

## **Ethical issues specific to border guarding**

This second part of the study catalogues the ethical rules that regulate the conduct of border guards in the Schengen area. These have been drawn from the following documents:

- National Codes of Conduct
- Schengen Borders Code
- Schengen Handbook
- Updated Schengen Catalogue
- EU Charter of Fundamental Rights
- 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.
- 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.

The rules are divided into five categories. The first three correspond to areas of border guard practice: border control; border surveillance; and return and readmission. The fourth lists rules relevant to the treatment of special categories of persons. The fifth addresses the issue of corruption.

### **1. Border Control**

- “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))
- Fundamental 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. (Schengen Handbook 1.2)
- “All travellers 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)

### **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)

### **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 43). The prohibition on discrimination (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.

### **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)

### **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)
- "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)

### **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)

### 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)

### 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)

### 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.

- “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 asylum seekers, children, victims of trafficking and other people who may have been exploited or otherwise be vulnerable to exploitation, including when these are illegal immigrants.<sup>1</sup>

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<sup>1</sup> Illegal immigrants are included here because the Updated Schengen Catalogue states that illegal immigrants must be interrogated: “Interrogation of all detected illegal immigrants

- Asylum seekers should be offered the choice to answer questions about reasons for seeking asylum in a private area if possible. Suspected victims of trafficking or other exploitation should also be offered the choice to answer questions about such exploitation in a private area if possible. Efforts should be made to provide such an area.
- Female asylum seekers, unaccompanied children, and suspected victims of trafficking or exploitation should be offered the chance to be questioned by a female border guard. Efforts should be made to ensure that a female officer is present on each shift.<sup>2</sup>
- “Questions posed by the traveller should not be considered as intrusive [or as suspicious]<sup>3</sup> and should be answered in a factual and polite manner.” (Schengen Handbook 1.3)

### **Provision of information**

- Whenever a border guard takes measures that restrict the liberty or affect the rights of a person, they should inform that person of their legal rights and obligations in a language they can reasonably be expected to understand. (derived from principle of openness in National Codes of Conduct, as well as rules and recommendations of Schengen Code, Handbook, and Catalogue)
- Whenever individuals may benefit from legal assistance, information about how to obtain such assistance should be made available. (Updated Schengen Catalogue; Schengen Handbook)

### **Recording of information**

It is important that border guards record what happens at borders, not only in order 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.<sup>4</sup>

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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).” 136.

<sup>2</sup> This gender distinction is not reflected in the Schengen documents. However, it does respect the dignity of individuals and does seem to be standard practice in national police forces.

<sup>3</sup> This reflects the requirement, noted above, that travellers should not be questioned as if they are criminals or illegal immigrants (Schengen Handbook 1.3).

<sup>4</sup> “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, 159)

- “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.

### **Fingerprinting and Biometrics**

Because fingerprints of all asylum applicants over the age of 14 must be taken,<sup>5</sup> and because the Updated Schengen Catalogue recommends that all illegal immigrants should be registered, including biometric data<sup>6</sup>, and because fingerprints and biometric data constitute personal data under the EU Personal Data Directive,<sup>7</sup> care must be taken to protect the right to privacy. The right to privacy and personal data is a fundamental right, enshrined in articles 7-8 of the Charter of Fundamental Rights.

### **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, below, both reflect these concerns.

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<sup>5</sup> “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)

<sup>6</sup> “Illegal immigrants should be registered before possible refusal of entry, removal or readmission measures. Including storing biometrics” (Updated Schengen Catalogue 137)

<sup>7</sup> 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.

- “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 Code Art.13(2))

- “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 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 Code Art.13.3)

## **Detention**

Because, according to the Schengen documents, 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)”<sup>8</sup> 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 39)

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

- “Additional facilities should be available for asylum seekers” (Schengen Catalogue 40)
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## **2. Border Surveillance**

At authorised border crossing points, 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 should be undertaken in accordance with the national data protection laws.” (Updated Schengen Catalogue 48)

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

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

At unauthorised crossing points, the use of force may sometimes be necessary, because border guards are required to 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. This also applies in the context of maritime patrols, where “[n]ecessary coercive measures” should also be used to intercept checked vessels at sea (Schengen Catalogue 118).

- 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)

Further rules specific to maritime operations are provided by the EU Parliament *Proposal for an EU Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation*

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<sup>8</sup> Schengen Handbook 6.1.2 and Schengen Code Art.13.4

*coordinated by the European Agency for the Management of Operational Cooperation at the External Borders.*

- “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.”(3.1)
- “The existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance.” (3.4)
- “No person should be disembarked in or otherwise handed over to the authorities of a country with regard to which there are substantial grounds for believing that he or she would be subjected to persecution or to torture or to other forms of inhuman or degrading treatment or punishment, or from which there is a risk of expulsion or return towards such a country. The persons intercepted or rescued must be informed in an appropriate way so that they can express any reasons for believing that they would be subject to such treatment in the proposed place of disembarkation.”(4.3)<sup>9</sup>

### **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 30)

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### **3. Return and Readmission**

- While taking decisions and choosing measures to be used for fighting illegal migration, it cannot be forgotten that illegal migrants have to be treated in a humane and respectful way, especially when they are victims of trafficking in people, who are subsequently abused by their employers. (Updated Schengen Catalogue, Part II)
- Detention should be used as a last resort and should not be treated as a punishment (Updated Schengen Catalogue, Part 2.13)
- Removal should be used as a last resort to ensure the implementation of a return decision. (Updated Schengen Catalogue Part 2.27)
- Removal operations should be carried out with due regard for human rights and human dignity.(Updated Schengen Catalogue Part 2.29)

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<sup>9</sup> See Article 19.2 of the Charter of Fundamental Rights.



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#### 4. The rights of asylum seekers and refugees.

The right to seek asylum is a fundamental human right.<sup>10</sup> 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 formally expressed. Border guards also have a key role in protecting the right of refugees to non-refoulement, which is one of the priorities of the common migration policy.<sup>11</sup>

- “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)
- “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)

“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

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<sup>10</sup> Charter of Fundamental Rights Article 18.

<sup>11</sup> “[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.

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)
- [Border guards should apply] the non-refoulement principle for the protection of persons, generally refugees, against their return to places where their lives or freedoms could be threatened.(Updated Schengen Catalogue Part 2, Recommendation 2)<sup>12</sup>

### **Children/minors**

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 Code 3.7.1)
- 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. (derived from EU Action Plan)
- Children travelling with their families should not be separated from their families unless this is unavoidable. (Updated Schengen Catalogue 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 Border Code) 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

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<sup>12</sup> Charter of Fundamental Rights, Article 19.2.

minors do not leave the territory against the wishes of the person(s) having parental care over them. (Schengen Border Code 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)

### **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.

### **The victims of trafficking, crime, or exploitation**

The Updated Schengen Catalogue states, border guards duty includes the “recognition of victims of crime, human trafficking and exploitation” (Updated Schengen Catalogue 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 12<sup>13</sup>)
- 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 3.7)
- Border agencies should refrain from placing these persons in detention facilities before their return, unless it is deemed absolutely necessary. (Updated Schengen Catalogue, Part 2.6)

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## **5. 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)

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<sup>13</sup> 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.

