



Surveillance, Data Protection and the Role of the EU Agency for Fundamental Rights

Niraj Nathwani, FRA, June 2009

relevant FRA projects

- FRA data protection study
- PNR opinion

FRA data protection study

- Data protection study expected for publication in late 2009
- Purpose
 - identification of gaps in EU data protection law
 - conclusions and opinions of FRA for improvement of data protection at EU level

EU acquis data protection

- EU Charter of Fundamental Rights: Art 7 (respect for private life) and Art 8 (data protection)
- Directive 95/46/EC: data protection directive
- Directive 2002/58/EC: e-privacy
- Directive 97/66/EC: data retention
- Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters

Effects of Pillar Structure

- First pillar: protection by variety of EC directives
 - minimum standards for data processing within Member States
- Third pillar (police, justice): Council Framework Decision 2008/977/JHA
 - limited scope: only covers *transborder flows of data between law enforcement authorities of the Member States*
 - no minimum standards for data processing within Member States

Security and Defence

- Gaps in EU data protection law:
 - Article 13/1 of EU data protection directive: restrictions to safeguard: (a) national security; (b) defence; (c) public security”
- Some Member States exempt these areas from national data protection law
- no proportionality requirement explicitly foreseen

Video Surveillance

- Preamble recital 14 of the EU data protection directive: sound and image data included → video surveillance covered
- Article 33 of the Data Protection Directive provides that the Commission shall examine the need for a special instrument for video surveillance.
- In some Member States (for example DK), new legislation was adopted which facilitates video surveillance (no need for prior approval etc.).

Suggestions

- suggestion for creation of minimum standards of data protection in third pillar
- suggestion for integration of proportionality principle concerning data processing for security and defence
- suggestion for a special instrument for video surveillance

PNR

- PNR stands for Passenger Name Record.
- Data collected in the process of flight booking (record of passenger's travel requirements)
- EU under pressure to share PNR data with US: negotiations between EU-US
- Proposal for framework decision for use of PNR in EU (COM 2007/654).
- Purpose: fight against terrorism and organized crime
- Method: creation of risk indicators, intelligence on travel patterns

FRA PNR opinion

- French Presidency requested opinion from FRA (amongst other expert bodies like EDPS and Art 29 Working Group)

FRA PNR opinion (2)

- 3 fundamental rights identified:
 - respect for private life (Art 8 ECHR, Art 7 CFR)
 - data protection (Art 8 CFR)
 - non-discrimination (Art 21 CFR)

FRA PNR opinion (3)

- Limitations of fundamental rights: requirement of precision and foreseeability; EU needs to avoid imprecise terms (“general remarks”, “associate”, “terrorist offence”, “organised crime”)
- Limitation of fundamental rights: requirement of necessity; more evidence for usefulness of PNR data needed
- Lack of safeguards; independent control body; procedures for rights of data subjects (access, rectification)

FRA PNR opinion (4)

- Profiling: need for explicit ban of profiling on the basis of stereotypes based on ethnicity or religion.
- Prevention of indirect discrimination: monitoring of who gets targeted in fact by profiling.

Thank you

- Many thanks for your kind attention