



FRA

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

**FRA Opinion – 1/2011
Passenger Name Record**

Vienna, 14 June 2011

Opinion

of the

European Union Agency for Fundamental Rights

on the

Proposal for a Directive on the use of

**Passenger Name Record (PNR) data for the prevention,
detection, investigation and prosecution of terrorist
offences and serious crime (COM(2011) 32 final)**

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on the European Union, in particular Article 6 thereof,

Recalling in particular the obligations set out in the European Convention on Human Rights (ECHR) and in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing the FRA, in particular, Article 2 with the objective of the FRA “to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”.¹

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of the FRA to “formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the European Commission”,

Having regard also to Recital 13 of Council Regulation 168/2007, according to which “the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned”,

In response to the request of 13 April 2011² from the European Parliament to provide an expert opinion on the Proposal for a Directive of the European Parliament and of the Council on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (COM(2011) 32 final)³ and its compliance with the Charter of Fundamental Rights of the European Union,

SUBMITS THE FOLLOWING OPINION:

¹ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1.

² Letter from the President of the European Parliament, Jerzy Buzek, to the Director of the FRA, Morten Kjærum.

³ European Commission, *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*, COM(2011) 32 final, Brussels, 2 February 2011.

1. Introduction

1.1. What are Passenger Name Record data?

Passenger Name Record (PNR) data contain several different types of information:

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 PNR;
18. any Advance Passenger Information (API) data⁴ collected;

⁴ API data contain the following types of information: the number and type of travel document used; nationality; full names; the date of birth; the border crossing point of entry into the territory of the Member States; code of transport; departure and arrival time of the transport; total number of

19. all historical changes to the PNR data listed in numbers 1 to 18.⁵

PNR data is information provided by passengers, and collected by and held in the carriers' reservation and departure control systems for their own commercial purposes.

Soon after the terrorist attacks of 11 September 2001, the United States adopted legislation requiring air carriers operating flights to, from or through its territory to provide to US authorities PNR data stored in their automated reservation systems. Canada and Australia decided to do the same. Sent well in advance of a flight's departure, PNR data should help law enforcement authorities screen passengers for potential links to terrorism and other forms of serious crime.⁶

1.2. Background of the opinion of the FRA

On 6 November 2007, the European Commission adopted a first proposal for a Council Framework Decision on the use of PNR data for law enforcement purposes.⁷ The proposal was extensively discussed in the Council. At the request of the EU Presidency, the FRA submitted an opinion on the proposal in October 2008.⁸ The FRA opinion focused on the following fundamental rights: the right to respect for private life, the right to protection of personal data and the prohibition of discrimination. The European Data Protection Supervisor (EDPS)⁹ and the Article 29 Working Party on Data Protection¹⁰ also contributed their respective opinions. The European Parliament adopted a Resolution in November 2008.¹¹ Upon entry into force of the Treaty on the Functioning of the European Union (TFEU) on 1 December 2009, the European Commission proposal, not yet adopted by the Council, became invalid and needed to be re-introduced. The current proposal replaces the 2007 proposal and is based on the

passengers carried on that transport; the initial point of embarkation. See European Commission, *Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data*.

⁵ See Annex to European Commission, *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*, COM(2011) 32 final, Brussels, 2 February 2011.

⁶ European Commission, *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*, COM(2011) 32 final, Brussels, 2 February 2011, p. 3.

⁷ European Commission, *Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes*, COM(2007) 654 final, Brussels, 6 November 2007.

⁸ PNR opinion of the FRA, October 2008, available at: http://fra.europa.eu/fraWebsite/attachments/FRA_opinion_PNR_en.pdf.

⁹ OJ 2008 C 110, 1 May 2008

¹⁰ Opinion number 145 of 5 December 2007.

¹¹ European Parliament resolution of 20 November 2008 on the proposal for a Council framework decision on the use of Passenger Name Record (PNR) for law enforcement purposes, P6_TA (2008)0561.

provisions of the TFEU. The previous opinion of the FRA was taken into account by the European Commission in its current proposal.¹²

Both the EDPS¹³ and the Article 29 Working Party¹⁴ have in the meantime submitted opinions on the current proposal.¹⁵ Both these opinions focused predominantly on the right to data protection and concluded principally that the current proposal does not meet necessity and proportionality requirements.

In general, the FRA shares these analysis and opinions and takes them as a point of departure. This FRA opinion complements and adds to the opinions of the EDPS and the Article 29 Working Group by focusing on topics from a broader fundamental rights perspective.

This opinion focuses on the intra-EU dimension of PNR and does not cover the external policy aspect. However, Article 19 (2) of the proposal refers to “bilateral and/or multilateral agreements with third countries”. In order to fully secure fundamental rights compliance, this Article could expressly refer to the standards arising from the Charter and other EU primary law.

2. Fundamental rights compliance

The Commission proposal for a PNR directive, which is subject to the ordinary legislative procedure (co-decision procedure with the European Parliament) according to Article 294 TFEU, has potential implications for a number of fundamental rights, such as: non-discrimination (Article 21 of the Charter, Article 14 of the ECHR and Article 1 of Protocol No. 12 to the ECHR); respect for private and family life (Article 7 of the Charter and Article 8 of the ECHR); and protection of personal data (Article 8 of the Charter and Article 8 of the ECHR as interpreted by the European Court of Human Rights (ECtHR)).

¹² See European Commission, Explanatory Memorandum to *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*, COM(2011) 32 final, Brussels, 2 February 2011, point 1, p. 6.

¹³ EDPS, *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*, 25 March 2011.

¹⁴ Article 29 Working Party, WP 181, 5 April 2011.

¹⁵ The European Economic Social Committee (EESC) adopted an opinion on the proposal on 5 May 2011, which the FRA also supports in general: EESC, *Opinion of the European Economic and Social Committee 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*, SOC/414, 5 May 2011.

In their Impact Assessment,¹⁶ the Commission services state that the impacts on fundamental rights have been assessed in line with the Fundamental Rights ‘Check List’ as provided for in the Commission’s Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union.¹⁷ They acknowledge that the use of PNR data interferes with the fundamental rights to the protection of private life and to the protection of personal data as guaranteed by Articles 7 and 8 of the Charter and Article 8 of the ECHR, as well as Article 16 of the TFEU. Furthermore, the Commission services point out that the rights to private life and to the protection of personal data are subject to limitations and conditions defined in Article 8 (2) of the ECHR and Article 52 of the Charter. When preparing this opinion, the FRA based itself mainly on the information included in the explanatory memorandum of the proposal¹⁸ and its accompanying working documents.¹⁹

The FRA will focus on one specific fundamental right (non-discrimination), which the Impact Assessment of the Commission services does not specifically mention, and on two broader fundamental rights issues (requirements for limitations of fundamental rights and effective supervision) which merit a deeper analysis in this context.

2.1. Prohibition of discrimination

2.1.1. Discriminatory profiling

In its previous opinion of October 2008,²⁰ the FRA had raised concerns regarding the possibility of discriminatory profiling in the context of an EU PNR system. The current proposal addresses these concerns with the introduction of new text, which is considered here.

The FRA notes that specific wording was included in Article 4 (3) of the proposal ensuring that the “assessment of the passengers prior to their scheduled arrival or

¹⁶ Commission Staff Working Paper, *Impact Assessment – Accompanying document to the proposal for a European Parliament and Council Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, SEC (2011) 132, p. 19.

¹⁷ COM(2010) 573 of 19 October 2010.

¹⁸ European Commission, *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*, COM(2011) 32 final, Brussels, 2 February 2011.

¹⁹ Commission Staff Working Paper, *Impact Assessment – Accompanying document to the proposal for a European Parliament and Council Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, SEC (2011) 132; Commission Staff Working Paper, *Summary of the Impact Assessment - Accompanying document to the proposal for a European Parliament and Council Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, SEC (2011) 133.

²⁰ PNR opinion of the FRA, October 2008, available at: http://fra.europa.eu/fraWebsite/attachments/FRA_opinion_PNR_en.pdf.

departure from the Member State shall be carried out in a non-discriminatory manner on the basis of assessment criteria established by its Passenger Information Unit”,²¹ which, under the proposal, is the unit responsible for the collection and analysis of PNR data. Article 4 (3) states further that the “assessment criteria shall in no circumstances be based on a person’s race or ethnic origin, religious or philosophical belief, political opinion, trade union membership, health or sexual life”. Article 5 (6) of the proposal guarantees, in addition, that decisions shall not be taken on the basis of a person’s race or ethnic origin, religious or philosophical belief, political opinion, trade union membership, health or sexual life. Finally, Article 11 (3) of the proposal ensures that the processing of PNR data revealing a person’s race or ethnic origin, religious or philosophical belief, political opinion, trade union membership, health or sexual life shall be prohibited. In the event that the Passenger Information Unit receives PNR data revealing such information, Article 11 (3) of the proposal requires the data’s immediate deletion.

The introduction of these Articles in the current proposal has reduced the risk of direct discrimination and discriminatory profiling. Direct discrimination is characterised as follows: an individual is treated unfavourably in comparison to how others in a similar situation have been or would be treated, because of his/her particular characteristic, which falls under a ‘protected ground’.²² Because certain types of data and assessment criteria are prohibited, the corresponding risk of direct discrimination is reduced.

These Articles of the proposal are reminiscent of the list of sensitive data contained in Article 8 of the EU Data Protection Directive²³ and the list of special categories of data contained in Article 6 of the Council Framework Decision 2008/977/JHA²⁴ (“racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life”), but do not cover all discrimination grounds mentioned in Article 21 of the Charter of Fundamental Rights of the European Union (“sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”). The FRA suggests to broaden Article 4 (3), Article 5 (6) and Article 11 (3) of the proposal to conform to the list of prohibited discrimination grounds contained in Article 21 of the Charter.

One possible remaining risk of direct discrimination concerns PNR data transmitted by air carriers. They might include sensitive or special data under the heading ‘general

²¹ According to Article 3 of the proposal, the Passenger Information Unit is the authority responsible for the prevention, detection, investigation or prosecution of terrorist offences and serious crime or a branch of such an authority set up or designated by each Member State to collect, analyse and process PNR data. The Passenger Information Unit is not independent.

²² FRA (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office of the European Union (Publications Office), p. 22.

²³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

²⁴ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

remarks²⁵ – a broad category potentially covering sensitive personal characteristics, for example special dietary requirements. Although the Passenger Information Unit can be expected to delete such information immediately as stipulated in the proposal, there is a risk that the air carrier continues to transmit this type of sensitive or special data if insufficient safeguards are in place to regulate its transmission to the Passenger Information Unit. It would therefore be useful to introduce a prohibition on the transmission of such data by air carriers. Consequently, to provide greater protection and to avoid relying solely on a prohibition of processing and a duty to delete such information, the FRA also suggests to include in Articles 4 (1) and 11 (3) a duty to refrain from transmitting such data in the first place.²⁶

2.1.2. The importance of statistics

In Article 18, the proposed directive describes the statistics to be collected,²⁷ which currently cover the following types of information: number of identifications of any persons who may be involved in a terrorist offence or serious crime; the number of subsequent law enforcement actions that were taken involving the use of PNR data per air carrier and destination. These statistics are collected on an anonymous basis.

The collection of statistics on the operation of the PNR system could serve two interrelated purposes: review of efficiency and detection of indirect discrimination. Both aspects could play an important role for the review of the directive envisaged in Article 17 of the proposal.

2.1.2.1. Efficiency

For the assessment of the efficiency of the PNR system, statistics on identifications and subsequent law enforcement actions mentioned in Article 18 of the proposal are important. Statistics are, however, equally crucial to detecting and monitoring those cases in which a person is negatively affected by the EU PNR system – in other words, cases in which PNR data brought people under otherwise unjustified scrutiny by authorities. Therefore, the FRA suggests to create the following statistics to assess the efficiency of the PNR system: total number of persons whose PNR data were collected and exchanged; number of persons identified for further scrutiny; number of

²⁵ Item 12 in the Annex to *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*, COM(2011) 32 final, Brussels, 2 February 2011.

²⁶ Both the EDPS and the EESC concur on the need to prohibit the transmission of sensitive data by airlines: EDPS, *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*, 25 March 2011, p. 10; EESC, *Opinion of the European Economic and Social Committee 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*, SOC/414, 5 May 2011, p. 9.

²⁷ COM(2011) 32 final, Article 18.

subsequent law enforcement actions; number of persons later found to have been unjustifiably flagged as suspicious by the PNR system.²⁸ Such statistics could be important to assess the efficiency of the system as well as for the review of its application as foreseen in Article 17 of the proposal.

2.1.2.2. Indirect discrimination

As stated above, provisions included in the proposal have reduced the risk of direct discrimination. One risk that remains is that of indirect discrimination. Indirect discrimination is characterised as follows: a neutral rule, criterion or practice affects a group defined by a 'protected ground' in a significantly more negative way in comparison to others in a similar situation.²⁹ The following example might serve to illustrate indirect discrimination in the context of PNR: a person becomes subject to further scrutiny because of his/her name. Indirect discrimination is also covered by the prohibition of discrimination contained in Article 21 of the Charter.

Because the rule, criterion or practice is neutral at face value, indirect discrimination can only be detected in practice by creating statistics on the application of a certain rule, criterion or practice. Suitable statistics are useful to detect discriminatory patterns and trends in the application of a certain rule, criterion or practice. Respective case law of the Court of Justice of the European Union (CJEU) - before the entry into force of the Lisbon Treaty: the European Court of Justice (ECJ) - and of the European Court of Human Rights (ECtHR) illustrates the close link between statistics and the detection of indirect discrimination.

In the *Schönheit* case of the ECJ,³⁰ the pensions of part-time employees were calculated using a different rate to that of full-time employees. Part-time employees received a smaller pension than full-time employees, even after taking into account the differing lengths of service, meaning that part-time workers were paid less. This pension calculation rule applied equally to all part-time workers and therefore appeared to be neutral. However, because around 88% of part-time workers were women, the effect of the rule was disproportionately negative for women as compared to men. Based on these statistics, the ECJ detected indirect discrimination.³¹

In the case of *D.H. and Others v. the Czech Republic* of the ECtHR,³² a series of tests were used in the Czech Republic to establish the intelligence and suitability of pupils to

²⁸ The EDPS suggests the collection of statistics on the number of effective convictions which have resulted or not: EDPS, *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*, 25 March 2011, p. 11.

²⁹ FRA (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, p. 29.

³⁰ ECJ, *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen*, Joined Cases C-4/02 and C-5/02, 23 October 2003.

³¹ FRA (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, p. 29.

³² ECtHR, Grand Chamber, *D.H. and Others v. the Czech Republic*, No. 57325/00, 13 November 2007.

determine whether they should be moved out of mainstream education and into special schools for those with intellectual or learning disabilities. In practice, these tests led to a situation that in some special schools Roma pupils made up between 80% and 90% of the total number of pupils. Based on these statistics of children in special schools, the ECtHR detected indirect discrimination.³³

Thus, for the detection of indirect discrimination, it would be useful to create suitable aggregate statistics based on PNR data to detect discriminatory patterns and trends in the application of the PNR system; these statistics must, however, be created anonymously and in a non-identifiable manner in order to comply with EU data protection principles.

Such statistics would also be crucial as evidence for the review of the application of the directive. The FRA suggests to add non-discrimination as an area of special attention for the review according to Article 17 (b) of the proposal. This would also be in line with Article 10 TFEU which states that the Union shall aim to combat discrimination in defining and implementing its policies and activities.

2.2. Requirements for limitations of fundamental rights

As acknowledged by the Commission services,³⁴ an interference with the fundamental rights to the protection of private life and to the protection of personal data as recognised by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and Article 8 of the ECHR, as well as Article 16 of the TFEU, is permissible if it fulfils the conditions of Article 52 of the Charter. In their Impact Assessment, the Commission services accept³⁵ that the use of PNR data interferes with these fundamental rights.

Article 52 (1) of the Charter establishes conditions for the limitation of the exercise of fundamental rights and freedoms recognised in the Charter and states that any limitation must be “provided for by law” and “respect the essence of those rights and freedoms”. Article 52 also stresses that, subject to the principle of proportionality, limitations are possible only if they are: necessary; genuinely meet objectives of general interest recognised by the EU; or aid in the protection of the rights and freedoms of others. In addition, Article 52 (3) of the Charter stipulates that, insofar as Charter rights are derived from the rights set out in the ECHR, a Charter right is to have

³³ FRA (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, p. 30.

³⁴ Commission Staff Working Paper, *Impact Assessment – Accompanying document to the proposal for a European Parliament and Council Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, SEC (2011) 132, p. 19.

³⁵ *Ibid.*

the same scope and meaning as the ECHR right in question.³⁶ Therefore, the FRA will draw especially on the case law of the ECtHR for the interpretation of the Charter.

In sum, limitations of certain fundamental rights are possible according to the Charter, but such limitations need to meet certain specified conditions, especially including “objectives of general interest recognised by the EU”, “provided for by law”, necessity and proportionality.

2.2.1. Objectives of general interest recognised by the EU

Article 52 of the Charter of Fundamental Rights of the European Union requires that any limitation on the exercise of the rights and freedoms genuinely meets “objectives of general interest recognised by the Union”. The ECtHR uses a different terminology and speaks of ‘legitimate aim’.

The prevention, detection, investigation and prosecution of terrorist offences and serious crime are legitimate aims recognised by the case law of the ECtHR. Article 8 (2) ECHR lists ‘national security’ and ‘prevention of crime’ as legitimate objectives under the ECHR for the limitation of the right to respect for private and family life. The ECtHR has confirmed that the fight against terrorism and the fight against crime are legitimate objectives in the case *Klass and Others v. Germany*.³⁷ The ECtHR explained in that case that democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake surveillance of subversive elements operating within its jurisdiction. The ECtHR has therefore accepted that the existence of some legislation granting powers of surveillance is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime. In the case of *Leander v. Sweden*,³⁸ the ECtHR also held that the covert collection of information about an individual in the interests of national security serves a legitimate objective.

Since terrorist offences and serious crimes potentially constitute threats to other fundamental rights – such as the right to life, physical integrity or ill-treatment in violation of the prohibition of torture, inhuman or degrading treatment – their prevention, detection, investigation and prosecution are also legitimate in order to protect the rights and freedoms of others, as per Article 52 of the Charter.

³⁶ At the same time, this provision emphasises that it does not prevent EU law from providing more extensive protection. The reference to the ECHR also includes its protocols. Explanations relate to the Charter, OJ 2007/C 303/17, 14 December 2007, p. 33.

³⁷ See ECtHR, *Klass and others v. Federal Republic of Germany*, No. 5029/71, 6 September 1978.

³⁸ See ECtHR, *Leander v. Sweden*, No. 9248/81, 26 March 1987.

2.2.2. Provided for by law

Article 52 of the Charter of Fundamental Rights of the European Union requires that any limitation on the exercise of the rights and freedoms recognised by the Charter be “provided for by law”. The ECHR uses a slightly different terminology and speaks of “in accordance with the law”.

According to the ECtHR jurisprudence, this not only requires that the restriction should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. To be accessible, the citizen must be able to have an indication of the legal rules applicable to a given case that is adequate in the circumstances.³⁹ A rule is foreseeable, if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to act accordingly.⁴⁰ The European Community Court of First Instance⁴¹ has held that the requirements of accessibility and foreseeability are also recognised as general principles of EU law.⁴²

These requirements of accessibility and foreseeability as developed by the ECtHR⁴³ constitute an essential legal protection against arbitrariness when fundamental rights are being limited.⁴⁴ The ECtHR has held that protection against arbitrariness is even more important as regards surveillance measures, due to the heightened risks of arbitrariness in such circumstances.⁴⁵ This is relevant for the proposed EU PNR system, because it could be considered as a surveillance measure.⁴⁶ Individual passengers may be generally aware that their flight details are being recorded and exchanged but will typically know neither the assessment criteria applied nor whether or not they have been flagged by the system for further scrutiny.

Therefore, any measure giving the authorities power to interfere with fundamental rights should contain explicit, detailed provisions which are sufficiently clear, sufficiently

³⁹ See ECtHR, *Sunday Times v. the United Kingdom*, No. 6538/74, 26 April 1979, paragraph 49. See also the Council of the European Union, *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies*, doc No. 10140/11, 18 May 2011.

⁴⁰ *Ibid.*

⁴¹ The Court of First Instance is, after the Lisbon Treaty, referred to as the General Court of the European Union.

⁴² Court of First Instance, T-43/02, *Jungbunzlauer v. Commission*, 27 September 2006, paragraph 7.

⁴³ See also ECtHR, *Malone v. UK*, No. 8691/79, 2 August 1984; ECtHR, *Kruslin v. France*, No. 11801/85, 24 April 1990; ECtHR, *Khan v. UK*, No. 35394/97, 12 May 2000; ECtHR, *Vetter v. France*, No. 59842/00, 31 May 2005.

⁴⁴ ECtHR, *Liberty and Others v. United Kingdom*, No. 58243/00, 1 July 2008, paragraph 69

⁴⁵ See ECtHR, *Klass and others v. Federal Republic of Germany*, No. 5029/71, 6 September 1978.

⁴⁶ Both the EDPS and the Article 29 Working Party concur: EDPS, *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*, 25 March 2011, p. 4; Article 29 Working Party, WP 181, 5 April 2011, p. 4.

foreseeable and meet the required degree of certainty⁴⁷ with respect to their application.

The proposal contains at least three formulations which might raise questions as to whether the required degree of accessibility and foreseeability is sufficiently met:

- In the proposal, the PNR data to be collected are listed in the Annex. They include as item 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)”. Because of the wording ‘such as’, this data item is very broad and could potentially include data relating to a passenger’s health, or dietary requirements which would permit identification of a passenger’s religious adherence. The heading ‘general remarks’ might raise concerns regarding foreseeability as it offers little guidance as to what information is to be excluded. The explanatory text within the brackets also indicates solely what kind of information is included, but does not limit the data to be collected. This might possibly permit unlimited information gathering and transfer and, therefore, might not be justified by the purpose of the PNR system.⁴⁸ This vague formulation also poses practical difficulties given the rule that PNR data beyond the scope of those listed in the Annex should be deleted immediately, as per Article 4 (1) of the proposal.
- Under the proposal, the PNR data collected may be processed for the following purposes only: the prevention, detection, investigation and prosecution of terrorist offences and serious crime. The definition of serious crime included in Article 2 (h) includes an open formulation: the definition says that “Member States may exclude those minor offences for which, taking into account their respective criminal justice system, the processing of PNR data pursuant to this directive would not be in line with the principle of proportionality”.⁴⁹ This wording

⁴⁷ In the case *Malone v. UK*, a case concerning telephone tapping, the UK Government argued that the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. The ECtHR accepted this argument but held nevertheless that the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with their right to respect for private life and correspondence. See ECtHR, *Malone v. UK*, No. 8691/79, 2 August 1984, paragraph 67.

⁴⁸ The EDPS suggests excluding the category of ‘general remarks’ from the list of PNR data: EDPS, 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*, 25 March 2011, p. 10.

⁴⁹ This provision will also be analysed later in this opinion from the perspective of necessity/proportionality.

might not reach the required degree of foreseeability to understand which offences Member States could exclude under this provision. To justify its proposal, the European Commission argued in part that the proposal would help harmonise the legislation of Member States in this area, eliminating the risks of uneven levels of protection of personal data across the EU, security gaps and legal uncertainty for passengers.⁵⁰ Against this background, the discretion the proposal grants Member States to decide which crimes are covered and which are not seems unnecessarily broad.

- Article 4 (2) (b) states that “the Passenger Information Unit may compare PNR data against relevant databases, including international or national databases or national mirrors of Union databases, where they are established on the basis of Union law, on persons or objects sought or under alert, in accordance with Union, international and national rules applicable to such files.” This provision allows for matching PNR data ‘with undetermined databases’.⁵¹ Because the databases are not specified, the use of PNR data might not reach the required level of foreseeability.⁵²

2.2.3. Necessity and Proportionality

Article 52 of the Charter requires that any limitation to rights and freedom recognised by the Charter be ‘necessary’. The ECtHR explained the meaning of ‘necessary’ as follows: “The Court notes [...] that, while the adjective ‘necessary’ [...] is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’.”⁵³ The ECtHR stated that the notion of necessity implies that an interference corresponds to a pressing social need.⁵⁴

Furthermore, Article 52 of the Charter requires that any limitation to fundamental rights must respect the principle of proportionality. The ECtHR has held that, to be compatible with the Convention, the interference must, among other issues, be “proportionate to the legitimate aim pursued”.⁵⁵ Proportionality puts the reason for the limitation and the scope of the limitation into relation with each other.

⁵⁰ COM(2011) 32 final, p. 4.

⁵¹ EDPS Opinion of 25 March 2011, point 31.

⁵² Both, the EDPS and the Article 29 Working Party concur that the relevant databases are not sufficiently foreseeable: EDPS, *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*, 25 March. 2011, p. 5; Article 29 Working Party, WP 181, 5 April 2011, p. 5.

⁵³ ECtHR, *Handyside v. UK*, No. 5493/72, 7 December 1976, paragraph 48.

⁵⁴ ECtHR, *Olsson v. Sweden*, No. 10465/83, 24 March 1988.

⁵⁵ ECtHR, *Handyside v. UK*, No. 5493/72, 7 December 1976, paragraph 49.

The General Secretariat of the Council sums up the principles of necessity and proportionality as follows: “It is settled case-law of the Court of Justice of the European Union that the principle of proportionality, which is one of the general principles of European Union law, requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it. Furthermore, the necessary and proportionate limitations must respect the essence of the fundamental rights concerned.”⁵⁶

In the Explanatory Memorandum attached to the proposal, the European Commission included some examples which provide evidence of the necessity of a PNR system leading to critical progress in combating serious crime, in particular in the fight against drugs and human trafficking.⁵⁷ It is important to further analyse these examples to assess the necessity of an EU PNR system.

Examples of the value of PNR data can also be found in other European Commission documents. In 2010, the Commission published a communication on information management in the area of freedom, security and justice. In this communication, the Commission provided further examples for the necessity of PNR data relating to child trafficking, trafficking in human beings, credit card fraud and drug trafficking, but it did not disclose the source of its information.⁵⁸

However, examples relating to terrorism or to many of the other types of crimes defined as serious crime in Article 2 (h) of the proposal cannot be found in the Explanatory Memorandum or in the accompanying documents.

The FRA is aware that further evidence proving the necessity of a PNR system might exist beyond what was disclosed. In this respect, the opinions of the European Union Committee of the UK House of Lords are instructive. This Committee initially said that it had not received evidence which would enable it to assess the value of PNR data.⁵⁹ However, in 2008, the Committee was persuaded by confidential evidence received from the Home Office that PNR data, when used in conjunction with data from other sources, could significantly assist in the identification of terrorists.⁶⁰ In 2011, the Committee said that it had no hesitation in accepting the Home Office’s assessment of the value of PNR data for the prevention and detection of serious crime and terrorism.⁶¹ Similarly, the FRA cannot exclude the possibility that further evidence proving the

⁵⁶ Council of the European Union (2011), *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council’s preparatory bodies*, Doc No. 10140/11, 18 May 2011.

⁵⁷ COM(2011) 32 final, pp. 5-6.

⁵⁸ European Commission (2010), *Overview of information management in the area of freedom, security and justice*, COM(2010) 385 final, Brussels, 2010.

⁵⁹ The EU/US Passenger Name Record (PNR) Agreement, 21st Report, Session 2006-07, HL Paper 108, paragraph 22.

⁶⁰ The Passenger Name Record (PNR) Framework Decision, 15th Report, Session 2007-08, HL Paper 106, paragraph 49.

⁶¹ The United Kingdom opt-in to the Passenger Name Record Directive, 11th Report, Session 2010-11, HL Paper 113, paragraph 6.

necessity of a PNR system does exist. In any case, the necessity and proportionality of the PNR system would need to be demonstrated.

The examples provided by the European Commission relate only to cases in which PNR data were successfully used in the course of investigations. For a more complete picture, it would also be necessary to analyse those cases in which the use of data proved to be misleading and led to the investigation of innocent people. Such a case is included by the European Union Committee of the UK House of Lords in its 2007 report on the EU/US Passenger Name Record (PNR) Agreement: the case of Maher Arar.⁶²

2.2.3.1. The definition of serious crime

The term 'serious crime' is defined in Article 2 (h) of the proposal and refers to Article 2 of Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States. It is important to note that this specific article of the Framework Decision does not itself use the term 'serious crime'. Rather, Article 2 speaks of 'offences' and the offences listed there might not be sufficiently serious to warrant a PNR system. This discrepancy is implicitly acknowledged by the provision in Article 2 (h) of the proposal that "Member States may exclude [...] minor offences" from the scope of this instrument.⁶³ The text of the proposal itself acknowledges that the definition of serious crimes in the proposal encompasses minor offences; otherwise, there would be no need to empower Member States to exclude them. In this context, it is unclear why the proposal leaves it to the discretion of Member States which offences to count as minor offences.⁶⁴ Rather, proportionality is mandatory under Article 52 of the Charter and the exclusion of minor offences could be considered to be equally mandatory.⁶⁵ The FRA suggests to limit the list of crimes covered by Article 2 of the proposal to ensure that they are sufficiently serious and to guarantee the proportionality of the EU PNR system.

The proposal distinguishes between 'serious crime' and 'serious transnational crime' in the definitions provided in Article 2 (h) and (i), respectively. Some aspects of the scope of the proposal relating to the creation and application of assessment criteria are limited to serious transnational crimes,⁶⁶ whereas important data-processing operations based on PNR data are also possible in relation to serious crimes, as per Article 4 (2) (b) and (c). However, all the examples provided by the Commission to justify the necessity of the PNR system relate to serious transnational crimes, but not to serious

⁶² The EU/US Passenger Name Record (PNR) Agreement, 21st Report, Session 2006-07, HL Paper 108, paragraph 24-27; for more details on the *Maher Arar* case, see the website of the Commission of Inquiry at: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/default.htm.

⁶³ See also, on that inconsistency, the EDPS Opinion of 25.3.2011, point 27.

⁶⁴ The Article 29 Working Party concurs: Article 29 Working Party, WP 181, 5 April 2011, p. 6.

⁶⁵ The EDPS concurs with this analysis: EDPS, *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*, 25 March 2011, p. 7.

⁶⁶ COM(2011) 32 final, p. 8.

crimes which are not transnational. In this respect, the necessity of the proposed PNR system with regard to serious crimes which are not transnational, is neither sufficiently substantiated nor explained in the proposal. The FRA suggests to limit the EU PNR system to serious transnational crime.

2.2.3.2. The systematic flagging of travellers

An analysis of the proportionality of the envisaged PNR system requires that special attention be paid to the treatment of innocent people.

This aspect played an important role in another debate about the fundamental rights compliance of EU legislation (data retention) which could also be useful for consideration in the context of PNR. When considering the fundamental rights compliance of the national implementation of the EU Data Retention Directive 2006/24/EC, questions of proportionality were raised by constitutional courts in various Member States, specifically Romania, Germany and the Czech Republic. In December 2009, the implementation of the EU Data Retention Directive was declared unconstitutional by the Romanian Constitutional Court.⁶⁷ In March 2010, Germany's Federal Constitutional Court suspended German legislation implementing the EU Data Retention Directive and held that the implementing legislation posed a grave threat to personal privacy rights.⁶⁸ In its decision, the German Constitutional Court reasoned that the principle of proportionality requires that a retrieval of the telecommunications traffic data stored by way of precaution to ward off danger is only permissible if there is sufficient evidence of concrete danger to the life, limb or freedom of a person, to the existence or the security of the federal government or the states or to ward off a common danger.⁶⁹ The Czech Constitutional Court also declared the national implementation of the EU Data Retention Directive as unconstitutional based on fundamental rights considerations.⁷⁰ The main criticism voiced by the Member States' constitutional courts referred to above relates to the retention and use of data of everybody instead of a more targeted approach. Such extensive data collection and processing was not considered to be proportionate, even in order to safeguard security.⁷¹ The same reasoning could also be applied to the proposed EU PNR system for it, too, foresees data collection and analysis for all passengers on international

⁶⁷ Romania, Constitutional Court, Decision No. 1258, 8 October 2009.

⁶⁸ Germany, Constitutional Court, Judgment of 2 March 2010, 1 BvR 256/08, available at: www.bundesverfassungsgericht.de/entscheidungen/rs20100302_1bvr025608.html

⁶⁹ *Ibid.*

⁷⁰ See www.concourt.cz/clanek/GetFile?id=5075.

⁷¹ EDPS, Article 29 Working Party and EESC concur with this analysis: EDPS, *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*, 25 March 2011, p. 5; Article 29 Working Party, WP 181, 5 April 2011, p. 4; EESC, *Opinion of the European Economic and Social Committee 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*, SOC/414, 5 May 2011, p. 5.

flights, rather than restricting the collection and analysis of PNR data in a more targeted manner.

Reports of civil society organisations indicate that in the UK PNR data collection and analysis for the period from April 2009 to February 2010 flagged 48,682 people, leading to the arrest of 2,000 people and to the denial of entry to the UK of 1,000 people. The police issued 14,000 intelligence reports on travellers for future use.⁷² The system's flagging of such numbers of people needs to be taken into account for the proportionality assessment. Data from the US Department of Homeland Security confirm this picture: 216 PNR data were shared by the EU with the US for the period from August 2008 to January 2010, leading to one criminal judicial proceeding.⁷³

The current proposal does not limit the creation or establish quality criteria for the creation of assessment criteria.⁷⁴ The FRA suggests for proportionality reasons to include an explicit obligation in the proposal to make every reasonable effort to define assessment criteria in a manner which ensures that as few innocent people as possible are flagged by the system. This aspect could also play an important role for the review envisaged in Article 17 of the proposal which states that special attention should be given in the course of the review to "the quality of the assessments".

2.3. Effective supervision

According to Article 8 (3) of the Charter, compliance with the protection of personal data shall be subject to control by an independent authority.

The CJEU recently interpreted broadly the concept of independence of data protection supervisory authorities.⁷⁵ In *Commission v. Germany*,⁷⁶ the CJEU dealt with the question of the independence of data protection supervisory authorities for the first time. The CJEU held that the German data protection institutions at the federal state (*Länder*) level responsible for monitoring the processing of personal data by non-public bodies were not sufficiently independent because they were subject to oversight by the

⁷² EDRI (2010), *PNR used to investigate innocent travellers and turn them into suspects*, EDRI-gram, No. 8.11, 2 June 2010, www.edri.org/edriagram/number8.11/pnr-uk-privacy-issues.

⁷³ US Department of Homeland Security (2010), *Update to the 2008 Report concerning Passenger Name Record Information derived from flights between the U.S. and the European Union*, 5 February 2010, pp. 6-7, available at: http://www.dhs.gov/xlibrary/assets/privacy/privacy_pnr_review2010update_2010-02-05.pdf.

⁷⁴ The EDPS notes in his opinion that the assessment will be performed on the basis of constantly evolving and non-transparent criteria". EDPS, *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*, 25 March 2011, pp. 4-5. The Article 29 Working Party recalls the importance of making sure any assessment criteria used by Member States to analyse data are specific, necessary, justified and regularly reviewed: Article 29 Working Party, WP 181, 5 April 2011, p. 5.

⁷⁵ See FRA (2011), *Fundamental rights: challenges and achievements in 2010*, Annual Report, Luxembourg, Publications Office.

⁷⁶ CJEU, *Commission v. Germany*, C-518/07, 9 March 2010.

state. The case revolved around the interpretation of Article 28 (1) of the Data Protection Directive which requires data protection authorities to “act with complete independence in exercising the functions entrusted to them”. In his Opinion, Advocate General Jan Mazák qualified the term ‘independence’ as relative in nature, since it is necessary that the legislator specifies the level of such independence and this remains undefined. Following this logic, Advocate General Mazák concluded that the German data protection institutions in question were sufficiently independent even though they were subject to state oversight.⁷⁷ In contrast, the Court rejected this line of argumentation and stressed that the directive should be interpreted in accordance with the usual meaning of the words, thereby opting for a strict construction of ‘independence’. The CJEU also pointed out that the word ‘independence’ is complemented by the adjective ‘complete’ in the directive and should therefore be understood in a broad sense.⁷⁸ This judgment is not just relevant for the interpretation of the Data Protection Directive, but also for the interpretation of Article 8 of the Charter.⁷⁹

Article 12 of the proposal states that the national supervisory authority established in implementation of Article 25 of the Framework Decision 2008/977/JHA shall also be responsible for advising on and monitoring the national implementation of the EU PNR system proposed by the directive. The powers of the supervisory authority are defined in Article 25 of the Framework Decision 2008/977/JHA. However, the powers defined in the stated article could be strengthened, especially those ensuring that the supervisory authority can itself take action on its own initiative to protect proactively and effectively the interests of data subjects.

As argued above,⁸⁰ the EU PNR system as it is proposed could be seen as a surveillance measure. The individual targeted by the system is mostly unaware of this fact. It is important, therefore, that a sufficiently independent supervisory authority effectively monitors the system and protects the interests of individuals proactively, ensuring full compliance with provisions on, for example, data protection and non-discrimination. Supervisory authorities can monitor the system effectively only if they have sufficient independence, powers and resources to effectively perform their role.

⁷⁷ Opinion of Advocate General Mazák delivered on Case C-518/07, 22 October 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007C0518:EN:HTML>.

⁷⁸ CJEU, *Commission v. Germany*, C-518/07, 9 March 2010.

⁷⁹ See explanations to Article 8 of the Charter, Presidium of the Convention, document CONVENT 49, CHARTE 4473/00, 11 October 2000: “This Article is based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. The right to protection of personal data is to be exercised under the conditions laid down in the above Directive, and may be limited under the conditions set out by Article 52 of the Charter.”

⁸⁰ See Section 2.2.2, ‘provided for by law’.

The FRA 2010 report on Data Protection Authorities concerned only the EU Data Protection Directive, not the Framework Decision 2008/977/JHA. Nevertheless, the report analysed and compared independence and powers of data protection authorities; especially relevant in this context are the factors highlighted in the report concerning independence, powers of investigation and intervention of the data protection authorities and the importance of sufficient human and financial resources to use these powers for the benefit of data subjects.⁸¹

The FRA suggests to ensure that Article 12 of the proposal guarantees that supervisory authorities are fully independent, can take action on their own initiative to protect proactively and effectively the interests of data subjects and have sufficient resources to do so in practice.

3. Concluding remarks

The FRA took the opinions of EDPS and the Article 29 Working Group as a point of departure and designed its opinion to complement them. In response to the request of the European Parliament, the FRA identifies the following concerns regarding compliance of the Directive's proposal on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (COM(2011) 32 final) with the Charter of Fundamental Rights of the European Union:

3.1. The FRA welcomes the introduction of guarantees in the current proposal that will reduce the risk of direct discrimination and discriminatory profiling. One possible remaining risk of direct discrimination, however, concerns PNR data transmitted by air carriers. They might include sensitive or special data under the heading 'general remarks' – a broad category potentially covering sensitive personal characteristics. Although the Passenger Information Unit can be expected to delete such information immediately as stipulated in the proposal, there is a risk that air carriers will continue to transmit this type of sensitive or special data unless sufficient safeguards are in place to regulate its transmission to the Passenger Information Unit. It would therefore be useful to introduce a prohibition on the transmission of such data by air carriers. Instead of relying solely on a prohibition of processing and a duty to delete such information, the FRA also suggests to include in Articles 4 (1) and 11 (3) a duty to refrain from transmitting such sensitive data in the first place.

3.2. Articles 4 (3), 5 (6) and 11 (3) of the proposal are reminiscent of the list of sensitive data contained in Article 8 of the EU Data Protection Directive and the

⁸¹ FRA (2010), *Data Protection in the EU: the role of National Data Protection Authorities - Strengthening the fundamental rights architecture in the EU II*, Luxembourg, Publications Office, Vienna, 7 May 2010, available at: www.fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub_data_protection_en.htm.

list of special categories of data contained in Article 6 of the Council Framework Decision 2008/977/JHA (“racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life”), but do not cover all discrimination grounds mentioned in Article 21 of the Charter (“sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”). The FRA suggests to broaden Articles 4 (3), 5 (6) and 11 (3) of the proposal to conform to the list of prohibited discrimination grounds contained in Article 21 of the Charter.

- 3.3. Article 21 of the Charter also covers indirect discrimination. For the detection of indirect discrimination, the FRA suggests to create suitable aggregate statistics based on PNR data to detect discriminatory patterns and trends in the application of the PNR system; these statistics must, however, be created anonymously and in a non-identifiable manner in order to comply with EU data protection principles. Such statistics could be useful for the review of the application of the directive. The FRA suggests to add ‘non-discrimination’ as an area of special attention for the review envisaged in Article 17 of the proposal.
- 3.4. For the assessment of the efficiency of the PNR system, statistics on identifications and subsequent law enforcement actions mentioned in Article 18 of the proposal are important. Statistics are, however, equally crucial to detect and to monitor those cases in which a person is negatively affected by the EU PNR system without justification. Therefore, the FRA suggests to create the following statistics to assess the efficiency of the PNR system: total number of persons whose PNR data were collected and exchanged; number of persons identified for further scrutiny; number of subsequent law enforcement actions; number of persons later found to have been unjustifiably flagged as suspicious by the PNR system. Such statistics could be important to assess the efficiency of the system as well as for the review of its application as foreseen in Article 17 of the proposal.
- 3.5. The limitation of fundamental rights is only possible if the limitation is provided for by law according to Article 52 of the Charter. This requirement implies a duty to ensure that the law limiting fundamental rights is sufficiently accessible and foreseeable. The FRA has identified a few vague formulations which might not meet these requirements. These are ‘general remarks’ in the Annex to the proposal, ‘minor crimes’ in Article 2 (h) of the proposal and ‘relevant databases’ in Article 4 (2) (b) of the proposal.
- 3.6. Article 52 of the Charter also requires that any limitation to fundamental rights be ‘necessary’. The FRA is of the opinion that the explanatory memorandum of the proposal does not sufficiently substantiate the necessity of the limitation for all crimes covered. The European Commission included some examples which

substantiate the necessity of a PNR system. However, examples relating to terrorism or to many of the other types of crimes defined as serious crime in Article 2 (h) of the proposal cannot be found in the accompanying documents for the proposal. In any case, the FRA cannot exclude the possibility that further evidence proving the necessity of a PNR system for all types of crimes covered does exist. The necessity and proportionality of the PNR system would need to be demonstrated.

- 3.7. The proposal distinguishes between ‘serious crime’ and ‘serious transnational crime’ in the definitions provided in Article 2 (h) and (i), respectively. However, all the examples provided by the Commission to justify the necessity of the PNR system relate to serious transnational crimes, but not to serious crimes which are not transnational. In this respect, the necessity of the proposed PNR system with regard to serious crimes, which are not transnational, is neither sufficiently substantiated nor explained in the proposal. The FRA suggests to limit the EU PNR system to serious transnational crime.
- 3.8. Article 52 of the Charter further requires that any limitation to fundamental rights respects the principle of proportionality. Article 2 (h) of the proposal states that Member States may exclude minor offences from the scope of the directive. The text of the proposal itself indirectly acknowledges that the definition of serious crimes in the proposal encompasses minor offences; otherwise, there would be no need to empower Member States to exclude them. In this context, it is unclear why the proposal leaves it to the discretion of Member States which offences to count as minor offences. Rather, proportionality is mandatory under Article 52 of the Charter and the exclusion of minor offences could be considered to be equally mandatory. In this respect, the FRA suggests to limit the list of crimes covered by Article 2 of the proposal to ensure that they are sufficiently serious to ensure the proportionality of the EU PNR system.
- 3.9. An analysis of the proportionality of the envisaged PNR system requires that special attention be paid to the treatment of innocent people. The proposal currently does not limit the creation or establish quality criteria for the creation of assessment criteria. The FRA suggests for proportionality reasons to include an explicit obligation in the proposal to make every reasonable effort to define assessment criteria in a manner which ensures that as few innocent people as possible are flagged by the system. This aspect could also play an important role for the review envisaged in Article 17 of the proposal which states that special attention should be given in the course of the review to “the quality of the assessments”.
- 3.10. Article 8 (3) of the Charter requires that compliance with the right to protection of personal data shall be subject to control by an independent authority. Such control can only be effective if the independent authority disposes of sufficient independence, powers and resources to effectively perform its role as a

fundamental rights protector of the affected data subjects. Such protection is especially important because the EU PNR system could be seen as a surveillance measure, especially because the affected passengers will in most cases not be aware that they were flagged by the system. The FRA suggests to ensure in Article 12 of the proposal that supervisory authorities are fully independent, can take action on their own initiative to protect proactively and effectively the interests of data subjects and have sufficient resources to do so in practice.

Vienna, 14 June 2011