

The use of body scanners: 10 questions and answers

FRA

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Foreword

A common European aviation security policy has been developed in the aftermath of the 9/11 attacks. Already in December 2001 the so-called ‘shoe bomber’, who endeavoured to hide explosives in the heel of his shoes, led some states to introduce specific measures to better screen shoes for explosives. In 2006 an attempt to blow up several aircraft over the Atlantic through the use of liquid explosives led to the prohibition of liquids on board of aircraft in Europe and several other states.

It is in this context that pursuant to a Resolution of the European Parliament, the Commission launched a public consultation on the issue of body scanners at the turn of 2008–2009. About 60 stakeholders provided the Commission with information and their opinions on body scanners. Also the European Union Agency for Fundamental Rights participated in this consultation and contributed its Opinion.

On 25 December 2009 the attempted terrorist attack with hidden explosives on Northwest Airlines flight 253 from Amsterdam to Detroit reminded policy makers of the limits of metal detectors, commonly used at airports. In the aftermath of this attempted attack, several states have speeded up the further development and eventual deployment of body scanners.

On 15th June 2010 the Commission published its *Communication on the use of security scanners at EU airports* COM (2010) 311 indicating a change of terminology from ‘body scanner’ to ‘security scanner’. In its Communication, the Commission concludes that this type of security scanner may be offering a reliable and effective screening method at airports to detect metallic and non-metallic objects carried by a person who intends to enter an aircraft. The communication refers to reservations expressed by the European Data Protection Supervisor (EDPS), the Article 29 Data Protection Working Party, and the Fundamental Rights Agency.

The Commission has transmitted its recent Communication to the Council and the European Parliament and this may eventually lead to a proposal for an EU legal framework for the use of security scanners at EU airports. Against this background, the European Union Agency for Fundamental Rights (FRA) issues its contribution to the public consultation which it originally delivered to the Commission in February 2009.

Morten Kjaerum

Director of the FRA

Introduction

The following 10 questions and answers are based on the FRA contribution to the public consultation of the European Commission 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’ in 2008-2009. This paper reproduces in a slightly shorter version the FRA’s replies to the consultation questionnaire distributed by the Commission in 2008. The ‘question and answer’ structure was adopted to make it a self-standing document. No new information and no new elements of assessment were added. The following questions and answers thus reflect the discussion as of the end of 2008 and the beginning of 2009. They offer an overview rather than a full assessment of the use of body scanners in relation to fundamental rights, personal data, data protection and potential health risks. Furthermore, the questions and answers touch on issues such as: whether people should be given a choice of the screening method used; which type of information they should be given before being screened by a body scanner; how intrusive body scanners are compared to other screening methods; and whether the detection capability of such scanners is an added value for enhancing security in Europe. Concrete legislative proposals at EU level will nevertheless require a more detailed assessment. In such a case, emphasis should be given to all of the various fundamental rights aspects involved, including those, for example, of data protection¹ and ethnic profiling².

In its recent Communication on *The Use of Security Scanners at EU airports*,³ the European Commission defines a security scanner – previously referred to as body scanner – as “the generic term used for a technology that is capable of detecting objects carried under clothes. Several forms of radiation differing in wavelength and energy emitted are used in order to identify any object distinct from the human skin. In aviation, Security Scanners could replace walk-through metal detectors (capable of detecting most knives or arms) as means of screening passengers because they are able to identify metallic and non-metallic objects including plastic and liquid explosives.”⁴ This paper uses the term ‘body scanner’ because it is this term which was originally used in the Commission consultation at the turn of 2008-2009; the term “body scanner” is also more commonly used in the public debate and is therefore more familiar to the general public.

¹ See, for instance, Fundamental Rights Agency (FRA) (2010) *Data Protection in the European Union: the Role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II)*, Luxembourg: Publications Office of the European Union, available online at http://www.fra.europa.eu/fraWebsite/research/publications/publications_en.htm.

² See, for instance, FRA (2010), *Towards More Effective Policing – Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, Luxembourg: Publications Office of the European Union (forthcoming); FRA (2010), *Police Stops and Minorities: EU-MIDIS Data in Focus Report*, Luxembourg: Publications Office of the European Union (forthcoming).

³ European Commission (2010), *Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU Airports*, Brussels, COM(2010) 311/4.

⁴ COM(2010) 311/4, p. 7.

Questions

1.	Which fundamental rights are at risk of being affected by the use of body scanners?	4
2.	Is the use of a body scanner to be considered as processing personal data?	6
3.	How could the requirements on the design and selection of body scanners best respect rules on data protection?	8
4.	How can body scanners be assessed from a rule of law perspective?	9
5.	Are there specific considerations to be taken into account when selecting people to be screened?	10
6.	Should the person to be screened be given the choice between a body scanner and other screening methods?	10
7.	Which information should be given to persons before they choose to be screened by a body scanner?	11
8.	How intrusive are body scanners if compared to other screening methods?	13
9.	Is the detection capability of body scanners an added value regarding security?	13
10.	Which conditions should apply in order to address the concerns related to fundamental rights?	14

1. Which fundamental rights are at risk of being affected by the use of body scanners?

In assessing the proportionality and the limits of the measures compromising several fundamental rights, it needs to be borne in mind that the body screening measures are primarily taken on a preventive basis. The screening is not done in a context of punishment of an individual guilty of a criminal offence or as a law enforcement activity reacting to a concrete danger or threat posed by the individual. The fact that the screening is not done in such a concrete and individualised law enforcement context adds to the severity of the measure, since the affected individual has not autonomously created the reason for the intrusion in his or her rights but must generally be considered innocent of any breach of law. The following fundamental rights are affected by the use of body scanners: the right to respect for private life; the right to freedom of thought, conscience and religion; the right to equal treatment; and the right to data protection.

The right to respect for private life

At a general level, a body scanner reveals the human person in a way that is normally reserved for the private sphere. For many cultures, this is not merely confined to visibility of the sexual organs. An obvious purpose of the wearing of clothing is to cover parts of the human body that are considered extremely personal and revelation of which is contemplated only in specific socially acceptable or intimate settings. As such, a body scanner inevitably interferes with the sphere of privacy protected under Article 8 of the of the European Convention for the Protection of Human Rights and Fundamental Freedoms, also known as European Convention of Human Rights (ECHR), Article 7 of the Charter of Fundamental Rights of the European Union (CFREU) and Article 17 of the International Covenant of Civil and Political Rights (ICCPR).

More particularly, images produced by a body scanner, depending on the depth of scanning, may reveal intentionally concealed physical features (for instance of transsexuals)⁵ or medical information⁶ (such as evidence of a mastectomy, perceived ‘deformities’, prosthetic limbs or implanted limb supports), which people might prefer not to be revealed. Thus, for many individuals the use of body scanners constitutes an interference with the right to respect for private life, which goes beyond simply revealing nudity.

⁵ The ECtHR has confirmed that private life will protect such important elements of the personal sphere as ‘gender identification, name and sexual orientation and sexual life’. ECtHR, *Bensaid v. United Kingdom* (No. 44599/98), judgement of 6 February 1998, paragraph 47.

⁶ ECtHR, *Z v Finland* (No. 22009/93), judgement of 25 February 1997; in paragraph 95, the Court stresses that “the protection of personal data, in particular medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life.”

This interference with the right to private life and the human dignity of certain individuals is accentuated by virtue of factors such as religious belief, the cultural traditions of a national, ethnic or religious minority, or certain physical features. For example, those belonging to certain religious traditions or cultural backgrounds might object to the use of body scanners as being contrary to the rules and principles of their religion or culture, such as rules relating to nudity and the visibility of sexual organs. Where the intrusion suffered by these particular groups of people is considered greater than that of the population at large, the interference with certain rights may be deemed disproportionate or discriminatory.⁷

The use of a body scanner must be proportionate to the end pursued. Both the UN Human Rights Committee and the European Court of Human Rights (ECtHR) have pointed out that “rigorous precautions”⁸ and “effective measures”⁹ are needed to protect the dignity of those being searched from being assailed any further than necessary insofar as personal and body searches are concerned.

As the aforementioned interferences are likely to relate to the ‘most intimate aspect of private life’,¹⁰ particularly serious reasons must exist before interferences on the part of the public authorities can be legitimate for the purposes of Article 8(2) ECHR. The use of a body scanner should have clear advantages compared with other available means of detection in order to be considered proportionate.

The right to freedom of thought, conscience and religion

This right is protected under Article 9 of the ECHR, Article 18 of the ICCPR and Article 10 of the CFREU. In certain religious traditions within Orthodox Judaism or Islam, for instance, men and women cannot reveal body parts considered to have sexual connotations. The use of a body scanner could therefore pose a direct interference with this right and have a knock-on effect on other rights, such as freedom of movement and the prohibition of discrimination.¹¹ When such a religious prohibition amounts to an “essential aspect of practice” of that religion,¹² the proportionality requirement of the limitation of the freedom to manifest one’s religion or belief would most likely not be met. This is due to the fact that the purpose of the use of body scanners might be achievable by alternative means which are less intrusive in the eyes of the passenger.

⁷ ECtHR, *Thlimmenos v. Greece* (No. 34369/97), judgement of 6 February 2000; in paragraph 44, the Court stipulated that “the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

⁸ ECtHR, *Case of Wainwright v. the United Kingdom* (No.12350/04), judgement of 26 September 2006, paragraph 48.

⁹ CCPR, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)*, 8 April 1988), paragraph 8.

¹⁰ ECtHR, *Dudgeon v. UK* (App. 7525/76), judgement 22 October 1981, paragraph 52.

¹¹ See, for example, ECtHR, *Cha'are Shalom Ve Tsedek v. France* (No. 27417/95), judgement of 27 February 2000, paragraph 80-81.

¹² *Ibid*, paragraph 73.

The right to equal treatment

The use of body scanners could also affect the prohibition against discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation as covered by Article 21.1 of the CFREU.

Discrimination could occur where body scanners are used for selected individuals on a discretionary basis, and where their use amounts to discriminatory ethnic, racial, national or religious profiling resulting in one or several particular social groups being disproportionately targeted.¹³

2. Is the use of a body scanner to be considered as processing personal data?

The EU Charter of Fundamental Rights – which, according to the new Article 6 of the Treaty of European Union, enjoys “the same legal value” as the EU Treaties – enshrines data protection as a fundamental right under Article 8, which is distinct from respect for private and family life under Article 7 CFREU. In Directive 95/46/EC, personal data are defined as “any information relating to an identified or identifiable natural person”, also referred to as the “data subject”.¹⁴ Therefore, if the images obtained by using body scanners are rendered anonymous, the information acquired through the use of body scanners would not constitute personal data. Rendering an image anonymous is possible by blurring or obscuring the image of the individual’s face. However, this may not be sufficient in the case where other elements of the image display distinguishing features of an individual which may identify the person. Furthermore, even if images are rendered anonymous it may still be possible to identify the individual where the image bears the person’s name or other means of reference to the person making identification possible. Only in the case where an image can be rendered anonymous and any reference to the person neutralised, the use

¹³ United Nations General Assembly (2007), *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin (A/HRC/4/26), paragraphs 34 and 41. Article 5.d(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) explicitly prohibits racial discrimination with respect to the freedom of movement; FRA (2010), *Towards More Effective Policing – Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, Luxembourg: Publications Office of the European Union (forthcoming); FRA (2010), *Police Stops and Minorities: EU-MIDIS Data in Focus Report*, Luxembourg: Publications Office of the European Union (forthcoming).

¹⁴ European Parliament and European Council, *Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, OJ L281, 23 November 1995, Article 2(a), available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>

of body scanners would not constitute the processing of personal data and, accordingly, not be an interference with the protection of personal data.

If the use of a body scanner produces personal data – that is, “any information relating to an identified or identifiable natural person or ‘data subject’”¹⁵ – then the decisive question is whether the images are stored or not. If not, then the use of a body scanner would not constitute the processing of personal data.

However, if images (constituting personal data) are stored, it would entail the processing of personal data and, accordingly, an interference with the protection of personal data. Consequently, the fundamental rules pertaining to the protection of personal data must be observed in the use of body scanners. Also the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data¹⁶ recognises these rules. Accordingly, the processing of such personal data without respecting these rules would constitute an interference with the right to respect for private life, as set out under Article 8 ECHR, which is distinct from the interference caused by the use of a body scanner as such.¹⁷

Moreover, to the extent that the use of a body scanner reveals personal data relating to an individual’s health or sexual life, for example, such data would qualify as sensitive data that deserves a higher level of protection. Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data requires that personal data “revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards”.¹⁸ However, this guarantee may be restricted under certain conditions, as defined in Article 9 of the Convention: “any derogation must be provided for under national legislation and must constitute a necessary measure in a democratic society in the interests of protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences; or of protecting the data subject or the rights and freedoms of others”.¹⁹

Given that the issue of storage is a decisive factor as to whether the use of a body scanner constitutes the processing of personal data, this question should be clarified by

¹⁵ Ibid

¹⁶ Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, Strasbourg, 28 January 1981, available online at: <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>.

¹⁷ According to the ECtHR, “the storing of information relating to an individual’s private life in a secret register and the release of such information come within the scope of Article 8 § 1”. See, for example, ECtHR, *Leander v. Sweden* (No. 9248/81), judgement of 26 March 1987, paragraph 48; ECtHR, *Kopp v. Switzerland* (No. 23224/94), judgement of 25 March 1998 and the *Report of judgements and decisions 1998-II*, paragraph 53, p. 540; ECtHR, *Amann v. Switzerland* (No. 27798/95), judgement of 16 February 2000, paragraph 65; ECtHR, *Rotaru v. Romania* (No. 28341/95) of 4 May 2000, paragraph 43; ECtHR, *Segerstedt-Wiberg and Others v. Sweden* (No. 62332/00), judgement of 6 September 2006, paragraph 73.

¹⁸ Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, Strasbourg, 28 January 1981.

¹⁹ Ibid.

law, which must be accessible to the individuals concerned. The same applies to the issue whether the images obtained through the use of body scanners are rendered anonymous by blurring the face, for example, or whether the use of body scanners results in any information relating to an identified or identifiable natural person.

3. How could the requirements on the design and selection of body scanners best respect rules on data protection?

Once personal data are rendered anonymous, the information obtained through the use of body scanners would not be regarded as personal data. Consequently, the best way to comply with the fundamental rules pertaining to the protection of personal data is to render the images obtained through scanning anonymous; for example, by blurring or obscuring the face and any other distinguishing features of the person screened.

However, if persons remain identifiable on the images obtained, then the use of these images by a screener should be organised without any storage of the images, as this would secure that the use of body scanners would not constitute the processing of personal data in the first place.

Only in those cases where a suspicious object has been identified through body scanning and its existence subsequently confirmed through a hand search, should the possibility to store the image as evidence be considered, even if the person is identifiable.

In all other circumstances where body scanning is used and no suspicious object identified nor its existence confirmed, the storage of images of people in full nudity, by which they can be identified, must be considered a particularly severe infringement affecting the very essence of the right to respect for private life and the right to protection of personal data.

In order to avoid data protection concerns in relation to the use of body scanners, the following aspects should be respected:

- only consultation of images by a screener, but no storage or archiving of pictures;
- blurring the face of the person screened to render the images obtained anonymous;
- using mimic boards to display results instead of images.

4. How can body scanners be assessed from a rule of law perspective?

According to Article 8(2) of the ECHR, any interference with private life must be based on law and justified by pursuing a legitimate aim. This may include reasons of national security or the protection of the rights and freedoms of others.²⁰ It is also a general requirement of the fundamental principles pertaining to the protection of personal data that the grounds on which the processing of personal data is allowed shall be clearly and precisely laid down by law. Therefore, legal measures should delimit both the sphere of action for state officials but also the rights and obligations of the individual subject to scanning.

As the use of body scanners constitutes an interference in the right to respect for private life, as well as potentially interfering with several other rights, the conditions under which their use is restricted must also be provided for by law. The latter must be accessible and readily understandable to the individual concerned, and must be sufficiently precise and foreseeable to protect individuals from arbitrariness. The individual should thus be able to anticipate the possible fundamental rights limitations based in law as a consequence of the use of body scanners.²¹

Any measure giving the authorities a power to interfere in the right to respect for private life by collecting and further processing personal data should contain explicit and detailed provisions concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained.²²

The procedural rights of the individual – the so-called data subject – should be spelled out explicitly in any instrument prescribing the processing of personal data obtained through the use of body scanners. This includes the right to information about the identity of the controller and the purposes of the processing of the data, the right of access to data and the right to rectification. The effective exercise of these rights under personal data protection law requires that the person be clearly informed about the procedures which should be followed and, for instance, about the respective duties of the authorities using body scanners.

The proportionality assessment depends also on the element of choice given to passengers. It is nonetheless impossible to properly assess the aspect of proportionality at an abstract level.

²⁰ European Court of Human Rights (ECtHR), *Klass and others v. Germany* (No. 5029/71), judgement of 6 September 1978, paragraph 48.

²¹ See, in general, the United Nations Human Rights Committee (CCPR) *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)* of 8 April 1988. See also Council of Europe (2002 and 2005), *Human Rights and the Fight against Terrorism – The Guidelines of the Council of Europe*, p. 9, in particular Guideline VI: “Measures used in the fight against terrorism that interfere with privacy (in particular body searches [...]) must be provided for by law”.

²² ECtHR, *Rotaru v. Romania* (No. 28341/95), judgement of 4 May 2000, paragraph 57.

5. Are there specific considerations to be taken into account when selecting people to be screened?

If body scanners pose a health risk for certain population groups, such as pregnant women or persons with a pacemaker, these groups should be excluded from being screened by body scanners. Any exemptions will, however, potentially defeat the purpose of the screening method applied as they can be intentionally utilised by persons carrying prohibited items. The broader the exemptions are, the more likely it is that the screening procedure will as a whole fail to meet the necessity test.²³

If body scanners are not used for all passengers but on a discretionary basis for selected passengers only, it would be necessary to prevent direct and indirect discrimination. For this purpose, it would be necessary to closely monitor who in fact becomes targeted by the proposed body scanners and whether the implementation of body scanners will result in discrimination on the grounds of gender, ethnicity, national origin, disability or religion or other discrimination grounds listed in Article 21 of the CFREU. Such monitoring will not require the identification of the persons and can be based on scientifically representative samples. The FRA's two reports on 'Police stops and minorities' and 'Towards more effective policing: understanding and preventing discriminatory ethnic profiling', serve to clarify further the use and nature of profiling, and when it can be considered discriminatory, as well as providing data on the prevalence of stops that are considered discriminatory by the subjects concerned.

6. Should the person to be screened be given the choice between a body scanner and other screening methods?

The choice given to the person to be screened between security checks according to the current methods used and the use of body scanners affects the fundamental rights assessment of the use of body scanners. Screening on a mandatory basis might be difficult to defend because the purpose of the use of body scanners might be achievable by alternative means which are less intrusive to fundamental rights like personal dignity, religious requirements and other relevant considerations. If the individual is given a choice, necessity and proportionality of the limitation are easier to justify.

On the other hand, if the use of body scanners is not mandatory, it may be difficult to prove that they are a necessary interference with fundamental rights because, a non-

²³ The necessity test is the test that a fundamental rights limitation is necessary in a democratic society. It is a test commonly used by the European Court of Human Rights in assessing the lawfulness of a limitation of a human right protected by the European Convention of Human Rights.

mandatory use of body scanners would suggest that other less intrusive measures are just as effective.

Regarding the right to data protection, it is significant whether the individual agrees to the data collection and processing.²⁴ According to the data protection regulation of many Member States and the European Union, it is significant whether the individual – also referred to as the ‘data subject’ – has given his or her consent unambiguously and voluntarily to the proposed transfer of personal data.²⁵ Such consent can indeed justify the collection and processing of data. Article 2(h) of the Data Protection Directive specifies that “the data subject’s consent shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed”.²⁶

Nonetheless, it is important to look at the consequences when a person does not agree to be screened by a body scanner. If denying consent to the use of body scanners will inevitably result in very intrusive and unpleasant, potentially degrading body searches, such as strip searches, it is questionable if consent under these conditions can really be interpreted as voluntary and valid. This observation relates to both the right to privacy as such and the specific issue of data protection.

7. Which information should be given to persons before they choose to be screened by a body scanner?

The use of body scanners may reveal sensitive data. It is, therefore, important to note that Principle 6.2 of the Recommendation No. R (97) 18 by the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes provides that “where the consent of the data subject is required for the collection or processing of sensitive data, it shall be explicit, free and informed. The legitimate objective of the survey may

²⁴ ECtHR, *S. and Marper v. the United Kingdom* (No. 30562/04 and 30566/04), judgement of 4 December 2008; in paragraph 104, the Court stated that “the interests of the data subjects and the community as a whole in protecting the personal data, [...] may be outweighed by the legitimate interest in the prevention of crime (see Article 9 of the Data Protection Convention). However, the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned”.

²⁵ See, for example, Article 26 of Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281, 23 November 1995, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>.

²⁶ See Council Directive 95/46/EC.

not be considered to outweigh the requirement of obtaining such consent unless an important public interest justifies the exception”.²⁷

At check-in and at the screening point, on airline and airport websites, at travel agencies and also through the general media, passengers should be informed about the following aspects:

- the functioning of body scanners;
- the purpose of body scanners and why body scanners are important and useful;
- the benefits of using body scanners;
- the list of prohibited items;
- the risks of using body scanners;
- what can be seen by using body scanners, with an illustrated example;
- who views the image produced by a body scanner;
- whether the sex of the person viewing the image matches that of the person being scanned;
- what data, if any, are stored through body scanners;
- where these data, if any, are stored;
- for how long these data, if any, may be stored;
- if applicable, the rights of the data subject, such as rectification, erasure, and blocking;
- information on the possibility to refuse the use of body scanners;
- possible alternatives and/or consequences, if an individual refuses to use a body scanner.

At the first meeting of the Commission Task Force on Body Scanners, held on 12 December 2008 in Brussels, evidence was given that surveys had been undertaken in some Member States to test passengers’ willingness to use body scanners instead of traditional detection methods; however, it was not clear from the evidence presented whether passengers had been shown an image of what they would look like should they choose to use a body scanner. In order to give an informed choice of being screened by a body scanner as opposed to other detection methods, people must be made aware of what the image of their body will look like to the security personnel viewing images from the body scanner. In this regard, any evidence that is forwarded concerning passengers’ willingness or choice to use body scanners must be based on the informed consent of the person as regards the images that are generated and viewed through scanning, and must be gathered independently of security and airport authorities.

²⁷ Council of Europe, Committee of Ministers, *Recommendation No. R (97) 18*, adopted on 30 September 1997, p. 5.

8. How intrusive are body scanners if compared to other screening methods?

As highlighted above, body scanners may interfere with a number of fundamental rights. Given the degree of revelation of a person's body, a body scanner's level of intrusion into a person's privacy exceeds that of a walk-through metal detector and hand-held metal detector. The same might hold true for hand searches since, although more intrusive than walking through a metal detector, unlike body scanners no body parts are revealed to a third person. Body scanners should be seen as analogous to intensive searches with partial removal of clothes, as both methods interfere with the sphere of personal space protected by clothing. A body scanner, however, may not constitute as great an interference with a person's private sphere as a complete strip search, given the immediate presence of the searching official in the latter case. A body cavity search goes even beyond this scale of intrusion.

If the persons viewing the images produced by the body scanner are of the same sex as the persons being screened, this might address some religious and/or cultural concerns. However, separation between the persons operating the device and the persons viewing the image will reduce the trust of the screened person that he or she is being observed only by persons of the same sex. The feeling of distrust may particularly emerge within population groups who, in other circumstances, experience distrust or fear in security procedures.

9. Is the detection capability of body scanners an added value regarding security?

While the FRA is not in the position to assess the detection capabilities of existing body scanners, or of those that will be available in the near future, the specific risk of persons hiding objects in or under their clothes deserves consideration.

Body scanners may have high detection capabilities to identify objects hidden in or under a person's clothes. At the same time, they may show a lower detection level than other devices or approaches, such as metal detectors or human observation of behaviour, in discerning other types of security risks. It is noteworthy that the detection capabilities of body scanning technologies, under the current frequencies proposed for use in the EU, are limited because items and substances inserted in the human body cannot be detected by scanning. Given that body cavities can be used to hide objects or substances, and in this regard are often used by so-called 'drug mules' for the illegal transportation of illicit drugs, body scanners have no advantages over existing non-intrusive detection methods with respect to items inserted in the body.

In order to assess the necessity and proportionality of the fundamental rights limitations caused by the use of body scanners, it is relevant and important to confirm

that body scanners constitute an added value for security compared to some other less intrusive methods of airport security.

10. Which conditions should apply in order to address the concerns related to fundamental rights?

Should the use of body scanners be foreseen, the following procedures could be considered to take into account fundamental rights concerns:

1. A person needs to be informed at two points in time: first, when booking the ticket, by a detailed notice on the airline or airport website or at travel agencies; secondly, at the screening point. At the screening point, a sign or poster would inform the traveller again. The information needs to consist at both times of the elements described in the answer to Question 8 above.
2. A team of at least two individuals should operate the body scanner: A and B. Screener A (at remote distance of the person being examined) looks at the image and if s/he notes a suspicious object, s/he should have radio contact with screener B who is next to the person being examined. Screener B will ask the person being examined about the suspicious object or s/he will subject the person to a hand search.
2. At the screening point, Screener B will ask the traveller whether s/he wants to go through the metal detector or other permissible and existing means of security screening, or through the body scanner. Travellers should be given the choice of being screened by a body scanner or by other existing means of security screening.
3. Body scanner images should only be seen at remote distance (behind a wall) by Screener A. In order to diminish the potentially degrading aspect of the screening, the screened person will be able to choose whether his or her image should be seen by a screener of a specific sex. Screened images will then only be analysed by a screener of the chosen sex. It should be noted, however, that separate lines for separate body scanners for men and women will not work for persons with disabilities, the elderly, children, and with regard to some cultural considerations, and may cause embarrassment and difficulties for transgender people.
4. When no suspicious objects are identified, the image should be destroyed automatically after viewing. When a suspicious element is found which turns out to be innocent when shown to Screener B, the image should be immediately manually destroyed by Screener A.

5. When a suspicious object is identified, it is essential to have minimum safeguards in place concerning, for instance, duration, storage, usage, access by third parties, procedures for preserving the integrity and confidentiality of the image and procedures for its destruction, thereby providing sufficient guarantees against the risk of abuse and arbitrariness.²⁸

²⁸ See also ECtHR, *S. and Marper v. the United Kingdom* (No. 30562/04 and 30566/04), judgement of 4 December 2008, paragraph 99.

European Union Agency for Fundamental Rights

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