

European Commission

22 January 2021
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Dear Commissioner Schinas,
Dear Commissioner Johansson,
Dear Commissioner Reynders,

The European Data Protection Board (EDPB) took note of the Commission report on the review of Directive 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, which was published on 24 July 2020.¹

As main conclusion, the Commission considers that assessment of the first two years of application of the Directive is overall positive and takes the view that no amendments to the PNR Directive should be proposed at this stage. The Commission also considers that some issues like a possible extension of the Directive's scope shall be further assessed. Furthermore, before deciding whether to propose a revision the Commission wishes to take into account the results of the on-going evaluation of the Advance Passenger Information Directive as well as the outcome of the preliminary ruling requests currently before the Court of Justice.²

The EDPB wishes to recall that the European data protection authorities already identified a need for amending the PNR Directive after analysing the reasoning of the CJEU on the envisaged PNR agreement with Canada³. This was put forward to the Commission in a letter of the former Working Party 29 (WP29) on 11 April 2018.⁴ In the view of the WP29, the Court's Opinion, though not having a formal legal effect on other acts of the Union, highlighted deficiencies that could equally be found in other PNR instruments. Regarding the PNR directive, the WP29 in particular pointed out that the indiscriminate and long-term retention of PNR data and access to them after passengers have been cleared in security and border

¹ COM(2020) 305 final.

² Request for a preliminary ruling in Case C-817/19 *Ligue des droits humains*, OJ C 36, 3.2.2020, p. 16-17 (pending); request for preliminary ruling in joined Cases C-148/20, C-149/20 and C-150/20 *Deutsche Lufthansa*, OJ C 279/21, 24.08.2020, p. 21-22 (pending); request for preliminary ruling in joined Cases C-215/20 and C220/20, not yet published (pending).

³ CJEU Opinion 1/15 (Grand Chamber) of 26 July 2017.

⁴ https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=51023.

control checks are not in compliance with the Opinion of the CJEU. While the processing, retention and transfer of PNR data is generally subject to stricter rules in the EU PNR directive than in the envisaged PNR agreement with Canada, the WP29 considered in 2018 that the EU PNR directive is at least partly not in compliance with the requirements expressed by the CJEU in its opinion. The EDPB upholds the former position of the WP29 and reiterates its call upon the European Commission to take action in order to ensure compliance with the CJEU's opinion regarding both PNR agreements with the US and Australia as well as regarding the PNR directive.

In the view of the EDPB, the review report does not explicitly confirm, nor substantiate in a comprehensive manner, the necessity and proportionality of the indiscriminate collection and processing of PNR data for the purposes of the PNR Directive, but rather raises even more doubts.

In this context, and in relation to the necessity principle and the retention and use of PNR data, the EDPB recalls that the CJEU in its opinion on the envisaged EU-Canada PNR agreement considered that *“the average lifespan of international serious crime networks and the duration and complexity of investigations relating to those networks, do not justify the continued storage of the PNR data of all air passengers after their departure from Canada for the purposes of possibly accessing that data, regardless of whether there is any link with combating terrorism and serious transnational crime (see, by analogy, judgment of 21 December 2016, Tele2 Sverige and Watson and Others, C-203/15 and C-698/15, EU:C:2016:970, paragraph 119).”*⁵ While this reasoning applied in the case of data retention and processing after departing a third country, the EDPB considers that the conclusion of the CJEU and the link between the retention of PNR data and the combatting of serious transnational crime remains relevant within the scope of the EU PNR Directive review and necessity assessment.

Furthermore, the EDPB would like to stress that the CJEU also recently held in *La Quadrature du Net* and others, that *“legislation requiring the retention of personal data must always meet objective criteria that establish a connection between the data retained and the objective pursued”*⁶. In the same context, in *Privacy International*, it also held that the legislator *“must rely on objective criteria in order to define the circumstances and conditions under which the competent national authorities are to be granted access to the data at issue”*⁷. In light of this recent case-law, the EDPB considers that the review of the EU PNR Directive must rely on

⁵ CJEU Opinion 1/15 (Grand Chamber) of 26 July 2017, § 205.

⁶ CJEU Judgement in joined cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net* and others, § 133.

⁷ CJEU Judgement in case C-623/17, *Privacy International*, § 78.

solid and evidence-based elements able to demonstrate the connection between the PNR data retained and the objective pursued.

The Commission points out the Member States' assumption that the different means of processing of PNR data available to them (i.e. real time, reactive and proactive) have already delivered tangible results in the fight against terrorism and crime. Thirteen case studies are presented as qualitative evidence in the accompanying Staff Working Document.⁸ However, the specifics and detailed circumstances of these case studies have not been made available, which therefore cannot be considered as sufficient elements able to substantiate in a general manner the necessity and proportionality of the processing under the EU PNR Directive.

Remarkably, in at least one of those case studies, the processing of PNR merely led to a time advantage. The fugitive, convicted to a six-year prison sentence for drug-related offences who was wanted by the authorities, would have been subject to a Schengen Information System (SIS) check in border controls as a traveler from a third country anyway. This check would have resulted in the identification, since a wanted fugitive is subject to specific alert within SIS. Whether PNR data were necessary at all to identify this person, is at least questionable, and may not allow to draw general conclusions as to the necessity of a general retention of PNR data. In addition, the upcoming implementation of the European Travel Information and Authorisation System (ETIAS), applicable to travelers exempted from visa requirements, would render this case even less relevant, as the individual coming from a non-EU country would be identified prior to entering the EU, at the time of the request for travel authorisation.

Even if not being exhaustive, the small number of case studies has to be seen in the light of the total amount of processing, which is processing of mass data. The statistics gathered by the Commission for 2019 indicate that 0.59% of all passengers whose data have been collected have been identified through automated processing as requiring further examination. An even smaller fraction of 0.11% was transmitted to competent authorities.⁹ In the view of the Commission this means that, overall, PNR systems deliver targeted results which limit the degree of interference with the rights to privacy and the protection of personal data of the vast majority of bona fide travelers. However, there is still a gap of 0.48% of passengers who were subject to further verification measures and 0.11% who were subject to further measures of the competent authorities.

⁸ SWD(2020) 128 final.

⁹ SWD(2020) 128 final, p. 28.

What might seem a very small amount of passengers, looks much larger when transferring it into total numbers of persons, for example with figures from 2018 as provided by Eurostat. Though the Eurostat figures may also include flights for which PNR data may not have been systematically collected, the EDPB considers these figures as relevant to draw conclusions in terms of scale and volume¹⁰. In 2018, 1.1 billion passengers travelled by air in the European Union, 16 % of those in national transport, the rest in intra-EU and extra-EU flights.¹¹ This would amount to 924 million passengers being subject to the collection of PNR data. With 0,59% of technical hits there would have been 5.451.600 persons subject to further processing in one year, 4.435.200 of them would have been sorted out and still, data of 1.016.400 persons would have been transmitted to competent authorities for further measures.

The great amount of persons concerned compared to the little evidence for the usefulness of PNR data given in the few case studies up to now, raises serious doubts towards the proportionality of such mass data processing.

In any case, the high number of persons sorted out in manual verification after technical hits shows an issue with data quality. This is notably due to the fact that PNR data are collected by carriers for a different purpose. For example, PNR data do not necessarily contain birth dates of air passengers. Therefore, real time comparison with EU information systems such as the Schengen Information System will almost inevitably produce a number of false or at least unverifiable matches. All those matches would then need to be further processed for manual verification, which may often lead to a dead end because of the missing birth date. The same issue may arise with reactive processing.

Having considered the Commission review report of the EU PNR Directive, and taking into account the latest CJEU case law, the EDPB takes the view that the necessity and proportionality of collecting and processing PNR data for each of the purposes set out in the Directive, as referred to in its Article 19, is not sufficiently substantiated and demonstrated. While the EDPB would very much welcome any further detailed assessment and communication in this regard, it reiterates in the meantime its call on the European Commission to take action, in due time taking into account the related CJEU cases currently pending, in order to ensure compliance of all EU PNR instruments, including the EU PNR

¹⁰ On the basis of the information available and the practices of Member States for the collection of PNR data for intra-EU flights, it seems that the proportion of flights from the Eurostat figures which would not be subject to PNR data collection remains marginal.

¹¹ See Eurostat statistics under <https://ec.europa.eu/eurostat/documents/2995521/10265946/7-06122019-AP-EN.PDF/8f2c9d16-c1c4-0e1f-7a66-47ce411faef7>.

Directive, with EU law and case-law. The EDPB stands ready to engage in further discussions and provide input to the Commission in this task.

Yours sincerely,



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