

Body Scanners

INEX Evening Round-Table 27 January 2011

Rapporteurs: Gloria González Fuster and Rocco Bellanova

ABSTRACT

This report presents a summary of the INEX Evening Round-table on “Body Scanners” that took place on 27th January 2011 at the Centre for European Policy Studies (CEPS), in Brussels. The event was co-organised by CEPS and the Law, Science, Technology and Society (LSTS) Research Group of the Vrije Universiteit Brussel (VUB) in the framework of the *Converging and conflicting ethical values in the internal/external security continuum in Europe* (INEX) Project (<http://www.inexproject.eu/>). It formed part of the 4th International Conference on Computers, Privacy and Data Protection (CPDP), titled “European Data Protection: In Good Health” (<http://www.cpdpcferences.org/>).



This event was organised within the framework of INEX - *Converging and conflicting ethical values in the internal/external security continuum in Europe*, a three-year project funded by the Security Programme of DG Enterprise of the European Commission's Seventh Framework Research Programme. For more information about the project, please visit: www.inexproject.eu

PROGRAMME

17.30 – 18.00: Registration

18.00 – 20.00: Presentations Panel

Welcome address: **Sergio Carrera** (CEPS)

Moderator: **Valentina Pop** (EU Observer)

Marc Rotenberg (Electronic Privacy Information Center, EPIC)

Mark B. Salter (University of Ottawa)

Martin Scheinin (European University Institute, EUI)

Claudia Fusco (European Commission, DG MOVE)

Jim Gaudoin (L-3 Security & Detection Systems)

Open Discussion

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IN:EX Round-Table

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Sergio Carrera (CEPS) welcomed the audience with a few words about INEX; an EU-funded research project coordinated by PRIO and devoted to the analysis of *Converging and conflicting ethical values in the internal/external security continuum in Europe*. Carrera explained that body scanners could be regarded as a case study on surveillance and its implications for 'ethical values' and fundamental rights, as well as, more generally, on the very understanding of the democratic constitutional state.

In Europe, he added, developments in the area of surveillance are significant. For instance, the Stockholm Programme foresees various steps towards the development of the concept of 'prevention', and even of 'anticipation'. What is the impact of these technologies on the individual and, more widely, on the rule of law? These are some of the questions that the INEX project has been exploring, in the context of which a discussion on body scanners appeared to be necessary.

Valentina Pop (EU Observer), the roundtable moderator, also underlined the importance of the subject of body scanners, has been mesmerising the European Parliament for a long time.

The first speaker, **Lillie Coney** (Electronic Privacy Information Center, EPIC) noted that she had been following this subject for many years, as in 2005 she initiated what was at the time called the "X-ray scanners" project for EPIC. She recalled that, in 2007, EPIC had been told that in the US body scanners were to be used only for the purposes of secondary passenger screening. However, in 2009, the US Transportation Security Administration (TSA) announced plans to use body scanners for the primary screening of all passengers. EPIC then issued a Freedom of Information Act (FOIA) request, and found out that body scanners had actually also been used in contexts unrelated to aviation security. They were told that no scanned images were stored by the machines, only to discover the existence of thousands of stored images and, more crucially, the fact that the technology being used had been designed in order to allow their automatic storage. As they fought a lawsuit to check whether the machines were systematically storing information or not, it appeared that 35,000 pictures had already been stored. EPIC actually filed different requests in parallel, and learnt that the requirements specified by the TSA for the machines included internet connectivity. EPIC prepared a petition for a formal rule-making process that would allow the public to comment on the issue, as well as to obtain independent expert input that because

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was unclear whether body scanners could really increase the level of security, or merely reinforce an illusion of security. Eventually, the Court decided to grant a hearing to EPIC and the TSA. In the meantime, the TSA decided to deploy body scanners in conjunction with so-called “enhanced pat down”, and the issue reached the attention of general public.

Activism soon sprang up in unexpected places and spread virally; some people created the ‘scanners opt-out day’, the ‘we won’t fly’ campaign and other initiatives. EPIC is still fully involved in the debate.

The next speaker **Mark B. Salter** (University of Ottawa) opened his intervention by describing two currently competing models in the field of aviation security. On the one hand, the ‘Israeli model’, which implies that airport security should spread out on different layers from the moment people choose to fly until the moment they actually fly. This model is based on risk assessment and profiling, and security measures apply intensively, especially for those individuals identified as being high-risk. On the other hand, the second model is more sensitive to the balance between security and privacy, as illustrated by the Canadian model. This model is grounded on the division of aviation security tasks through different actors so that primary passenger screening is applied equally to all passengers, imposing the same security process on everybody. Salter observed that these two models mirror different ways of looking at risk assessment.

Salter then looked at how body scanners had been integrated into the second system model cited above and argued that body scanners fit well into such a system. His major concern, however, was the possible reliance on body scanners only for secondary screening, a practice that would increase the actual significance of profiling. In this context, two issues can be considered as particularly important: communication about risk management and the question of metrics, i.e. how to measure ‘security efficiency’, and how to measure ‘aviation security’?

Martin Scheinin of the European University Institute (EUI) and United Nations (UN) Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, spoke from the perspective of international law, partly on the basis of work done at the EUI within the FP7 project DETECTER. First, he underlined that in relation to body scanners there has been a disproportionate discussion of data protection issues, for instance during the European Commission’s consultation on the subject. In his view, data protection issues, even if relevant, have proved to be easily solvable as far as body scanners are concerned, and an excessive focus on them could shift attention away from the many other human rights at stake. Among them: privacy, non-discrimination, freedom of religion, and even personal liberty. From this perspective, it is crucial to acknowledge that, in order to be acceptable, body scanners need not only to serve a good purpose, but must also be necessary and proportional.

Scheinin listed a series of what can be considered worrying developments. First, it is a fact that the discussions on body scanners come and go, suggesting that governments’ interest in them might be linked more to reacting to occasional events than to the intrinsic security benefit of the machines. Second, the legal basis for deployment is still rather vague in many countries. Third, although as part of the ‘proportionality test’ one is always obliged to choose the least intrusive method available, it would seem that factors such as convenience and industry interest are being more relevant to determine

choices than the degree of intrusiveness of the technology used. Fourth, and as a consequence of the persistently serious doubts about the actual effectiveness of body scanners in detecting prohibited substances, the 'necessity test'. Here, the possibility of choice, sometimes given to individuals to decide whether to go or not to go through the body scanner, might also have negative repercussions on effectiveness and therefore on the 'necessity test'. Fifth, what is offered as an alternative to going through a body scanner generally also constitutes an intrusive measure; more intrusive than measures being applied before the deployment of body scanners. Hence, the deployment of body scanners, even when choice is introduced, will result in an overall increase in the level of intrusion. Sixth, discrimination issues need to be considered, as some groups of individuals have particular feelings in relation to the possible capturing of their body images (for instance, deeply religious persons within many world religions), and some groups might be more often flagged by the machines (for instance, people with disabilities). Seventh, better and less intrusive technology might actually be already available, in particular technology that does not focus on the screening of individuals (looking for 'the bomber') but on objects (looking for 'the bomb') and which would, in his view, represent a genuine shift from 'body scanners' to 'security scanners'. Direct detection of explosives themselves is a promising alternative in airport security.

Finally, Scheinin reviewed alternative paths that need to be discussed in the context of mitigating the adverse consequences of body scanners, such as replacing body images with dummy images and increased public awareness. Behavioural profiling could be used more extensively as an alternative to body scanners, but, as it also raises many human rights questions, it is unclear whether it would be a better choice. In any case, group-based profiling cannot be regarded as a possible alternative. From a human rights viewpoint, routine and random universal searches might offer a better solution. In closing, Scheinin underscored that each fundamental right has an essential core that needs to be respected, but as the essential core of data protection is still unclear from the perspective of international law, it is critical not to evaluate the use of body scanners by referring exclusively to the data protection issues.

Claudia Fusco (European Commission, DG MOVE, Unit E.5 – Aviation Security) presented the perspective of the European Commission. She explained that the attention devoted to 'security scanners' for the purpose of civil aviation is due to the evolving threats that aviation security is facing and therefore the need to further enhance the security systems currently in use. In this context, 'security scanners' can be considered as enhancing security since they detect not only metals, but also non-metallic items carried on a person.

In response to Scheinin's observations on the sometimes vague legal basis for the use of 'security scanners', Fusco pointed out that in the European Union the legal basis is clear. Indeed, under the current legal framework, security scanners are not allowed for passenger screening as they are not included in the list of eligible methods and technologies. However, Member States can deploy them as a more stringent measure (above currently allowed screening methods) for higher threat levels or as a trial of new methods and technologies (if authorised by the Commission). Several Member States such as Finland, the Netherlands, the United Kingdom and Germany have undertaken trials of security scanners. Given the current fragmentation in Europe in the deployment of security scanners, this situation might undermine the principle of 'one-stop' security and might provide for different levels of protection of fundamental rights in the EU.

In 2008, the European Commission proposed to add 'body scanners' to the list of authorised screening methods, but the European Parliament opposed such an inclusion and asked for a careful assessment of their impact in terms of fundamental rights and health. An on-line public consultation took place in 2008/2009. The European Data protection Supervisor and Article 29 Working party were consulted. Moreover, a Task Force on security scanners, conveying interested parties, Member States, associations of fundamental rights and stakeholders, was created and met twice. Finally, in June 2010, the European Commission adopted the Communication on the use of security scanners at EU airports.² This document provides a first analysis of security scanners in terms of detection performance, costs and of the possible impact on fundamental rights and health. It concludes that technical standards and operational conditions to be laid down by law could significantly reduce concerns related to fundamental rights and health. In particular, as regards health, the Communication recalls that EU and Euratom legislation is applicable and that within these frameworks it falls under the competence of the Member States to make the necessary risk assessments in full compliance with the principles and dosage limits set in these legal frameworks. The overall conclusion was that 'security scanners' alone – like any other single security measure – cannot guarantee 100% aviation security. However, security scanners can improve the quality of security controls at EU airports since their use could considerably increase the detection capacity, especially of prohibited items such as liquid or plastic explosives, which cannot be detected by walk-through metal detectors. In any case, a European approach on the use of 'security scanners' is necessary. An impact assessment further assessing the detection performance, costs, fundamental rights and health issues is expected to be finalised in the coming months and published in the near future. Such an impact assessment would also address the possibility to allow the passengers to opt out from going through the scanners. Based on this impact assessment, the European Commission might come up with a legislative proposal before the summer at the earliest.

Jim Gaudoin (L-3 Security & Detection Systems) introduced himself by emphasising that technology developers should not be viewed as the evil ones in this context. His company is very aware of the different concerns expressed by the European Parliament in 2008, and responded to them by developing their products accordingly. He devoted his presentation to a description of the latest version of one of their products, the Provision Automatic Threat Detection (ATD), although, regarding the detection capabilities of the machine, he cautioned that he was not allowed to go into the detail of its functioning. Gaudoin first compared the product to the current use of walk-through metal detectors for civil aviation security: metal detectors can generate an alarm that will lead to enhanced search, to be carried out by humans, which could be seen as a factor contributing to the potential inconsistency of searches, and thus ultimately compromise the level of security. Since 2008, his company has been developing a scanner that would increase security, address the issue of passengers' rights by ensuring the preservation or improvement of their fundamental rights, ensure health protection of passengers' and other individuals going through the machines. Finally, this body scanner system would also reduce the 'human factor' and, more concretely, the number of times that people are obliged to touch other people. The scanners that have been designed to take into account all these issues might not be

² European Commission (2010), *Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU airports*, COM 2010(311), 15.6.2010, Brussels.

the panacea for aviation security, but are to be regarded as a useful tool to be used in conjunction with other tools, he noted.

Gaudoin asserted that the product described is able to detect more threats than any metal detector and hand search combined, and thus provide wider, improved security. What body scanners are looking for are any objects that are on bodies that should not be there, he insisted. The respect of fundamental rights and dignity of the individual is addressed in the machine by the lack of image generation: a red or green indicator and the location of the suspect object are the only graphic data produced by the machine; no actual image of the individual is generated, and therefore his or her physical attributes are not visible. Although the exact eventual use of the machine is not on the hands of the developer, they would suggest that a green light should lead for the passenger to be able to go through immediately, whereas a red light should lead to hand searches directed towards the identified zone. He affirmed that, all in all, those who have no issues with the use of metal detectors should have no problems with the use of this type of body scanners. Regarding health, Gaudoin explained that the technology used by their machines is non-ionising radiation.

Speakers were given the opportunity to react to the interventions. Lillie Coney took the floor to underscore that human rights issues are crucial for them, and that the lawsuit they introduced was based on the 4th amendment of the US Bill of Rights, the Privacy Act, the protection of religious minorities, their freedom of travel and the powers of discretion of government agencies. Prompted by Scheinin to give more information on the market value of his product, Gaudoin informed that he was not able to communicate the exact price of the machines, as costs could be dependent of the actual demand and because they like to treat these issues with commercial confidentiality. Salter emphasised that all the issues at stake ultimately concern political decisions still to be taken. He also remarked that, undoubtedly, border screening is undergoing a process of securitisation, and it is in this process that the focus on explosives detection should be contextualised.

Discussions started with the factors underpinning and the implications of the use by the European Commission of the term 'security scanners' as opposed to 'body scanners'. Other questions raised were how to make sure that security, privacy and fundamental rights in general remain meaningful under the pressure of discourses that refer to always evolving targets, threats and security technologies; who might be financially responsible for the deployment of scanners in EU airports; and how to educate the general public in relation to risk management.