



Statewatch Analysis

Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

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Only days after the “European Privacy and Data Protection Day, 2011”, the European Commission released its proposal for an EU Passenger Name Record (PNR) Directive for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (the proposal).¹ The proposal obliges air carriers entering into or departing from the EU, to provide the national authorities in the Member States with the passenger data which they routinely collect for reservation and commercial purposes, so that Member States can systematically store and analyse it.²

Background

The current proposal originates from the Commission Communication “Transfer of Air Passenger Name Record (PNR) Data: A global EU approach” of December 2003, when a European policy in the area was initiated.³ The cry for a common policy in this area was heightened after both the 9/11 and Madrid terrorist attacks and in the Council’s Declaration on combating terrorism in March 2004, a “common EU approach [for the] use of passengers’ data for border and aviation security and other law enforcement

¹ Proposal for a European Parliament and Council Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, 2.2.2011, (Proposal for a PNR Directive):

<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

² Commission Staff Working Paper Impact Assessment, Accompanying document to the Proposal for a PNR Directive, SEC(2011) 132;

<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-ia-sec-132-11.pdf>

³ COM (2003) 826 final

purposes” was called for.⁴ This was again reiterated in the Hague programme for 2005-2010.⁵ In this vein, the Commission in 2007 adopted a proposal for a Council Framework Decision on the use of PNR data for law enforcement purposes⁶ (2007 proposal). The European Parliament refused to vote on the **2007 proposal** in November 2008⁷ and such was **both criticised and opposed by the Parliament** for failing to produce legal certainty in relation to compatibility with the Charter of Fundamental Rights, as well as failing to adequately demonstrate that the use of PNR for the purposes of law enforcement is necessary and proportionate.⁸ Regardless of this however, the proposal for an EU-PNR scheme was included in “The Stockholm Programme” of 2009 and the Commission published the current proposal for an EN-PNR Directive on the 2 February 2011. As such and despite opposition, it seems that the EU is intent on pushing forward provisions which contribute even further to the creation of a surveillance state.

The core provisions of the Commission’s proposal

- *Transfer of passenger data from air carriers on international flights -*

The Commission’s proposal for a PNR Directive would oblige *air carriers flying into and out of EU Member States* to transfer passenger’s data to national authorities in the Member State of departure or arrival.

- *Data to be transferred -*

Air carriers operating flights between the EU and any third country will be required to transfer by electronic means the PNR data “already collected by them” to the Member State on the territory of which the international flight will land or depart, (a) 24 - 48 hours before the scheduled time for flight departure and (b) immediately after flight closure.⁹

PNR data is “unverified information” required by air carriers for their own reservation and commercial purposes.¹⁰ Such data includes travel dates, contact details, means of

⁴ <http://www.consilium.europa.eu/uedocs/cmsUpload/DECL-25.3.pdf>

⁵ See n.2

⁶ COM(2007) 654

⁷ <http://www.statewatch.org/eu-pnrobbservatory.htm>

⁸ European Parliament Resolution of 20.11.2008 - P6_TA (2008):

<http://www.statewatch.org/eu-pnrobbservatory.htm>

⁹ Article 6, Proposal for a PNR Directive:

<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

¹⁰ http://ec.europa.eu/home-affairs/news/intro/news_intro_en.htm

payment used, baggage and frequent flyer information, travel agent details and “general remarks”.¹¹

- *Processing of passenger data by Member States -*

The proposal further permits Member States to “process”, “collect”, “use” and “retain” this information as well as “exchange” between other Member States and third countries for the purposes of the prevention, investigation and prosecution of terrorist offences, serious crime and serious transnational crime.¹²

Each Member State will be required to establish Passenger Information Unit (PIU) to which airlines will be required to transfer data on passengers on international flights. These PIU’s will be responsible for collecting, storing, processing the PNR data. Upon analysis and assessment of the PNR data against “pre-determined criteria”, PIU’s are required to alert the authorities of any persons who (a) may be involved in a terrorist offence or serious transnational crime and who may require “further examination by the competent authorities” or (b) who may be “sought or under alert” according to national and international databases.¹³ Where links with terrorism and serious crime are suspected and such persons may be prevented from flying or arrested.¹⁴

- *Transfer of passenger data to other MS and third countries -*

Where a passenger, following assessment by the PIU, is suspected of being involved in a terrorist offence, serious transnational crime or is identified as being sought or under alert, Member States are required to transmit such passenger’s data to the PIU’s of other Member states, who will transmit it to the competent authorities, where it is considered necessary for the prevention, detection, investigation or prosecution of such offences.

Furthermore, a Member State’s PIU may request from the PIU of another Member State, the transmission of specific unmasked passenger data as well as the result of the processed passenger data, in exceptional circumstances for the purposes of responding to or investigating a specific terrorist offence or serious crime.¹⁵

¹¹ Annex, Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

¹² Article 1, Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

¹³ Articles 3 and 4, Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

¹⁴ Pop, “EU to collect data of international air travellers”, 1.2.2011, <http://euobserver.com/22/31731>

¹⁵ Article 7, Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

Member states are in addition permitted to transfer PNR data as well as the results of the PIU's analysis to any third country on a "case-by-case" basis and where it is necessary for the fulfilment of the purposes of the Directive.¹⁶

- *Period of data retention -*

All passenger data will be retained by the PIU's for 30 days after their transfer to the PIU of the Member State where the international flight is landing or departing. Upon expiry of this 30 day period, the passenger data shall be retained by the PIU's for a further period of 5 years, after which time it will be deleted.¹⁷

During this 5 year retention period, elements of the data (such as name, address, collected Advance Passenger Information and general remarks) which could serve to identify the passenger to whom the data relates is to be "anonymised" or masked and shall only be accessible only by limited number of PIU personnel and where reasonably believed to be necessary to carry out an investigation or prosecution.¹⁸

Where the assessment of the passenger data against the PIU's "pre-determined" criteria has *falsely* identified persons who (a) may be involved in a terrorist offences or serious transnational crime or (b) who may require "further examination by the competent authorities" and has thus returned a "negative match", PIU's will be nonetheless be permitted to retain the passenger data for a maximum of 3 years.¹⁹

- *Review and possible extension of PNR Directive -*

Although the current proposal relates only to air carriers operating flights into and out of the EU, the proposal has asserted that not only will a review be carried out of the necessity of extending the scope of the Directive to include internal flights,²⁰ but that the current proposal is very much "part of a step-by-step approach" ²¹ to the systematic collection and assessment of traveller's movements.

Where the future lies for the PNR proposal

¹⁶ Article 8, Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

¹⁷ Article 9, Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

¹⁸ Article 9(2), Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

¹⁹ Article 9(4), Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

²⁰ Article 17, Proposal for a PNR Directive:
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-com-32-11.pdf>

²¹ Commission Staff Working Paper Impact Assessment, Accompanying document to the Proposal for a PNR Directive, SEC(2011) 132, 32;
<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-staff-working-paper-sec-133-11.pdf>

The EU currently lacks a uniform approach for the use of the PNR data provided by passengers in the process of booking and checking in for flights.²² However, although only the UK, France and Denmark,²³ the proposal aims to “harmonise” and regulate at EU level, Member States’ use of PNR data for law enforcement purposes relating to terrorist offences and serious crime.²⁴ Essentially the proposal marks **only the commencement of a broader scheme** of PNR data collection, retention and assessment and by regulating for this at EU level, the remaining *21 Member States that currently do not* systematically collect and analyse PNR will become obliged to do so. As the proposal indicates, as well as the support it has received from many Member States,²⁵ there is a distinct possibility if not an inevitability that extensive governmental powers will be granted to **monitor** the PNR data of passengers as they travel by air *within* the EU.²⁶

The UK delegation has proposed amending the proposal to include “intra-EU travel as well as travel between Member States and third countries,” once a Member State gives notice in writing to the Commission that it wishes to apply the provisions of the Directive to internal flights.²⁷ In addition, the UK has proposed in its amendments that Member States be allowed to decide the specific intra-EU, as well as international routes on which it wishes to collect PNR data and that each Member State should be granted the complete discretion of changing the particular internal and international flights at any time.²⁸ Accordingly, Member States will be granted the **absolute discretion to monitor whichever routes and thus passengers they wish**. Furthermore the answer to whether the assessment of PNR data will be halted at air travel remains unresolved as an “extension to sea and rail travel could be considered in the future ...”²⁹ and it thus seems that we really are “sleep-walking into a surveillance society.”³⁰

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²² Zeldon, *European Union: Proposed Directive on Airlines’ Passenger Data Transfer*, http://www.loc.gov/lawweb/servlet/lloc_news?disp1_l205402505_European%20Union

²³ See n.2 at 14

²⁴ Proposal for a PNR Directive, 4: n.1

²⁵ Council of the European Union, *Outcome of Proceedings*, 6847/11, CATS 13, COMIX 108, Brussels, 22 Feb. 2011: <http://register.consilium.europa.eu/pdf/en/11/st06/st06847.en11.pdf>

²⁶ Council of the European Union, *Note from UK delegation to delegations*, 6359/11 LIMITE, GENVAL 8 CATS 10 AVIATION 21, Brussels, 10 February 2011 DATAPROTECT 9

²⁷ Council of the European Union, *Note from UK delegation to delegations” on the subject of the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime - Proposed Amendments*, Brussels, 10 February 2011 [Note from UK delegation to delegations of the Council of European Union re proposed amendments to the proposal]:

<http://www.statewatch.org/news/2011/feb/eu-pnr-uk-proposals-6359-11.pdf>

²⁸ Article 6 and Article 6A, Note from UK delegation to delegations of the Council of Europe

²⁹ See n.2 at 36

³⁰ Landrum, *Are we sleep-walking into a surveillance society?*”

http://www.theosthinktank.co.uk/Are_we_sleep-walking_into_a_surveillance_society.aspx?ArticleID=2188&PageID=47

Essentially, upon implementation of the Commission's proposal, which taking into account the support by other Member States may well include the proposed amendments by the UK Government, *passengers on all intra- and extra-EU flights* will be subjected to "extensive tracking, tracing and screening."³¹

Governments have attempted to quell criticism of such intrusive proposals with the much exhausted argument that those with "nothing to hide ... have nothing to fear" and have insisted on the necessity of these measures in the name of security and the "prevention, detection, investigation and prosecution of terrorist offences and serious crime".³² Since the failed 2007 proposal, the scope of the current proposal has been extended to include "serious offences" which are punishable by a custodial sentence of 3 years.³³ The systematic collection, storage and assessment of personal information interferes with the right to a private life and to the protection of personal data as guaranteed by Article 8 of the ECHR as well as Article 7, 8 and 52 of the Charter on Fundamental Rights of the European Union. For any state interference with these rights to be legitimate, they must be both proportionate and necessary in a democratic society. Difficulties thus arise with the Commission's interchangeable use of "terrorist offences", "serious crime" and "serious transnational crime" and the fact that the Commission have made no real attempt to justify the proposed measures other than by making the non-substantiated, sweeping statement that "most *organised crime* involves international travel,"³⁴ regardless of the fact that the scope of the current proposal no longer extends to "organised crime" as did the 2007 proposal.³⁵ In addition, the Commission has made the flawed suggestion that the crime rate in 2007 was "143.948 criminal offences per 100.000 population."³⁶ So far the Commission has produced no concrete evidence to demonstrate the actual usefulness of the collection of PNR data for the prevention of serious crime or terrorist offences and the Commission attempts to justify the use of PNR by discussing terrorism and crimes involving an element of travel more generally, rather than by demonstrating and linking the claim that the use of PNR specifically has led to the prevention and detection of terrorism and serious crime.³⁷ To add to this the UK delegation has attempted to justify the extension of the provisions of the proposal to intra-EU flights based on the Commission's already non-substantiated reasoning. As noted

³¹ Veld, MEP *Moving Dots: The need for proportionality in monitoring and screening travellers*: http://www.europeanprivacyday.org/sites/default/files/European_data%20protection_2011.pdf

³² Proposal for a PNR Directive, see n.1

³³ Article 2, see n.1

³⁴ Explanatory Memorandum to the Proposal for a PNR Directive, 2, see n.1

³⁵ Veld, see n. 34

³⁶ Explanatory Memorandum to the Proposal for a PNR Directive, 8, see n. 1; this seems to indicate that each EU citizen commits 1.43 recorded crimes per year.

³⁷ *Ibid.* 5

by the Fundamental Rights Agency, it is “essential to demonstrate effectively” that the collection and use of PNR data is “beyond any doubt absolutely necessary” for combating terrorism and serious crime.³⁸ However, save for some unreferenced statements indicating that the use of PNR data assists the authorities in the prevention and detection of serious crimes and terrorism, by identifying previously “unknown” suspects,³⁹ the proposal fails to demonstrate exactly *how* the processing and scrutiny of PNR data contributes to the overall aim of the directive in order to guarantee proportionality.

In addition, the Commission has asserted that in “harmonising” and employing an EU approach to the use, collection and assessment of PNR data, “security gaps” will be avoided and “legal certainty” will be promoted.⁴⁰ Surely this is undermined by the UK’s proposed and largely well received amendments which would grant each Member State the discretion to “decide the particular intra-EU routes on which it wishes to collect PNR data.”⁴¹ The Commission wish to counter-act the possibility of the creation of “27 considerably diverging systems,”⁴² yet this would permit individual Member States to monitor and assess the PNR data of indiscriminate routes and passengers. Depending on your country of residence, frequency of travel and chosen route, EU citizens will be subjected to varying degrees of surveillance, which serves to undermine the Commission’s proposal. Considering the indicated support for the UK’s proposed amendments to the proposal, the EU will effectively be legitimising Member States’ policing and scrutiny of their citizens through the façade of democratic and harmonised EU action, while simultaneously failing to demonstrate the necessity and proportionality of such intrusion.

The proposal calls for the systematic collection and processing of EU and non-EU citizens who are generally **not suspected of any crime**, except the act of **booking a flight**.⁴³ Democracy would not accept the searching of premises without reasonable suspicion or a warrant, yet it seems that we are to “meekly accept the equivalent of such random searches” of our personal data in an electronic environment.⁴⁴ As stated in the Charter of Fundamental Rights of the EU, there is an explicit right to data protection. In addition, according to Directive 95/46EC on the protection of individuals with regard to the processing of personal data and the processing of such data, personal data must only be

³⁸ Opinion of the Fundamental Rights Agency, <http://www.statewatch.org/news/2008/oct/ep-pnr-opinion-fra.pdf>

³⁹ Explanatory Memorandum to the Proposal for a PNR Directive, 4, seen n. 1

⁴⁰ See n.2: 15

⁴¹ Note from the UK delegation to the delegations of the Council of the European Union re proposed amendments to the proposal, n. 28

⁴² See n.1, 4

⁴³ Brouwer, “The EU PNR System and Human Rights: Transferring passenger data or passenger freedom?”, CEPS Working Document No. 320/September 2009

⁴⁴ Veld, see n. 34

collected for *specified* and *explicit* purposes.⁴⁵ Difficulty again arises with regard to the Commission's interchangeable purpose of the proposed PNR directive as it remains unclear as to whether the purpose of the instrument is merely the prevention etc. of "terrorist offences" and "serious crimes" as well as "organised crime" or whether as per Recital 28, it extends to the "possibility ... [that] ... Member States ... [may] ... provide ... for a system of collection and handling of PNR data *for purposes other than those specified*."⁴⁶ In addition, PNR data will be transferable (including in some instances *unmasked* data) between Member States as well as to third countries.⁴⁷ As the proposal makes no reference to the requirement that "the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited,"⁴⁸ the transfer of PNR data to third countries "creates the risk of serious infringements of fundamental rights."⁴⁹

The proposal marks only the beginning of the use of PNR data to monitor the travel of air travellers. Based not only on the UK's proposed amendments to the proposal, but also on the Commission's own acknowledgement that the proposal is part of a "step-by-step approach,"⁵⁰ which will see the systematic collection, retention and analysing of passenger's data whether they fly from or to the EU and a third country (as per the proposal), or whether they fly *internally* within the EU (as per the UK's proposed amendments to the proposal.) Alarming, plans for the surveillance of traveller's do not stop there and the extension of this proposal to the use of PNR data of sea and rail travellers has not been completely ruled out.⁵¹ Thus the Commission, together with support from the UK, aims to contradict one of the core principles of the EU, namely the citizen's right to freedom of movement within the EU which on this "slippery slope" may be completely undermined if an EU travel authorisation system comes into operation.⁵²

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⁴⁵ Article 6.1(b) EC Directive 95/46

⁴⁶ Explanatory Memorandum to the Proposal for a PNR Directive, Recital 28, see n. 1

⁴⁷ Article 8(c), Proposal for a PNR Directive, see n. 1

⁴⁸ 57th Recital in the preamble to Directive 95/45/EC

⁴⁹ Opinion of the Fundamental Rights Agency, 9: see n. 39

⁵⁰ Commission Staff Working Paper Impact Assessment, Accompanying document to the Proposal for a PNR Directive, SEC(2011) 132, 32:

<http://www.statewatch.org/news/2011/feb/eu-com-eu-pnr-staff-working-paper-sec-133-11.pdf>

⁵¹ See n.2 at 36

⁵² European Commission, The Commission Work Programme for 2011, "Communication on the possibility of introducing an EU ESTA" at

http://ec.europa.eu/governance/impact/planned_ia/docs/2011_home_015_eu_esta_en.pdf