy and data protection; right to free movement (esp. EU citizens) and international protection.

**Needs of border control:** efficiency, innovation and information for decision-making.

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