

Identification and surveillance at EU external borders – Legal issues

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FastPass

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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?

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).



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Biometrics at borders: Data Protection and Privacy Concerns



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

Storage = interference, S& Marper, par.67

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

Centralized or decentralized storage.

Processing of personal data = interference with data protection.
Data Retention Judgment, C-293/12 and C-594/12, par. 36

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

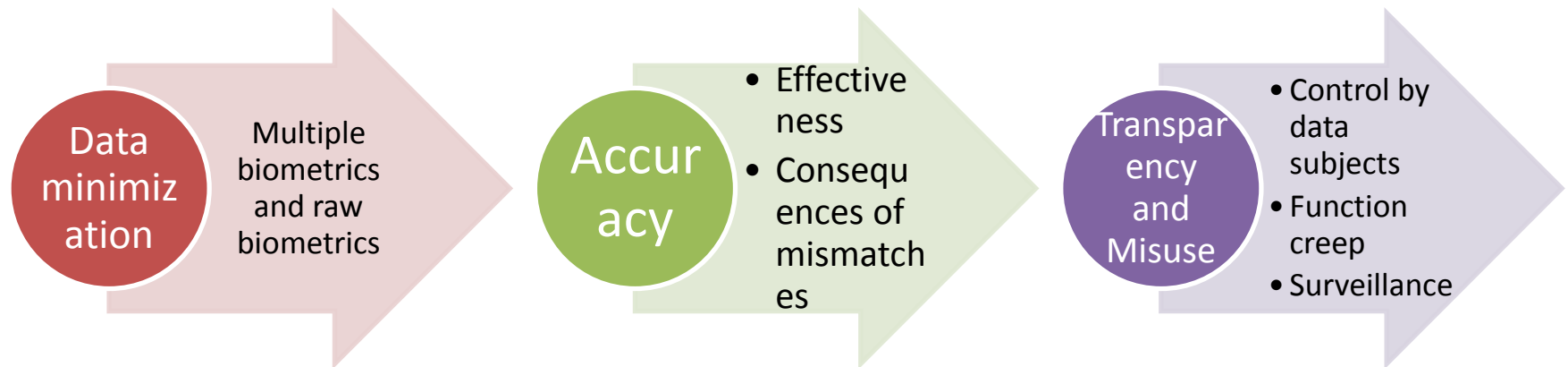


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Challenges

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



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?



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*)

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Recommended Measures

On policy and organisational level

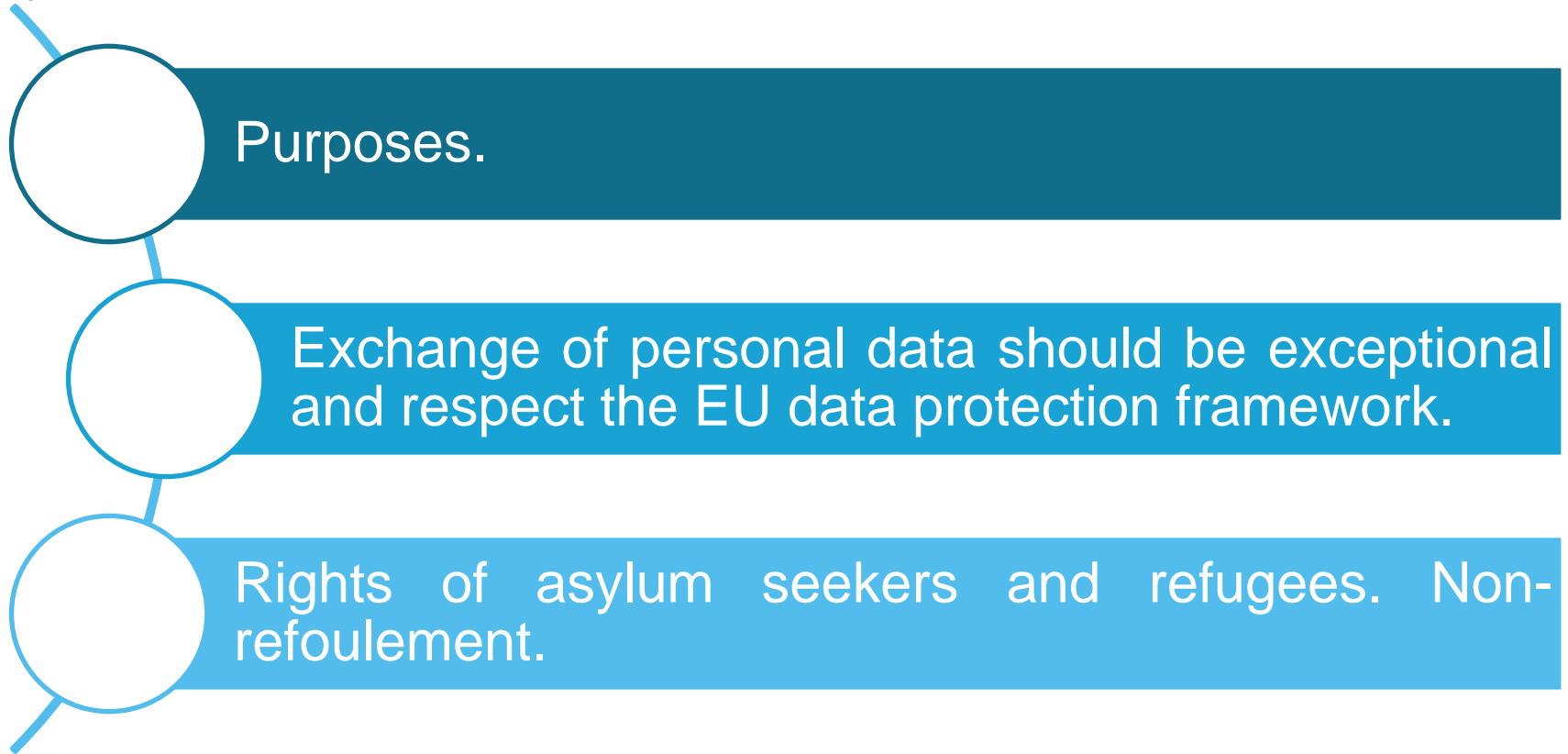
- Proper legal basis for the selected data processing, e.g. through ABC, when the data processing would be necessary and proportionate.
- Purpose limitation.
- Transparency policies.
- Procedures for exercise of data protection rights.

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:



Conclusion

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.

