

EDPS comments on the draft proposals for a Commission Regulation amending Regulation (EC) No 272/2009¹ (hereinafter, the "Proposal for a Regulation") and for a Commission implementing Regulation amending Regulation (EC) No 185/2010² (hereinafter, the "Proposal for an implementing Regulation") on common basic standards on civil aviation security as regards the use of security scanners at EU airports

Introduction

The EDPS welcomes the fact that there is an EU approach to security scanners, which can guarantee legal certainty and a consistent level of protection of fundamental rights. However, the EDPS regrets that he has not been consulted as regards these proposals.

The choice of the regulatory procedure and the regulatory procedure with scrutiny is questionable. As the European Parliament stated in its Resolution of 23 October 2008, rejecting the previous Commission Proposal for a Regulation on security scanners³, the proposals contain more than technical measures, they have an impact on fundamental rights, including the rights to privacy and data protection, and it is questionable whether they meet the principle of proportionality (see below).⁴ Therefore, a wider and transparent debate should have been required.

Applicability of the data protection legislation

As the EDPS and the Article 29 Working Party have previously stated⁵, the use of security scanners involves a processing of personal data. The image provided by the scanner will allow for the indirect, if not direct, identification of the data subject, as explained by the EDPS letter of 1 July 2010⁶, since it will be used to decide whether the passenger can access

¹ Proposal for a Commission Regulation amending Regulation (EC) No 272/2009 supplementing the common basic standards on civil aviation security as regarded the use of security scanners at EU airports.

² Proposal for a Commission implementing Regulation amending Regulation (EC) No 185/2010 implementing the common basic standards on civil aviation security as regards the use of security scanners at EU airports.

³ European Parliament resolution of 23 October 2008 on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection, adopted on 23 October 2008, available on <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0521+0+DOC+XML+V0//EN>.

⁴ Article 5a of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission as amended by Council Decision 2006/512/EC of 17 July 2006 allows the Council or the Parliament to oppose the draft measures proposed by the Commission provided that measures "exceed the implementing powers provided for in the basic instrument, that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality". OJ L 184 , 17.07.1999, p. 23 and OJ L 200, 22.07.2006, p.11.

⁵ Article 29 Working Party end EDPS consultation paper on the impact of the use of body scanners in the field of aviation security on human rights, privacy, personal dignity, health and data protection, adopted on 11/02/2009 (available on http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2009_05_11_annex_consultation_letter_chairman_art29wp_daniel_calleja_dgtren_en.pdf).

⁶ EDPS letter to Commission Vice-president Sim Kallas of 1 July 2010 (EDPS comments available on

security restricted areas. Therefore, despite the fact that the Annex of the Proposal for an implementing Regulation (Para. C(d)) states that "the image shall not be linked to any data concerning the screened person and his/her identity shall be kept anonymous", the image itself might still be indirectly related to the data subject, especially if the screener cannot determine whether or not the passenger is carrying prohibited articles (Para. B(d)) or if the passenger is not cleared. National data protection laws implementing Directive 95/46/EC are thus applicable.

However, the EDPS welcomes the safeguards foreseen in the Proposal, including the obligation for the human reviewer to be in a separate location (Para. C(b)) in order to prevent him from seeing the passenger, the prohibition of any unauthorised access or use of image and the prohibition of introducing devices capable of storing, copying or photographing in the separate location (Para. C(c)).

Necessity and proportionality

The Commission has already acknowledged in its Communication on body scanners that "the capability of some screening technologies to reveal a detailed display of the human body (even blurred), medical conditions, such as prostheses and diapers, has been seen critically from the perspective of respect for human dignity and private life"⁷. The interference with privacy is all the more relevant as regards scanners presenting a full image of the human body. These would furthermore imply the processing of health data, which falls within the special categories of data subject to stricter rules in Directive 95/46/EC⁸.

According to Article 52(1) of the EU Charter of Fundamental rights, any limitation to fundamental rights, including the right to private life and the protection of personal data⁹, must be *necessary and proportional*. The necessity principle is closely related to the proportionality principle, under which, according to Article 5(4) of the Treaty on the Functioning of the European Union, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". According to the European Convention for the Protection of Human Rights and Fundamental Freedoms, an interference by a public authority with individuals' rights to privacy may be necessary in the interest of national security, public safety or the prevention of crime¹⁰.

The European Court of Human Rights has stated that such interference can be justified if it is lawful, pursues a legitimate aim and is necessary in a democratic society. It is considered necessary if it answers a pressing social need, is proportionate to the aim pursued and if the reasons put forward by the public authority to justify it are relevant and sufficient¹¹. Similarly,

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2010/10-07-01_Security_scanners_EN.pdf

⁷ Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU airports of 15 June 2010 (COM (2010) 311 final), p.11 (available on http://ec.europa.eu/transport/air/security/doc/com2010_311_security_scanners_en.pdf)

⁸ Article 8(1) prohibits, except under strict conditions, the processing of personal data *revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life* (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 (OJ L 281, 23.11.1995, p. 31).

⁹ Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (OJ C 83, 30.03.2010, p. 389).

¹⁰ Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No 5), Council of Europe, 4.11.1950.

¹¹ *S. and Marper v. the UK*, European Court of Human Rights judgement, Strasbourg, 4.12.2008.

according to the European Court of Justice, it has to be demonstrated that other less intrusive methods were not available¹².

The effectiveness of body scanners in comparison with less intrusive methods is therefore relevant to assess the necessity and proportionality of this measure and consequently its legitimacy. Recital 4 of the draft Commission Regulation states that security scanners are an effective method for passenger screening. However, it does not provide any justification on the necessity of adding them to the list of allowed methods of screening of Regulation (EC) No 272/2009¹³.

Use of security scanners providing a detailed image of the human body

The EDPS, the Article 29 Working Party¹⁴ and the European Privacy and Data Protection Commissioners¹⁵ have already stated that, in case the necessity and proportionality of security scanners were demonstrated, security scanners presenting a standardised body image (mimic board) would be less intrusive and should be used instead of scanners providing a detailed picture of the data subjects' body. This view has also been recently endorsed by the European Parliament, which "believes that only stick figures should be used and insists that no body images may be produced"¹⁶. The US is also moving in this direction: according to the TSA, automated targeting recognition (ATR) software are being installed on existing body scanners and all new scanners will be equipped with this technology¹⁷.

Taking into account the doubts on the effectiveness of body scanners and that, in case its necessity is demonstrated, there is at least one type of body scanners which is less intrusive, the EDPS regrets that body scanners providing a detailed image of the body will be allowed. Despite Recital 8 of the Proposal for a Regulation, which states that "Member States and industry will work closely to make sure that as soon as possible only security scanners based on automated threat detection are deployed at EU airports", scanners providing a full image are allowed from the entry into force of the proposals and there is neither a clear obligation nor a deadline for its phasing-out.

Retention period

The EDPS welcomes the obligation to delete images as soon as the passenger is cleared. However, he has concerns on the retention periods for data relating to passengers who have been found to carry prohibited articles or in situations where the forscreeener cannot determine whether or not the passenger is carrying prohibited articles. This retention period should also be clearly specified and the data should in any case be deleted as soon as it is not necessary any more.

¹² C-92/09 Volker and Markus Schecke GbR v. Land Hessen and C-93/09 Eifert v. Land Hessen and Bundesansalt für Landwirtschaft und Ernährung, 9.11.10.

¹³ Commission Regulation (EC) No 272/2009 of 2 April 2009 supplementing the common basic standards on civil aviation security laid down in the Annex to Regulation (EC) No 300/2008 of the European Parliament and of the Council (OJ L 91, 3.4.2009, p.7).

¹⁴ Consultation paper by the Article 29 Working Party and the EDPS, cited above.

¹⁵ Resolution on the use of body scanners for airport security purposes adopted by the European Privacy and Data Protection Commissioners' Conference 29-30.04.2010, Prague (available on http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Cooperation/Conference_EU/10-04-30_Prague_resolution_bodyscanners_EN.pdf).

¹⁶ European Parliament resolution of 6 July 2011 on aviation security, with a special focus on security scanners (2010/2154(INI)), available on <http://www.europarl.europa.eu/oeil/file.jsp?id=5869532>.

¹⁷ See <http://www.homelandsecuritynewswire.com/full-body-scanning-shy>, last accessed on 26.09.2011.