

Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament and the Council on the use of security scanners at EU airports'

COM(2010) 311 final

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On 15 June 2010, the Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU airports

COM(2010) 311 final.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 2 February 2011.

At its 469th plenary session, held on 16 and 17 February 2011 (meeting of 16 February), the European Economic and Social Committee adopted the following opinion by 104 votes to one, with five abstentions.

1. Conclusions

1.1 The EESC agrees that aviation security is a legal right that must be protected. However, it believes that the Commission should take a more holistic approach in which 'enhanced intelligence sharing and human factor analysis' would become key elements of the system, and not just the use of technologies which raise serious and as yet unresolved doubts and risks.

1.2 The use of this type of scanner could particularly affect fundamental rights (human dignity, personal privacy and data protection), should images be unduly stored, printed, transmitted or retained, and subsequently disseminated. The EESC believes that in all other circumstances passengers should be allowed to opt out of such checks and should always maintain the right to fly, regardless of the option they choose. In any event, there must be sound legislative guarantees that those who opt out will not suffer additional burdens such as facing annoying delays while queuing for security checks or exhaustive searches.

1.3 With regard to health protection, the EESC calls on the Commission to provide conclusive studies on the potential implications of such devices for the health of passengers and of staff submitted to frequent checks in the course of their work; in the event of any doubt, it would be preferable to use other types of instruments.

1.4 The EESC wishes to remind the Commission that the Communication makes no mention of the effective legal

remedy that should be guaranteed to the weaker party, i.e. the passenger using airlines and airports, for without sufficient procedural safeguards, individual rights are not guaranteed.

1.5 The Committee believes that serious consideration should be given to alternatives to the use of security scanners or body scanners. An alternative would be to use technical systems to identify broad potential sources of threat which could then be investigated in greater detail by means of 'pat-down' searches.

2. Introduction and gist of the communication

2.1 The Commission communication addresses the increasing use of Security Scanners at airports of the European Union, regulated at national level.

2.2 For the Commission, only the common European standards for aviation security can provide the framework ensuring a harmonised approach to the use of Security Scanners at airports.

2.3 Aviation security is, according to the Commission, facing new types of threats today; threats to which the traditional security technologies used at airports cannot give an adequate and efficient response. Consequently, some Member States started to trial and deploy Security Scanners at their airports. This is resulting in different rules being used across the EU.

2.3.1 Security Scanner is 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.

2.4 In accordance with EU law, Member States may introduce the use of Security Scanners at their airports either i) by exercising their right to apply security measures that are more stringent than existing EU requirements or ii) temporarily, by exercising their right to conduct trials of new technical processes or methods for a maximum period of 30 months.

2.5 As concerns health and more particularly the use of ionising radiation, European legislation under the Euratom Treaty sets thresholds for radiation doses (ad hoc and per year), requires legitimate justification for human exposure to radiation and requests that protection measures ensure exposure as low as possibly achievable.

2.6 The Commission points out that the main principle of European as well as international rules is to keep threat items such as arms, knives or explosives (‘the prohibited articles’) away from aircraft.

2.6.1 This common regulatory framework provides for the ‘one-stop security’ already operational in some EU Member States, though not yet fully rolled out, and will in the future be the most important element of facilitation, both for the industry as well as passengers.

2.7 Under the current EU legal framework for aviation security, Member States and/or airports are given a list of screening and monitoring methods and technologies from which they must choose the necessary elements in order to perform effectively and efficiently their aviation security tasks.

2.7.1 The Commission notes that current legislation does not permit airports to replace systematically any of the recognised screening methods and technologies by Security Scanners. Only a decision of the Commission, subject to comitology procedure, supported by Member States and the European Parliament can be the basis for allowing Security Scanners as a further eligible method for aviation security.

3. Comments

3.1 The EESC has significant, grave reservations about the approach taken by the Commission’s Communication. In principle, the EESC opposes the potential adoption and implementation of a future regulation which could place considerable burdens on private individuals, affecting the exercise of their fundamental rights. However, given the swiftness with which this technology evolves, the Committee could be in favour of

a security scanning device using less intrusive technology provided that it is fully reliable with no impact on fundamental rights or risks for human health.

3.1.1 More specifically, the EESC highlights certain aspects of the communication which display serious legal shortcomings.

3.1.2 Firstly, there are doubts as to whether the main objective of the legislative act in question (the widespread introduction in all EU airports of ‘Security Scanners’) is the most suitable way to achieve maximum aviation security. Even though the Commission maintains that the introduction of scanners would be optional, passengers would not have the option of choosing whether or not to undergo checks. The Committee believes that serious consideration should be given to alternatives to the use of security scanners or body scanners. An alternative would be to use technical systems to identify broad potential sources of threat which could then be investigated in greater detail by means of ‘pat-down’ searches.

Before adopting a measure on this scale, the ‘proportionality test’ should be carried out, weighing up the need for its adoption with other factors, such as the potential costs of setting up such security scanners.

It is currently too great a burden on the public purse to set up these systems (cost of purchasing basic equipment plus additional support required) in all EU airports, given the serious doubts that exist regarding their reliability, public health and the impact on fundamental rights.

The EESC believes that it would be more logical, given the fast-developing market, to wait for other technology that is more advanced, less intrusive and more in line with the objective to be achieved – namely, aviation security.

3.1.3 Secondly, the EESC has reservations about the severe limitation of fundamental rights that the implementation of the regulation will entail. In one regrettable case, at a Florida court where millimetre wave technology was used, agents retained 35 000 images which were then posted on the Internet, breaching the fundamental rights of thousands of people.

3.1.4 Lastly, the Communication’s choice of legal vehicle and the adoption procedure could be questioned.

3.2 All in all, in the light of the criteria long established in the case law of the European Court of Justice and the European Court of Human Rights, the communication does not appear to comply fully with the three criteria of necessity, proportionality and legality that must be displayed by any measure adopted by the public authorities of a Union (or State) based on the rule of law, so as not to reduce or limit the exercise of people’s rights and freedoms.

3.2.1 As regards the first aspect mentioned, there are serious reservations concerning the tenuous link between the proposed measure (the introduction of Security Scanners) and the objective of achieving higher aviation security standards.

3.2.2 When it comes to the impact of adding new methods and technologies following various aviation security incidents in recent years, the Commission itself notes in the communication that this 'proves more and more inefficient', calling instead for 'a more holistic approach [...] in which enhanced intelligence sharing and human factor analysis [...] would constitute key elements in the future'.

3.2.3 This assessment coincides – not by accident – with the position of the European Data Protection Supervisor who, at the request of the Commission, drew up an ad hoc report on the controversial legislation, and has defended this position in every opinion on the application of European security measures in the face of terrorist threats.

3.2.4 A balance must be reached between the need to adopt a non-discriminatory European approach to the problem of aviation security and the definitive establishment of 'one-stop security', in compliance with fundamental rights, particularly when it comes to voluntarily submitting to checks using these technologies.

3.2.5 The position of the Working Party instituted by Article 29 of Directive 95/46/EC is stronger still. In its report adopted on 11 February 2009, it states that these scanners are not alternatives to the other methods already in use for detecting aviation security threats, and even concluded that there are no factors to date that demonstrate the need to replace current airport security monitoring measures by these scanners.

3.3 Secondly, the Committee also wishes to express its deep concern at the significant impact that the application of the regulation resulting from the communication could have on the exercise of fundamental rights.

3.3.1 The focus on the fundamental rights affected stands in stark contrast to the extensive analysis of the financial cost of installing scanners in airports in order to justify their benefits.

3.3.2 The aim here is to strike the right balance between freedom and security, and this requires a careful interpretation of legislation for various reasons.

3.3.3 Firstly, the rights and freedoms most affected are almost exclusively those forming what the European Court of Human Rights considers to be the untouchable hard core of

public policy established by the European Convention of Human Rights.

3.3.4 Therefore, any restriction of these rights must be exceptional; with no watering down of legal guarantees and it must be subject to supra-national oversight and compatible with the practices of an advanced democratic society. In the future regulation, the Commission must provide for summary and priority procedures – or refer to those that already exist in the Member States – in order to resolve any breaches of fundamental rights.

3.3.5 Moreover, as pointed out by Advocate General Sharpston in her conclusions to Case C-345/06 (Heinrich), which also concerns the adoption of a legislative text from the European Commission in the field of aviation security, there is no place in the EU for arguments justifying the suspension or restriction of guarantees of fundamental rights in order to address risks to public security, even where these are particularly high owing to difficult times or circumstances.

3.4 The EESC has particular concerns with regard to the health of passengers and of staff submitted to checks in the course of their work. In order to protect against any health risks arising from the repeated use of sophisticated equipment, the Committee therefore urges that such equipment be operated by appropriately qualified staff. Correspondingly, good pay and employment conditions are key to this. Employing qualified staff would help to reduce frequent walk-through metal detector checks which pose a risk to health.

3.5 The EESC hopes that the Commission's proposal will set a high level of health protection, based on duly verified, conclusive, reliable scientific research and opinions which are satisfactory for passengers, with a view to ensuring the minimum possible exposure to any harmful effects. Moreover, specific rules should be laid down for especially sensitive or vulnerable passengers, such as pregnant women, children, people with disabilities or with specific illnesses making this type of check inadvisable.

3.6 Finally, there is no conclusive proof that such scanners pose no risk to human health, nor has any code of conduct meeting legal requirements for personal data protection been adopted with a view to the possibility that use of these scanners might become widespread. The Commission should therefore develop the content of the protocols drawn up to ensure that they respond sufficiently to concerns about fundamental rights, and should circulate these so that passengers are above all aware that the use of the scanners is strictly voluntary and by no means mandatory.

3.6.1 In any event, it must be made possible to opt out of checks using the scanners, and there must be sound legislative guarantees that those who opt out will not suffer additional burdens such as facing annoying delays while queuing for security checks or exhaustive searches – although the Communication includes neither of these provisions.

3.7 Another aspect that is cause for some confusion is the Commission proposal's use of terminology and the way in which the subject is presented.

3.7.1 The Commission uses the term 'Security Scanners' from the outset, replacing the term 'body scanner' which had previously been used in the public consultation carried out on the same topic by the Commission, as required by the EP resolution of 23 October 2008.

3.7.2 Changing the terminology is an attempt to make the communication more politically attractive with a view to its adoption, as demonstrated by the Commission's favourable attitude to the introduction of these devices as part of the array of aviation security measures that will have to be applied in EU airports.

3.7.3 Thus, for example, point 34 of the communication states that scanners may replace the other techniques used in aviation security.

3.7.4 Likewise, point 45 states that, given the technology at hand today, 'it is clear' that these devices 'would have maximised' the probability of detecting threats and will provide a 'considerably enhanced' prevention capability.

3.7.5 Point 82 reiterates that the deployment of these devices would enable large airports to achieve 'greater flexibility and potential to further strengthen aviation security'.

3.7.6 Given the various uncertainties surrounding the use of these devices and their undeniable impact on rights and public freedoms, it would be more appropriate to put forward a more diverse text presenting the current situation and possible alternatives more objectively.

3.7.7 The Commission's drafting approach affects the last of these aspects, relating to the choice of legal vehicle (regulation) and the suitability of the procedure selected for its adopted (comitology procedure).

3.8 All in all, there are serious doubts, not as to the legality, but rather the legitimacy of the communication.

3.8.1 Clearly, the Commission can act in this field on the basis of the powers vested in it by Article 4(2) of Regulation No 300/2008 of the European Parliament and of the Council.

3.8.2 However, the Commission should have taken far greater care when drawing up such a controversial proposal, particularly in the light of recent experiences, where legal challenges resulted in it having to amend acts in the same field.

3.8.3 In these circumstances, it would seem more appropriate to opt for a decision aimed at all the Member States or even – in order to give greater room for manoeuvre to the competent authorities and allow for a longer period in which to (voluntarily) test the scanners – a recommendation.

3.8.4 Similarly, it should be stressed that the comitology procedure followed by the Commission in order to adopt the future legislative proposal, although legally valid, is too restrictive and obscure for such an important act.

3.8.5 This holds all the more true given that the Lisbon Treaty, in the new Article 290 TFEU, lays the groundwork for a new mechanism under which the Commission will exercise the powers delegated to it by the Council and the Parliament, whereby the delegation may be repealed without the need for further justification (Article 290(2)(a)). In this context, the Commission should carefully consider whether the significant impact that the proposal for a regulation would have on people's existing legal rights if it entered into force should be aired in a wider institutional framework open to public debate by all stakeholders, and open to the political debate between representative parties that is part and parcel of parliamentary democracy, and in which the European Parliament, in its debate on fundamental rights, should play a key role – an approach clearly not fulfilled by the comitology procedure.

Brussels, 16 February 2011.

The President
of the European Economic and Social Committee
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