



**According to Advocate General Pitruzzella, the transfer and the generalised and undifferentiated automated processing of PNR data are compatible with the fundamental rights to respect for private life and to the protection of personal data**

*By contrast, a generalised and undifferentiated retention of PNR data in a non-anonymised form can be justified only where there is a serious, actual and present or foreseeable threat to the security of the Member States, and only on condition that the duration of such retention is limited to what is strictly necessary*

*Furthermore, the transfer of data appearing under the heading 'General remarks' laid down by the PNR Directive does not meet the requirements of clarity and precision required by the Charter*

The use of PNR data is an important element in the fight against terrorism and serious crime. To that end, the PNR Directive <sup>1</sup> requires the systematic processing of a significant amount of data relating to air passengers entering and leaving the European Union. In addition, Article 2 of this directive provides Member States with the possibility to apply the directive to intra-EU flights also.

The 'Ligue des droits humains' (Human Rights League) (LDH) is a not-for-profit association which filed an action for annulment with the Cour constitutionnelle (Constitutional Court, Belgium) in July 2017 against the Law of 25 December 2016 which transposed the PNR Directive and the API Directive <sup>2</sup> into Belgian law. According to the LDH, this Law infringes the right to respect for private life and to the protection of personal data, guaranteed under Belgian and EU law. It criticises, first, the very broad nature of the PNR data and, second, the general nature of the collection, transfer and processing of those data. In its view, the Law also infringes the free movement of persons in that it indirectly re-establishes border controls by extending the PNR system to intra-EU flights.

In October 2019, the Belgian Constitutional Court referred ten questions to the Court of Justice for a preliminary ruling on the validity and interpretation of the PNR Directive and the API Directive, but also on the interpretation of the GDPR. <sup>3</sup>

In his Opinion delivered today, Advocate General Giovanni Pitruzzella states, first of all, that, where measures involving interferences with the fundamental rights established by the Charter of Fundamental Rights of the European Union ('the Charter') originate in a legislative act of the European Union, **the onus is on the EU legislature** to set out the **essential elements** which define the scope of those interferences. He then points out that provisions requiring or permitting the communication of personal data of natural persons to a third party, such as a public authority, must be classified, in the absence of consent on the part of those natural persons, and irrespective

<sup>1</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (OJ 2016 L 119, p. 132).

<sup>2</sup> Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data (OJ 2004 L 261, p. 24).

<sup>3</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).

of the subsequent use to which the data in question are put, as an interference with their private life and as an interference with the fundamental right to protection of personal data.<sup>4</sup> Such interferences can be justified only if they are provided for by law, if they respect the essential content of those rights and, in compliance with the principle of proportionality, if they are necessary and meet effectively objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

As regards, in the first place, the personal data which air carriers are required to transfer to Passenger Information Units (PIUs) under the PNR Directive, the Advocate General notes that the extent and seriousness of the interference with the fundamental rights to respect for private life and to the protection of personal data, entailed by a measure introducing restrictions on the exercise of those rights, depend, first and foremost, on the extent and nature of the data which are the subject of processing. The identification of those data is therefore an essential operation, which any legal basis introducing such a measure must necessarily carry out as clearly and precisely as possible. After noting that the use of general categories of information, which do not adequately determine the nature and extent of the data to be transferred, **did not satisfy the conditions of clarity and precision** laid down by the Charter, the Advocate General concludes that **point 12 of Annex I to that directive is invalid**, in so far as that provision includes, among the categories of data to be transferred, the heading 'General remarks', which is intended to cover all information collected by air carriers in the course of their operations of service provision, in addition to the data expressly listed in the other points of that Annex I.

In addition, the Advocate General points out that the data that air carriers are required to transfer to PIUs under the PNR Directive are **relevant, adequate and not excessive in relation to the objectives** pursued by that directive and that their scope **does not exceed what is strictly necessary in order to attain those objectives**. He considers, moreover, that this transfer is surrounded by **sufficient safeguards**, the objectives of which are, first, to ensure that only the data **expressly referred to** are transferred and, second, to ensure the **security and confidentiality** of the data transferred. The Advocate General also recalls that the PNR Directive sets out a **general prohibition on the processing of sensitive data**, including also their collection, with the result that the PNR system provides **sufficient safeguards** making it possible to exclude, at each stage of the processing of the data collected, that this processing may directly or indirectly take into account protected characteristics.

In the second place, the Advocate General considers that the generalised and undifferentiated nature of the transfer of PNR data and the prior assessment of air passengers by means of the automated processing of those data is compatible with Articles 7 and 8 of the Charter, which enshrine the fundamental rights to respect for private life and to the protection of personal data. In this regard, he takes the view in particular that the Court's case-law on data retention and access in the electronic communications sector<sup>5</sup> is not transposable to the system laid down by the PNR Directive. He notes, moreover, that the adoption of a system for processing PNR data, harmonised at EU level, as regards both extra-EU flights and, for the States which have made use of Article 2 of the PNR Directive, intra-EU flights, makes it possible to ensure that the processing of those data takes place in compliance with the high level of protection of the fundamental rights set out in Articles 7 and 8 of the Charter which that directive lays down.

More generally, the Advocate General stresses the fundamental importance, in the context of the system of safeguards put in place by the PNR Directive, of supervision by an **independent supervisory authority** which is **empowered to verify the lawfulness of that processing, to conduct investigations, inspections and audits** and to **deal with complaints lodged by any person concerned**. He states, in this respect, that it is essential that the Member States, when transposing this directive into national law, recognise **the full extent of these powers** for their

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<sup>4</sup> See, inter alia, judgment of 18 June 2020, *Commission v Hungary*, [C-78/18](#) (paragraph 124 and the case-law cited) and [PR No 73/20](#).

<sup>5</sup> See, inter alia, judgments of 21 December 2016, *Tele2 Sverige*, [C-203/15](#) and C-698/15 (see also [PR No 145/16](#)), and of 6 October 2020, *La Quadrature du Net and Others*, [C-511/18](#), C-512/18 and C-520/18 (see also [PR No 123/20](#)).

national supervisory authority by providing it with the material and staff resources necessary for it to carry out its task.

As regards, in particular, the prior assessment of air passengers, with regard, first, to the comparison of PNR data with the databases relevant for the purposes of the prevention and detection of terrorist offences and serious forms of criminality, and their corresponding investigations and prosecutions, which is the first aspect of this assessment, the Advocate General states that the concept of '**relevant database**' must be interpreted in accordance with the requirements of clarity and precision laid down by the Charter and in the light of the purposes of the PNR Directive. In his view, this concept must be interpreted as covering only national databases managed by the competent authorities and EU and international databases, directly operated by those authorities in the course of their duties, in addition to the fact that they must be **directly and closely related to the objectives of fighting terrorism and serious crime pursued by the PNR Directive**, which implies that they have been developed for those purposes. With regard, second, to the automated processing of PNR data in the light of pre-established criteria, which constitutes the second aspect of this prior assessment, the Advocate General takes the view, in particular, that such processing cannot be carried out by means of machine-learning artificial intelligence systems, which do not make it possible to ascertain the reasons which led the algorithm to establish a positive match.

Third, as to whether EU law precludes national legislation providing for a general five-year retention period for PNR data, without distinguishing whether or not the passengers concerned have been found, in the context of the prior assessment, to be liable to pose a risk to public security, the Advocate General proposes that the PNR Directive should be interpreted in accordance with the Charter, such that the retention of PNR data provided by air carriers to the PIU for a period of five years **is permitted, after the prior assessment has been carried out, only to the extent that a connection is established, on the basis of objective criteria, between those data and the fight against terrorism or serious crime**. A general and undifferentiated retention of PNR data in a non-anonymised form can be justified **only where there is a serious threat to the security of the Member States which is shown to be real and present or foreseeable**, linked, for example, to terrorist activities, and **only on condition that the duration of such retention is limited to what is strictly necessary**.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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