



**Consultation**

**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**

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 01/06.

Website: [http://ec.europa.eu/justice\\_home/fsj/privacy/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm)

## Consultation

### **The impact of the use of body scanners in the field of aviation security on human rights, privacy, personal dignity, health and data protection**

#### **Background**

On 11 March 2008 Regulation (EC) No 300/2008 of the European Parliament and of the Council on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002<sup>1</sup> was adopted. The aim of this Regulation is to protect persons and goods within the European Union by preventing acts of unlawful interference with civil aircraft (e.g. hijack, sabotage of aircraft). One of the means for ensuring this is to screen persons before they enter security restricted areas at airports and board an aircraft.

The Commission is required by Article 4(2) of this Regulation to adopt general measures on aviation security, which must include the 'methods of screening allowed'. One possible method of screening persons at airports is by use of machines known as 'body scanners'. In order to decide whether or not 'body scanners' could be allowed as a method of screening persons at airports and if so, under what conditions, the Commission is carrying out a consultation 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.

This consultation is carried out in the light of a Resolution adopted by the European Parliament on 23 October 2008 on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection.<sup>2</sup>

The EP Resolution asks the Commission to:

- carry out an impact assessment relating to fundamental rights;
- consult the European Data Protection Supervisor (EDPS), the Article 29 Working Party and the Fundamental Rights Agency (FRA);
- carry out a scientific and medical assessment of the possible health impact of such technologies;
- carry out an economic, commercial and cost-benefit impact assessment.

#### **Body scanners**

##### *What are body scanners?*

Body scanners produce an image of the body of a person showing whether or not objects are hidden in or under his clothes. The image produced is rather opaque, not of high quality and resembles a photographic negative. For a person to be screened by a body scanner, he must stand still for a few seconds either inside the body scanner (which is the size of a telephone booth) or directly in front of it.

##### *Are there different types of body scanners?*

There are various technologies of body scanners being developed. The most advanced technologies are:

- millimetre wave, using radio waves equivalent to 0.01% of the permissible dosage for mobile phones;
- backscatter, using low dosage x-rays equivalent to 2% of the dosage of radiation experienced by a passenger during a long-haul flight

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<sup>1</sup> OJ L97, 9.4.2008, p. 72.

<sup>2</sup> EP Resolution (2008)0521

- t-ray, using terahertz radiation which lies between infrared light and microwaves on the electromagnetic spectrum.

The term 'body scanner' is used generically to cover all these various technologies.

*Why are body scanners under consideration for possible use in the field of aviation security?*

A weakness in aviation security today is the detection of non-metallic items. All passengers normally pass through walk-through metal detectors (WTMD) which should ensure that guns and knives (and some other prohibited items) are detected. If the WTMD alarms, this alarm is often resolved with a hand-held metal detector (HHMD). The use of metal detectors is complemented by selecting passengers for a hand search.

The combination of metal detectors and hand searches is currently the optimal means of detecting concealed prohibited items. However, the quality of hand searches is very variable at Community airports, as has been seen by the Commission as part of its compliance monitoring programme of airport inspections (in accordance with Article 7(2) of Regulation (EC) No 2320/2002). Furthermore, passengers often find hand searches intrusive and upsetting to their dignity. Finally, the hand searching of passengers is time-consuming and labour-intensive, making it expensive to perform.

Since body scanners can detect any item concealed on a person's body or in or under his clothes, they could be used as an alternative to the existing means of screening passengers.

## **Consultation**

### ***Questionnaire***

In order to address the issues raised by the European Parliament in its Resolution, questions as set out below have been developed for consultation of interested parties, including the European Data Protection Supervisor (EDPS), the Article 29 Working Party and the Fundamental Rights Agency (FRA).

The Commission is kindly requesting you to respond to the questions below to the extent possible and as concisely as possible. You are not obliged to answer all questions. For example, the EDPS may choose to ignore the questions raised in part II on the detection capabilities of body scanners, whereas equipment manufacturers would be in the position to answer these questions.

Responses to the questions below should be provided by **Friday 19 December 2008** at the latest by e-mail to the dedicated mailbox:

**[tren-bodyscanners@ec.europa.eu](mailto:tren-bodyscanners@ec.europa.eu)**

### ***Body Scanners Task Force***

In addition to the questionnaire, the Commission is organising a 'public-private dialogue' that will take the form of a Body Scanners Task Force. **The first meeting of the Body Scanners Task Force will take place on Friday 12 December 2008 in Brussels.** The meeting will take place in English only.

If you would like to attend the meeting of the Body Scanners Task Force on Friday 12 December 2008, you are kindly requested to apply for an invitation by **Wednesday 3 December 2008** at the latest by sending an e-mail to the dedicated mailbox:

**[tren-bodyscanners@ec.europa.eu](mailto:tren-bodyscanners@ec.europa.eu)**

In this email you should indicate the name, organisation and e-mail address of the person(s) that would like to attend the Task Force meeting.

Based on the number of requests received, you will by Friday 5 December 2008 at the latest be informed whether or not you can attend the meeting. The Commission will ensure that a balanced representation of interested parties is allowed to attend the meeting. Please note that only invitation holders will be permitted access to the meeting.

### ***Report***

On the basis of these consultations, the Commission will make a report on body scanners and the impact of their use in the field of aviation security on human rights, privacy, personal dignity, health and data protection. The report will address the questions raised by the European Parliament in its Resolution on body scanners. It will also form the basis of whether or not the Commission will bring forward legislation to allow body scanners as a method of screening at airports and/or under what conditions they could be allowed.

### **Personal data protection statement**

*1. What is the objective for launching a consultation 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?*

The objective of this consultation is to collect the views of interested parties.

*2. What personal information will be collected and for what purpose?*

The following data will be collected: name of the organisation, name of a contact person and e-mail address. The data will identify the respondent, notably in case of multiple replies. In addition, they may serve to interpret the results of the consultation by classifying them according to certain categories.

*3. Additional information*

The contact data provided by the respondent shall make it possible to contact the organisation to request clarification if necessary on the information supplied. Moreover, the contact data could be used for inviting the relevant organisation to a future meeting of the Body Scanners Task Force.

*4. Who has access to your information and to whom is it disclosed?*

The contributions will be analysed by Unit F-5 of DG TREN, which deals with aviation security matters. Contributions received may then be used in the abovementioned report to be written by the Commission. The report will contain a list of those organisations that made contributions unless they indicated their wish to remain anonymous. The report will be made publicly available.

*5. How do we protect and safeguard your information?*

The replies are being kept at the European Commission with access limited to designated Commission officials or agents. In line with Regulation (EC) No 45/2001 on data protection, supervision is being exercised by the European Data Protection Supervisor.

*6. How can you verify, modify or delete your information?*

You can verify, modify or delete your personal data kept at the European Commission. If you wish to modify or delete your reply, please send a message to the contact address mentioned in paragraph 7 below.

*7. Contact information*

Please address any issues/questions concerning this document by e-mail to the dedicated mailbox:

**[tren-bodyscanners@ec.europa.eu](mailto:tren-bodyscanners@ec.europa.eu)**

## QUESTIONNAIRE

### Questions 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

#### I. General information

|    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
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| 1. | <p>On behalf of whom are you answering this questionnaire?</p> <p>Please be as precise as possible, e.g. type and name of organisation.</p> <p>The answers below are given by the Article 29 Working Party, representing Data Protection Authorities of the EU in accordance with Art 29 of Directive 95/46/EC on privacy and data protection.</p> <p>The European Data Protection Supervisor has been consulted separately but at this stage, in the view of a harmonised approach, he is answering to this questionnaire together with national DPAs in the framework of the art 29 WP.</p> |
| 2. | <p>Name:</p> <p>Address:</p> <p>Contact telephone number:</p> <p>E-mail address:</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

#### II. Detection capabilities of body scanners

##### [General comment]

Walk through metal detectors and hand held metal detectors will not detect the kinds of elements body scanners are supposed to detect. A comparison between their detection capabilities seems to be therefore a little irrelevant, especially when we consider that the sensitiveness of WTMD could be tuned and increased by the operator himself depending of the situation. In any event, scanners are not an alternative to hand searches as an individual will still need to undergo a hand search if the scanner detects an anomalous object. However, data quality is an important data protection principle and it is then decisive to accurately know the real detection level of the scanner used. In that sense, additional information and especially impact assessments demonstrating the necessity of body scanners should be conducted (see on this point Chapter V, answer to question 6).

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| 1. | <p>On a scale of 1-10, how would you rate the detection capabilities of body scanners?</p> <p>Please explain your rating.</p> <p><i>'detection capabilities' means 'being in a position to identify objects hidden in or under a person's clothes'</i></p> <p><i>1 = low detection capabilities; 10 = high detection capabilities</i></p>                                                                           |
| 2. | <p>On a scale of 1-10, how would you rate the detection capabilities of body scanners when compared to other, existing methods of screening – i.e. walk-through metal detectors (WTMD), hand-held metal detectors (HHMD), hand searches?</p> <p>Please explain your rating.</p> <p><i>1 = much lower detection capabilities; 5 = equivalent detection capabilities; 10 = much higher detection capabilities</i></p> |

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| 3. | What objects (e.g. type, size, material of object) can be detected on a person when screened by a body scanner?                                    |
| 4. | Please provide any further relevant information on the detection capabilities of body scanners that has not been addressed in the questions above. |

### III. Fundamental rights - general

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| 1. | <p>Respect for privacy, human dignity as well as protection of personal data are the fundamental rights most often discussed in relation to body scanners. Are there any other fundamental rights that in your opinion could be affected (either positively or negatively) by the use of body scanners?</p> <p>There is a close link between privacy, protection of personal data, human dignity and <i>physical integrity</i> in relation to the use of body scanners. Although the answers below focus on privacy and data protection, the evaluation of the impact of body scanners on the privacy of individuals should necessarily take into account the intrusion in relation to their human dignity and physical integrity.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 2. | <p>If at an airport screening point body scanners are used, should the person to be screened be given the choice between a body scanner or other (existing) methods of screening?</p> <p>This depends on the threat levels and the reasons given for needing body scanners. If there is evidence that the existing measures are not sufficient, then the scanners would have to be compulsory, as making them voluntary undermines these reasons for needing them. It is for the legislator to provide the justification for needing to introduce these scanners.</p> <p>o Yes, the person to be screened should be given a choice (so, screening by body scanner on a voluntary, optional basis)</p> <p>If the scanners are optional they could be an alternative to hand searches if the individual sets off the metal detectors. However, their benefit appears to be in detecting non-metal objects as well, so you may still have individuals let through security with concealed threat objects who have not set off the metal detector.</p> <p>x No, the person to be screened should not be given a choice (so, screening by body scanner on a mandatory basis)</p> <p>Giving a choice to the individual might at first sight appear as a more balanced solution but raises serious questions as to the effective necessity and efficiency of body scanners. For this reason, developed below in Chapter 5, point 3, choice does not appear to be a valid basis for scanning.</p> |

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| 3. | <p>If the use of body scanners is optional, what information should be given to persons to allow them to make a considered choice about being screened by a body scanner?</p> <p>Independently of an optional or compulsory implementation, and independently of the technology used, the use of body scanners will require the following information to be provided to the individual.</p> <ul style="list-style-type: none"> <li>• What data are processed.</li> <li>• What processing is taking place (what the scanner does, such as sees through clothes, detects metallic and non-metallic items hidden; the level / resolution of image produced; how it works, such as a remote monitor to view images; any health implications; and the circumstances in which an image will be retained).</li> <li>• Who is responsible for the data processing.</li> <li>• The consequences of setting off the scanner (such as hand search).</li> <li>• Any categories of people who are unable to use the scanner.</li> <li>• Where to go for more detailed information.</li> </ul> |
|    | <p>When and where should the person to be screened be informed?</p> <p>The answer to this question will partly depend on whether the scanners are mandatory or not.</p> <p>In any case, information should be given on websites of airports using the scanners, leaflets at check-in and at the screening points, signs at the screening points.</p> <p>If the scanners are optional, clear and detailed information will have to be provided enough in advance to the individual for him/her to give his/her consent according to article 2.h of directive 95/46.</p> <p><i>(e.g. on airline/airport websites, at check-in, at the screening point)</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 4. | <p>Do you consider that the person being screened by a body scanner can be identified solely by the image produced?</p> <p>Whether an individual is identified by an image produced by a body scanner or not depends on the technology used, the quality / resolution of the images and on the link made with the individual during the screening process This question is nevertheless very narrow and takes the image out of context.</p> <p>If so, why?</p> <p>If not, why not?</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 5. | <p>On a scale of 1-10, how would you rate the level of intrusion of body scanners with a person's privacy and personal dignity when compared to other, existing methods of screening at airports – i.e. walk-through metal detectors (WTMD), hand-held metal detectors (HHMD), hand searches?</p> <p>Please explain your rating.</p> <p><i>1 = significantly lower level of intrusion; 5 = around the same level of intrusion; 10 = significantly higher level of intrusion</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |

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|    | <p>General comment: Compared with other existing "metal" detectors, "body" scanners reflect by their very name (a name used by stakeholders and not specifically by data protection advocates) a wider intrusion for the individual.</p> <p>With regard to hand searches, body scanners would not appear to replace them but to precede them and the hand search could follow on the basis of the scanning. The appreciation of the level of intrusion of both search tools will very much depend on cultural and personal context.</p> <p>Rating the level of intrusion of body scanners will above all depend on the technical features of the scanner: while scanners giving a detailed picture of the human body (possibly including internal organs) are highly intrusive, scanners presenting a standardised body image (mimic board) with identification of areas to be searched further would present a lesser degree of intrusiveness.</p>                                                                                                                                                                                                                                                                                                                                                                                                              |
| 6. | <p>If the use of body scanners can replace both the use of metal detectors and hand searches at airport security points, would you welcome their introduction (subject to the rules on the use of body scanners)?</p> <p>The introduction of body scanners would depend on their clearly established <i>necessity</i>, on the balance between their necessity and the fundamental rights of the individuals, and on the nature of the rules and safeguards put in place.</p> <p>While assessing the necessity of body scanners, a distinction should be made between their <i>convenience</i> (gain in time) and their added value in terms of <i>security</i> (capacity to detect concealed threat objects).</p> <p>As to the issue whether body scanners would replace metal detectors and hand searches, it seems that, if a individual sets off a scanner by carrying a concealed object, hand searches will still need to be carried out to determine whether the object is a threat or not and, if so, to remove the object. Hand searches would therefore not be suppressed.</p>                                                                                                                                                                                                                                                                          |
| 7. | <p>If body scanners were allowed to be used as a means of screening persons, under what conditions should they in your opinion be used in order to address concerns related to fundamental rights?</p> <p>Please describe these conditions in detail, e.g. by describing the procedure to be followed.</p> <p><i>(e.g. 1: only use at remote distance. Screener A (at remote distance of the person being examined) looks at the image and if he notes a suspicious object, he should have radio contact with screener B who is next to the person being examined. Screener B will ask the person being examined to get the suspicious object out of his pocket or he will subject the person to a hand search.)</i></p> <p><i>(e.g. 2: allow persons the choice of being screened by a body scanner or by other, existing means of screening)</i></p> <p>The intrusion capability of a body scanner could reach an acceptable level only if the information provided by the scanner is strictly limited to the purpose of its implementation: to locate suspected objects and possibly additional information on their nature, without providing images considered to be so intrusive that they raise proportionality issues. This can be achieved by limiting the body image to a schematic drawing. The scanner should not be used for any other purpose.</p> |



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|    | <p>Depending on the level of detail in the image, operators may or may not need to be located away from the individual screening area. If the operator obtains only a schematic drawing of the body with the suspicious objects rightly targeted, they would not necessarily need to operate remotely. However, if the images are more detailed (without going as far as a 'naked' body obviously) then remote viewing is a more privacy friendly option. In this case radio contact would be needed between the operator and staff at the screening point if further searching was needed. In any event, the quality / resolution of the image should not be enough to identify that individual, and it is preferable for images to exclude the head and face (unless there is clear evidence of individuals hiding threat objects around the head and face).</p> <p>If there is a need for further search, the operator and the data subject shall be isolated from others individuals as their discussion may reveal private and intimate information. Further searches should take place in a private room with the same rules and procedures as currently exist for further searches, such as the number and gender of duly authorised staff to be present.</p> <p>Staff should be appropriately trained and monitors / systems should be non-networked to increase security. The system should not allow any downloading or copying of the data produced.</p> <p>According to statements made by national research centres, this specific technology using schematic drawing of the body would not be mature or enough accurate yet. However, some industry providers seem to offer already this option.</p> <p>In any case, images should not be retained. The system should overwrite the images immediately as soon as the person has been cleared. If an individual is stopped for carrying a hidden threat object then an image may need to be retained as evidence until the case is solved and also to allow the data subject to exercise his/her rights.</p> <p>There should also be review and audit mechanisms built into the system.</p> |
| 8. | <p>Should certain categories of persons be automatically exempted / excluded from being screened by body scanner?</p> <p>If so, please give reasons why.</p> <p><i>(e.g. persons under 18, pregnant women, persons with a pacemaker)</i></p> <p>This question triggers an additional question as to the efficiency of body scanners: if some categories of persons are to be excluded from being screened for very valid reasons such as health (medical experts would need to advise on this matter) or cultural reasons, this would appear to open a weakness in the system itself.</p> <p>Excluding some individuals from the screening, whatever the reason (just as giving a choice to the individual), puts into question the real necessity of the system, as any <i>mala fide</i> person could use such exemption to bypass the control. If certain categories of people are excluded for medical reasons, there needs to be appropriate alternative measures in place.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 9. | <p>Please provide any further relevant information on fundamental rights in general that have not been addressed in the questions above, nor in part V on data protection.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

## IV. Health

### [General comment]

Although the WP29 and the EDPS are in principle not competent for replying to this section, they would like to highlight the data protection dimension which is triggered by possible health issues related to the use of body scanners. Medical contraindications which could be possibly identified shall be considered as sensitive data which will need to be provided in a satisfactory way (from a data protection point of view) to the operator. It should also be noted that measures proposed to address medical concerns may themselves have implications for data protection.

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| 1. | What type(s) of technology is (are) used by the body scanners that you have examined, use and/or produce?<br><ul style="list-style-type: none"><li>➤ Millimetre wave;</li><li>➤ Backscatter / x-ray;</li><li>➤ Terahertz/ t-ray;</li><li>➤ Other (describe);</li></ul>          |
| 2. | How far can the body scanner indicated by you under point 1 penetrate, e.g. into clothes, to the skin, just below the surface of the skin, to internal organs?                                                                                                                  |
| 3. | What are the possible health implications when using the type(s) of technology as indicated by you under point 1?<br><br>Do you have scientific evidence to come to this conclusion?<br><br>Please provide details of any scientific evidence that you may have (e.g. reports). |
| 4. | Please provide any further relevant information on health issues that have not been addressed in the questions above.                                                                                                                                                           |

## V. Protection of personal data

The fundamental right to the protection of personal data is laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 8 of the Charter of Fundamental Rights of the European Union, as detailed in Directive 95/46/EC.<sup>3</sup>

In order to establish whether or not data protection rules apply, it must first be established whether personal data of individuals are being processed.

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<sup>3</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, OJ L 281, 23.11.1995, p. 31.

- **personal data** means "any information relating to an identified or identifiable natural person ('data subject')" (Article 2 of Directive 95/46/EC; see also Article 29 Working Party: "Opinion N° 4/2007 on the concept of personal data").
- **processing of personal data ('processing')** means "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction" (Article 2 of Directive 95/46/EC).

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|----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | <p>Do you consider the use of a body scanner as processing personal data?</p> <p>Yes, in principle it is considered as data processing.</p> <p>If so, why?</p> <p>A link is established between the data provided by the body scanner and the individual who is being screened. Based on the information provided by the body scanner, an evaluation of the threat will be conducted which will result in an impact on the individual (release or additional check). It has therefore to be considered as a processing of personal data. See answer to the question 4 of part III for additional elements.</p> <p>If not, why not?</p> |
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If body scanners in use are deemed to be processing personal data, the rules require body scanners to be designed and selected in accordance with the aim of collecting, processing or using no personal data or as little personal data as possible. In particular, use is to be made of the possibilities for pseudonymisation or rendering individuals anonymous. The use of Privacy Enhancing Technologies (PETs) can help to design information and communication systems and services in a way that minimises the collection and use of personal data and facilitate compliance with data protection rules.<sup>4</sup>

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| 2. | <p>How could in your opinion the requirements on the design and selection of body scanners be put into practice in order to best respect rules on data protection?</p> <p><i>(e.g. only consultation of images by a screener, but no storage / archiving; blurring the face to make images anonymous; using mimic boards to display results instead of images)</i></p> <p>"Privacy by design" is the first and essential requirement in the development of body scanners. In concrete terms, this means that scanners should be designed taking into account the purpose of the collection of information (i.e. the location of suspect <i>objects</i>) and minimising the personal data necessary to achieve this purpose. If the purpose is to identify <i>objects</i>, the capture of <i>body</i> images should be avoided as much as possible.</p> <p>Blurring faces, limiting the storage/deleting data and separating the location of the scanner from the location of the screener are positive measures but it should be clear that they do not solve as such the privacy issue.</p> |
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<sup>4</sup> See Communication from the Commission to the European Parliament and the Council on Promoting Data Protection by Privacy Enhancing Technologies (PETs); COM/2007/0228 final.

|  |                                                                                                                                                                                                                        |
|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | To limit the intrusion into the individual's privacy, it is essential to minimise in the very first phase the collection of personal data (the body image), such as only providing a schematic view of the individual. |
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Furthermore, if body scanners in use are deemed to be processing personal data, then the processing of such personal data could constitute an interference with the right to respect for private life, under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 7 of the Charter of Fundamental Rights of the European Union. Such interference would only be permitted under three conditions which are cumulative. Each condition has an autonomous function to fulfil:

- **Legitimacy:** The objective must be legitimate and meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others according to Article 52 of the Charter of Fundamental Rights of the European Union;
- **In accordance with the law:** The conditions under which the restriction is imposed must be provided for by law, in legislation or regulations which must be accessible to the individual concerned and protect that individual from arbitrariness through, inter alia, precision and foreseeability;
- **Proportionality:** The means chosen must be proportionate to the end pursued so that they can be considered necessary. A disproportionate infringement of the right to protect personal data is not allowed, even for the sake of achieving highly desirable objectives.

#### [General comment]

It should be recalled that not only the ECHR and the Charter of fundamental rights apply to body scanners, but also Directive 95/46/EC. In addition to legitimacy, lawfulness and proportionality, all the principles of the Directive should be taken into account, including the necessity test, transparency and rights of the individual (access, redress).

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| 3. | <p>If a person is given the choice of different screening methods and he opts for a body scanner, then in your view does this count as consenting to his image being handled and examined (subject to the rules on the use of body scanners)?</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|    | <p>To be valid, consent must be free and informed. It should be ensured that the individual is not influenced or prejudiced depending on his/her choice, and that exhaustive information is given to him as to the option of the body scanner (including a clear image of the result of a body scanning).</p> <p>Besides, consent should not be used to legitimise a processing of personal data, if there is no legal basis for that processing. Indeed, giving a choice to the individual would tend to prove that body scanners are not essential. If their necessity is not established, they should simply not be used at all.</p> <p>On the other hand, <i>if</i> their necessity is clearly established, their use could be acknowledged <i>provided</i> fundamental rights of individuals are protected in a satisfactory way, and including privacy by design (no processing of body image).</p> |

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| 4. | <p><b>Legitimacy</b></p> <p>Body scanners would be used for screening persons at airports in order to protect persons and goods within the European Union by preventing acts of unlawful interference with civil aircraft (e.g. hijack, sabotage of aircraft).</p> <p>Do you consider the condition of 'legitimacy' to be met when using body scanners for this purpose in the field of aviation security?</p> <p>If so, why?</p> <p>Aviation security is a legitimate aim, but needs to be backed up with evidence as to why scanners are needed and that existing measures are not sufficient.</p> <p>In the assessment of the legitimacy it is important to accurately check if there are any other less intrusive alternatives to reach the same goal. Safeguards for their implementation described in answers to questions 3.7 and 5.7 should be implemented.</p> <p>If not, why not?</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 5. | <p><b>In accordance with the law</b></p> <p>Should rules on the use of body scanners be set at Community (EC) level or at Member State level?</p> <p>Please explain your answer.</p> <p>Definition of rules at community level will foster the harmonisation of data protection safeguards. It will also mitigate the risk of facing various security levels among EU airports, and avoid the situation that those with harmful intent only travel through airports considered to have lower levels of security.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 6. | <p><b>Proportionality</b></p> <p>Do you consider the use of body scanners in the field of aviation security to be proportionate to the end pursued so that they can be considered necessary and genuine?</p> <p>The use of body scanners could only be considered as proportionate if an acceptable balance is reached considering on the one hand the necessity and the effectiveness of their use and on the other hand the intrusion in the privacy of individuals.</p> <p>Only if the necessity of their use is established, and in parallel appropriate data protection safeguards are in place and the rights of individuals are guaranteed, could body scanners be considered as proportionate. While the cultural background of member states may differ, systems which provide clear and detailed pictures of naked bodies, or that show internal organs, may be considered disproportionate in view of the level of intrusion into the privacy of the individual: the disclosure of such pictures can be seen as having a deep impact on human dignity which can hardly be justified for routine security measures.</p> <p>To evaluate correctly this balance, impact assessments should be conducted by independent bodies and their conclusions as well as the results of pilot projects should be widely displayed. At the moment this is all hypothetical. There has been no evidence presented to date (to our knowledge) to show why scanners are necessary and why existing measures are not sufficient.</p> <p>If such necessity is established, proportionality will also very much depend on the type of scanner used and whether or not they include privacy by design.</p> |

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| 7. | <p>If body scanners were allowed to be used as a means of screening persons at airports, under what conditions should they in your opinion be used in order to respect in full the rules on personal data protection?</p> <p>Please describe these conditions in detail, e.g. by describing the procedure to be followed.</p> <p>The same requirements suggested in the answer to question 3.7 can be also applied for this question, that is:</p> <ul style="list-style-type: none"> <li>• The use of PETS/privacy by design (the most privacy friendly option among those presented by manufacturers / technology developers), producing no image of a naked body but rather a mimic board.</li> <li>• The fixed and limited amount of time that an image is to remain on screen.</li> <li>• That the image data is to be sent remotely as described previously and that further investigation or searches take place in a different room.</li> <li>• The data cleansing / deletion requirements.</li> <li>• The procedure for retrieving images needed for evidence and for the exercise of individuals' rights (access, deletion).</li> <li>• The information to be given to individuals including their rights.</li> <li>• The review / audit mechanisms.</li> </ul> <p>Any other procedural matters to be specified.</p> <p>It might be useful to introduce an EU-wide technical standard, so that European standardisation organisations can make proposals to support a privacy and data protection friendly deployment of body scanners for the identification of non-metallic objects for the purposes of aviation security, to which industry can then adhere.</p> |
| 8. | <p>Please provide any further relevant information on the protection of personal data that has not been addressed in the questions above.</p> <p>As mentioned above just before question 3, the principles of Directive 95/46/EC should be taken into account, including not only legitimacy, lawfulness and proportionality of the use of body scanners, but also a necessity test, full transparency and rights of data subjects.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

## VI. Economic, commercial and/or cost-benefit impact assessment

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| 1. | Have you performed an economic, commercial and/or cost-benefit impact assessment on the use of body scanners?                                                                                                                                                               |
|    | If so, what was the outcome of this/these impact assessment(s)?                                                                                                                                                                                                             |
|    | Please provide details of the impact assessment (e.g. reports).                                                                                                                                                                                                             |
| 2. | <p>If the use of body scanners is not prescribed as a compulsory means of screening, but is allowed as an optional means of screening, on what basis would you decide to use body scanners?</p> <p><i>(e.g. budget, number of passengers, throughput, facilitation)</i></p> |

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| 3. | <p>If the use of body scanners is not prescribed as a compulsory means of screening, but is allowed as an optional means of screening, do you consider it necessary to carry out a(n) (European) economic, commercial and/or cost-benefit impact assessment?</p> <p>Please explain your reasoning.</p> |
| 4. | <p>Please provide any further relevant information on economic, commercial and/or cost-benefit impact assessments that has not been addressed in the questions above.</p>                                                                                                                              |