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ANALYSIS OF SELECTED EU MEMBER  
STATES' NATIONAL PNR  
IN LIGHT WITH THE EU PNR  
DIRECTIVE

Master thesis

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# TABLE OF CONTENTS

Acronyms used.....	3
Introduction.....	4

## 1. THE EU PNR DIRECTIVE: A CONTROVERSIAL MEASURE WITHIN THE EUROPEAN UNION

<b><u>1.1. Context surrounding the EU PNR Directive: the needs of a PNR data requirements within the EU</u></b> .....	10
1.1.1. International context	11
1.1.2. Differences between API and PNR systems	13
1.1.3. Security reasons to adopt a PNR system	17
<b><u>1.2. The response to the needs: the EU PNR Directive adoption</u></b> .....	20
1.2.1. EU PNR Directive's adoption	20
1.2.2. EU PNR Directive's implementation	22

## 2. COLLECTION AND ANALYSIS OF PNR DATA WITHIN THE EUROPEAN UNION

<b><u>2.1 - PNR system framework</u></b> .....	25
<b>2.1.1. Scope of application</b>	25
2.1.1.1. <u>Flights concerned</u>	26
a) EU PNR Directive	26
b) British PNR system	30
c) French PNR system	33
d) Belgium PNR system	35
2.1.1.2. <u>Targeted crimes</u>	36
a) EU PNR Directive	36
b) British PNR system	38
c) French PNR system	39
d) Belgium PNR system	44
<b>2.1.2. Establishing a Passenger Information Unit</b>	45
2.1.2.1. <u>Passenger Information Unit structure</u>	46
a) EU PNR Directive	46
b) British PNR system	47
c) French PNR system	47
d) Belgium PNR system	48
2.1.2.2. <u>Data protection officer</u>	49

<b>2.2. <u>PNR data processing</u></b> .....	52
<b>2.2.1. PNR Data collection</b>	52
2.2.1.1. <u>Data transfer obligation</u>	52
a) EU PNR Directive	52
b) British PNR system	53
c) French PNR system	54
d) Belgium PNR system	54
2.2.1.2. <u>Passengers' data collected</u>	55
a) EU PNR Directive	55
b) British PNR system	56
c) French PNR system	58
d) Belgium PNR system	59
<b>2.2.2. <u>Data processing safeguards</u></b> .....	60
2.2.2.1. <u>Directly after reception : auto deletion of additional data</u>	61
a) EU PNR Directive	62
b) British PNR system	62
c) French PNR system	63
d) Belgium PNR system	64
2.2.2.2. <u>Before data analysis: non-discrimination rules and restricted goals</u>	64
a) EU PNR Directive	65
b) British PNR system	66
c) French PNR system	66
d) Belgium PNR system	67
2.2.2.3. <u>While analysing PNR data: human factor</u>	67
a) EU PNR Directive	67
b) British PNR system	68
c) French PNR system	68
d) Belgium PNR system	69
<b>2.2.3. <u>PNR data transfer</u></b> .....	69
2.2.3.1. <u>National level</u>	70
a) EU PNR Directive	70
b) British PNR system	70
c) French PNR system	71
d) Belgium PNR system	71
2.2.3.2. <u>EU level</u>	71
a) EU PNR Directive	71
b) British, French and Belgium PNR system	72
<b>2.2.4. <u>PNR data storage</u></b> .....	73
2.2.4.1. EU PNR Directive	73
2.2.4.2. British PNR system	74
2.2.4.3. French PNR system	75
2.2.4.4. Belgium PNR	75
Conclusions & Recommendations .....	76
Bibliography.....	82
Abstract & summary.....	91
Annexes.....	94
Honesty declaration.....	98

# ACRONYMS USED

API= Advanced Passenger Information

Charter= the European Union Charter of Fundamental Rights

EU= European Union

ECJ= European Court of Justice

ECHR= European Convention on Human Rights

EUROPOL= European Police Office

GDPR= General Data Protection Regulation

INTERPOL= International Police Office

PNR= Passenger Name Record

PIU= Passenger Information Unit

TEU= Treaty on the European Union

TFEU= Treaty on the Functioning of the European Union

UK= United Kingdom

USA= United States of America



# INTRODUCTION

## 1. Problem of research

Every time a person books a flight, this person needs to fill some personal information. Once the flight is booked, this information is gathered into a Passenger Name Record (PNR) file. The PNR has been used for decades in the airline and travel industries for purposes of commercial targeting<sup>1</sup>. The beginning of the XXIst century marked the era of a new use of the PNR data. It contains crucial information, which could help the national authorities to do some profiling activities, in order to prevent criminality. More and more States decided to do so, as for instance the United States of America, Australia, South Africa, Japan or the United Kingdom<sup>2</sup>. These States collected the PNR data of all the air passengers passing by its territory. This situation led to a legal loophole in the European Union for a while, which needed to be closed and solved. The problem was that the States were collecting and analyzing the PNR data of the European Union citizens, while there was almost no reciprocity within the European Union Member States, except for the United Kingdom. In order to protect the data collected by the third countries, but also to be able to collect and use the data of the passengers passing through the European Union, some international agreements for the use of the passengers' data within the country were concluded (e.g. between the European Union and the United States of America, Canada or Australia<sup>3</sup>). However, these agreements allowed to protect the passengers' PNR data outside the European Union, but were not sufficient for the European Union to start collecting the data as well; it requires some rules and technical processes to follow. This is shortly why the European Union PNR Directive is needed.

The conducted research focuses on the EU PNR Directive and its implementation at national level in selected Member States. This Directive was adopted on the 14th of April 2016<sup>4</sup>, after many years of discussions and negotiations upon its needs and mainly its right balance regarding the challenged fundamental rights. The Member States needed to implement it in two years after its adoption, precisely by the 25th of May, 2018<sup>5</sup>.

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1 EDRI, consulted on 27th November 2017 - <https://edri.org/faq-pnr/>

[https://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pnr\\_report\\_20081218.pdf](https://www.dhs.gov/xlibrary/assets/privacy/privacy_pnr_report_20081218.pdf) p6

2 IATA API-PNR Toolkit - <http://www.iata.org/publications/api-pnr-toolkit/Pages/index.aspx> p4-5

3 Europa, EU PNR Directive introduction and third countries agreements - [https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange/pnr\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange/pnr_en)

4 Directive 2016/681, "EU PNR Directive" - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0681&from=EN>

5 EU PNR Directive, Article 18

However, the harmonization is a challenge: some Member States had already got a PNR system introduced before the Directive was adopted (for instance the UK – which decided to take part of that directive, even though it had the choice (as it falls within the Area of Freedom, Security and Justice<sup>6</sup>)). Some other Member States did not have a PNR system already implemented, but started to create a draft law or a system before the final EU PNR Directive was actually voted. This action was partly pushed by the European Commission, which distributed some funds to help the Member States in that purpose<sup>7</sup>. As the transition period ended, we could raise the question if the current national system respect the rules (guidelines) established in the EU PNR Directive. This leads to the main question developed in this paper; “whether the British, French and Belgium systems are in line with the EU PNR Directive?”.

The first idea for this paper and its problematic was to include as many PNR national systems as possible, as far as they were already set up in the relative EU Member State. However, a real difficult access to the information needed was encountered, aggravated by the language barriers, but also the difference of constitutional framework, which is essential to compare laws and systems within several countries. Therefore, in order to present a good and complete comparative analysis, the choice was made to focus only on the Belgium, British and French systems, in light with the EU PNR Directive.

The British, French and Belgium systems were chosen for different reasons:

- systems adopted in different periods of time:
  - > the British system was already effective before the adoption of the EU PNR Directive, and was created independently from that European project,
  - > the French system was created in light with the EU PNR Directive drafts, but before the final text was adopted.
  - > the Belgium system was created after the EU PNR Directive adoption, in order to transpose it.
- technical reasons (mainly the language barrier): finding enough sources for other countries which already have an active PNR system was quite challenging, to not say impossible (as Hungarian or Spanish ones). As a French and English speaker, the author did the choice to focus on these three systems because it was easier to get a full understanding and enough information about them. They constitute a good approach also as they were all created at a different period of time, taking the EU PNR Directive as a basis. The Belgium system was

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6 Opt-in possibility of UK – Protocol 21 -

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/588184/jha-opt-in-background.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/588184/jha-opt-in-background.pdf)

7 EU Funds map, Annex II

firstly considered to be only an added value sometimes, depending on the interest and the available sources. Finally, the decision was made to include it fully in the comparative analysis, as enough information was actually available to do so, and it was relevant to include a country which based its system on the EU PNR Directive text and guidelines.

## **2. Relevance of the thesis**

The thesis topic is relevant thanks to the novelty of this European law, driven by the EU Directive. As the transition period just ended, it concretely means that all the Member States should currently have firstly an effective PNR system, and secondly that this system should be in perfect compliance with the EU PNR Directive.

This paper could also help the Belgium, French and British governments to check whether their system are ready to follow the EU PNR Directive guidelines. Some differences between the national systems and the EU PNR Directive requirements are highlighted in that paper. This allows the Member States to adapt their system right after the deadline, in order to comply with the EU PNR Directive before they could risk an infringement procedure or a fine due to that.

The European Commission could also use this paper to write the report that has to be presented to the European Council and Parliament maximum two years after the end of the transposition period, that is to say on the 25th of May 2020 maximum<sup>8</sup>.

From another perspective, this paper could help the EU citizens to raise an action against the PNR regulation, in order to protect their fundamental rights.

## **3. Scientific novelty and overview of the research on the selected topic**

This topic was chosen as it is new, as already explained above, but also because there is a lack of researches in this area. While the international PNR agreements between the EU and the third countries - the USA, Canada and Australia<sup>9</sup> - were highly covered by some scholars, the final text of the EU PNR Directive stayed hidden behind the curtains since its adoption.

However, the Directive's impact is significant and concerns directly the EU citizen passengers and a lot of travelers worldwide. Indeed, even though each Member State would decide to stick to the basic rule developed by the EU PNR Directive, the PNR data will be collected for everyone who is travelling from a third country to the EU Member States (or vice versa). To avoid any confusion, according to common definition used in EU terms; a third

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<sup>8</sup> Article 19, EU PNR Directive

<sup>9</sup> EU & Third countries agreements

country means any State which is not one of the 28 EU Member States of the EU<sup>10</sup>. It means that every traveler arriving or departing from an EU Member State by using a commercial plane will automatically be subject to this set of rules and data collection, analysis and also data storage.

#### **4. Significance of research**

The research and its highlights could assist the governments, lawyers or judges in interpreting the national or European laws. Indeed, the EU PNR Directive enters into force on the 25th of May 2018. At that particular moment, the national systems have to be in perfect compliance with it. This is challenging as the British and French systems were created before its adoption. Regarding Belgium, the question is different due to the recent adoption of the Belgium law; it is more a focus to determine how the pure transposition procedure was made. Furthermore, some articles need an interpretation due to the broad language of a Directive.

Thanks to the research, the national legislator could become aware of the discrepancies between his national system and the EU PNR Directive. Therefore, the legislator could then decide to amend the existing text to comply entirely with the Directive.

Also, once a lawsuit would be launched, it will obviously fall into the scope of a particular national system. While taking care of the proceedings, the lawyers or judges could use this research in order to know if there is an infringement of EU law committed by the Member State, and therefore adapt their conclusions or judgements accordingly.

Furthermore, the EU Commission could also use it while writing its above-mentioned report.

#### **5. Aim of research**

The British, French and then Belgium legislators could have a comparison basis between the respective national system they elaborated and the EU PNR Directive requirements. In the cases where there could be some differences which lead to a violation of the EU law, the modifications could be done before an infringement procedure started from the European Commission's initiative. This paper will offer some ways to Belgium, France and the United Kingdom to comply with the Directive, in case there would be some critical parts. Even though this paper will be published just at the end of the transition period, it would still be better to modify the national legislations before the EU institutions will force the States to do it, and apply some fines due to the discrepancies found and the non-respect of EU rules.

Furthermore, the EU PNR Directive was created by taking into inspiration the already existing PNR system developed in UK. The paper could help the European Court of Justice to lead its interpretation role. It could be a support in case of an interpretation of the EU PNR

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<sup>10</sup> Eurofunds, 11 June 2007, "Third country nationals" - <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/third-country-nationals>



Directive would be asked within preliminary ruling proceedings (especially whether it will include France, Belgium or eventually still the UK if it might happen before the Brexit).

## **6. Objectives of research**

The research's main goal is to critically assess the compliance of the Belgium, French and British systems, with the EU PNR Directive requirements. This goal will be reached by:

- a) Analyzing the structure and the main rules of the British, French and Belgium national PNR systems,
- b) Confronting the national PNR systems to the EU PNR requirements, in order to evaluate whether they are compliant with the EU law,
- c) Assessing if the differences found between the national systems and the EU PNR Directive represent a violation of the EU law, which should be modified by the national legislator,
- d) Preparing a modification plan in order to adapt the national systems to the EU PNR Directive.

## **7. Research methodology**

As “*there are no two things completely the same anywhere in heaven or earth*”<sup>11</sup>, this paper will compare the differences between the different systems. Therefore, in order to achieve the above-mentioned goals, the main methodology used is the comparative analysis.

To be able to compare, each part of the systems should first be defined and explained in details. Only that essential step allows us to reach the second one: the comparison in itself. That is why, apart from the main methodology used, some descriptive method will be needed in order to introduce the laws and systems, before being able to compare them.

## **8. Structure of research**

The research is divided into two chapters. The first chapter focuses on the EU PNR Directive and the PNR systems globally, in order to expose why the European Union decided that such a system is needed. The latter chapter develops the content of the PNR system, and compare the different targeted systems: the Belgium, British and French systems between each other, but mainly to check their compatibility with the EU PNR Directive requirements. This

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<sup>11</sup> Hegel, *Lesser logic*

chapter is divided itself into two parts: the first one dedicated to the PNR data collection while the second one focuses on the use of the PNR data previously collected.

## **9. Defence statements**

This paper reveals the discrepancies between the EU PNR Directive requirements and the national systems of the selected Member States. The fact that Belgium created its system after the Directive's adoption leads obviously to a more compliant system. However, the author would still suggest some light changes. Then, Belgium and French systems have a common issue, as their laws are actually mixing two types of passengers data (API and PNR data, which will be developed below). This could lead to a misuse of some data collected, as well as a wrong data storage period, as the EU requirements are significantly different depending on both types of data. Solutions could be either to adopt two distinct laws in order to follow the EU structure - with two different directives - or to separate the two types of data more clearly in the sole created law, mainly regarding the data use and storage topics. Additionally and mainly, the French system infringes severely the passengers' fundamental rights by not respecting the data retention period of the PNR data properly. Some data safeguards should be set up at an earlier stage after PNR data reception than the French law is currently doing; the masking-out process in order to protect the data collected should happen after six months after the reception, and not two years as it is currently. Plus, the French law does not state clearly that the eventual additional data which would be not useful for the analysis would be automatically deleted. The British system does not consider at any time such a process neither to depersonalize the data, nor to delete automatically some data. It is not clearly stated in the British law the obligation to comply with the EU Charter of Fundamental rights - as it was adopted before the Charter entered into force. Generally, the British system is wider than the EU PNR Directive. Indeed, the data analysis is extended to merchandises and not only to passengers. Also, the goals are more extended as it could take into account illegal immigration, and some goals are not defined in a strict manner. Furthermore, the UK already collects the data for different means of transportation and not only the air. It eventually would have to prove the necessity of this choice, as well as the Belgium if it extends the means of transportation as initially planned.

# **CHAPTER I. THE EU PNR DIRECTIVE: A CONTROVERSIAL MEASURE**

The first draft of the EU PNR system was written in 2007<sup>12</sup>. Thus, it took almost ten years between the first project and the real creation and adoption of the EU PNR Directive. The harsh context of this long and difficult adoption will be explained first (Part I). Then, the focus will be turned on the different goals pursued by the EU PNR Directive, as well as the challenges regarding the fundamental rights, which could explain this long time process before finding a compromise (Part II).

## **1.1 - PART I. CONTEXT SURROUNDING THE EU PNR DIRECTIVE: THE NEEDS OF PNR DATA REQUIREMENTS WITHIN THE EU**

Observing the international context and agreements needed to be negotiated, the EU realised the needs of creating a PNR analysis system within its own territory as well (Section I). Even though the EU already had a system to collect the passengers' data, it appeared to not be enough to face the existing threats. The necessity of a creation of a PNR data collection system while some others air passengers data are already collected will be explained, by highlighting the difference between both API and PNR systems (Section II). Collecting and analysing the PNR data could allow to prevent some threats than the API data could not help to face. These different crimes and the use of PNR data would be finally explained (Section III).

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12 Eur-lex, Proposal for a Council Framework decision, on the use of PNR for law enforcement purposes, 06/11/2007 - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007PC0654&from=en>

### 1.1.1. SECTION I. International context

The United States of America (=USA) was the first country that started to use the PNR data of all passengers flying within its territory (from, to or within its territory)<sup>13</sup>. The air passengers' data collection took an important turnover in the 2000's. Indeed, at the beginning of the XXIst century, only a couple of countries were already collecting and using the PNR data or other data about passengers entering or leaving their territory<sup>14</sup>. Adding to the USA, it could be mentioned at that period all of them easily; Australia, Canada, France, Japan, Mexico, the Netherlands, South Africa, Spain and also the United Kingdom<sup>15</sup>. Only a few years later, on September 2013, the IATA showed that it has more than tripled<sup>16</sup>. However, this global data covers all the kinds of passengers data collection, and not only the PNR ones (which is a more limited number).

Seeing this increasement of passengers data collection and analysis, the EU needed to react. Indeed, many States started to collect the data of EU citizens when they are travelling from, to, within or through their territories. However, only some EU Member States were doing the same from the beginning. Therefore, there was a lack of reciprocity from the EU side. In that situation, the people from these countries could move absolutely freely to most parts of the EU without having any data collected. However, these countries were tracking the passengers from the EU Member States by collecting some personal data. To get back to a reciprocity situation, some international agreements were needed. It was a first step required before even thinking about creating a more established system within the whole EU (later developed in the Section III). Hornung and Boehm's analysis permits to have a better understanding of the consequences of such a lack of reciprocity, with the USA exemple : *“as PNR data [on passengers on flights to or from the EU] is usually collected by a controller which is based in an EU Member States, the respective national data protection laws apply in accordance with Article 4 (1) Directive 95/46. Companies are thus bound by both US law and the law of the respective EU Member State. As the US do not, as such, ensure an adequate level of protection as defined by Article 25 Directive 95/46, it is in principle, illegal for air carriers to transfer the data to the US. However, US law*

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13 THE CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA (T-PD) Passenger Name Records, data mining & data protection: the need for strong safeguards Directorate General Human Rights and Rule of Law

, Geoge M., 2015 - <https://rm.coe.int/16806a601b>

14 IATA, Passenger data exchange - The basics, 2013,

[https://www.icao.int/APAC/Meetings/2015%20FAL/1.IATA\\_What%20is%20API-PNR.pdf](https://www.icao.int/APAC/Meetings/2015%20FAL/1.IATA_What%20is%20API-PNR.pdf)

15 *Ibid*, p4

16 Annex I for a concrete and easy overview

*precisely obliges the air carriers to do so. There is thus a conflict of law to which there was no solution prior to the respective PNR agreements.*”<sup>17</sup>. The airline companies were stuck in their duties, as they need to comply with the different laws and requirements. The international PNR agreements succeeded to solve this critical situation. They allowed creating a framework on the way to exchange the data, but also on the way this data will be then proceed in the receiving country, and eventually shared. These rules were essential in order to respect the right of protection of personal data<sup>18</sup>.

The international bilateral PNR agreements were created in that context, as a first and “faster” solution. The first one which entered into force was between the USA and the EU, in 2006<sup>19</sup>. Then, an agreement with Canada<sup>20</sup> (in 2006 as well) and with Australia<sup>21</sup> (in 2008) followed. Some new agreements were negotiated with the USA and Canada, due to a Commission’s communication of 2010 in order to create a “*global approach to transfers of PNR to third countries*”<sup>22</sup>. As the EU Parliament raised an action to get the ECJ’s opinion regarding the agreement with Canada, the new agreement is still not into force - comparing to the new one with the USA. This action, plus the creation of the EU PNR Directive, stopped the processes of negotiations with a future PNR agreement with Mexico<sup>23</sup>, and with Australia to review the current agreement. On the 26th July 2017, the ECJ issued its opinion regarding the PNR agreement between the EU and Canada<sup>24</sup>. The Luxembourg judges considered that the agreement could not be concluded as it is, as it infringes two fundamental rights, mentioned in the EU Charter of Fundamental rights; right for EU citizens to respect the private life and to have their

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17 Comparative Study, Gerrit Hornung & Franziska Boehm, 04/03/2012 <http://www.uni-muenster.de/Jura.itm/hoeren/itm/wp-content/uploads/PNR-Study-FINAL-120313.pdf>

18 Article 8, Charter of Fundamental Rights of the EU - [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

19 Eur-Lex, Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, 27/10/2006 - [http://eur-lex.europa.eu/resource.html?uri=cellar:31401f5a-f8ec-41f7-9a0f-0ea1f8c29ccc.0005.02/DOC\\_2&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:31401f5a-f8ec-41f7-9a0f-0ea1f8c29ccc.0005.02/DOC_2&format=PDF)

20 Eur-Lex, Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data, 21/03/2006, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A0321\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A0321(01)&from=EN)

21 Eur-Lex, Agreement between the European Union and Australia on the processing and transfer of European Union sourced passenger name record (PNR) data by air carriers to the Australian customs service, 08/08/2008 - [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22008A0808\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22008A0808(01)&from=EN)

22 COMMUNICATION FROM THE COMMISSION On the global approach to transfers of Passenger Name Record (PNR) data to third countries, 21/09/2010, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:jl0043> + <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0492&from=EN>

23 Council Decision to authorise the opening of negotiations for an agreement between the EU and Mexico for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime - <http://data.consilium.europa.eu/doc/document/ST-9583-2015-REV-1/en/pdf>

24 Press release, Opinion 15/1, 26/07/2017 - <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/cp170084en.pdf>

personal data protected<sup>25</sup>. This opinion 1/15 of the ECJ influences a lot the future of the EU PNR Directive, and helps to understand more the current point of view of the ECJ regarding the PNR.

These bilateral agreements permit to create a close framework on the possibilities that the special concerned third country has to collect, use, and store the PNR data of the EU air passengers. However, it still does not give to the EU the possibility to collect the data, not because of the non-reciprocity, but because not every country within the EU possesses a system which could afford such amount of data. Thus, deciding to collect the PNR data from other countries is a first step, but it cannot mean that it could be an immediate action to be able to do so. It leads to the following question: what advantages could have the EU Member States and the EU globally to start collecting such data as well? The answer should be divided into part. The author will firstly go through the EU system, which already collects passenger data – API system - and its difference with the PNR system to then focus on the security needs to settle a PNR data analysis within the EU.

### **1.1.2. SECTION II. Differences between PNR and API systems**

This section is dedicated to the Advanced Passenger Information (=API) Directive<sup>26</sup>, which already created some rules to collect air passengers' data. As the EU Member States already agreed on a way to collect some air passengers' data, the PNR Directive project could seem to be an added value wished, but not really needed. This was actually the point of view firstly of the European Data Protection Supervisor, in his opinion about the PNR Directive draft<sup>27</sup>. The data protection authorities - or fundamental human rights authorities - could understand the choice to use the EU level to act, but not the real intention and benefit of the PNR data collection, except violating many Human and Fundamental rights<sup>28</sup>.

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25 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=193216&doclang=EN>

26 API Directive, Directive 2004/82/EC - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0024:0027:EN:PDF>

27 Opinion of the EDPS of 25 March 2011 on 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 ([https://edps.europa.eu/sites/edp/files/publication/11-03-25\\_pnr\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/11-03-25_pnr_en.pdf))

28 Europa, Joint opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes, presented by the Commission on 6 November 2007, December 2007, [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp145\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp145_en.pdf)

Thus, another point which needs to be highlighted is why do we need the PNR data collection and analysis, while we are already collecting air passengers data through the API system? It took many years before convincing the European Parliament, its committee, and several stakeholders as the above mentioned data protection authorities, about the necessity of a PNR data analysis<sup>29</sup>.

The API Directive was actually already voted in 2004<sup>30</sup> for collecting air passengers details who are flying from a third country to a EU Member State or vice versa. However, the API data in itself is quite different than the PNR one<sup>31</sup>. Both types are some data collected from air passengers for - at least - extra-EU flights. They could then look quite similar at the first glance. However, the collection of data does not have the same aim. Due to that, they do not focus on the same elements.

At the EU level, the API Directive pursue a goal of “*improving border controls and combat illegal immigration*”<sup>32</sup> while the PNR Directive needed to be created to fight against terrorist offences and serious crime<sup>33</sup>. Nonetheless, the API could also detect some serious criminals, but only if they are already known in some records (e.g.: Schengen Information System and Visa Information System<sup>34</sup>). The PNR data analysis goes further, using special algorithms gives the possibility to discover some potential criminals by crossing the PNR information gathered. In that situation, it allows to discover some unknown criminals. The PNR Directive’s aim is wider, as it is to “*prevent, detect, investigate, and prosecute the terrorists and serious criminals*”<sup>35</sup>. Concretely, the API Directive does not allow to profiling, as PNR system could lead to, and is aimed for.

Plus, the amount of data collected is significantly different. While the API data could be powerful only with a few information shared, the PNR data could be analysed in a proper way only if the information gathered is quite important, to comply with the developed algorithm(s).

Actually, this is also proved by the fact that API Directive’s adoption went through more easily in the European Parliament, as just a few data needs to be collected to reach its purpose.

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29 Europarl, EU PNR Directive: an overview, 01/06/2016 - [http://www.europarl.europa.eu/news/en/news-room/20150123BKG12902/eu-passenger-name-record-\(pnr\)-directive-an-overview](http://www.europarl.europa.eu/news/en/news-room/20150123BKG12902/eu-passenger-name-record-(pnr)-directive-an-overview)

30 Ibid

31 International Civil Aviation Organization, Passenger Data exchange - The basics, [http://www.icao.int/APAC/Meetings/2015%20FAL/1.IATA\\_What%20is%20API-PNR.pdf](http://www.icao.int/APAC/Meetings/2015%20FAL/1.IATA_What%20is%20API-PNR.pdf)

32 API Directive, Article 1

33 European Commission, Council Framework Decision on the use of PNR for law enforcement purpose, 06/11/2007 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007PC0654&from=EN>

34 EU PNR Directive proposal of 2011, COM 2011/0032 final, ” *existing provisions in the area of the proposal* ” <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0032>

35 EU PNR Directive, title

Also, the collected data for API system does not have to be kept for a long period: only 24 hours while the EU PNR directive requires to keep them for 5 years. This period and different ways of keeping the PNR data at different stages were one of the main discussions about the EU PNR Directive, which was finally adopted with the maximum data retention period set up at 5 years<sup>36</sup>.

In the chart below – on the next page - the main differences previously explained generally, are highlighted with more details:

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<sup>36</sup> Opinion 5/2015, p7, 24



**Chart I. Main differences API / PNR directives**

	<b>API</b>	<b>PNR</b>
Goals pursued	Improving border controls and combat illegal immigration	Prevention, detection, investigation and prosecution of terrorist offences and serious crime
Data collected	A few: - passenger identification (including travel documents) - flight (destination / departure & arrival time)	A lot of data: 19 different categories: listed in the Annex II of the Directive
Flights concerned	Third country to EU Member State	Third country to EU Member State (& vice versa) + eventually intra-EU flights
Analysis use	Based on existing records (e.g.: Schengen and Visa Information Systems)	Profiling method
	Main use: illegal immigration controls Eventually as a plus: Serious criminals could be detected, based on existing criminal records	Criminal records could be used, but also (and mainly) the data-mining allows to find some potential unknown criminals, by using algorithms techniques
Storage time (after data reception from airlines in both cases)	24 hours	5 years Divided into two different periods: - 6 months of availability (under special request, only for competent authorities) - 4 years and a half remaining (in which the data is accessible only under certain conditions and after a special authorization)

It can clearly be seen on this chart that, even though the same type of data are collected - air passenger personal data -, the two Directives vary a lot. The API Directive was a first step in order to fight against international crimes by using air passengers' data. However, the international context and some security reasons showed that the needs were higher to fight the threats as wished and try to protect the citizens as efficiently as possible. Indeed, the proposal for the EU PNR Directive, presented in 2011 stated that a “*more systematic collection, use and retention of PNR data with respect to international flights, subject to strict data protection guarantees, would strengthen the prevention, detection, investigation and prosecution of terrorist offences and serious crime and is, as further explained below, necessary to meet those threats to security and reduce the harm they cause*”<sup>37</sup>. The security goals pursued in order to protect the EU citizens and territory cannot be attained only with the API Directive. That is why the EU needed to be complete its rules with the EU PNR Directive.

### 1.1.3. SECTION III. Security reasons to adopt a PNR system

The EU territory allows people and goods to travel or be transported really easily. However, this also creates a favorable ground for criminals to develop their activities. Indeed, “*Europol’s EU Organised Crime Threat Assessment 2009 (OCTA 2009), points out that most organised crime involves international travel, typically aimed at smuggling persons, drugs or other illicit goods into the EU*”<sup>38</sup>.

To focus on the terrorist part, the PNR Directive proposal mentions that “*most terrorist activities are transnational in character and involve international travel, inter alia to training camps outside the EU, calling for increased cooperation between law enforcement authorities*”<sup>39</sup>. Many terrorist attacks unfortunately occurred from the beginning of the 21st century within Europe, hurting deeply different countries and their population. It started from the Madrid attack in 2004, going through the combined attacks in Paris, leading to more recently Manchester, Barcelona, for the last ones in 2017<sup>40</sup>. The timeline drawn by the New York times

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37 EU PNR Directive proposal, 2011 - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0032&from=EN>

38 EU PNR Directive proposal, 2011 - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0032&from=EN> - OCTA 2009

39 EU PNR Directive proposal, 2011 - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0032&from=EN> - Europol’s EU Terrorism Situation and Trend Report 2010

40 <https://www.independent.ie/world-news/europe/timeline-of-europes-terror-attacks-35786085.html>

team (see Chart II below) just after the Manchester attack highlights how harsh were these two past years, showing the places and dramatic consequences in terms of human lives lost due to them<sup>41</sup>.

**Chart II. Terrorist attacks in Europe and victims impact**



This context of insecurity is regrettably rising everywhere, and mainly in the Western part of Europe at a European scale. Currently, the terrorism danger increased a lot, and we need to find some solutions. Each Member State could take individual measures, but acting altogether at the European Union level could allow the Member States to have much power and impact. The more globalization became the new system in the world, the more it had some repercussions on the criminal world as well. We moved smoothly to an era where international criminality, also known as “trans-border criminality” became the new common basis in terms of criminality. INTERPOL is already fighting against that tendency since almost one century<sup>42</sup>. In complement, the EU created EUROPOL, to have a better cooperation at the European level, with the same goals as INTERPOL, but the possibility sometimes to go further thanks to the existing binding links between the EU Member States<sup>43</sup>.

Serious trans-border crimes, including terrorism, are well organised and “*infrastructure (transports, roads, harbours, airports, transportation infrastructure) is a crucial variable in the mobility of crime*”<sup>44</sup>. Indeed, the travel means used by some people and some particular details

41 Karen Yourish & others, The New York Times, How the Manchester Bombing compares to Recent Deadly Terror Attacks in Europe, 23/05/2017 - [https://www.nytimes.com/interactive/2017/05/23/world/europe/europe-terror-attacks.html?\\_r=0](https://www.nytimes.com/interactive/2017/05/23/world/europe/europe-terror-attacks.html?_r=0)

42 INTERPOL, Accessed on November 2016 - <https://www.interpol.int/en/Internet/About-INTERPOL/Overview> : International organization which gathers police from 190 countries over the world, to fight together against trans-border criminality (created in 1923)

43 EUROPOL, Accessed on November 2016 - <https://www.europol.europa.eu/about-europol/our-thinking> : EU agency which helps EU Member States to prevent and fight against “all forms of serious international organised crime and terrorism”

44 J. Peter Burguess, Handbook of New security studies, p.255, 22/01/2010 - Google books :

<https://books.google.cz/books?hl=fr&lr=&id=kKaMAGAAQBAJ&oi=fnd&pg=PA253&dq=psychoanalysis+and+cr>

could help to define, according to some precise criteria, that some of them could actually be potential serious international criminals. This could appear even though there are not yet in any research list, and not know yet by the police or secret services. Thus, the European Union needs to use these new tools to be able to fight more efficiently against international crimes within its territory, whether it is about terrorism, human trafficking, or money laundering. Taking the example of terrorism, Michele NINO perfectly sums up the situation, saying that: *“international terrorism has a transnational character. As a consequence, the cooperation, the coordination, and the exchange of information between law enforcement authorities of the EU Member States, their agencies, Europol, and judicial authorities constitute fundamental elements in order to guarantee the effectiveness of the fight against terrorism and organized crime”*<sup>45</sup>. In order to face those crimes, the EU needs to work with a team spirit and not only separately. This was already the idea developed in the Stockholm programme on civil and criminal matters<sup>46</sup>.

Collecting the air passengers data is included in the way to fight terrorism, but also international criminality in a more general way. From 2004, the EU adopted a text to do so and starts to collect some data called Advanced Passenger Information (=API)<sup>47</sup>. However, this is not enough to combat all the threats and international criminals.

After this overview context about air passengers' data collection, analysis and storage within the EU but also at international level, it permits us to introduce in details the EU PNR Directive.

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[iminal+behavior+PNR&ots=mWSfGTBI5F&sig=FVVPJWoaBdaWPoP9ja28KixV46w&redir\\_esc=y#v=onepage&q&f=false](#)

45 Michele Nino, The protection of personal data in the fight against terrorism, New perspectives of PNR European Union instruments in the light of the Treaty of Lisbon, Michele Nino, (Utrecht Law Review 6. Utrecht L. Rev.), 2010, -

[http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein\\_journals/utrecht6&start\\_page=62&collection=journals&id=62](http://heinonline.org.skaitykla.mruni.eu/HOL/Page?handle=hein_journals/utrecht6&start_page=62&collection=journals&id=62)

46 EUR-Lex, The Stockholm programme - an open and secure Europe serving and protecting citizens, 2010/C 115/01 - 16/03/2010 - <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:j10034&from=FR>

47 Eur-Lex, Directive 2004/82/EC on the obligation of air carriers to communicate passengers data, 29/04/2004 - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0082&from=GA>

## 1.2 - PART II. The response to the needs: the EU PNR Directive adoption

The discussions regarding the EU PNR Directive were numerous before finding a compromise and adopting the EU PNR Directive (Section 1). Currently<sup>48</sup>, the transposition process just came to its end<sup>49</sup> (Section II).

### 1.2.1. SECTION I. EU PNR Directive's adoption

The first project to create some common rules within the EU about the PNR data collection, analysis and transfer was launched by the European Council on the 25 and 26th of March, 2004<sup>50</sup>. It demanded to the European Commission to prepare a text about the EU harmonisation of the systems to require air passengers data. This discussion appeared in the meantime as the negotiations with the USA and Canada about the exchange of air passengers' data<sup>51</sup>.

Following this, the Council Framework Decision 2007/0237 was drafted<sup>52</sup>. Its principal aim was to fight terrorism and organised crimes by introducing the PNR data analysis as a tool. The EU action was justified by the need of creating a common system, requiring the same obligations to all the air carriers which fly within the EU sky<sup>53</sup>. Even though this EU level was not contested according to the principles of proportionality and subsidiarity, a lot of discussions were needed, to improve the first draft. Many authorities were consulted about that project, mainly on the one hand airlines and on the other hand the data protection authorities, from national and EU level.

The conclusions of the Article 29 Data Protection Working Party - a group of several data protection authorities - revealed some concerns about the proportionality of such a measure, including privacy concerns<sup>54</sup>. The goal of fighting terrorism and serious crime is considered from the beginning as totally legitimate. However, a lack of protection about the personal data

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48 May 2018

49 EU PNR Directive, Article 18: "by 25 May 2018"

50 Eur-Lex, Council Framework Decision 2007/0237, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007PC0654&from=EN>

51 Ibid

52 Ibid

53 Ibid, Legal elements of the proposal (3)

54 Europa, Joint opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes, presented by the Commission on 6 November 2007, December 2007, [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp145\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp145_en.pdf)

collected from the air passengers was highlighted, putting forward some important breaches to fundamental rights, which are unacceptable; “*the EU data protection authorities consider that the proposal as currently drafted is not only disproportionate but may violate fundamental principles of recognised data protection standards as enshrined in Art. 8 of the European Convention on Human Rights and Convention 108 of the Council of Europe*”<sup>55</sup>. After listing all the main issues relatively to data protection, the Working party concluded by claiming that “*an EU PNR regime must not lead to general surveillance of all travellers*”<sup>56</sup>.

Even though after the remarks the draft of the Council Framework Decision was modified, the text was not adopted on time due to the adoption of the Lisbon Treaties, respectively the Treaty on the EU and the Treaty on the Functioning of the EU<sup>57</sup>. The ground of the text - the third pillar - and the form of a Council Framework decision, were not adapted anymore for this new EU. Therefore, this first draft needed to be abandoned.

Once the above-mentioned new framework of the EU was created and entered into force, the project of a PNR requirement system within the EU reappeared, officially with the Stockholm programme<sup>58</sup>. This programme was written under the Swedish presidency of the EU, with the goal to set up a more secure space within the EU, within its area of freedom, security and justice. It is under this programme that the new harmonised PNR project emerged in 2011. The form of a Directive was decided as the only one, which could suit such an idea in the EU. Indeed, as this project falls within the area of freedom, security and justice, it is a shared competence between the EU and the Member States<sup>59</sup>. A regulation might have been drafted and voted, but it would have not been appropriate; taken into account the fact that the Member States have to create some new institutions or at least procedures to be able to collect, analyse and transfer the PNR data<sup>60</sup>. The directive was the best solution to offer some flexibility to each Member State in order to respect their own criminal, police and judicial system, while reaching the goal to treat PNR data within the EU territory. Hence, within this context, the Draft Directive 2011/0023 was created, released by the European Commission on the 2nd of February, 2011.

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55 Ibid

56 Ibid

57 Europa, Explaining the Treaty of Lisbon, 01/12/2009, [http://europa.eu/rapid/press-release\\_MEMO-09-531\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-09-531_en.htm?locale=en)

58 EUR-Lex, The Stockholm programme - an open and secure Europe serving and protecting citizens, 2010/C 115/01 - 16/03/2010 - <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:j10034&from=FR>

59 Article 4 TFEU & <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020>

60 The creation of a Passenger Information Unit is needed, requirement of the EU PNR Directive – explained more in details below

Many consultations and negotiations were needed to get a text which could be approved<sup>61</sup>. Even after some improvements comparing to the obsolete Council Framework decision, the Article 29 Working Party still considered that the draft's measures are too intrusive with the fundamental rights<sup>62</sup>. The Civil and Liberties Committee worked on more than one thousand amendments before offering a modified Draft Directive, which was approved by the European Parliament. This step allowed starting the negotiations with the Council within June 2015<sup>63</sup>.

The PNR Directive on the use of PNR data for the prevention, detection, investigation, prosecution of terrorist offences and serious crime, was finally adopted at the European Parliament on the 14<sup>th</sup> of April 2016<sup>64</sup>. Following that, the European Council approved it on the 21<sup>st</sup> of April<sup>65</sup>, leading to its publication in the Official Journal of the European Union on the 4<sup>th</sup> of May 2016<sup>66</sup>.

### **1.2.2. SECTION II. EU PNR Directive's implementation**

The entry into force of a directive within the EU does not lead to any direct binding actions or rules, expect this transposition duty that each Member State need to fulfil, according to the principle of sincere cooperation<sup>67</sup>. Starting from the official publication after voting, the Member States of the EU have two years to transpose the Directive into their national systems, which means exactly until the 25<sup>th</sup> of May 2018, as directly mentioned in the EU PNR Directive<sup>68</sup>.

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61 By European Data Protection Supervisor or Fundamental Right Agency as well

62 Europa, Opinion 10/2011 on 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, 5/04/2011 - [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp181\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp181_en.pdf)

63 Council of the EU, 02/12/2015 - <http://statewatch.org/news/2015/dec/eu-council-eu-pnr-final-compromise-14670-15.pdf> (p1)

64 European Commission, Statement - 14/04/2016 - [http://europa.eu/rapid/press-release\\_STATEMENT-16-1404\\_fr.htm?locale=EN](http://europa.eu/rapid/press-release_STATEMENT-16-1404_fr.htm?locale=EN)

65 Council of Europe statement, 18/04/2016 - <http://data.consilium.europa.eu/doc/document/ST-7829-2016-ADD-1/en/pdf>

66 Official Journal of the EU, Number 119, Year 2016, p 132 - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:119:FULL&from=FR>

67 EUR-Lex, Consolated version of the Treaty on European Union - [http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF) - Art 4§3 TEU: principle of sincere cooperation: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"

68 EU PNR Directive, Art 18.1 : « Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 May 2018 »

However, not exactly all the Member States of the EU have to take into account this directive. Some exceptions need to be pointed out. Indeed, the Denmark, Ireland and the UK have a special regime - with slight differences - concerning all the measures linked to the Area of Freedom, Security and Justice. The PNR Directive falling into that area, they can decide either to participate or not in the project: it is called the opt-in and opt-out process<sup>69</sup>. This particular regime is ruled by the Protocol 21 of the TFEU for Ireland and the UK. Thanks to this flexible arrangement of a directive form, these two Member States decided to take part of the EU PNR Directive. As the UK already has a PNR national system, its Parliament was convinced it could be great to take part of this European project<sup>70</sup>. At the end, “*the UK and Ireland have opted in to this directive. Denmark is not participating*”. In conclusion, every Member State of the EU has to get their own PNR national system, except the Denmark, to which the EU PNR Directive does not apply. However, the Danish PNR system<sup>71</sup> will exist as well, without being linked to the EU Member States’ one or EUROPOL. Therefore, Denmark PNR system is the only which does not have to comply with the EU PNR Directive requirements.

The EU PNR Directive is inspired by the system set up firstly in the United States of America, but also by the British system. UK, which already has the system, started to do their first tests on restraint routes and air companies from 2006<sup>72</sup>, so even before the first EU draft was actually written. The UK started to use the PNR data collection in a more automatic and general way from 2008<sup>73</sup>. The British system is very important for the analysis in this paper, as it is the basis of the European text and the more experienced country as of now within Europe relating PNR data processing. The negotiations regarding the Brexit are still in process. Therefore, it cannot be stated yet how will be the future of the UK within the EU, and whether it would have to adapt its PNR system to the EU PNR Directive requirements. Another question might be to know what will happen regarding the transfer of PNR data between the UK and the EU,

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69 Europa, Opting out, Consulted on 25/05/2017, [http://eur-lex.europa.eu/summary/glossary/opting\\_out.html](http://eur-lex.europa.eu/summary/glossary/opting_out.html)

70 UK Parliament, The UK Parliament opt-in to the PNR Directive, 2011, <https://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/113/11303.htm>

71 EDRI, Jesper Lund, New Danish PNR system, will rival the PNR Directive, 22/04/2015 <https://edri.org/new-danish-pnr-system-will-rival-the-eu-pnr-directive/>

72 The Stationery Office, *Immigration Control* (Vol 2: Written evidence), 17/07/2006 [https://books.google.cz/books?id=pj72vG7G2qAC&pg=PA22&lpg=PA22&dq=semaphore+system+beginning+of+PNR&source=bl&ots=THkOEmRT3q&sig=gT9vuRC773cL65IzblihCkdYDdY&hl=en&sa=X&ved=0ahUKewi\\_rs ea7Y3UAhVqKpoKHZeoBt8Q6AEIPzAE#v=onepage&q=semaphore%20system%20beginning%20of%20PNR&f=false](https://books.google.cz/books?id=pj72vG7G2qAC&pg=PA22&lpg=PA22&dq=semaphore+system+beginning+of+PNR&source=bl&ots=THkOEmRT3q&sig=gT9vuRC773cL65IzblihCkdYDdY&hl=en&sa=X&ved=0ahUKewi_rs ea7Y3UAhVqKpoKHZeoBt8Q6AEIPzAE#v=onepage&q=semaphore%20system%20beginning%20of%20PNR&f=false)

73 Claudine Gerrier, *Security and Privacy in the Digital Era*, John Wiley & sons, 16/08/2014 - Google books; <https://books.google.cz/books?id=TcneDAAAQBAJ&pg=PT178&lpg=PT178&dq=beginning+of+PNR+data+collection+in+United+Kingdom&source=bl&ots=auV-Q67dyc&sig=E-bwrgquzBnmU6k5TIYdKKqTjkU&hl=fr&sa=X&ved=0ahUKewjg1P6o-8TSAhVE8ywKHU3QDaMQ6AEIMzAD#v=onepage&q=beginning%20of%20PNR%20data%20collection%20in%20United%20Kingdom&f=false>



imagining a post-Brexit situation. Would the two parties create an international agreement as between the EU and USA, Canada or Australia? Or will they find a way to keep a closer cooperation for such an exchange of information? These questions are fully opened and depends on the following months regarding the final decisions about the UK quitting the EU.

As far as concern all other States, which will take part in the project, we need to divide them into two different groups. On the one hand, the States which decided to act after the draft directive was created, even if the text was not adopted yet (e.g. Lithuania, Hungary). On the other hand, there are the other Member States, which decided to wait for this directive before setting up their national system (e.g. Belgium, Bulgaria). The European Commission shared some EU funds between several Member States in 2012, which already have a project to set up their PNR system at a national level<sup>74</sup>. The Commission organised a call for proposals for States which were ready to establish a Passenger Information Unit, which is the basis needed for a national PNR system as it is through this Unit that the data are collected and then kept. Fifteen States were included in the program and received some EU funds in that purpose: Austria, Bulgaria, Estonia, Finland, France, Hungary, Latvia, Lithuania, Netherlands, Portugal, Romania, Slovenia, Spain and Sweden<sup>75</sup>. It does not mean that nowadays, all these above-mentioned States have already a current operative PNR system internally. Actually, the ones which surely do have currently an active PNR scheme are the following ones; the UK (as previously mentioned), France, Hungary, Lithuania and Spain. The Belgium adopted the main framework, and started from 1st January 2018 to analyse the PNR data, starting only with Brussels Airlines before expanding the system to all the airlines. The Belgium government did not inform about an eventual extension to more airlines until now.

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74 Annex II – National PNR systems in EU Member States - <http://www.consilium.europa.eu/en/press/press-releases/2016/04/21-council-adopts-eu-pnr-directive/>

75 Ibid

# CHAPTER II. COLLECTION AND ANALYSIS OF PNR DATA

To be able to create a PNR system, some preliminary steps are needed. Indeed, the State has to draw the general framework (Part I). Once these basic rules are fixed, the focus will be first on the data collection and then on the data analysis (Part II). Even though the General Data Protection Regulation<sup>76</sup> does not distinguish these both steps, the difference will be kept, in order to present a better understanding of the EU PNR Directive. In this whole chapter, the following structure will be adopted to present clearly the topic developed: introducing the EU PNR Directive rules, and then the UK system, French and finally Belgium systems.

## 2.1 - PART I. PNR system framework

To define the framework of the PNR system, the Member State has to precise the scope of application of its rules (Section I), as well as to set up an administration responsible for the collection and analysis of the PNR data (Section II).

### 2.1.1. SECTION I. Scope of application

The scope of application of the PNR system needs to be precisely set in a limited legal framework, in order to be able to determine clearly which data will be collected and later processed, and for which reasons and for how long as well. A focus will be first on the means of transport targeted by the PNR system (1), and then on the crimes which could be pursued with this data collected (2).

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<sup>76</sup> GDPR regulation, Regulation 2016/976, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>

### 2.1.1.1. Flights concerned

#### 2.1.1.1.a) EU PNR Directive

According to its first article, the EU PNR Directive stated that it will provide a framework for “*the transfer by air carriers of passenger name record (PNR) data of passengers of extra-EU flights*”. It means concretely the flights from one country outside the EU (so called “third country”) to a EU Member State, and vice versa.

After many discussions, the difference was made between the intra-EU flights and the extra-EU flights, generally named as international flights. It allows the Member State to choose by itself how intrusive it would rather be with the passengers’ right to travel, as far as they are travelling within the EU or their own territory. The basic draft of the EU PNR Directive did not include the intra-EU flights<sup>77</sup>. The first idea was to settle the PNR systems first only for the international flights – including a third-country element -, and later then consult and consider the possibility to extent the PNR system to intra-EU flights as well. This plan was as following; starting for the first four years by including only a PNR data collection and analysis on international flights exclusively. Depending on the results of this period, it would have led to a discussion regarding the intra-EU flights, to consider their eventual addition into the PNR system<sup>78</sup>. Indeed, the PNR draft of 2007 was first of all a reaction to the international agreements. Its primary goal was not to be applied also within the EU territory in itself.

However, the UK delegation submitted the idea to include all flights from the very beginning of the draft creation, as an option that the Member State could choose<sup>79</sup>. According to this proposal, the State could include internal flights or not, as well as only some particular intra-EU flights, or simply all of them (international, intra-EU and internal flights).

After reviewing this proposal and analysing some data on the percentage of flights within EU territory<sup>80</sup>, a particular interest started to grow up. Indeed, including the internal EU-flights needs to be taken into account for establishing a safer space within Europe. On the one hand, this follows the Stockholm programme's goals<sup>81</sup>. On the other hand, this leads to a certain limitation to the free movement of EU citizens within the Schengen area, which is a precious right to which the EU citizens are used to, and also attached to.

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77 Eur-Lex, Council Framework Decision, Proposal on the use of PNR data for law enforcement purposes, p10, 06/11/2007 - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007PC0654&from=EN>

78 Council of the EU, Inter-institutional file, 211/0023(COD),8016/11, 28/03/2011, p2, <http://data.consilium.europa.eu/doc/document/ST-8016-2011-INIT/en/pdf>

79 Ibid

80 Based on Eurostat

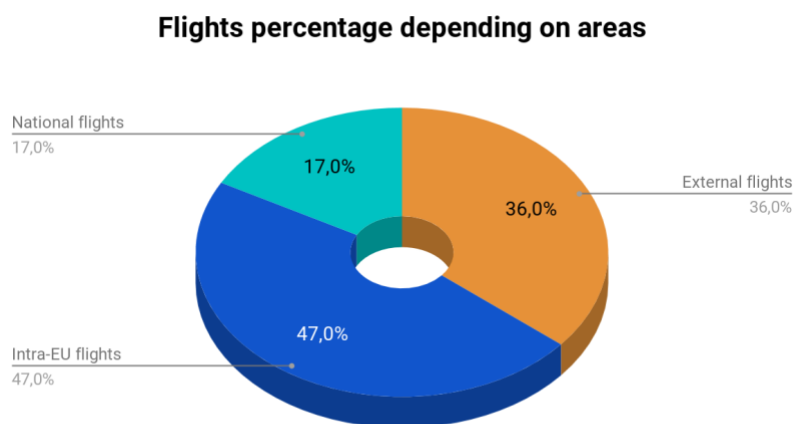
81 <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:jl0034&from=FR>

A compromise between both options needed to be found, in order to satisfy both goals. Analysing the data from the extra-EU flights only might not be sufficient to reach the goal of getting a safer European area, where international criminals could be more found and so international crimes more stopped. The first general step and idea of having some PNR data analysed was welcomed by the States which pursue a security goal as one of the first priority, and would like to have a safer territory.

However, taking into consideration the global number of intra-EU flights, excluding them from the PNR data collection and analysis represents a big difference. In 2011, intra-EU flights were counted at more than 42%<sup>82</sup>. Nowadays, with the new statistics of 2017, it even increased a bit, to be at 47%<sup>83</sup> according to the last available numbers. Going further by including even the national flights to that intra-EU flights statistics, it would even lead to the huge percentage of 65% of the flights within the European territory<sup>84</sup>.

Therefore, the inclusion of the intra-EU flights makes actually an important difference; more than half data are taken into account or missed, depending on this crucial choice<sup>85</sup>.

### Chart III. Flights percentages depending on areas



Originally, according to the EU PNR Directive draft of 2007, the only mandatory flights for which PNR data should be collected represent only a third of the global air traffic around Europe. Including intra-EU flights – with national flight or not – has a big impact on the final amount of passengers' data which are collected and processed. Therefore, the results of introducing a PNR system could be totally different depending on the option chosen by the EU

82 Ibid

83 Eurostat, Air transport statistics, Last modification on 07/02/2017, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Air\\_transport\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Air_transport_statistics)

84 Ibid - National flights represent 18% of the flights within the European territory

85 Ibid

in its text, which will be used as guidelines for the most part of the EU Member States to then create their own PNR systems.

Hence, the UK Government raised an amendment, later approved by the EU Parliament. The UK wanted that all flights could be included. After some discussions, the following compromise was found; each Member State has the choice to include directly the intra-EU flights or not in its national PNR regulation and future system. The national flights are considered within intra-EU flights in the EU PNR Directive, and are the collection of data from these flights is optional as well. As a result, a Member State has the mandatory obligation to include the international flights in its PNR scope of application. Then, it is free to decide whether it would like to include also in its scope of application the intra-EU flights, as well as the national flights on its territory solely.

Several possibilities were discussed before choosing that option. On the one hand, a few Member States, defending above all the data protection and free-movement rights, wanted to limit the PNR data collection to the international flights<sup>86</sup>. On the other hand, a few other Member States defended the idea to include all the flights, without differencing the ones with a third country destination and the ones within the European or Schengen territories<sup>87</sup>. A compromise was finally found, in the middle of these two extreme positions: the possibility to include the flights or not is the discretion of every Member State. Thus, the Article 2 of the EU PNR Directive sets up the optional “*application of this Directive to intra-EU flights*”<sup>88</sup>. This option is actually very extended: indeed the Member State can decide to include them totally or not, but can also choose to target only particular routes. The only obligation that the Member State has, is to always notify the European Commission of its decision. This allows the Commission to keep in order its information, and to have a proper tracker, State by State, regarding the flexible rule. Moreover, the Member State could change its rules anytime, as far as the Commission keeps being informed and is actually updated by notification about these change<sup>89</sup>.

Thus, including the intra-EU flights is the biggest decision for each Member State, as it doubles the quantity of data collected from the air passengers, before being then kept and analysed. The decision to include intra-EU flights, normally reserved exclusively for each Member State, was finally taken at a more global level. Indeed, a common decision was taken by

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86 Council of the EU, Inter-institutional file, 2011/0023(COD), 9103/11, 15/04/2011, <http://data.consilium.europa.eu/doc/document/ST-9103-2011-INIT/en/pdf>

87 Ibid

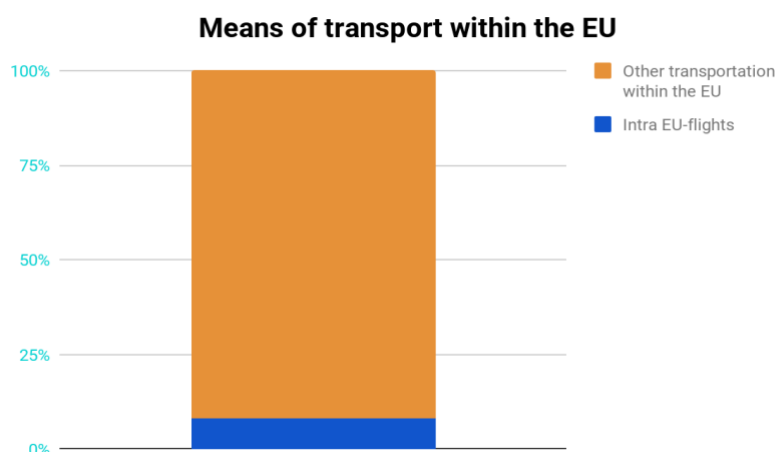
88 EU PNR Directive, Article 2, Title

89 EU PNR Directive, Article 2

the EU Member States to include the intra-EU flights while the EU Council was gathering on the April 2016; “considering the current security situation in Europe, Member States declare that by the date of transposition provided for in Article 18 they will make full use of the possibility provided for by Article 2 under the conditions set by the Directive”<sup>90</sup>. Even though the EU Parliament left first an open option, the Member States then decided to create a common rule and all include the intra-EU flights at the end. This decision was taken very early, as the statement was published even before the final vote of the EU Parliament regarding the EU PNR Directive<sup>91</sup>.

On the other hand, by adopting a more global perspective, an ALDE member just showed that the added value of intra-EU flights would be really limited, mentioning that “*intra-EU flights cover roughly 8% of all intra-EU traffic. 92% of travel is by car, train, bus, boat, motorbike, on foot or otherwise*”<sup>92</sup>. These statistics can minimize the actual impact of each Member State for the decision to include or not the intra-EU flights in its PNR data analysis. It could bring some additional data, in order to try to get a safer Europe. However, it is far from being the mean of transportation the most used in order to travel within Europe, including national transport or by crossing some borders within the European territory or the Schengen area.

#### Chart IV. Means of transport within the EU



90 Statement by the Council, 18/04/2016 - <http://www.statewatch.org/news/2018/mar/eu-council-pnr-internal-flights-7829-ADD-1-16.pdf>

Only three EU Member States have transposed EU PNR Directive into national law – the deadline for the rest is 25 May 2018, Statewatch, 13/03/2018 - <http://www.statewatch.org/news/2018/mar/eu-council-pnr.htm>

91 Statement on 18/04/2016, while the EU PNR Directive was adopted by the EU Parliament on 27/04/2016 (then published at the Official Journal of the EU on the 04/05/2016)

92 <http://www.sophieintveld.eu/blog-pnr-mythbuster/#>

Furthermore, this observation also led to the idea of some countries to collect PNR data from other means of transport more used in the EU, and not only from the airplanes. To do so, the recital 33 of the EU PNR Directive states that *“this Directive does not affect the possibility for Member States to provide, under their national law, for a system of collecting and processing PNR data from non-carrier economic operators, such as travel agencies and tour operators which provide travel-related services — including the booking of flights — for which they collect and process PNR data, or from transportation providers other than those specified in this Directive, provided that such national law complies with Union law”*<sup>93</sup>. The EU PNR Directive only requires in a mandatory way that the national PNR systems collect the data from air carriers.

The EU PNR Directive also opens other possibilities through the recital 33. First, each Member State could extend its PNR system by including the collection and process of data collected not only by the air carriers, but also by other economic operators which would sell flight tickets. Second, each Member State could decide to create a PNR system applicable to other types of transportation. However, the national system created should also be in respect with the EU law. Therefore, the Member State would have to keep in mind that the PNR system also infringes a lot of human and fundamental rights. The decision of extending the national system should be proportionate with the goal pursued. Plus, the ECJ might evaluate this extension. Being pro fundamental rights of the passengers in its opinion 1/15, the ECJ might consider that the extension to other means of transportation than strictly the airplanes could be an infringement of EU law, as it is not a requirement from the EU PNR Directive. However, this would be an eventual future decision of the ECJ. The possibility is right now opened by the EU PNR Directive and some Member States might decide to include some extra analysis in their personal national PNR systems.

#### 2.1.1.1.b) British PNR system

As already mentioned in the Chapter I, the UK was the first EU Member State creating a PNR data collection and processing within the EU. Its PNR system was already fully operational while the UK Parliament decided to opt in and participate in the EU PNR Directive project <sup>94</sup>. Its system is usually called Semaphore, due to the fact that it was introduced with an idea of

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93 EU PNR Directive, Recital 33

94 UK Parliament, The UK Parliament opt-in to the PNR Directive, 2011, <https://www.publications.parliament.uk/pa/ld201011/ldselect/lddeucom/113/11303.htm>

controlling in an electronic way the movement of persons at UK borders; idea belonging to a more general project Semaphore, covering other things than solely the PNR system in UK to reach that goal<sup>95</sup>.

The Immigration, Asylum and Nationality Act<sup>96</sup> contains the parts linked to PNR data. The Section 32 (1) of this Act shows that the collection of PNR data concerns every aircraft which leaves UK or arrives in UK, without any exception for the EU Member States. Therefore, we can deduct that the UK PNR system is globally applied to each State, without regard if it could be a EU Member State or a so-called “third state” in the EU terminology. Therefore, there is no surprise that the UK delegation required the inclusion of intra-EU flights, for sure already for the second draft of the EU PNR Directive in 2011<sup>97</sup>. Plus, the British delegation was the one introducing the idea to include the intra-EU flights in the draft directive. The UK Parliament affirmed that it supports the UK Government in this idea to push the EU institutions and other Member States to understand the importance of including intra-EU flights<sup>98</sup>. Moreover, it has to be mentioned that the UK also collects and analyse data of its own domestic flights<sup>99</sup>. Therefore, the Semaphore project is more than a high tech border control system, as it includes also movements within the same State without an international factor.

For PNR data collection and analysis, the UK is opening its scope of application also to the maritime and railway transport, and not only the air transport<sup>100</sup>. The Immigration, Nationality, Asylum Act welcomed some amendments, in order to include the Channel Tunnel Order 2007, which extends it also to railway passengers’ data collection and analysis<sup>101</sup>. Indeed, every time that the Immigration, Nationality and Asylum Act mentions originally “*ships and aircrafts*”, it could be substitute to “*through trains and shuttle trains*”. The UK is going further than the EU PNR Directive in the passengers’ data collection and analysis, as the EU’s adopted text is strictly limited to the flights, so solely the air transportation. Even though the main way to

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95 <http://news.bbc.co.uk/2/hi/technology/3700232.stm>

96 Immigration, Asylum and Nationality act, 2006 - <http://www.legislation.gov.uk/ukpga/2006/13/section/32>

97 UK proposals and amendments regarding PNR - UK seeking to extend Commission proposal to cover intra-EU flights from the start, 02/03/2011 -

[https://www.eerstekamer.nl/eu/artikel/20110302/uk\\_seeking\\_to\\_extend\\_commission/document](https://www.eerstekamer.nl/eu/artikel/20110302/uk_seeking_to_extend_commission/document)

98 Ibid, (14)

99 Tim Rymer, Statewatch, UK Semaphore system, 27/03/2008, <http://www.statewatch.org/news/2008/may/uk-pnr-semaphore.pdf>

100 UK Parliament, pt 72 for sea

<https://www.parliament.uk/documents/upload/governmentresponsecm7461pnrframeworkdecision060808.pdf>

101 <https://www.legislation.gov.uk/uksi/2007/3579/article/2/made>



get to the UK is largely by using an aircraft, the UK government decided to go further by including directly a control through the sea<sup>102</sup>:

Furthermore, the UK analyses the data linked to passengers from different means of transportation, but also the data linked to freight transportation<sup>103</sup>. It means that the commercial transport is also targeted by the UK system. However, this part is totally out of the scope of the EU PNR Directive. Indeed, the European text focuses only on the passengers' data, and never mentioned any possible freight analysis, which is totally a different matter as it is a merchandise, not a person.

These UK national acts – Immigration, Asylum and Nationality Act and the Code of Practice – were created before the EU PNR Directive in the British system. Hence, if the UK remains part of the EU after the 25th of May 2018, it will have to change its legislation to be in accordance with the Directive, or will have to explain such an extent to the European Commission and other institutions. Therefore, the material scope of application of the UK Immigration, Nationality and Asylum Act is not in compliance with the EU PNR Directive; it is going further than the EU PNR Directive requirements and open possibilities. The EU PNR Directive considers the eventuality to extend the collection and analysis of data to other types of transportation. However, it does not consider possible to extend the data collection to merchandises and not only human passengers.

In conclusion, the British system is actually violating two parts of the EU PNR Directive, by going further in its collection of data and following analysis of it. The UK does not seem ready to minimize this data collection to limit only to air traffic, as the extension to domestic flights and all means of transportation will directly be amended in the Immigration, Nationality, Asylum Act, to enter into force from 1st of April 2018 at the latest<sup>104</sup>.

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<https://www.ons.gov.uk/peoplepopulationandcommunity/leisureandtourism/datasets/overseasresidentsvisitsstotheuk> (Sheet 4.01: Visits and spending in UK: by mode of travel, region of residence and purpose of travel, 2016)

103 Code of Practice, 3.3.3 - <http://www.statewatch.org/news/2008/may/uk-cop-data-share-borders.pdf>

104 Immigration, Asylum and Nationality Act, 2006 (32) - <http://www.legislation.gov.uk/ukpga/2006/13/section/32>

### 2.1.1.1.c) French PNR system

According to many media<sup>105</sup>, the Paris attacks are considered to have been the new trigger leading to the adoption of the EU PNR Directive. However, at the national level, the PNR data collection actually started to be envisaged even before these events. The possibility to collect passengers' data to fight against terrorism and serious crimes was created in France in 2013, with a national programme linked to some military projects<sup>106</sup>. This first law used targeted only API data collection, in a folder called "Air passengers report"<sup>107</sup>. However, this folder was quickly replaced by another one<sup>108</sup>, which could include more data, then called "SETRADER", which stood for "European system of data analysis of check-in and booking"<sup>109</sup>. SETRADER system allowed to collect PNR data, but only on particular cases and restricted flights. The restriction was severe and officially published in a list: only around 30 third States were targeted<sup>110</sup>. Unfortunately, this list is not accessible to citizens. The only available information is that at the beginning, seven countries were targeted, while later on, they were thirty-eight in total<sup>111</sup>. The fact to include the concerned destinations in a list involves that not all French airports were bound by that measure, but only those which receive some flights to or from these particular destinations.

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105 France info, 19 Nov 2015 [http://www.francetvinfo.fr/faits-divers/terrorisme/attaques-du-13-novembre-a-paris/attaques-a-paris-a-quoi-sert-le-pnr\\_1183505.html](http://www.francetvinfo.fr/faits-divers/terrorisme/attaques-du-13-novembre-a-paris/attaques-a-paris-a-quoi-sert-le-pnr_1183505.html)

Le Monde, 3 mars 2016

[http://www.lemonde.fr/europe/article/2016/03/03/l-adoption-du-projet-de-pnr-le-fichier-sur-les-passagers-aeriens-a-nouveau-retardee\\_4876315\\_3214.html](http://www.lemonde.fr/europe/article/2016/03/03/l-adoption-du-projet-de-pnr-le-fichier-sur-les-passagers-aeriens-a-nouveau-retardee_4876315_3214.html)

106 Loi du 18 décembre 2013 relative à la programmation militaire, Article 17 -

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028338825&categorieLien=id>

107 Fichier des passagers aériens (= FPA)

108 Within the same year, 2013

109 Fichier des passagers aériens (=FPA) to Système européen de traitement des données d'enregistrement et de réservation (= SETRADER) <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027332492>

110 Only around 30 third States targeted countries (-> restricted destinations so restricted airports concerned by the measure as well)

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027332492>

111 Rapport relatif aux moyens mis en œuvre par l'Etat pour lutter contre le terrorisme depuis le 7 janvier 2015, M. Sebastien Pietrasanta, 05/07/2016, p701 -

<https://books.google.fr/books?id=AR2pDAAAQBAJ&pg=PA701&lpg=PA701&dq=liste+du+minist%C3%A8re+de+l%27int%C3%A9rieur+pays+SETRADER&source=bl&ots=->

[6LH42fAF&sig=LrubxkmO94SwUSLT5iXAAxHEGBU&hl=fr&sa=X&ved=0ahUKEwi7woevnYrbAhXPa1AKHRf0BIoQ6AEIVjAH#v=onepage&q=liste%20du%20minist%C3%A8re%20de%20l'int%C3%A9rieur%20pays%20SETRADER&f=false](https://books.google.fr/books?id=AR2pDAAAQBAJ&pg=PA701&lpg=PA701&dq=liste+du+minist%C3%A8re+de+l%27int%C3%A9rieur+pays+SETRADER&source=bl&ots=-6LH42fAF&sig=LrubxkmO94SwUSLT5iXAAxHEGBU&hl=fr&sa=X&ved=0ahUKEwi7woevnYrbAhXPa1AKHRf0BIoQ6AEIVjAH#v=onepage&q=liste%20du%20minist%C3%A8re%20de%20l'int%C3%A9rieur%20pays%20SETRADER&f=false)

Rapport sur la surveillance des filières et individus djihadistes, M. Patrick Menucci, 02/06/2015, p83 -

<https://books.google.fr/books?id=NpDVCQAAQBAJ&pg=PA87&dq=liste+du+minist%C3%A8re+de+l%27int%C3%A9rieur+pays+SETRADER&hl=fr&sa=X&ved=0ahUKEwjtU7G2oYrbAhUCsxQKHWDvCrwQ6AEILTAB#v=onepage&q=liste%20du%20minist%C3%A8re%20de%20l'int%C3%A9rieur%20pays%20SETRADER&f=false>

Even though the rules of SETRADER are different from the EU PNR Directive, some of them are already closed to it; indeed, the data collection process was automatic, and the data storage maximum time was already limited at five years maximum<sup>112</sup> at that time<sup>113</sup>. From 2013 to 2017, this system SETRADER was used within France.

Then, a law from 30th October 2017 amended the 2013 SETRADER system, in order to create the current API-PNR system<sup>114</sup>. This newborn collects the data for all the flights, except the internal ones: which means that currently, intra-EU or third State destinations are both part of the French PNR data collection and analysis. This new system is quite different from the previous system SETRADER, which targeted solely its maximum thirty-eight destinations, due to their particular risk, within some third countries. However, the national flights are excluded, and are not part of the collection and analysis of air passengers data<sup>115</sup>.

It is interesting to mention that from June 2016 until October 2017, the French PNR system was extended for two means of transport: air transport, but also maritime one<sup>116</sup>. The national voyages were excluded for these two types of transportation during that period of time as well.

The next law in October 2017 brought back the system to its previous and initial scope of application: including only air transportation<sup>117</sup>. Therefore, the current French system is in line with the basic PNR Directive's requirements regarding the concerned flights and means of transportations, and does not go further than these requirements.

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112 Journal Officiel de la République Française, N°93, 20 Avril 2013, Arrêté du 11 Avril 2013 portant autorisation d'un traitement de données à caractère personnel dénommé SETRADER, Article 4

113 Le Figaro, 20/04/2013, <http://www.lefigaro.fr/flash-actu/2013/04/20/97001-20130420FILWWW00351-un-nouveau-fichier-des-passagers-aeriens.php>

114 Loi n°2017-1510, 30 Oct 2017, renforçant la sécurité intérieure et la lutte contre le terrorisme - [https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=0CC90C7524B7253A083297EF4A991B78.tplgfr41s\\_3?cidTexte=JORFTEXT000035932811&idArticle=LEGIARTI000035933831&dateTexte=20180402&categorieLien=id#LEGIARTI000035933831](https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=0CC90C7524B7253A083297EF4A991B78.tplgfr41s_3?cidTexte=JORFTEXT000035932811&idArticle=LEGIARTI000035933831&dateTexte=20180402&categorieLien=id#LEGIARTI000035933831)

115 Art L232-7, II - Ibid

116 Security Interior Code, Article L232-7, II - version due to loi n°2016-816, pour l'économie bleue, June 2016 - [https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=0CC90C7524B7253A083297EF4A991B78.tplgfr41s\\_3?idArticle=LEGIARTI000032748245&cidTexte=LEGITEXT000025503132&categorieLien=id&dateTexte=20171030](https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=0CC90C7524B7253A083297EF4A991B78.tplgfr41s_3?idArticle=LEGIARTI000032748245&cidTexte=LEGITEXT000025503132&categorieLien=id&dateTexte=20171030)

117 Security Interior Code, Article L232-7, II - latest version, Oct 2017 - [https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=0CC90C7524B7253A083297EF4A991B78.tplgfr41s\\_3?idArticle=LEGIARTI000035937527&cidTexte=LEGITEXT000025503132&categorieLien=id&dateTexte=](https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=0CC90C7524B7253A083297EF4A991B78.tplgfr41s_3?idArticle=LEGIARTI000035937527&cidTexte=LEGITEXT000025503132&categorieLien=id&dateTexte=)

### 2.1.1.1.c) Belgium PNR system

Belgium PNR system was created after the EU PNR Directive adoption, started by a law adopted on 25th December 2016<sup>118</sup>. This law constitute the legal framework for transposition of the EU PNR Directive. However, it is not enough by itself to be effective; to start having a PNR system and all the rules related to it, the law should be then completed by other internal regulations, called “arrêtés royaux”. These complementary regulations will allow to set up some technical rules regarding the obligations of each carrier to transfer the data, and also set up a date for the entry into force of those rules<sup>119</sup>.

Comparing the Belgium system to the French and UK PNR systems, two important elements must be noticed. On the one hand, Belgium is going further than France and the UK, by considering the possibilities to include all means of transport; air, maritime, railway, but also road. To do so, the terms used in the law stay very general; by using every time only the term “transporteur”, which could be translated by “carrier”, the Belgium legislator leaves the door open to include all types of carrier, as no details are given. Moreover, the law contains a definition of the all four types of transport<sup>120</sup>. By road, the Belgium actually means to have a control of passengers using international buses. It is not a way to settle an automatic control at the border for every passenger passing by car, bus, or any other means of transportation using the road<sup>121</sup>. This would be totally disproportionate and not compatible with the Schengen area and freedom of movement within this area. On the other hand, Belgium law is similar to the UK regulation regarding the scope of application: the PNR data will be collected, whatever the destination or departure place is. This means that Belgium PNR system will collect data for every travel, at any level: national, European, or purely international with the involvement of a third country State<sup>122</sup>. In a nutshell, the Belgium system uses all the abilities of the PNR data analysis, by collecting the data for all types of travel, whatever the mean of transport or the destination, even without crossing any border.

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118 Loi relative au traitement des données des passagers, 25 Dec 2016 -

[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2016122543&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2016122543&table_name=loi)

119 Arrêté royal, 18 July 2017, introductional part explaining the context - [http://www.etaamb.be/fr/arrete-royal-du-18-juillet-2017\\_n2017030879.html](http://www.etaamb.be/fr/arrete-royal-du-18-juillet-2017_n2017030879.html)

120 Article 4, Ibid

121 Article 7, <https://www.dekamer.be/flwb/pdf/54/2069/54K2069003.pdf> p30; only international transportation by bus

122 Article 3, Ibid

For the moment, only the regulation regarding the air transport was adopted on 18th July 2017<sup>123</sup>, and already entered into force two weeks later for air transportation area and air carriers obligations to collect the data<sup>124</sup>. However, no regulation was set up as of now regarding the other means of transportation.

After focusing on the means of transport which are in the scope of the EU PNR Directive, and the different options chosen by the UK, France and Belgium, the focus needs to be also on the crimes pursued by the PNR data collection and analysis.

### 2.1.1.2. Targeted crimes

The PNR data collection and its further analysis should be done solely in order to prevent, detect, investigate and prosecute terrorist offences and serious crime<sup>125</sup>. The idea of this data analysis system is to be able to do some profiling. It could allow to find some serious criminals, with the real added value to be able to discover new potential targets, and not only find out the researched people which are categorized in a watch-list, as the API Directive allows to<sup>126</sup>. Thus, we need to focus on what exact purpose could the PNR data collected be used for.

#### 2.1.1.2.a) EU PNR Directive

The title of the EU PNR Directive is by itself already explicative, claiming that the data collection and further analysis is for the “*prevention, detection investigation and prosecution of terrorist offences and serious crimes*”<sup>127</sup>. Nevertheless, some doubts could be raised, and some different point of views could emerge, on the way how to interpret the directive’s goal.

Being just a directive, it could lead to some vague interpretations by each different Member State on what should be included in this list of serious crimes to fight against and what is a terrorist offence, or also to which extent could a State go for prevention or investigation purposes. The Article 3 of the EU PNR Directives states not a direct definition of a terrorist offence, but relies to another EU text previously adopted in that matter; the Framework Decision 2002/475/JHA, which structures the rules in order to combat terrorism within the EU Area of

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123 Arrêté royal, 18 July 2017 -

[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2017071804&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2017071804&table_name=loi)

124 Entry into force on the 07/08/2017 - <http://reflex.raadvst->

[consetat.be/reflex/?page=chrono&c=detail\\_get&d=detail&docid=135255&tab=chrono#topofpage](http://consetat.be/reflex/?page=chrono&c=detail_get&d=detail&docid=135255&tab=chrono#topofpage)

125 EU PNR Directive, Title

126 Statewatch, EU: European Commission to propose EU PNR travel surveillance system, 15/07/2007,

<http://www.statewatch.org/news/2007/jul/03eu-pnr.htm>

127 Ibid

Security, Freedom and Justice<sup>128</sup>. To prevent any abuse from a Member State in its future interpretation, mainly regarding the serious crime which is a very open notion, the Article 3 of the Directive refers to its Annex II, which creates a strict framework and describes exactly the twenty-six (26) different crimes hunted through the PNR data analysis<sup>129</sup>. Hence, the Member States have to comply with this list, and cannot use the PNR data for further reasons or any other particular crime. In conclusion, being defined as a serious crime in a Member State is actually not enough to use PNR data to detect potential criminals. The crime has to be connected with one of the crimes listed in the Annex II of the Directive. Firstly, while writing the draft of the Directive, the definition of serious crimes was referred to a Framework Decision as well<sup>130</sup>; the one concerning the European Arrest security goals relating to counter-terrorism and the need to avoid distortion in the internal market. However, there is no general European definition on what is a “serious crime”. It could have led to many differences from one Member State to another. Thus, the decision was made to adopt a precise list, added as an annex to the EU PNR Directive, in order to make sure that all the Member States will consider the same crimes in the same manner, and include the same ones by using the PNR data previously collected.

However, we could wonder whether this framework is enough to have the same crimes in the scope of application of the PNR data analysis for the all twenty-seven (27) Member States which have to set up their PNR system<sup>131</sup>. Even though a precise list is stated by this Annex I of the EU PNR Directive, the crimes are just listed, without giving any precise definition to refer to. Thus, it could still lead to some divergences, depending on each Member State’s national law to define each crime listed in its own national system.

Some efforts were done to create a precise range of crimes. However, it could create some remaining situations in which it will maybe not be obvious whether the crime pursued is part of part of the EU PNR Directive’s list. The ECJ will maybe have to have a role of interpretation of the EU law once again in some cases

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128 Eur-Lex, Framework decision 2002/475/JHA, EU rules on terrorist offences and related penalties, 13/06/2002 - <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:32002F0475&from=EN>

129 Annex II, EU PNR Directive

130 Clan C. Murphy, EU Counter terrorism Law: Preemption and the Rule of Law, 08/06/2012,

<https://books.google.cz/books?id=VJR6BAAAQBAJ&pg=PT130&lpg=PT130&dq=PNR+system+UK+national+flights+included&source=bl&ots=pvSqjfZeTP&sig=q3Ay0v4LAPyT219up8HLW19PQ8A&hl=en&sa=X&ved=0ahUKewi-4YnT6IDUAhUDWSwKHUnmDrwO6AEIQzAG#v=onepage&q=PNR%20system%20UK%20national%20flights%20included&f=false>

131 Denmark not included, as it opt-out for the EU PNR Directive - Europa, Council adopts EU PNR Directive, Press release, 21/04/2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/04/21-council-adopts-eu-pnr-directive/>

### 2.1.1.2.b) British PNR system

In the UK, the Code of Practice on the management of information shared by the Border and Immigration Agency, Her Majesty's Revenue and Customs and the Police<sup>132</sup> mentioned that the PNR data could be collected for different goals. It could be in order; to “*identify those who present a risk for border security*”, to “*determine a proportional response*”, to “*detect crime*” and to “*do profiling and trend analysis*”. These goals are also the ones highlighted to be able to share the data, according to the Immigration, Asylum and Nationality Act<sup>133</sup>.

The UK system does not give any detailed list of crimes pursued, as the PNR Directive does. However, the Code of Practice gives the four above-mentioned categories. There are some short explanations in the Code of Practice of what should be included in each category. Thanks to that, it allows to compare with the EU PNR Directive, and to realise that some ways to use data could be not in line with it. Indeed, some parts seem to allow collection and analysis of the data in too many cases comparing to the strict framework originally given by the Directive.

The main problem to highlight is that the goals stated in the Code of Practice are vague, very open. They cannot be attached to a proper strict definition. For instance, the shared data could be used to “*identify individuals who are involved or suspected of being involved in crime*”<sup>134</sup>. However, there is any further details or proper definition about what could be considered as a crime. Thus, no real limit is clearly stated. It could concern many crimes which are not included in the definition and lists of the PNR Directive, as far as they receive the crime definition in the UK law. This issue related to the use of the term crime solely is also present for one general purpose category, which simply states “*to detect crime*”<sup>135</sup>, without never defining which categories of crime should be included in this detection or research.

Even when the purpose is not as vague as previously developed, some other differences can be noticed. For example, the shared data are used to “*identify individuals who are of a national security, smuggling, or immigration interest*”<sup>136</sup>. The national security and smuggling could be linked to terrorist offences, illegal traffickings that the EU PNR Directive covers. However, we can wonder what is exactly hidden behind all these words, and to what extent an

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132Code of Practice on the management of information shared by the Border and Immigration Agency, Her Majesty's Revenue and Customs and the Police, 3.5 - <http://www.statewatch.org/news/2008/may/uk-cop-data-share-borders.pdf>

133 UK Government, Immigration, Asylum and Nationality Act, 2006 - <https://www.google.cz/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKEwivr9uJpIPUAhUL2SwKHbuDBXMQFgg4MAM&url=https%3A%2F%2Fec.europa.eu%2Fmigrant-integration%2Findex.cfm%3Faction%3Dmedia.download%26uuid%3D29C736D2-A8D2-67CA-B52C47191B640B7C&usg=AFQjCNGgIo5X8Cx08zPRmVe063Ltfkmhwg>

134 Code of Practice, 3.5.1

135 Code of Practice, 3.5.3

136 Code of Practice, 3.5.1

information could serve this interest of identification. Plus, the last category - related to immigration interest - could be linked to the EU PNR Directive only if it is strictly limited to the persons who facilitate “*unauthorised entry or residence*”. By opening a bit further the interpretation, the “*forgery of administrative documents and trafficking them*” could be included if to some extent we consider the fraudulent papers that the person could create and sell in that particular situation<sup>137</sup>. However, the UK version is vague and could be interpreted in a way to include really more immigration cases. Indeed, the term “*immigration interest*” in itself could actually cover a lot of topics and issues: as far as someone is coming or leaving the UK territory, this could be considered as an immigration interest, if no further details put a framework and some boundaries.

Furthermore, the freight issue - above mentioned regarding the means of transport concerned by the national law<sup>138</sup> - shows up here as well regarding the crimes targeted by the PNR data collection and analysis within the UK. Indeed, the Code of Practice allows profiling to “*analyse trends in passenger/freight movement*”<sup>139</sup>. However, we could wonder to which extent should the freight be analysed? Even though the EU PNR Directive considers the crimes of illegal trafficking of several goods, it is made only for passenger and crew, and their affected luggage. It is written anywhere in the Directive that a possible extension could be done for every freight, or solely commercial transportation. Indeed, the EU PNR Directive focuses only on passengers, so on human beings, not on merchandises.

To conclude shortly, the UK legislation is vague while defining the situations in which the PNR data could be used. It seems to give a framework too open, which could allow the border agencies to always justify their actions to decide to collect the PNR data according to one of the purposes described above, as these purposes do not have strict barriers or limits.

#### 2.1.1.2.c) French PNR system

The French PNR system and its organization is different than the UK one. It is closer to the EU PNR Directive way to mention the crimes which could be pursued with the PNR data processing. The French Procedure Penal Code - a legal book gathering all laws and rules regarding criminal proceedings and some crimes - is the basis used to find the related crimes pursued by the PNR data collection and analysis. Different French Laws are involved as

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137 EU PNR Directive, Annex II (11 & 18)

138 Chapter II, Section I, Part I, b)

139 Code of Practice, 3.3.4



references to describe the crimes which could be pursued<sup>140</sup>. Indeed, the Article L232-7 of the Security Interior Code states that the crimes pursued could be terrorism, or afterwards mentions a list of crimes, available in another part of the same legal book<sup>141</sup>. In that structure, it is very similar to the EU PNR Directive and its Annex II. The list is available through the Article 695-23 of the Procedure Penal Code<sup>142</sup>. This Article mentions finally a list of crimes classified in another part. The list of the Article 694-32 of the same Code<sup>143</sup> seems to be firstly very similar to the one stated in the Annex II of the EU PNR Directive. However, some differences need to be mentioned.

While the Annex II states twenty-six (26) different crimes which could be in the scope of the PNR data analysis to define serious crimes, the French law considers in total thirty-two (32) of them in its list. It does not mean that there are exactly six (6) crimes which should be deleted from the French law; a comparison of the exact content of both lists is obviously needed in order to understand the differences between both texts. After reading each crime one by one, we need to focus on three different ones, which do not seem to correspond directly to any crime mentioned in the Annex II of the EU PNR Directive. The eventual non-compliance could be with these following crimes, which will be developed below:

- “fraud on the payment means”<sup>144</sup>,
- “racism and xenophobia”<sup>145</sup>,
- “arson”<sup>146</sup>.

Article 3 of the EU PNR Directive describes the serious crime notion as “*the offences listed in Annex II that are punishable by a custodial sentence or a detention order for a maximum period of at least three years under the national law of a Member State*”<sup>147</sup>.

The definition of Article 3 (9) does not allow to include any further crime than the ones listed in the Annex II, even though some crimes could be punished in a national system with a

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140 OMD n°77, June 2015, p23

141 Interior security Code, Article L232-7,

<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000032748245&cidTexte=LEGITEXT00025503132&dateTexte=20170522&oldAction=rechCodeArticle&fastReqId=1065819723&nbResultRech=1>

142 Procedure Penal Code, Article 695-23,

<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000033518865&cidTexte=LEGITEXT00006071154&dateTexte=20170522&oldAction=rechCodeArticle&fastReqId=49091079&nbResultRech=1>

143 Procedure Penal Code, Article 694-32,

<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000033515114&cidTexte=LEGITEXT00006071154&dateTexte=20170522&oldAction=rechCodeArticle&fastReqId=1746865191&nbResultRech=1>

144 Ibid, (24)

145 Ibid, (17)

146 Ibid, (29)

147 EU PNR Directive, Article 3, 9

custodial sentence of at least three years. It is the case for arson in France<sup>148</sup>. The crime of arson is punishable of a maximum sentence up to 10 years in the French law. However, it does not constitute a sufficient reason to add it in the list of crimes which could be pursued by using the French API-PNR system.

If the ECJ would encounter a case including a crime which is not part of the EU PNR Directive list, the Luxembourg judges will use their power of interpretation to determine whether it was a reasonable choice to include this crime. A matter of illegality could be raised. In order to be in a State of law, the crimes have to be strictly defined in advance, in order to avoid any abuse of powers from the different authorities, and also to protect the personal data rights of every passenger in the particular case of the PNR data collection. Therefore, the crime of arson should not be included in the French list of crimes pursued by using the PNR system.

Regarding the fraud on the payment means, it could probably be interpreted largely and linked to the EU PNR Directive concerning fraud or laundering, as it is also money issues and crimes, even though the Directive did not go so much in details while mentioning that crime in the Annex II<sup>149</sup>. Therefore, it is possible to link it to a crime available in the EU PNR Directive's list. However, it is also a matter of interpretation, which could be handled only by the national and mainly Luxembourg judges in case of a concrete situation.

As for the two other crimes -, racism and xenophobia and arson - it is more difficult to relate them to any of the crime listed in the Annex II of the EU PNR Directive, comparing to the link just created regarding the fraud.

Concerning the crime of racism and xenophobia, it could be linked to the Annex II due to its possible relation with the punishable crimes in front of the International Criminal Court<sup>150</sup>. Indeed, the Rome Statute - which frames the International Criminal Court's competence - in its Article 7 allows the Court to judge the crimes against humanity and define the different crimes a bit more in details<sup>151</sup>. To relate to the French crime of racism or xenophobia, the crime against humanity could be the one described as a "*persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within*

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148 Penal Code, Article 322-6 - up to 10 years

149 EU PNR Directive, Annex II, (8 and 9)

150 Annex II of the EU PNR Directive, 22

151 Rome Statute, [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

*the jurisdiction of the Court*<sup>152</sup>. To be considered in the scope of the International Criminal Court, it has to be highlighted that the crime should be of a particular importance, and should be constituted of some acts committed “*as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*”<sup>153</sup>. Therefore, it cannot include every act of violence against one or a few person(s) which could be linked to some discrimination behaviour. The suspect might have committed a particular crime against a certain population. However, the interpretation and decision to include this particular crime in an eventual PNR analysis remains under the power of the French judges and the ECJ. It is quite uncertain, as the French law settling the PNR system is also mentioning directly in a particular line the crimes which are in the scope of the International Criminal Court<sup>154</sup>. Therefore, it seems that the crime of racism and xenophobia cannot be included in the reasons why collecting and processing the PNR data or the travellers passing through France.

As for the above-mentioned crime of arson, it cannot be linked to any crime listed in the Annex II of the EU PNR Directive, even by using a broad interpretation as for the racism and xenophobia previous example. Therefore, the arson crime would have to be deleted from the list in order to comply with the EU PNR Directive and not go further than the crimes considered by EU law. Without denying the importance of arson, and even though it could be defined as a serious crime within France and under French law, the arson could be considered out of the framework stated by the EU PNR Directive.

Another point to highlight is that the French law, in its Article L.232-7 - before using the references to the Criminal Proceedings Code to have a proper list - states that the PNR data could also be collected and processed in order to fight against the “violations against the fundamental interests of the Nation”<sup>155</sup>. According to the French Parliament - Senate institution -, an extension to this type of crime is possible<sup>156</sup>. Indeed, the argument advanced by the senators is that this particular kind of crime does not fall into the scope of EU law or some competences shared between the Member State and the EU. Following this rationale, it leads to the possibility for a Member State to be fully competent to decide to include such a crime in its PNR scope. This reason is usually invoked by the French legislator or government in order to have more power during emergency times, or following some particular events – as following the 2015 Paris attacks. The French senators considers that this crime could be part of the French list of crimes due to the fact that it is not part of the competences shared with the EU. The author

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152 Ibid, Article 7, h

153 Ibid, Article 7

154 Procedure Penal Code, Article 694-32, 30

155 Interior Security Code, Article L232-7, I, alinéa 2

156 French Senate website - <http://www.senat.fr/rap/a16-636/a16-6361.html>

considers as well that this crime could be accepted, even though it is not firstly part of the EU PNR Directive's list. The extension to this particular crime can be explained due to French habits to have this reserve, and the fact that it remains a national competence to fight this particular crime against its own nation. However, the author thinks that this crime should be defined in a very precise manner, and very limited in its use in order to collect and analyse PNR data. This type of extension should be limited to a strict definition, in order to stay in compliance with the EU framework and not go further than the strict necessity. Otherwise, France will violate EU law by including more crimes than the list provided by the EU PNR Directive, even though an exception could be done due to its strict national competences. However, the author considers that this exception cannot be applied in the same way to the general extension and inclusion of other means of transportation in an automatic way done by the UK PNR system. The reason is that the consequences are not the same: the inclusion of other means of transportation adds a lot of passengers' PNR data globally collected, comparing to the addition of a particular crime of national interest, limited to the already collected passengers' data..

While examining the changes which should be done in the French system and associated law in order to comply with the EU PNR Directive, the Parliament is considering that this crime of “violations against the fundamental interests of the Nation” could remain in the French PNR law<sup>157</sup>. Thus, we could wonder if the same rationale might be applied to arson. However, arson is a type of crime which cannot be ranked as such a special crime against the Nation. The only exception might be if the arson would be done against some special buildings, areas or during a special national event; it means that this special arson could fall down again in the “special crime against the Nation” type, and not be judged as an arson solely. The extension in order to add other types of crime should be very limited to be considered as a proportionate choice. The author believed that the particular crime could be accepted

Furthermore, there is a reversed issue; one crime listed in the Directive is actually missing in the French list. Indeed, the “*industrial espionage*”<sup>158</sup> does not appear anywhere in the French law regarding crimes that PNR data could be used for. The only close term listed in the French law would be the “sabotage” crime, which is the last one mentioned in the French list<sup>159</sup>. However, it is also part of the list provided by the Annex II of the EU PNR Directive, and covers the same type of crime under the same name, in both languages French and English. Even

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157 Ibid

158 Annex II of the EU PNR Directive (26)

159 Procedure Penal Code, Article 694-32, 36

though the sabotage crime could also be linked to industries while it is more related to military or State, the sabotage does not include some espionage part. Indeed, it focuses more on the actual fact to destroy a State, a firm or a business, without focusing on the means to realize that goal. Thus, it all depends on the actual future way to interpret the sabotage notion while first from the agencies for collecting the PNR data, and second from the judges in case of some proceedings due to that statement. As the Annex II of the EU PNR Directive is a strict list, the author would recommend to not wait for some eventual interpretations, but to add directly the industrial espionage to the existing list in the French law.

Therefore, regarding the French PNR system and crimes targeted, deleting arson which cannot be associated to the PNR Directive range of crimes is mandatory. On the contrary, the industrial espionage should be added in the French law instead of the existing arson, in order to cover fully the crimes considered by the Annex II of the EU PNR Directive. The question of violations against the fundamental interests of the Nation is more complicated, but the author considers that it could be accepted due to the special competences of the Member States. Finally, the crime of industrial espionage should be added to the existing list.

#### 2.1.1.2.d) Belgium PNR system

The Belgium PNR system follows strictly Annex II of the EU PNR Directive, without bringing any details or personal list defining the crimes pursued by the PNR data collection and analysis; it mentions that the “*PNR data could be used only for infractions strictly stated in the Directive and which could be punished by a custodial sentence or a detention period of at least three (3) years*”<sup>160</sup>. This copies exactly the definition of serious crime provided by the EU PNR Directive<sup>161</sup>.

However, it is important to still mention some particularities regarding the Belgium law. Indeed, the transposition of API Directive was initially done by a national regulation - arrêté royal - in 2006. However, it is abrogated<sup>162</sup> by the law adopted on the 25th December 2016, which creates the PNR system, in order to combine in the same text the EUAPI and PNR

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160 <https://www.dekamer.be/flwb/pdf/54/2069/54K2069003.pdf>, p6

161 EU PNR Directive, Article 3, 9

162 <http://www.lachambre.be/FLWB/PDF/54/2069/54K2069001.pdf> p6: “l’arrêté royal du 11 décembre 2006 est abrogé”

Directives (as well as a part of the Directive of 20 October 2010 on reporting formalities for ships arriving in and/or departing from ports of the Member States)<sup>163</sup>.

The fact that the API Directive is merged in the law to transpose the EU PNR Directive leads that the fight against illegal immigration is included in the crimes to be pursued. Therefore, during the debates regarding the draft, a deputy asked to precise this purpose<sup>164</sup>. The Minister Jan Jambon confirmed that Article 29, mentioning the fight against illegal immigration is purely limited to the API Directive, with a focus only with external borders to the EU. This could be remarked and confirmed by the fact that the data will be erased after twenty-four (24) hours<sup>165</sup>.

In conclusion, the French and UK PNR systems encounter different issues while comparing them with the EU PNR Directive's goals and Annex II. The UK system is very vague, permitting a free interpretation and an inclusion of crimes which are not part of the Annex's strict limits. The French system is more precise, but does not cover exactly all the crimes covered by the Annex II of the EU PNR Directive. However, the Belgium law, fully created after the EU PNR Directive adoption, is in line with the EU PNR Directive. It only has to strictly respect the difference between the dispositions regarding the API and the PNR Directives, which are merged in one singular national law.

### **2.1.2. SECTION II. Establishing a Passenger Information Unit**

To collect and analyse the PNR data, a special agency needs to be created or appointed by the Member State. The Member State has to inform the European Commission about its choice (§1). Inside this special agency, called Passenger Information Unit (=PIU) by the EU PNR Directive, a Data protection officer has to be nominated, to make sure the personal data rights of the passengers are respected while the data are collected, processed or stored (§2).

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163 Directive 2010/65/EU, 20 October 2010 on reporting formalities for ships arriving in and/or departing from ports of the Member States and repealing Directive 2002/6/EC - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0065&from=FR>

164 <https://www.dekamer.be/flwb/pdf/54/2069/54K2069003.pdf> p34, Deputy Mr Stephane Crusnière, Chapter 11, Art 28 to 31

165 Cf. Chapter I, Section II, chart

### 2.1.2.1. PIU structure

#### 2.1.2.1.a) EU PNR Directive

The PIU is settled in Article 4 of the EU PNR Directive. Its role is to be responsible for “collecting PNR data from air carriers, storing and processing those data”<sup>166</sup>. The PIU is linked to other authorities, which are all “competent for the prevention, detection, investigation or prosecution of terrorist offences or serious crime”<sup>167</sup>.

The EU PNR Directive is really open concerning the way of establishing the PIU and the requirements, letting each Member State to create it according to the needs of its national system and the way the State is more globally organised. Thus, Article 4 of the EU PNR Directive does not include any precise requirements, that we can relate on, to make sure that for example the competent authority could be approved by the European Commission.

However, the European Commission has to check the list of competent authorities which could request the PNR data. Therefore, it does not mean that the Member State is totally free at the end to attribute the PIU role to any already existing institution, as it is still does have to explain its final choice eventually<sup>168</sup>. Many different schemes were decided by the Member States to create a PIU. In some of them, the PIU institutions is more linked to the the Police, while in some others it is more related to the Customs Office for example. It is anyway a special branch and the PIU composition should be a mix of different national institutions. At the end, the European Commission members will be the only ones able to check if the choices were correct and could be accepted or not. However, the ECJ will have a role also later, in order to determine whether the neutrality of the PIU is fully respected, while facing some particular proceedings.

The PIU is described by some authors as an “*ad hoc* national authority”<sup>169</sup>. It has to be an independent administration. Consisting the core of the system, its creation and structure is really important, in order to make sure that the good balance between security and personal data rights will be ensured.

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166 Article 4 (2a), EU PNR Directive

167 Article 7 (2), EU PNR Directive

168 Article 4 (5), EU PNR Directive

169 Lafarge François, Neframi Eleftheria, Mangenot Michel, « Chronique de l’administration européenne\* », Revue française d’administration publique, 2016/3 (N° 159), p. 931-970. DOI: 10.3917/rfap.159.0931  
<http://www.cairn.info/revue-francaise-d-administration-publique-2016-3-page-931.htm>

#### 2.1.2.1.b) British system

In 2003, the British government launched a plan called “e-Borders programme”, in order to settle a totally new way - guided entirely through electronics and technology, leading to the chosen name electronic-Borders programme<sup>170</sup> - to protect the borders, handle the controls or identity checks, and also include the analysis of PNR or API data<sup>171</sup>. The main goal of this programme is to create a prevention system which allows to check the identity of travellers even before they will be officially on the UK soil, and being able to eventually block their journey from the very beginning, instead of doing so once they are already ready to cross a UK border<sup>172</sup>.

Under the e-Borders Programme, two different centres were created; Joint Borders Operations Centre in 2005, to then replaced by the National Border Targeting Centre in 2010<sup>173</sup>. The National Border Targeting Centre is composed of agents from Police, Border force and the Serious Organised Crime Agency<sup>174</sup>. The Centre relies on the Border Force Intelligence Directorate - usually called Department’ Border Force, previous Border Force<sup>175</sup> UK -, which itself depends on the Home Office Ministry.

The agents at the National Border Targeting Centre work 24/7, in order to have some coverage non-stop, in case of a need of a human personal check after a match of collected and analysed information regarding a passenger evaluated as suspicious<sup>176</sup>. If such a case would happen, they will then decide whether to forward the information to a special agency to deal with, as the Police or Border Force.

#### 2.1.2.1.c) French system

The French Passenger Information Unit, called “Unité d’Information Passagers” was created in 2014 through a national text: the decree 2014-1566<sup>177</sup>. It is an office directly tied to the Custom Ministry<sup>178</sup>. It is stated that the French PIU is also dealing with different other ministries: Interior,

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170 <https://www.afcea.org/content/united-kingdom-sets-electronic-borders>

171 E-Borders programme - <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2015/e-borders-15-16/>

172 Ibid

173 <http://www.statewatch.org/news/2013/oct/uk-e-borders-inspection-report.pdf>, p15

174 Ibid

175 [https://publications.parliament.uk/pa/cm201516/cmselect/cmpublic/643/64306.htm#\\_idTextAnchor013](https://publications.parliament.uk/pa/cm201516/cmselect/cmpublic/643/64306.htm#_idTextAnchor013)

176 Ibid, p22

177 Légifrance, Décret 2014-1566 portant création d'un service à compétence nationale dénommé « Unité Information Passagers » (UIP), 24/12/2014,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029953824&categorieLien=id>

178 Ibid, Article 1



Defence, and Transports<sup>179</sup>. This list is quite important, but justified by the different goals of the PNR data analysis and inevitable in order to cover all the fields.

The French PIU, called “Unité d’Information Passagers” was created linked to the project to set up a PNR system<sup>180</sup>. Based at Paris Roissy Charles de Gaulle Airport, the French PIU started to be effective from the 21st September 2016<sup>181</sup>. The announced plan was to get in total around 75 workers within the PIU, to assure a 24/7 work<sup>182</sup>. The data collected in itself is stored in a police particular database<sup>183</sup>. Regarding the different authorities which are then entitled to access the data after some special request, there are numerous; the police, the gendarmerie - military police -, the customs office, and special agents regarding investigation due to terrorism or intelligence office generally<sup>184</sup>. It is ensured that in case of a “hit”, which means that the automatic data could mean to an eventual suspicious profile due to the algorithm used, the PIU agent will consult it and analyse the situation before eventually forwarding the information gathered to some special agencies entitled to receive it, above-mentioned. By that rule, the French API-PNR system respects the requirements of the EU PNR Directive; a human interaction after the automatic assessment<sup>185</sup>.

#### 2.1.2.1. d) Belgium system

Already during the redaction of the draft of the final law, the Belgium legislator informed that a PIU will be created<sup>186</sup>. Chapter 7 of the Belgium law is dedicated to its PIU<sup>187</sup>. The Belgium PIU is linked to the Interior Public Service, which is an equivalent to an Interior Ministry. The Belgium Interior Public Service has competences to deal with such matters as security, elections, migration, asylum, citizenship, and identity<sup>188</sup>. The Belgium PIU is part of the “Crisiscentrum”, a more general institution of the Interior Public Service.

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179 Ibid

180 <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029504412>

181 <http://tempsreel.nouvelobs.com/rue89/rue89-applis-rue89/20160323.RUE2496/tout-ce-que-raconte-le-pnr-sur-moi-quand-je-prends-l-avion.html>

182 Interior Minister, <https://www.nouvelobs.com/rue89/rue89-police-justice/20150528.RUE9222/que-sait-on-de-moi-quand-je-prends-l-avion-de-plus-en-plus-de-choses.html>

183 Gendarmerie’s network to save data (Gendarmerie = half police half army) - Ibid

184 CNIL, <https://www.cnil.fr/en/node/15754>

185 EU PNR Directive, Article 6 (5)

186 <https://www.dekamer.be/flwb/pdf/54/2069/54K2069003.pdf> p12

187 Articles 12-14

[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=2016122543](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2016122543)

188 <https://ibz.be/>

As required in the framework law of 25th December 2016, a national regulation was adopted in order to determine the working conditions and status of agents within the PIU: it is the “arrêté royal” of 21th December 2017<sup>189</sup>.

The Belgium PIU gathered some agents from different Belgium institutions, which are once again quite similar with the UK and French choices: Border control, Police, Intelligence and some State security specialists. According to the law project and its comment, it is supposed to gather two agents of each institution, plus seven agents in charge of all the administration part, and of course the mandatory Data Protection Officer, that will be developed just below<sup>190</sup>. There are no details about a special number of employees in the later regulation which was adopted. This allows the Belgium system to adapt depending on its practical needs.

### 2.1.2.2. The Data Protection Officer

In every PIU, a particular independent person needs to be appointed: the Data Protection Officer<sup>191</sup>. This person is a key in the whole PNR structure. Indeed, the PNR data collection, analysis and storage is really intrusive against human privacy. The Data protection officer is settled to keep an eye on every action done by the PIU, in order to guarantee a smooth and respectful data treatment.

Violating the personal data protection and right to privacy, the PNR data collection needed to be accompanied by a lot of safeguards to convince the different human rights stakeholders of the necessity and mainly proportionality of the measure. The introduction of an independent person who ensures that the passengers’ personal data protection is guaranteed was not envisaged from the beginning, but is really necessary. Thus, the European Data Protection Supervisor, in its second opinion concerning the draft directive at that moment, welcomed the creation of a Data protection officer within the PIU, as a mandatory rule<sup>192</sup>. This step does not mean that the European Data Protection Supervisor gave his full green light regarding the EU PNR Directive. Indeed, he continued criticizing the huge amount of data collected with a PNR system. Plus, some skepticism remain concerning the whole necessity of such a measure: “*the*

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189 <http://www.ejustice.just.fgov.be/eli/arrete/2017/12/21/2017031868/justel#tablematiere>

190 [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=2016122543](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2016122543)

191 EU PNR Directive, Article 5

192 European Data Protection Supervisor, Opinion 5/2015, Second Opinion on 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, III.4, 24/09/2015, [https://edps.europa.eu/sites/edp/files/publication/15-09-24\\_pnr\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/15-09-24_pnr_en.pdf)

*EU needs to justify on a basis of available evidence why a massive, non-targeted and indiscriminate collection of data of individuals is necessary and why that measure is urgently needed*<sup>193</sup>. One of the main issue of the European Data Protection Supervisor is the lack of proof of the real needs and results provided by the PNR data analysis<sup>194</sup>.

Thanks to the final EU PNR Directive adopted, a Data protection officer per each Member State would be responsible of the guarantee of protection of personal data. Thus, every PIU has to appoint a Data Protection Officer *“for monitoring the processing of PNR data and implementing relevant safeguards”*<sup>195</sup>.

The Data Protection Officer is part of a more global tendency within the EU. Indeed, the new framework offered by the General Data Protection Regulation is considering to have such a controller, in every national or authority body which are dealing with sensitive data. The Article 29 Working Party gave a detailed report on Data Protection Officer’s role within the Member State’s bodies, and also about its appointment. Plus, this report permits to light up some parts of the GDPR, which sometimes could be blurred or a lack of some definitions<sup>196</sup>. The Data Protection Officer sets up by the GDPR entered in the scope of application of the EU PNR Directive: there is a clear correlation between both texts. While appointing the Data protection officer of the PIU, the GDPR and these guidelines should be kept in mind, as they entered into force on the same day as the EU PNR Directive. The GDPR is for sure applicable to the air carriers. They will have the duty to transfer the PNR data that they collect while a passenger is booking a flight with us. However, the data transfer is done for another purpose than this initial commercial purpose: to prevent, detect, investigate and prosecute terrorist offences and serious crimes. Indeed, the Working Party 29 informed in its transparency guidelines that *“a data subject should not be taken by surprise at the purpose of processing of their personal data”*. Due to this transparency principle, the airlines will have to inform the passengers of the PNR data collection and further transfer to the national authorities, i.e. the PIU<sup>197</sup>. However regarding the PIU in itself, the GDPR does not apply directly in the same way. Indeed, Recital 19 of the GDPR informs that the *“prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties (...) is subject of a specific Union legal act. This Regulation*

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193 Ibid

194 Ibid

195 EU PNR Directive, Article 5(1)

196 Article 29 Working Party, Guidelines on the Data Protection Officer(s), 13/12/2016,

[https://www.google.cz/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiIoaS11Y\\_UAhVL6RQKHeIIAKsQFggkMAA&url=http%3A%2F%2Fec.europa.eu%2Fnewsroom%2Fdocument.cfm%3Fdoc\\_id%3D43823&usq=AFQjCNEByOWl\\_41poQ-zIX4TWGpzxqhMA](https://www.google.cz/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiIoaS11Y_UAhVL6RQKHeIIAKsQFggkMAA&url=http%3A%2F%2Fec.europa.eu%2Fnewsroom%2Fdocument.cfm%3Fdoc_id%3D43823&usq=AFQjCNEByOWl_41poQ-zIX4TWGpzxqhMA)

197 Expert Guides, Catherine Erkelens, 22/05/2018 “Airlines and PNR: how does the GDPR come into play?” - <https://www.expertguides.com/articles/airlines-and-pnr-how-does-the-gdpr-come-into-play/armvjme>

*should not, therefore, apply to processing activities for that purpose*<sup>198</sup>. The mentioned specific legal act is the Directive 2016/680 (“*on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data*”).

As of now, any information is available concerning a Data Protection Officer officially named, neither in the British, nor in the French or Belgium system. The information is not communicated, and it is not possible to find a clear hierarchy of each PIU’s personal internal organisation.

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198 GDPR, Recital 19

## PART II. PNR DATA PROCESSING

The EU PNR Directive's main goal is collecting the data of the air passengers, in order to be able to detect, prevent, investigate and prosecute terrorist offences and serious crimes within EU. The part II will now focus first on the whole data processing steps: collection (I), safeguards (II), transfer (III) and finally the storage (IV). In order to have a clear view of the methods and rules chosen by the EU PNR Directive and the selected Member States for the comparison, the same presentation scheme will be kept in this part as in part I, e.i. presenting one by one the EU PNR Directive framework, and then the UK, French and Belgium systems.

### 2.2.1. SECTION I. PNR Data collection

Section I will be divided into two parts. The first part focuses on the data transfer obligation which is imposed to the carriers, leading to the use of the so-called push method (1). The second part focuses on the exact data which will be collected by using that method (2).

#### 2.2.1.1. Data transfer obligation

Collecting the data is crucial in the PNR systems. A wide and secure collection is needed in order to then be able to use properly the passengers' data.

##### 2.2.1.1.a) EU PNR Directive

There are two main methods to share PNR data. On the one hand, the Member State could be the one in charge of gathering the PNR data collecting first by the air carriers. This first method is known as the "pull system". To do so, the Member State authorities – PIUs - would need to have the ability to access to the air carrier database, and extract the required PNR data. On the other hand, the other option is as following: it is the duty of the air carrier to send the required PNR data to the Member State authorities. This is called the "push system"<sup>199</sup>. The IATA Guidelines on PNR data is introducing both methods and welcoming both of them, letting totally free each State to decide which one would be the more appropriate with its national

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<sup>199</sup> [https://www.iata.org/iata/passenger-data-toolkit/assets/doc\\_library/04-pnr/New%20Doc%209944%201st%20Edition%20PNR.pdf](https://www.iata.org/iata/passenger-data-toolkit/assets/doc_library/04-pnr/New%20Doc%209944%201st%20Edition%20PNR.pdf) 2.7, p21

system. Within the EU, a discussion was opened regarding both methods, and if one only should be selected strictly in the EU PNR Directive.

The method chosen to collect the information by the EU PNR Directive is exclusively the push method, even though the text informs in its Recital part about the existence of both methods<sup>200</sup>. From the very first draft of 2007, the push method was the chosen one, and welcomed by the Article 29 Working Party, claiming that *“the push method is from a privacy point of view the only acceptable one and for that reason the pull method should not exist along the push system”*<sup>201</sup>. Indeed, the pull method is more intrusive than the push method, as it is the Member State authorities which are in charge to collect the data they want. It means the authorities have an access to the air carriers’ database, and could check all the information and data they wish which are part of this PNR database. On the opposite, by using the pull method, the national authorities are in a waiting position. They are passive and need to wait for the data to come to their system. They cannot nor control the number of data sent, neither add additional data or just read some additional data. This is more respectful of the fundamental rights, as it inserts a strict limit regarding the data collection, which is actually more a data reception process. The national authorities are in a position of receivers, they are not the prime actor of PNR data transfer. The author considers this choice of push method as an exclusivity as the more appropriate one, in order to respect the passengers’ fundamental rights and limit as much as possible their infringement - which is obliged due to the EU PNR Directive and its goals.

#### 2.2.1.1. b) British PNR system

To collect the data, the UK favours the push method<sup>202</sup>. The Code of Practice highlights this choice, by informing that it is the carrier which should send the data to the border agencies<sup>203</sup>.

From a practical point of view, the UK will operate the collection mainly via the system called GDS, operated directly by Amadeus for instance<sup>204</sup>. Amadeus is defined as a “third party computer reservations system”<sup>205</sup> by the Home Affairs Committee of the UK Parliament.

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200 EU PNR Directive, Introduction, 16

201 [https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218\\_eu\\_pnr\\_proposal\\_d.pdf](https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218_eu_pnr_proposal_d.pdf) 5, p8

202 <http://www.statewatch.org/news/2008/may/uk-pnr-semicolon.pdf> p16

203 <http://www.statewatch.org/news/2008/may/uk-cop-data-share-borders.pdf> Code of practice, 3.3.1, p10

204 <http://www.statewatch.org/news/2008/may/uk-pnr-semicolon.pdf> p16

205 Immigration control, Home Affairs Committee of the Great Britain Parliament - <http://bit.ly/2pHGcZn>

In a report from 2017, the National Audit Office checked the actual quantity of PNR data collected<sup>206</sup>. The last data from March 2017 indicates that “*the Home Office collected PNR data for 67% of passengers, compared to 20% when the report was published. It planned to increase PNR coverage to 100% of airlines in 2017*”<sup>207</sup>. Unfortunately as of now, no updated data is available in order to know whether the 2017 goal was achieved, and whether all the expected PNR data for each traveler is being collected or not, depending also eventually on the different means of transportation.

#### 2.2.1.1.c) French PNR system

The French PNR system uses the push method as well. This could be deduced from Article L232-7 of the Security Interior Code, which states in that the airlines should send the data to the concerned national administrations<sup>208</sup>. Even though the method is not officially written in the French law, we can deduct it from the text and settled system. First, any process of pull method could be set up, as technically the PIU cannot take the information from the air carriers. Second - and most important for the deduction to tend to the push method - the carriers have the obligation to send the booking information, and generally the information required. Plus, also the Ministry could add these obligation to some travel agencies<sup>209</sup>.

#### 2.2.1.1.d) Belgium system

To finish, the Belgium PNR system uses the push method too. As for the French system, Chapter IV of the law settling the PNR system is requiring that airlines and travel agencies will send the PNR data to the PIU.

In conclusion, the push method is the one chosen by the EU PNR Directive. All the selected Member States for the comparison are in compliance with that choice, and also use this method. Thus, we could now focus on which data are sent by using it

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206 <https://www.nao.org.uk/wp-content/uploads/2017/10/The-UK-border.pdf> p22

207 Ibid

208 Article L232-7, II Code de sécurité intérieure -

[https://www.legifrance.gouv.fr/affichCode.do;jsessionid=EDB5EE76EEFED388B5C8AB25F0558586.tplgfi26s\\_1?idSectionTA=LEGISCTA000025508287&cidTexte=LEGITEXT000025503132&dateTexte=20180425](https://www.legifrance.gouv.fr/affichCode.do;jsessionid=EDB5EE76EEFED388B5C8AB25F0558586.tplgfi26s_1?idSectionTA=LEGISCTA000025508287&cidTexte=LEGITEXT000025503132&dateTexte=20180425)

209 Security Interior Code, Article L232-7, III - Ibid

### 2.2.1.2. Passengers' data collected

While Annex I of the EU PNR Directive develops a list of nineteen (19) different data which could be collected for the PNR analysis, some Member States did not have exactly the same number of data, or did not use the same terms to qualify the data collected<sup>210</sup>.

To check if the amount of data collected by the Member States is in compliance with the EU PNR Directive, we need to compare each list in details, to be able to access to the description of each data and understand the exact content collected.

#### 2.2.1.2. a) EU PNR Directive

Annex I of the EU PNR Directive lists nineteen different information which will be collected by the PNR system of each Member State. The form of a list to mention the data collected was already used for PNR agreements with some third country as with the USA. The list presentation was used from the first draft of the EU PNR Directive<sup>211</sup>.

While the first draft was elaborated in 2007, the Article 29 Working Party considered that the amount of data collected was “excessive”<sup>212</sup>. As already mentioned previously in its Opinion regarding the first PNR agreement between the EU and the USA, the EU Data protection authorities highlighted that in reality, the nineteen (19) bullet points comprise in fact at least 35 different type of data and information<sup>213</sup>. The authorities were not convinced by the necessity of all these elements in order to reach the pursued goal. This doubt increased even more after comparing the PNR agreement between the EU and Canada, and realising that only 25 data in total were necessary for Canadian authorities to be collected to then do the PNR data analysis. The Article 29 Working Party required that some details were removed from the draft of the PNR Directive, as for example the information regarding the language(s) spoken by the passenger. This could easily linked some people to some minorities or particular ethnicities. Therefore, it is considered to be eventually discriminatory depending on the use of this information, and should be removed<sup>214</sup>. However, this element stays mentioned and present in the PNR of a passenger who accompanies some minor(s), but only regarding the minor(s)<sup>215</sup>. This particularity is due to the human trafficking and could help to fight against children trafficking.

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210 Annex IV of the Master thesis

211 [https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218\\_eu\\_pnr\\_proposal\\_d.pdf](https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218_eu_pnr_proposal_d.pdf) p9, 8

212 [https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218\\_eu\\_pnr\\_proposal\\_d.pdf](https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218_eu_pnr_proposal_d.pdf) p3

213 Ibid, p10

214 Ibid, p10

215 Annex I, 12



However, despite of these requirements to remove some particular parts, the final list adopted with the EU PNR Directive in 2016 still contains 19 elements. In case the Member State would receive more data than expected and limited in the list, the additional elements should be deleted. This automatic deletion rule will be described in the next section, as it is part of the PNR data safeguards.

#### 2.2.1.2.b) British PNR system

The UK does not have a clear list of the PNR data it collects, stated in the same way as the EU PNR Directive does. Indeed, the UK splits the data into four different categories in the Code of Practice<sup>216</sup>, which are: the Travel Document Information, the Other Passenger Information and the Service Information, and a last open category called “*additional information regarding passengers’ and crew vehicles and member of crew*”<sup>217</sup>. Basically, the Annex D of the Code of Practice precises the Other Passenger Information, which are the closest to the PNR ones. It includes 29 bullet points, so first we can imagine that the UK is going really far in its demand comparing to the EU PNR Directive request. However, when we dig into the comparison, we can relate to almost every point of Annex I of the EU PNR Directive. The only notable difference is the way to consider the other passengers included in the same PNR Code: the UK legislation is going further, allowing to get information about the “*complete itinerary for passengers on the reservations*”<sup>218</sup> or about the split of the reservation due to the change of itinerary of one of the passenger.

However, an important difference needs to be highlighted: the UK collects the PNR data for passengers, but also for freight movements. Indeed, the categories 2 and 3 of data collected could concern freight, either the vehicle which transport it, either “*details about the freight movement, including the parties involved in the transaction and details about the goods being moved (e.g. description, weight, origin, value, route taken to the UK etc)*”<sup>219</sup>. The freight is not part of the EU PNR Directive, which focus solely on human passengers. This could be a huge difference, which is not in compliance with the Directive, but also could infringe the free circulation of goods guaranteed within the EU<sup>220</sup>. It is an infringement to the internal market and one of its main freedom: the free circulation of goods within the EU. To guarantee this free circulation, the goods could cross some borders without any border check: the internal market

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216 Code of Practice - <http://www.statewatch.org/news/2008/may/uk-cop-data-share-borders.pdf>

217 Ibid - p10-12

218 Ibid - Annex D, p40

219 Ibid, p12, Category 3

220 TFEU, Article 26

should be “an area without internal borders, in which goods could move as freely as on a national market”<sup>221</sup>. The fact to control all the information about each good quitting or arriving the UK is not in line with a free market where the circulation is without any restriction, even though the data information does not lead to an additional fee for the transporter or seller. However, it leads to some automatic information available for the national authorities, that they should not have so automatically, and could be considered as a measure equivalent to an automatic border control, and so a restriction to free movements of goods within the EU. Indeed, it could hinder, directly or indirectly, actually or potentially, the free movement of goods. However, the UK could, in order to keep its measure and extension, invoke the exceptions developed in the case *Cassis de Dijon*, and then stated in Article 36 of TFEU: the public security could explain the implementation of such a measure<sup>222</sup>. However, the use of PNR data regarding goods would then depends on the proportionality test in case this legality issue would face the ECJ. The UK will have to prove that the inclusion of goods data analysis is necessary and proportionate in order to fight against terrorist offences and serious crimes. It could be easily understandable to include this analysis in order to fight against drugs or weapons trafficking, as well as protected species illicit trafficking. It could be added other types of illicit trafficking quoted by the EU PNR Directive list in its Annex II as regarding the stolen vehicles or also the cultural goods, and hormonal substances. However, is a few of twenty-six (26) crimes listed in the EU PNR Directive list enough in order to introduce such an automatic control? The author tends to consider that the proportionality test would be negative and that including the PNR data collection and analysis on goods is violating the EU law, as it infringes the free movement of goods, core of the EU from its creation.

The UK PNR system goes further and collects more data and information than the EU PNR Directive limits with its Annex I. This point is quite important, as negotiating the number of data shared is an important issue from the first negotiation of a PNR agreement with the USA, in 2004<sup>223</sup>. Hence, collecting more data than the directive allows could be an infringement to the passengers’ fundamental rights.

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221 European Parliament, Mariusz Maciejewski, *Free movement of goods*, 11/2017 - [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_2.1.2.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.2.html)

222 ECJ, *Cassis de Dijon*, 20/02/1979 - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61978CJ0120&from=EN> + Articles 34, 35 and 36 TFEU

223 [http://ec.europa.eu/justice/data-protection/international-transfers/pnr-tftp/pnr-and-tftp\\_en.htm](http://ec.europa.eu/justice/data-protection/international-transfers/pnr-tftp/pnr-and-tftp_en.htm)

### 2.2.1.2. c) French PNR system

France might also face issues regarding the amount of data collected. Indeed, it is explained that the data are collected in two different stages, which are the booking and check-in time, that is to say before the check-in but also the boarding moments. This is not in against the EU PNR Directive, which also requires this two stages of data collection. However, the data collected at first and then on last minute is different. The PIU requires to get the details regarding the travel document used (type, number and expiry date)<sup>224</sup>. This seems to be out of the list of the EU PNR Directive at the first glance. However, it is actually part of the eventual API data that air carriers get, so at the 18 part of Annex I of the EU PNR Directive. This particularity could be highlighted with another example regarding the “*border crossing point of entry into the territory of the Member States*”, which is a part of API data required from API Directive, and considered into the French law regarding this second category of check-in data<sup>225</sup>.

The French system is quite confusing as it mixes directly the API and PNR data. On the one hand, while focusing only on the PNR data category, it can be remarked that it follows exactly the same structure and order than the EU PNR Directive. However, the 12° is requiring to collect “*any other information*”, as far as it is not a discriminatory detail<sup>226</sup>. This line is too vague and could open to too many type of information, which is not necessary in order to do the PNR data analysis, and could infringe the passengers’ fundamental rights of privacy. It is also not clear what should be evicted due to the fact that it might lead to some discrimination. Even though it is closed to 12° of Annex I of the EU PNR Directive, which mentions the “*general remarks*”, the French law seems to be wider with this global idea of “*any other information*”. This line is the only one which could lead to a particular interpretation into the French list. Apart of it, the French law in its Article R232-14 keeps exactly the same structure and 19 elements as the EU PNR Directive in its Annex I, and in the same order. Due to these similarities, it could be supposed that the “*any other information*” is actually a translated choice of “*general remarks*” as it appears in the Directive. However, a precision about the interpretation of this line would be recommended. This would be the only way to make sure of the meaning of it, and to guarantee a certain amount of data collected. On the other hand, while focusing on the API data required by the French system, it can be noticed that a lot of details are required in the French law, comparing to the initial list of the API Directive; the Directive has only nine (9) elements while the French law has sixteen (16) in total. Some are simply splitted in a different way, but some

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224 <https://www.cnil.fr/fr/le-systeme-api-pnr-france>

225 Article R232-14 b)

[https://www.legifrance.gouv.fr/affichCode.do;jsessionid=1ED363A3111C3C77E43E2450765E7EB2.tplgfr28s\\_1?idSectionTA=LEGISCTA000029507135&cidTexte=LEGITEXT000025503132&dateTexte=20150106](https://www.legifrance.gouv.fr/affichCode.do;jsessionid=1ED363A3111C3C77E43E2450765E7EB2.tplgfr28s_1?idSectionTA=LEGISCTA000029507135&cidTexte=LEGITEXT000025503132&dateTexte=20150106)

226 Ibid, a)

others are purely added as for example, the expiry date of the travel document, information regarding the baggage or seat at boarding time, PNR code, destination details and finally the person's status, that is to say whether it is a passenger, pilot or crew member<sup>227</sup>.

Generally, the fact that PNR and API data are mixed in the same law and folder could lead to some non-compliance with EU law. However, on a practical point of view, as API and PNR are both passengers' data, gathering them in a same system to process the information is really interesting and efficient. The separation should be kept properly between both of them and the uses done of each type of data, as well as the persons who could access to the data, and for how long.

#### 2.2.1.2. d) Belgium PNR system

The Belgium PNR system is close to the French one, in the way that the data collected are listed in an article, and separated into two categories; commercial booking information and check-in or boarding information<sup>228</sup>. The first ones gather nineteen (19) elements, such as the EU PNR Directive does in its Annex I, and follows the same order as the Directive, as the French law does. It can be noticed that even though the French and Belgium laws are both available in French language, 12° of the Belgium law is more precise than the French one. It strictly copies the PNR Directive for that requirement, and keeps the term "general remarks" as the Directive states, before explaining after in the following parts the requirements about the minors under eighteen (18) years old. As far as concerning the second category - which is the API data - it takes into account exactly as the French law, sixteen (16) different elements. The order is totally different to list the required elements. However, the content is quite close in both versions. The only difference is that the Belgium API list does not include the particular information regarding the status of the passenger or crew member<sup>229</sup>. Generally, there is this same issue about the number of data which is excessive comparing to the API Directive list.

After reviewing in details the data collection process and the exact content of air passengers' data, it is necessary to focus in the following part about the process of this data.

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227 API Directive & art 232)12 b) Security Interior Code

228 Article 9, 25 Dec 2017 law

229 11° b) of Article 232-14 Security Interior Code

## 2.2.2. SECTION II. Data processing safeguards

Data processing is the way the PNR data is used after being treated generally. It concerns the data collection, analysis, transfer but also the storage of the information. Data analysing rules are settled in Article 6 of the EU PNR Directive. It is the key moment in which the data faces some databases, in order to find some potential criminals and eventually decide to go further due to these findings. Some algorithms are also used to cross the data gathered trying to detect some eventual criminals due to their particular profiles. The question is to know what could happen if there would be some positive results, if the database or the algorithm's criteria linked together show that there could be a risk regarding a certain passenger? Such a situation is called a "match", also known as a "hit". Concretely, it means that the process of data concludes that the person could be a criminal according to several criteria linked together. Despite that hit, it is not enough to launch directly a further investigation about the person.

Due to this uncertainty of the automatic evaluation, the data treatment cannot be solely automatic and processed with electronic systems: in case of a hit, a human factor is required sometimes. Even before going to that step, the collected data needs to be verified, but also to be safe thanks to certain rules.

Only after making sure the data are safe, used properly, and that the hit might reveal something really interesting for a potential investigation, someone could decide to transfer the data to some "competent authorities". This transfer could be within the concerned Member State where the PIU dealt with the PNR data, but also more global depending on the cases.

The data processing is the core of PNR data. It covers how the data could be used in order to prevent, detect, investigate, and prosecute terrorism and some particular serious crimes, as above-mentioned in Chapter I. In the context of the General Data Protection Regulation (GDPR)<sup>230</sup> and the whole new protective framework for data within the EU, the EU PNR Directive – which have just entered into force, as the GDPR – needs to be in line with these requirements. First of all, the data should be collected but also be stored within the territory of the Member State of the EU<sup>231</sup>. Some other criteria already mentioned could be reminded, as the fact to have a neutral PIU, a Data Protection Officer, a restricted number of data collected, as well as a limited list of offences which allows to use the data to be processed. Some other safeguards are settled in order to make sure to offer a secure framework to the PNR data collected; the eviction of additional data received (1), the non-discrimination rule (2), and the

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230 GDPR,

231 EU PNR Directive, Article 6, 8)

double-check of the data after a hit, which should be done by non-automated means, so the human factor (3).

#### 2.2.2.1. Directly after reception : general rule of auto deletion of additional data

The PNR data are collected by the airlines firstly, as it is linked to the reservation in itself. As the air carriers are taking the data for commercial purposes, there could be details and more data than the ones the PIU needs to “detect, prevent, investigate and prosecute” terrorist offences and serious crimes. The PIU does not need the eventual extra data that the airline might collect for its own purpose, it is clearly against the privacy rules to be able to use this additional information, which are not clearly included in the Directive.

Within the whole Europe and especially the European Union, a particular interest is settled on the data protection. Indeed, Article 8 of the European Convention on Human Rights (ECHR) <sup>232</sup>, protecting the right to have and respect a private and family life, was from the beginning protecting people’s correspondences. In time it led to some adaptation with some famous cases in order to take into account the new technologies around us<sup>233</sup>. In parallel, the Council of Europe also decided to adopt the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data<sup>234</sup>. As the EU Charter of Fundamental Rights – the Charter - is more recent, it includes directly a particular article devoted to the “protection of personal data”<sup>235</sup>, without forgetting the right to keep some privacy in personal life<sup>236</sup>.

Even though both European organisations work together to defend generally European citizens’ rights, we will focus mainly on the EU Charter as it is actually the same legal level as the European Directive, as well as the GDPR. Indeed, the EU Charter is a text directly issued by the EU institutions, while the ECHR comes from a bigger and different organization, i.e. the Council of Europe. Article 8 of the Charter states that the “*data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law*”<sup>237</sup>. This constitutes the legal framework to apply for every data which could be subject to an analysis within the EU. In the PNR data analysis context, this

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232 European Convention on Human Rights: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

233 The right to respect for private and family rights, A guide to the implementation of Article 8 of ECHR, Ursulla Kilkelly -

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff47>

234 Traité No 108 - Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data - <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>

235 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

236 EU Charter, Article 7

237 EU Charter, Article 8 (2)

general rule helped a lot to create a proper limit of the number of data collected, in order to find a good balance between the protection and the need of certain particular data in order to accomplish the goal of the Directive. Indeed, some of the data is really crucial to get a valuable result: the profilers need particular elements to be able to combine them together before facing them to some algorithms. However, the European Data Protection Supervisor first disagreed with the first projects of the EU PNR Directive, considering that it actually goes too far, on the number of data collected, but also on the way to save them and keep them for a long while<sup>238</sup>.

#### 2.2.2.1. a) EU PNR Directive

The Article 29 Working Party, commenting the second draft of the EU PNR Directive, “*recalls the importance of including appropriate data protection measures and safeguards in EU-level proposals impacting the rights and freedoms of individuals*”<sup>239</sup>.

Thanks to the precise list given by Annex I of the EU PNR Directive, the air carrier knows exactly which data it is supposed to be sent to the PIU. Ideally, it should be the one responsible to filter which exact data should be sent to the PIU. However, it could happen sometimes that the air carriers collect more data, and eventually will send its whole PNR folder without selecting the exact required data. In such a situation, the PIU have a strict obligation to get rid of these elements straight away. Indeed, if it occurs, the EU PNR Directive states that the PIU “*shall delete such data immediately and permanently upon receipt*”<sup>240</sup>. This rule is essential in order to respect people’s fundamental rights.

#### 2.2.2.1. b) British PNR system

In the Code of Practice, the duty to respect the ECHR is mentioned, as well as national texts (the Data Protection Act 1998 and the Immigration Asylum and Nationality Act 2006) is mentioned<sup>241</sup>. However, the EU Charter is not mentioned anywhere in the British law. As the PNR system exists in UK for a while and was not linked to the EU PNR Directive, the EU rules are not part of it. To be in compliance with the Directive, the UK institutions - first of all the PIU

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238 European Data Protection Supervisor’s opinion - [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XX0622\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XX0622(02)&from=EN)

239 [https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218\\_eu\\_pnr\\_proposal\\_d.pdf](https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218_eu_pnr_proposal_d.pdf)  
p10

240 EU PNR Directive, Article 6(1)

241 Code of practice, 16

and other e-Borders institutions - should take into account the EU Charter. It should ideally be added to the Code of Practice.

Regarding the auto-erasure of some data, it does not seem to be considered by the Code of Practice, which states that “*whilst not every element of data will be used in every case of interest, each element of data may be of use in a particular case and it is not possible in advance to determine which elements are relevant to each individual*”<sup>242</sup>. Thus, there is not a rule to delete the additional data that the PIU might have received. On the other hand, this could be a bit balanced by the fact that the UK developed in total eight (8) “data protection principles”. Among them, there is the principle to collect only “adequate, relevant, and not excessive data”<sup>243</sup>. The data collection is still in a limited framework, but without a proper automatic erasure system of additional data as the EU PNR Directive requires it.

The fact to keep some additional data which are not part of the EU PNR Directive list of Annex I is against the passengers’ fundamental rights, and therefore against EU law. Moreover, not creating a proper system to delete the additional data could lead to an infringement of EU law, as it does not follow the EU PNR Directive requirements.

#### 2.2.2.1. c) French PNR system

The French PNR system does not have either the rule to delete the additional data once received. Indeed, the French law considers that the carriers are in charge to send some passengers’ data as required, and “*eventually more if they would have more*”<sup>244</sup>. The initial requirement is exactly to send the passengers’ data which is collected by the carriers during the booking, and the information necessary for departure controls<sup>245</sup>. However, these rules were created in order to implement the API Directive, and not the PNR one, even though it was modified afterwards and completed. It means that the exact data concerned are in reality only the API data (mentioned in the French law as the one in API Directive, 3°), which is a part of PNR data, and not excessive.

However, the French legal system does not state any rule which states an automatic deletion of the eventual additional data that the PIU should not receive.

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242 Code of practice, p18

243 Code of Practice, 3rd DPP

244 Article L232-4, Interior security Code

245 Article L232-1 3°, Interior security Code



#### 2.2.2.1. d) Belgium PNR system

The Belgium PNR system is the only one created after adoption of the EU PNR Directive. Due to that, it directly includes the rule regarding the auto deletion of additional data. Indeed, Article 11 of the Belgium law creating the PNR system states that any data not included in the list or linked to a potential discrimination should be deleted directly after reception and in a definitive manner<sup>246</sup>.

In conclusion, Belgium is the only Member State which follows perfectly the EU PNR Directive rule of automatic deletion in case of reception of some additional data. The fact that the UK and France do not have this rule is a problem to be in compliance with the EU PNR Directive. However, most of the data which are sent by the carriers are part of the PNR data required by the Directive. Some additional data could be quite rare and hard to exactly define, as 12° of Annex I of the PNR Directive is really open and vague, accepting any kind of “general remarks”. As far as this category will not be defined in a better way, it is difficult to imagine how the data received could be considered as an extra which should be directly deleted. Mainly, this rule is accompanied by other safeguards which are more precise and easier to control, about the data treatment in itself once received, and not beforehand, even before considering to process the data.

#### 2.2.2.2. Before analysing the data: non-discrimination rule

Before analysing the data received, some other rules need to be applied, to make sure that only the authorized data will be analyzed. Indeed, the safeguards are also settled on the eviction of any data which could have some particular information leading to some discrimination against the passenger. Moreover, the use of the data could be only for some particular goals – and crimes as explained above - and not for any kind of investigation.

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<sup>246</sup> Belgium Law, 25 Dec 2016, Article 11

#### 2.2.2.2. a) EU PNR Directive

The non-discriminatory principle appears into two different parts of the EU PNR Directive. First, after data collection and according to Article 13 of the EU PNR Directive, it is prohibited to use information “*revealing a person's race or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, health, sexual life or sexual orientation*”<sup>247</sup>. In the situation that the PIU would receive such kind of data, it should, according to this same article, delete it directly. It constitutes a following part of the above-mentioned explained rule, but with a strict framework to know exactly which data should be deleted. Second, according to Article 6.4 of the EU PNR Directive, the data should be processed in a non-discriminative manner. This actually indicates that the criteria used in order to target the passengers while doing the profiling should be set up in a neutral way, without any discrimination characteristics<sup>248</sup>.

Regarding this non-discriminatory rule, an issue was raised by the Data Protection Authorities from the very first draft, but also after the second one: the language(s) spoken by the passenger. It was then removed from the list of PNR data collected. However, it stays part of 12° of Annex I - the general remarks regarding a minor. Article 29 Working Party mentions in its opinion that keeping this information, even only for a minor, is contrary to the non-discrimination principle and should be removed, as it could reveal the minor's ethnic origin<sup>249</sup>. Even though the Data Protection Authorities wanted to delete this part, it was decided to keep it in the final version of the EU PNR Directive for the minors. This element is actually crucial in order to detect some human trafficking, especially in that case some minors illicit trafficking. For example, if a minor does not speak the same language as the only accompaniment with whom he or she is travelling, this could lead to some suspicions (increased by eventually a first trip alone by the adult, while coming back with one or more minor(s) with him). As it was decided to be kept in the EU PNR Directive, for obvious practical reasons as explained, only the ECJ would be able to eventually determine whether this disposition is in line with the Charter and non-discrimination principle. As far as the data regarding the minor is collected in order to protect him from serious crime, the author believes that this measure should be kept as it is. A special report could be made after the first year, in order to realise whether this additional information

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247 Article 13 (4), EU PNR Directive

248 EU PNR Directive, Article 6(4)

249 Opinion 2007 -

[https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218\\_eu\\_pnr\\_proposal\\_d.pdf](https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218_eu_pnr_proposal_d.pdf)

whether the minor was useful or not to prevent, detect, investigate or prosecute some serious crime. Following this report and its results, a decision could be taken to eventually erase this option or not.

#### 2.2.2.2.b) British PNR system

In the UK, the data collection and analysis should be done by respecting some “*data protection principles*”<sup>250</sup>. The data safeguards are part of these principles. One of those is that the data is “*processed compatibly with lawful purposes*”<sup>251</sup>. This covers the part to analyse data only for restricted goals, in order to pursue some crimes. However, there is no precise principle which covers the eventual discrimination situation.

Regarding the discrimination, the Code of Practice mentions the eventuality that the PIU would receive some “*sensitive information*”; it “*may include some sensitive personal data*”<sup>252</sup>. It covers exactly the same kind of information as the EU PNR Directive. However, the UK border agencies do not have the obligation to delete this information. According to the Code of Practice, it could be kept and analysed, as far as it is considered to meet one of the data protection principle: being adequate and relevant<sup>253</sup>. Some particular examples are given in order to explain why it could be important to have this data for the border agencies and their analysis.

Thus, we can see that the British PNR system, even though it follows some data privacy acts at national or international level, could go further than what the EU PNR Directive’s scope.

#### 2.2.2.2.c) French PNR system

The French PNR system has a strict rule in order to follow the non-discrimination principle. Indeed, it is stated in Article L232-7 that all the personal sensitive information are removed from the automatic data processing<sup>254</sup>.

Therefore, the French system follows perfectly the EU PNR Directive for these two safeguards and creates the same framework about PNR data use.

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250 Code of Practice, p19 - <http://www.statewatch.org/news/2008/may/uk-cop-data-share-borders.pdf>

251 *Ibid*, 2nd Data Protection Principle

252 Code of practice, p18

253 Code of practice, 3rd DPP

254 Security Interior Code, Article L232-7 (I)

#### 2.2.2.2. d) Belgium PNR system

The Belgium PNR system has a strict framework as well. Concerning the non-discrimination, the rule is established in Article 10 of the Belgium law<sup>255</sup>. It uses exactly the same terms as the EU PNR Directive. Plus, the following article indicates that this data should be deleted, taking into account the automatic deletion rule of any additional information, including the fact that this particular information could lead to some discriminatory treatment.

#### 2.2.2.3. While analysing the data: human factor

The focus will be now on the case of a “match” – or “hit”; in the situation when a person is revealed to be a potential criminal according to the automatic checks. The PIU should then forward the PNR data and results to some competent authorities, after a mandatory double check done by a person. This is a secure mean to limit that feeling that everyone is being watched as soon as he/she is a traveler from or to EU, or even within the EU in some cases. It allows to have another look on the PNR data analysis and to avoid the reaction shared by Niovi Vavulo in her article: *“I travel, therefore, I am the suspect”*<sup>256</sup>.

##### 2.2.2.3. a) EU PNR Directive

In case of a “hit”, Article 6.5 of the EU PNR Directive requires that it has to be reviewed by a human being. This condition is mandatory, as the EU PNR Directive states the needs to review the result of a PNR data process *“by non-automated means”*<sup>257</sup>. Before sending the information and folder to the *“competent authorities”*<sup>258</sup> - as police or custom officers depending on each Member State’s choice - a PIU member has to check this match, and if it needs to be shared, or if it is actually not an interesting one which could be useful for the relevant competent authority. This ensures that the passengers’ personal data are not shared in an excessive way with the Police, Custom Officers or Secret services if the match appears to not be a threat. Even though one of this administration could be the basis of the PIU, or having some members

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255 Law of 25 Dec 2016, Article 10

256 <http://eumigrationlawblog.eu/i-travel-therefore-i-am-a-suspect-an-overview-of-the-eu-pnr-directive/>

257 EU PNR Directive, Article 6, 5)

258 Official term used to define the offices and persons who could receive the PNR data match and go further with the investigation - EU PNR Directive, Article 7

working for the PIU, it does not mean that the PNR data would be available for the whole staff of each national competent authority directly. This creates a limit.

Despite the fact that every passengers' PNR data would be collected, it does not mean that everybody will be considered as a suspect. The PIU "human verification" is another step to decide if the alert should be sent to some national competent authorities. Moreover, sending the PNR data after a hit never means that the traveler whose PNR data got a match will be arrested, but only that an investigation might be necessary. This decision will be up to the competent authority which will receive the information; the data processed is still, even after a double-check, considered as a presumption. Processing PNR data with automated means will never lead to arrest someone directly (even though this investigation could lead to a check of the person by the border guards at the airport for example)..

#### 2.2.2.3. b) British PNR system

The British system takes into account a human check for both API and PNR data<sup>259</sup>. The PIU – National Targeting Border Centre<sup>260</sup> - is never sending an alert to the competent authorities without checking it manually first. Once the system gets a match, a specialized agent trained to deal with PNR data is checking the information and the match in itself. The agent could decide to validate the match or not. If valid, the agent could decide to add some other information to the alert created, and is the one in charge to decide to which competent authority it should be send to.

#### 2.2.2.3. c) French PNR system

The French PNR system also has a mandatory human check step<sup>261</sup>. However, this obligation is not stated in the French law in a clear manner. The official website of the French PIU is mentioning in the short description of the PIU role that the agents will be in charge to check the data; it could be deduced from the information that the data requests or their results need to be "*validated or refused by some agents of the PIU*"<sup>262</sup>. However, it is not stated anywhere in the French law the exact situation when an agent should intervene personally in

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259 <http://www.statewatch.org/news/2008/may/uk-pnr- semaphore.pdf> p19 and 24

260 Called JBOC in the document <http://www.statewatch.org/news/2008/may/uk-pnr- semaphore.pdf> as it was before the change in 2010

261 <https://pnr.gouv.fr/Presentation-UIP/Presentation-de-l-Unite-Information-Passagers>

262 *Ibid*

order to check some results. There are some details about the situation when it would be the competent authority – so an external authority from a PIU – which would request access to some data. However, there is no particular parts about the PNR data check after a match. This is a lack of transparency and also data protection safeguard in the French law.

#### 2.2.2.3. d) Belgium PNR system

The Belgium law does not precise specifically when an agent should intervene to check an eventual match. There is no direct information in any article, but the human intervention could also be guessed. Indeed, the Article 24 §4 states that the match should be validated by the PIU within 24 hours after the notification of the automatic check-up<sup>263</sup>.

Once making sure that the match issued from the automatic checks with the databases is founded and relevant, it means that the data should be forwarded to a competent authority, which will deal with this information afterwards. The competent authority will receive it in that case as an “alert”. Another possibility is that the competent authority, during an investigation, would ask to get some data. In any case, it includes an eventual data transfer from the PIU to another entity in order to investigate further.

### **2.2.3. SECTION III. PNR data transfer**

The data transfer could be declined into two different origins: either it comes from an alert - so from the PIU database and a match – or it comes from a request from an authority to receive or have access to some particular information regarding a passenger in the context of an investigation. The data transfer could act at different levels; national (a) or European (b). This part will consist only of a brief overview, as the information is difficult to find, or the texts too recent to already have some relevant data regarding the PNR data transfer.

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<sup>263</sup> Law of 25 Dec 2016, Art 24§4

### 2.2.3.1. National level

Once the data is considered to be potentially relevant and interesting for some further investigation, the PIU decides to validate the match or the request done by the agent, and to send the data to a competent authority. The question which remains is how to understand this term of “competent authority”. At the end, it is an authority able to receive the PNR data and analyse them for preventing, detecting, investigating or prosecuting a person who might have planned to commit or already committed a terrorist offence or serious crime. This definition is too vague and should be completed by the legal texts, in order to exactly know to whom the passengers’ personal data could be shared with.

#### 2.2.3.1.a) EU PNR Directive

In order to protect the PNR data and passengers rights, Article 7 of the EU PNR Directive states that each Member State should define in advance which national authority could receive or request some PNR data<sup>264</sup>. A list should have been sent to the European Commission from each Member State before 25 May 2017<sup>265</sup>.

#### 2.2.3.1.b) British PNR system

The UK PIU could transfer data to the “*Police, Immigration Service and HM Revenue and Customs*”<sup>266</sup>. The PNR data or its result after processing could be required by or sent to these different entities only to pursue special goals for each kind of offices, strictly described by the law depending on each part of UK (England and Wales together, then separately Scotland, Ireland<sup>267</sup>).

If one of the competent authority asks for receiving some data or the results, a member has to do a “*Subject Access Request*”<sup>268</sup>. All the precise rules depending on each concerned agency and their way to do such a request are available in the Annex of the Code of Practice<sup>269</sup>.

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264 EU PNR Directive, Article 7

265 Ibid, Article 7(3)

266 RIA Data capture - <http://www.statewatch.org/news/2008/may/uk-data-capture-ia.pdf> - Section 36(2) Immigration, Asylum and Nationality Act: <http://www.legislation.gov.uk/ukpga/2006/13/section/36>

267 Example with Immigration, Asylum and Nationality Act, Section 36 (9)

268 Code of practice, p25

269 Annex E, Code of practice, p43

#### 2.2.3.1.c) French PNR system

A French law, adopted on 7 October 2016, organizes exactly which agency is competent to receive PNR data or the results after a match with the database. Article R232-15 of the Security Interior Code lists the national competent authorities in detail, with some distinctions depending on the offences pursued<sup>270</sup>. It creates a very strict framework, in order to make sure that the passengers' data will be sent out of the PIU only if some particular conditions are met; regarding the goals pursued with this information but also who could have access to it. The list is always divided depending on the offences targeted, but also on the fact that it would be a request from the national competent authority or an alert sent from the PIU to the entity. This scheme follows the EU PNR Directive requirements regarding the national competent authorities.

#### 2.2.3.1.d) Belgium PNR system

The Belgium PNR system only mentions the notion of “competent authority” after an alert would be sent, and the duty to act as soon as possible<sup>271</sup>. However, there is no details about what could be exactly define as a competent authority, and which exact national agency is such an entity. Therefore, it does not seem to be clearly established yet which authority could exactly receive or ask to receive some PNR data. There is a lack in this part of the Belgium PNR framework.

### 2.2.3.2. EU level

#### 2.2.3.2.a) EU PNR Directive

As the EU PNR Directive has just entered into force, there is not a lot of practice regarding this topic. However, it is good to mention the possibility to transfer the data within the EU, either to Europol, or to another Member State's PIU. The EU PNR Directive forecasts these options in its Articles 9 and 10.

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<sup>270</sup> Interior Security Code, Article R232-15

<sup>271</sup> Belgium law, 25 Dec 2016, Article 24 §5



Regarding the exchange of PNR data between different Member States, the data transfer should be done through the two concerned PIUs of each Member State. Only afterwards, the PIU could send the data to its national competent authority. For data protection and security reasons, all transfers should be through the two PIUs at first. Ideally, it should be during the first period of time, when the data are not masked out yet; which means concretely within the first six months after that the PIU received the data. In some particular cases, depending on the goal pursued as for terrorist offences, the request could be for data which is already depersonalized due to the gravity of situation or eventually emergency purposes<sup>272</sup>.

The framework regarding PNR data transfer to Europol is strictly defined. According to Article 10 of the EU PNR Directive, Europol can submit a request to a Member State's PIU to have access to some PNR data that it stores, or the result of its processing. The framework of such an exchange is strictly restricted by the directive: Europol should every time motivate in details its request, the reason why it could help in the investigation, proves that it is in the PNR Directive goals but also within its personal competencies and sphere of actions<sup>273</sup>. Plus, every transfer of this kind should be transferred to the European Data Protection Officer<sup>274</sup>.

Finally, the EU PNR Directive also considers the eventuality to share the PNR data at an international level in the following article: Article 11 of the EU PNR Directive. Every data sharing with "third countries" will be evaluated on "*case-by-case basis*".

#### 2.2.3.2.b). British, French and Belgium PNR systems

The PNR data transfers are considered in every system: British, French and Belgium ones. The UK's Code of Practice states with its eighth data protection principle that the PNR data transfer with a non European Economic Area would be possible only after a proof of an adequate level of data protection as in UK<sup>275</sup>. The French system has the same kind of limitation, in a more general rule and not a particular mention to PNR data<sup>276</sup>. As the British rule, the Belgium law distinguish the international and EU data sharing<sup>277</sup>. The PNR data sharing at an

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272 EU PNR Directive, Article 11(3-4)

273 EU PNR Directive, Article 10(2)

274 EU PNR Directive, Article 10(3)

275 Code of Practice, p27

276 Security Interior Code, Article L235-1

277 Belgium law, Chapter 12

international level should always follow the data privacy rules, but also always be preceded of a special agreement with that third country, signed by the Data Protection Officer and the Head of the PIU<sup>278</sup>. Otherwise, the conditions regarding the PNR data sharing with another PIU of a Member State or Europol follows exactly the rules determined by the EU PNR Directive.

In order to ensure some security about the data stored and shared, the EU Commission also created an Implementing Decision on 28 April 2017 in order to structure the possibilities of data formats to use while sharing<sup>279</sup>. Even though this decision applies to air carriers, it also means that then the PIU will keep this formatting while exchanging the data. This ensure a certain security level on PNR data, and the way it will be stored and shared.

## **2.2.4. SECTION IV. Data storage**

### **2.2.4.1. EU PNR Directive**

The data storage was in the core of the discussions about the EU PNR Directive during all the different steps before its adoption. The Data Protection Authorities always considered that storing the data for many years was an issue, and an infringement to passengers' fundamental rights. The retention period was planned for thirteen years in total with the first draft of 2007, divided into five and then eight years<sup>280</sup>. In the following draft, the data retention period was reduced to five years<sup>281</sup>. Finally, the EU PNR Directive distinguish in its Article 12 two different period of time, with an influence on the data. The directive imposes that the data are all stored within the EU, on a Member State territory.

Generally, the PNR data can be stored up to five years maximum after reception by the PIU. After that period of time, everything should be automatically deleted. Within that period, there is a difference made between the first six months and the following part. During the first

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278 <https://www.dekamer.be/flwb/pdf/54/2069/54K2069003.pdf>

279 Implementing decision, 28 April 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D0759&from=FR>

280 Opinion 2007, p9 -

[https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218\\_eu\\_pnr\\_proposal\\_d.pdf](https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/int/20071218_eu_pnr_proposal_d.pdf)

281 Opinion 10/2011, [http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp181\\_en.pdf](http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp181_en.pdf)

six months after reception, the PNR data are fully accessible by the PIU competent agents. However, after that time, the data should be “masked out”. Indeed, Article 12 of the EU PNR Directive indicates that after six months, the PNR data should be “*depersonalised through masking out the following data elements which could serve to identify directly the passenger to whom the PNR data relate*”<sup>282</sup>. A list of particular elements follows this text, which allows to identify the person. This is a step in order to make the access to PNR data more difficult, and possible only under special circumstances afterwards. The 2010 proposal offered to mask out the data after 30 days<sup>283</sup>. The data masking process in itself was questioned by the EU Data Protection Authorities<sup>284</sup>. However, the final EU PNR Directive decided to keep the data for six months before masking them out.

#### 2.2.4.2. British PNR system

The British Code of Practice, in its fifth data protection principle, states that the data should not be retained more than necessary for the goals pursued<sup>285</sup>. The global data retention period is set up for five years in the e-Boc, the UK database<sup>286</sup>. After that period of time, the data should be deleted automatically. It is also considered in the Code of Practice to delete some information before the five-year-period, but no details are given. No information is given regarding a masking out process after a certain period of time.

Regarding the right to access to the data after a transfer to a national competent agency, the period of time depends on which national competent authority could require the PNR data. The national authority is the one which should declare the necessary reasonable time in order to fulfill its missions. It could vary from the five-year-basis to ten, or unlimited on a case-by-case basis<sup>287</sup>. This raises an issue; even though the PNR data after five years are deleted from the basic e-Boc system, it does not mean that any national agency does not have these data. Plus eventually, these national agencies could store these data for a long period of time, to not say forever.

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282 EU PNR Directive, Article 12(2)

283 Opinion 10/2011, [http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp181\\_en.pdf](http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp181_en.pdf) p6

284 *Ibid*

285 Code of Practice, p22

286 *Ibid*

287 Code of Practice, p23-24

#### 2.2.4.3. French PNR system

As already mentioned above, the French PNR system does not set up a clear difference between API and PNR data, or sometimes it might be confusing. It is the case regarding the data storage period of time, as there is not a clear distinction between the API data storage and the PNR storage. However, it is possible to question the importance of this distinction, taking into account the fact that the API data are finally part of the PNR data anyway, due to the 18° of Annex I of the EU PNR Directive.

Article R232-16 of the Security Interior Code states that the data could be stored in the system for five years, as the EU PNR Directive requires to do<sup>288</sup>. However, there is an issue regarding the masking out process; indeed, the following part of this Article indicates that the data would be depersonalized after a period of two years, while the EU PNR Directive requires that this process would be done after six months<sup>289</sup>. The French Senate already realized this discrepancy and need to adapt the French law to the EU PNR Directive within the transition period<sup>290</sup>. However, as of now the Security Interior Code still states the same rule, with two-year-period for the data retention without depersonalized them.

#### 2.2.4.4. Belgium PNR system

Due to the fact that the Belgium PNR system was created after the EU PNR Directive's adoption, it does not encounter this issue. The data storage and retention period follow fully the EU PNR Directive's requirements; five years in total, then an automatic deletion, with a masking out of the data after the six first months<sup>291</sup>.

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288 Security Interior Code, Article R232-16(1)

289 *Ibid*, (2)

290 [http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp233\\_en.pdf](http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp233_en.pdf)

291 Belgium Law, 25 Dec 2016, Chapter IX

# CONCLUSIONS & RECOMMENDATIONS

The PNR systems elaborated by Belgium, France and UK were analysed in this paper, and the particularities which are not in compliance with the EU PNR Directive were highlighted. Therefore, the conclusions will first be used as a small reminder regarding the issues encountered for the national systems to be in compliance with the EU PNR Directive. Then, the recommendations will be used in order to summarize the discrepancies, and offer some solutions chosen by the author to solve the non-compliance with the EU PNR Directive guidelines and more generally the EU law infringement. The focus will be on each State, one by one.

## CONCLUSIONS

### **1. Belgium**

The Belgium PNR regulatory framework is in compliance with the EU PNR Directive.

The only issue might be that Belgium created a unique law to deal with API and PNR data. This could lead to some confusions, as the fight against illegal immigration - which could be done only with API data during the first 24 hours upon receipt of the passengers' data. As far as the API data are strictly used for that goal during that period of time, everything is in order as it is stated in the Belgium law, as the immigration part is clearly separated from other goals (terrorist offences and serious crime prevention, detection, investigation and prosecution).

Belgium actually succeeded to merge API and PNR Directives, while in the meantime distinguishing them properly. As far as the PIU and the competent authorities will follow the given framework on the way to use which data under which circumstances, the Belgium's passengers data system is clear and in compliance with the EU rules..

## 2. France

The French PNR/API system is close to the Belgium's one, on the way that it deals with both types of air passengers' data in the same system. However, different laws created the final current system, comparing to the Belgium one which has a unique legal framework gathering both EU Directives regarding air passengers' data processing. As the French PNR system was created before the EU PNR Directive's adoption, some rules are not in compliance with it.

The biggest issue is regarding the PNR data storage period. Indeed, the data should be masked-out 6 months after the reception, and not 2 years after as the French system is currently doing. The French depersonalization period is therefore not in line with the EU PNR Directive.

As far as regarding the data collected, there might be an option within the French list of data, which would be too wide comparing to the EU PNR Directive list of Annex I. 12° of Article R232-14 of Security Interior Code simply states that any kind of additional data could be collected, if there is no discriminatory details. In comparison, the EU PNR Directive states in details in Annex I which exact type of data could be considered under the terms of "general remarks", by precisising them into brackets.

In the same category of data collection issue, it could be mentioned that there is no clear procedure of the auto erasement of additional data which are not needed in order to proceed with the analysis.

Another issue is on the exact targeted crimes in order to use the PNR data. They are some discrepancies between the EU PNR Directive rules and the French law. The crime of arson is mentioned by the French law while it does not appear in the EU PNR Directive's list, presented in Annex II. It was added by the French legislator. Every crime which are against the fundamental interest of the nation is also added by the French legislator. However, the crime of industrial espionage was evicted by the French legislator: it is missing from the French list of crimes which could be pursued while using the PNR data collected.

Moreover, it is not clearly stated in the French law that in case of a hit, a human intervention will be a mandatory step.

Therefore, the author realizes that the French law needs some certain changes to make sure it will be in compliance with the EU PNR Directive. As it is as of now, on the day of deadline limit to transpose the Directive, there are some discrepancies which need to be changed in order to adapt the French system to the EU framework given through the EU PNR Directive.

### **3. United Kingdom**

The British system in order to analyse passengers' data is older than the EU PNR Directive, even the first draft of it. This leads to many discrepancies between this system and the EU PNR Directive. They will be highlighted in these conclusions. However, any precise recommendations would be given, as the Brexit might happen soon and the UK will not have to strictly comply with the EU PNR Directive.

One of the main difference between the EU PNR Directive rules and the UK system is on the collected data. Indeed, the UK already collects PNR data from passengers but also for goods, mentioned with the term "freight". The freight is not considered at any point in the EU PNR Directive, which sticks only to human passengers' data. This is going really further and changes the dimension of the original EU PNR Directive, which focuses only on passengers data to identify potential criminals, even though it might be to discover then some crimes linked to good, mainly some illicit traffic of goods done by the potential criminal.

Moreover, the PNR data collected could come from various means of transportation: from air, sea or train transportation sources. This extent a lot the goal of the EU PNR Directive to collect PNR data for air passengers, even though it does open the possibility to apply this system to other means of transportation.

These two parts lead to the question of compatibility with EU law due to these big extensions of the EU PNR Directive goals and purpose. The author considers that, even by doing the proportionality test, the UK PNR system is too wide comparing to the EU strict framework.

Furthermore, there are some eventual issues regarding the data protection topic. The Code of Practice does not mention that it should respect the EU Charter of Fundamental Rights, as it is older than even its creation.

Moreover, as the French system, there is not a clear rule regarding the auto erasement of additional data received from the beginning of the data transfer from airline to the PIU.

Otherwise, the British PNR rules are too wide regarding the crimes targeted by the data collected and its analysis. The most problematic rule is the fact that immigration purposes is one of the goal in order to use the data.

The British system is a proof that harmonizing a national system due to the creation of a EU framework is far from being easy. A lot of discrepancies are remaining between the British and the EU framework to use the PNR data, and conditions to collect them as well.

## RECOMMENDATIONS

### 1. Belgium

Ideally, the author would recommend to create some practical guidelines or a Code of Practice (as the UK did). It could allow to show clearly to the concerned authorities how to deal with which data and what are the actual limits depending on the goal pursued (i.e. on the one hand illegal immigration controls and on the other hand prevention, detection, investigation and prosecution of terrorist offences and serious crimes). This could be useful for airlines regarding the data to transfer, PIU for a practical way to use the data, as well as all competent authorities able to receive the PNR data in case of a hit. A handbook in order to determine how the data should be used or treated could only help every actor to respect the passengers' fundamental rights. It also brings some transparency, as everyone could access to this handbook and know how his or her personal PNR data are being used.

### 2. France

Regarding the masking-out issue, the author would recommend the French legislator to amend the current Article R232-16 of Security Interior Code, in order to change the period of time. The terms "two years" should be replaced by "six months".

Regarding the data collection issues, first the author would recommend to the French legislator to explain the terms of "any additional information" as it is used in 12° of list of collected data. It could be done by simply used the same terms as used in the EU PNR Directive, in order to give a clear framework in compliance to it. If the choice of an independent list is made by the French legislator, he has to be careful concerning the terms used, and also the inclusion of other data than the ones stated in the EU PNR Directive. The list of data should



respect the passengers' fundamental rights, and to do so, should be strictly limited. Due to the global similarities between the French list and the EU PNR Directive, it could be supposed that "any other information" is actually a translated choice of "*general remarks*" as it appears in the Directive. However, a precision about the interpretation of this line would be recommended, to avoid any doubts and additional data which should not be collected according to the EU law.

Regarding the data reception, the author recommend to add the auto-deletion rule directly to the French law. This could be welcomed in Article R232-14 of Security Interior Code, by creation a part III dedicated to that concern.

Regarding the different discrepancies of the crimes listed in the French law, some changes are needed to be in line with the EU PNR Directive. From the list in Article 694-32 of the Procedure Penal Code, on the one hand the author would recommend to delete the crimes of arson for sure, as well as eventually the crimes of racism and/or xenophobia. On the other hand, the author would recommend to add the crime of industrial espionage, which is part of the EU PNR Directive but absent in the French law. The author also considers the "violations against the fundamental interests of the Nation" could be kept in the French law, even though it is not part of Annex II of the EU PNR Directive and could therefore being against EU law. Article L.232-7 - before using the references to the Criminal Proceedings Code to have a proper list in Article 694-32 - states that the PNR data could also be collected and processed in order to fight against the "violations against the fundamental interests of the Nation"<sup>292</sup>. The author recommends to describe more in details this notion, in order to limit the possibility of a misuse of the passengers' data already collected.

Concerning the human intervention which is a mandatory step to check a hit and before transferring eventually the PNR data to some national authorities, the author would recommend to edit an "arrêté d'exécution", in order to include some practice of behavior of the PIU's agents, as well as eventually a Code of Practice for the PIU agents.

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<sup>292</sup> Interior Security Code, Article L232-7, I, alinéa 2

### **3. United Kingdom**

The more interesting angle of research for the future would be to know how the PNR data might be exchanged between the UK authorities and the EU Member States in order to cooperate eventually in the fight against terrorism and serious crimes. Would it take the form of a EU-PNR international agreement, as it already does exist with the USA, Canada and Australia? Or will it take the form of a closer agreement, due to the special previous links between the UK and the EU, increasing by its wish to participate into that EU PNR Directive project?

### **4. All selected Member States**

The author would finally recommend all the EU Member States – selected for the research but also others – to offer a transparency regarding the PIU structure, and mainly the Data Protection Officer linked to it. It is essential for the passengers to be able to know who will be the person who keeps an eye on their personal data treatment.

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# ABSTRACT

This paper presents a comparison of Belgium, British and French's Passenger Name Record (PNR) systems with the European Union (EU) rules, guided by the EU PNR Directive. This directive was adopted in spring 2016, leading to a mandatory transposition in the national systems at the latest on the 25<sup>th</sup> of May 2018. Such a system allows to collect and use air passengers' data in order to prevent, detect, investigate or even prosecute terrorist offences or serious crimes. The main goal of the thesis is to highlight the differences between the EU and national rules, in order to help solving them to be in compliance with the EU framework. To do so, the comparative method is the most used, also combined with the descriptive one, in order to first present each system independently.

The analysis shows that the Belgium system, created in light with the EU PNR Directive as a real transposition law, is the closest to the EU framework and in compliance with the EU rules. However the French and British systems, which were created before the Belgium and EU rules, have some discrepancies, which need to be changed in order to comply with the EU PNR Directive.

PNR – EU – data – terrorism - criminality

# SUMMARY

The Passenger Name Record (PNR) data is a file created by the airlines per each booking. It contains personal information, which could help some particular national authorities to prevent, detect, investigate or even prosecute some terrorist offences or serious crimes. It allows to eventually discover some potential criminals by using the profiling methods. Some States decided to create a PNR system to collect and use this data., as the United States of America first, but also the Canada or the United Kingdom for example. The European Union (EU) reacted to this phenomenon firstly by concluding international agreements with the countries outside the EU, and secondly by adopting the EU PNR Directive; a text with rules to guide each Member State of the EU in order to create its own PNR system, or eventually adapt its already existing one to this new EU framework.

This paper presents an analysis of selected Member States' national PNR in light with the EU PNR Directive. It compares the Belgium, British and French PNR systems to the EU PNR Directive, in order to analyse their compliance with the EU rules. The choice of these particular EU States was made due to two main reasons; the language barrier that the author faced - as an English and French speaker - but also the different creation period of these three national systems; before, during the redaction, and after the adoption of the EU PNR Directive. The presentation is divided into two chapters; the first one explaining the needs of a PNR system within the EU and so as the result, the EU PNR Directive creation in itself, while the second one focuses on the creation of a PNR system in each Member State, starting with the preliminary requirements to then continue with the pure data collection and analysis.

As the systems were adopted at different moments, some discrepancies could be noticed more for French and British systems than with the Belgium one. Even though the Belgium law does not follow exactly the EU PNR Directive structure, the created system follows the EU rationale and is in compliance with the EU PNR Directive. The Belgium law actually merges it with the API PNR Directive, an older EU law which also regulates the passengers' data collection and analysis, but to fight against illegal immigration or detect already known suspects or criminals. The French system as well developed a common approach to both systems. However, as it was created through disparate laws and before the EU PNR Directive adoption, the French system is not in perfect compliance with the EU framework. The biggest issue is the

data storage period considered by the French system, comparing to the EU one. Some issues are also remarked regarding the crimes pursued by the French PNR system comparing to the EU rules. Finally, the British PNR system is quite different to the EU rules. This could be explained by the fact that it was created even before the EU PNR Directive's first draft. For instance, the data retention period varies, but also the data collected, which concerns the human passengers but also the goods. Also, the EU Charter of Fundamental Rights is not mentioned by the UK law, as it was not elaborated yet at that time. Regarding the UK, a question could be opened on the necessity to comply with the EU PNR Directive as the Brexit might happen soon. The differences are still highlighted in this paper.

# ANNEXES

**Annex I** - IATA. Difference of air passengers' data requirements within the XXI<sup>st</sup> century

Part I:



Annex I, Part II :





## Annex II – National PNR systems in EU Member States and EU funding

Figure: PNR Systems in MS and EU Funding



Source: European Commission

From <http://www.consilium.europa.eu/en/press/press-releases/2016/04/21-council-adopts-eu-pnr-directive/>

## **Annex III - Crimes targeted by the EU PNR Directive ; EU PNR Directive, Annex II**

### ***List of offences referred to in point (9) of Article 3***

1. *participation in a criminal organisation,*
2. *trafficking in human beings,*
3. *sexual exploitation of children and child pornography,*
4. *illicit trafficking in narcotic drugs and psychotropic substances,*
5. *illicit trafficking in weapons, munitions and explosives,*
6. *corruption,*
7. *fraud, including that against the financial interests of the Union,*
8. *laundering of the proceeds of crime and counterfeiting of currency, including the euro,*
9. *computer-related crime/cybercrime,*
10. *environmental crime, including illicit trafficking in endangered animal species and in endangered plants,*
11. *facilitation of unauthorised entry and residence,*
12. *murder, grievous bodily injury,*
13. *illicit trade in human organs and tissue,*
14. *kidnapping, illegal restraint and hostage-taking,*
15. *organised and armed robbery,*
16. *illicit trafficking in cultural goods, including antiques and works of art,*
17. *counterfeiting and piracy of products,*
18. *forgery of administrative documents and trafficking therein,*
19. *illicit trafficking in hormonal substances and other growth promoters,*
20. *illicit trafficking in nuclear or radioactive materials,*
21. *rape,*
22. *crimes within the jurisdiction of the International Criminal Court,*
23. *unlawful seizure of aircraft/ships,*
24. *sabotage,*
25. *trafficking in stolen vehicles,*
26. *industrial espionage.*

## **Annex IV. List of data collected for PNR system - EU PNR Directive, Annex I**

### **Passenger name record data as far as collected by air carriers**

1. *PNR record locator*
2. *Date of reservation/issue of ticket*
3. *Date(s) of intended travel*
4. *Name(s)*
5. *Address and contact information (telephone number, e-mail address)*
6. *All forms of payment information, including billing address*
7. *Complete travel itinerary for specific PNR*
8. *Frequent flyer information*
9. *Travel agency/travel agent*
10. *Travel status of passenger, including confirmations, check-in status, no-show or go-show information*
11. *Split/divided PNR information*
12. *General remarks (including all available information on unaccompanied minors under 18 years, such as name and gender of the minor, age, language(s) spoken, name and contact details of guardian on departure and relationship to the minor, name and contact details of guardian on arrival and relationship to the minor, departure and arrival agent)*
13. *Ticketing field information, including ticket number, date of ticket issuance and one-way tickets, automated ticket fare quote fields*
14. *Seat number and other seat information*
15. *Code share information*
16. *All baggage information*
17. *Number and other names of travellers on the PNR*
18. *Any advance passenger information (API) data collected (including the type, number, country of issuance and expiry date of any identity document, nationality, family name, given name, gender, date of birth, airline, flight number, departure date, arrival date, departure port, arrival port, departure time and arrival time)*
19. *All historical changes to the PNR listed in numbers 1 to 18.*

# HONESTY DECLARATION

26/05/2018

Vilnius

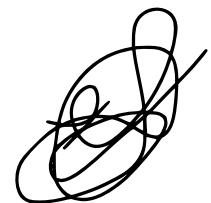
I, Elodie Freitag, student of Mykolas Romeris University (hereinafter referred to University),

At Faculty of Law, European and International Law Institute, European Union Law and Governance Programme, confirm that the Master thesis titled

“ Analysis of selected EU Member States’ national PNR in light with the EU PNR Directive“:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.



Elodie Freitag