

Legal base for harmonized data protection

Draft discussion paper

Stefan Jenner Meeting of IALA LAP 12 March 7-8, 2013

1. Introduction

There is a great demand today to exchange shipping information. Great importance is attached to the position data of the ships. Such data is contained in the AIS data records.

To satisfy this need for exchange, the question has to be answered whether any legal obstacles to be observed here, and how they can be overcome.

2. The actual need to share AIS data

Following international initiatives and projects are given as examples of the need for a vessel traffic data exchange:

- Common Information Sharing Environment as part of the Integrated Maritime Policy of the EU with the project MARSUNO, BMM, CoopP, POV-CISE
- SUCBAS (Surveillance Cooperation Baltic Sea) – military surveillance network in the Baltic Sea
- HELCOM (AIS-HELCOM-Server in the Baltic Sea)
- North Sea Data Exchange
- SSN (SafeSeaNet) driven by EMSA
- EUROSUR driven by FFRONTEX
- MARSUR driven by EDA

There are also developments in the safety of navigation and in the shipping industry needing intensive exchange of vessel data such as E-Navigation and E-Maritime.

E-Navigation

E-Navigation is an overarching concept developed under the patronage of the IMO to create **safety** and security in maritime shipping by better organization of information flow on ships and on shore, and **better data exchange** and communication between the two sides.

IMO- and IALA-definition: *E-Navigation is the harmonized collection, integration, exchange and presentation and analysis of maritime information onboard and ashore by electronic means to enhance berth to berth navigation and related services, for safety and security at sea and protection of the marine environment.*

Actual projects are for examples:

Mona Lisa

ACCSEAS

These projects develop services for the exchange of vessel data between ships and between ship and shore

E-Maritime

The EU e-Maritime initiative aims to promote coherent, transparent, efficient and simplified solutions based on advanced information technologies (EU-Commission).

This means Maritime transport data are used to enhance the transport chain in a whole.

This shows that there is already a concrete need to collect data not only shipping but also to pass on existing data to the widest range of users.

Currently shipping traffic data originate from different sources:

VMS (common fisheries policy) Regulation (EC) 1489/97 and 2244/2003

LRIT (Long Range identifications and Tracking of Ship SOLAS V 19-1 IMO Resolution MSC.202(81)

Ship Reporting Systems SOLAS V 11

Notification of dangerous goods aboard ship VTM Directive 2002/59/EC

Port security notification Regulation (EC) 725/2004 SOLAS XI-2 ISPS-Code

AIS Automatic Identification System SOLAS V 19 2.4

Legal restraints for data exchange

Here we will consider what legal requirements exist in the exchange of AIS data.

AIS data differ on an essential point from the other above-mentioned ship data collection systems. They are freely available to anyone who uses a VHF device with the appropriate frequencies.

That circumstance is in the legal status and argumentation important. First, I would like to briefly identify the legal basis for AIS. Legal Base for AIS in the international Law is SOLAS Chapter V Regulation 2. The so called VTM EU Directive (EC) 59/2002 requires Member States to establish AIS shore stations. In national law directly applicable regulations for mandatory equipment, the transmission and processing of data received are implemented. The protection of data is based in the EU under the Directive (EC) 95/46 and otherwise in accordance with the national data protection law.

3. Legal restraints for data exchange

Are AIS Data personal data ?

The first question on the application of data protection law, are the AIS-data personal data.

What personal data are, is defined in Art. 2 EU Directive (EC) 95/46:

'Personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

The Content of AIS data are static data of the ship, like IMO-Number, Callsign etc., dynamic Data, like speed over ground, position or course over ground and voyage data.

This information are not directly related to natural persons. But it is possible with the help of additional informations on the IMO number and the crew list to make statements about the behavior of a particular skipper during the cruise. This plays in the investigation of accidents in lawsuits an important role when it comes to the finding of individual guilt. In individual cases, the vessel or IMO number refers to the owner, who may be a natural person.

For the term personal data within the meaning of the Directive (EC) 95/46, the possibility of an indirect assignment to individuals is sufficient. In its content, AIS data could be Personal Data.

Something else could arise from the fact that these data are freely accessible to the owner of a corresponding FM receiver (see EU Commission, Legal Aspects of Maritime Monitoring & Surveillance Data, October 2008, page 32, 80).

This conclusion may not be shared. Just because a piece of information is not particularly effectively protected, it does not lose its legal protection. An example is the copyright of images and photos in the Internet. This can also be saved by anyone, distributed and published. One need only be in possession of an Internet-enabled device. Despite this possibility, it is recognized that this content is protected by copyright. There is no legal principle according to which everything that is possible, is also allowed. The open access to AIS data changes nothing because they are covered by the Data Protection Act.

Moreover, there is also a need to protect the data legally. The IMO warned of the dangers of unprotected access to AIS data in the Internet (MSC 79 th session).

Furthermore, in Germany, inland waterway shipping companies have clearly called for the protection of the AIS data, which they have submitted, to protect their economic interests (ZfB 2011, 46).

For this reason, the German law determined that only in certain cases, the AIS data can be collected and disseminated (§ 9e SeeAufgG). Austria has a similar regulation for AIS data in inland waterways (§ 24 Abs. 19 Schifffahrtsgesetz).

4. AIS Data as personal data - Consequences

This has the following consequences for the data processing:

- Processing of AIS data needs to be legitimate
- Principle of purpose-limitation
- Deletion of data when purpose is fulfilled
- Exchange only if purpose does not change or a legal base exists
- The proportionality principle is to respect at all times.
- Adequate security measures have to be made.

For the international exchange and the change over sectors, it is of particular importance:

- Intersectoral exchange = change of the purpose of data processing
- international exchange = adequate level of protection ensured ?

To ensure that the exchange of AIS data across national boundaries, the data protection provisions are observed, a legal framework is required. This may either be an agreement between the States or an international legal act. In the area of the EU this can also be done through a directive or regulation

5. Solution suggestions

Under international law, it is difficult to set an appropriate regulation. This regulation could be contained in SOLAS, since AIS is there regulated. The actual purpose of the IMO and SOLAS is not in data protection but to protect the safety at sea. Thereby specific data protection rules would be out of place in SOLAS.

Thus, inter-governmental schemes remain as an appropriate instrument. It commits the government to consider the existing data protection requirements. This could be for the EU area content of a directive or regulation.

For EU countries or countries that have a comparable level of data protection, the following minimum content would to regulate (in consideration of the principles laid down in the EU directive (EC) 95/46:

- purpose of exchange and limitation in the use of data after exchange must be defined
- clarification of the Data transmitter
- clarification of the Data Reciever
- Obtaining the principle of proportionality on proceeding data
- the transfer to third countries is under the conditions of Article 25 Directive (EC) 95/46 possible. This means, in essence, in the third country must be an appropriate level of data protection.