



Counter-terrorism, De-Radicalisation and Foreign Fighters

Joint debate during the extraordinary meeting
of the LIBE Committee

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Chair, Honourable members of this Committee,

Thank you for your invitation to join this extraordinary meeting. I am very honoured to have an opportunity to talk to your Committee for the first time following my appointment as European Data Protection Supervisor.

Europe is facing an unprecedented and serious terrorist threat.

This is a crucial moment for security, the first of such magnitude since the attacks in Madrid and London which propelled the Parliament and the Council towards a number of measures, including the now annulled Data Retention Directive.

Against the backdrop of the tragic and shocking terrorist incidents in Paris this month, we too understand at the EDPS that the EU has to take meaningful action.

National governments and EU institutions are quite properly now considering what measures, including legislative steps, are needed to prevent this month's outrages from recurring.

However, Europe's immediate response to the brutal attacks, and to the subsequent coordinated raids on terror suspects here in Belgium, has also been to unite around our values and fundamental freedoms.

We must continue to do so.

This moment is also crucial because it is a test: *a test of whether the EU legislators are able to learn the lessons of the past and avoid investing energies on initiatives which are ineffectual, or measures whose legality will be questioned.*

I share the viewpoint of the EU Counter-Terrorism Coordinator expressed in his document of January 17, that *"we need to focus on sustainable and long term policies"*. Sustainability also means being true to our values in terms of fundamental rights and freedoms.

As you know, the Court of Justice of the European Union last year struck down the Data Retention Directive because – and I quote [paragraph 69 of CJEU judgment of 8 April 2014 in Joined Cases C-293/12 and C-594/12] - *'by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter'*:

Limits which, the Court held (paragraphs 47 and 48), is 'reduced' where interference with those rights and freedoms is *serious*; and with the result that judicial review of the legislature's discretion should be strict.

The Court has for the first time laid down a clear series of criteria for assessing compliance of a measure in the security sphere which interferes with fundamental rights. They are of a general nature, although they were articulated in relation to the specific case of traffic data retention.

Let me therefore urge this highly expert and highly respected Committee to *double-scrutinise* any proposal with those criteria in mind.

The legislators are currently considering various counter-terrorism options.

Some of them may be, in principle, unproblematic from a data protection perspective: for example,

- the establishment of a European Counter-Terrorism Centre at Europol and of Focal Point Travellers,
- a more systematic and proactive exchange of data on terrorist related convictions via the ECRIS Platform,
- the removal of on-line publication of terrorist-related material, and
- the improvements to both border controls and information sharing.

The French authorities, via a Mutual Legal Assistance request to the FBI, were able to obtain communications information from a US-based service provider within an hour.

However, other options on the table still require more detailed analysis.

With that in mind, let me turn specifically to the proposal for an EU system for processing PNR for the purposes of combating crime and terrorism, including PNR data for intra-EU flights which we know a number of national governments are insisting on.

According to recent European Parliament research an estimated 3 000 EU citizens are or have been foreign fighters in Syria, and up to one in 15 of those who return to their home countries are suspected of involvement in terrorist activities at home. That means the EU and its Member States have to deal with 150 to 200 of its own citizens who are trained potential terrorists.

Risks not only come from foreign fighters. Nevertheless, how is PNR relevant to this threat?

An EU PNR, like the Data Retention Directive, would 'appl[y] to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime' [para 58 of C-293/12 and C-594/12 judgment]

Therefore, the EU needs to justify why any massive, non-targeted and indiscriminate collection of data of individuals is really needed [see para 17 of C-293/12 and C-594/12 judgment], and why – as many are arguing in the case of PNR – that measure is urgently needed now.

Is there evidence, for example, that a PNR directive would have thwarted the Charlie Hebdo attacks?

One can say that some information contained in passenger name records is already available to law enforcement authorities under the Advanced Passenger Information Directive (Council Directive 2004/82/EC Article 6).

What, therefore, is the additional value of PNR's further categories of data to combating crime and terrorism?

You know that my predecessor was very critical of the Commission's proposal in his Opinion of 25 March 2011.

I represent an independent institution. We are not *a priori* in favour or against any measure.

But we do take extremely seriously our mission of advising the institutions on the implications of policies which have a more serious impact on the rights to privacy and data protection.

I have indicated my willingness *proactively* to help the EU legislator achieve its objectives with less intrusive measures. I have already contacted Commissioner Avramopoulos's office to start building a fruitful working relationship.

I stand ready to engage more closely with this Committee and with the Council at all stages to help find effective security solutions which minimise impact on individual rights and freedoms.

But it is not easy for you, as co-legislator, or for me as advisor to the legislator, to assess the need for a measure on the basis of threadbare information. The balancing of interests and the proportionality test which the Court requires can only be performed if those advocating an intrusive measure better supply the evidence – whether in public or in camera.

Otherwise, distinguished Members of the Committee, you run the risk that these measures will go the way of the Data Retention Directive – a fate which runs counter to the principles of administrative efficiency, not to mention the cost to individual liberties.

So let's work quickly, but together and methodically.

Let's try to better understand why a selective, *case-by-case approach rather than an indiscriminate approach* would not work. One that for example was targeted at specific third countries or at itineraries of types of travellers assessed objectively as indicating a greater risk. Recent public statements from public prosecutors with a solid counter-terrorism background highlighted their favour for more targeted approaches by investing more resources on dynamic intelligence instead of delegating the response to passive large scale databases we are unable to fully analyse.

Let's therefore look carefully at the types of data available in PNR, and leave out whatever is irrelevant or excessive to the purpose of the measure.

Previous debates around bilateral PNR agreements with third countries show the need in the mid-term for a consistent approach at worldwide level: rather than another regional approach for the EU, there ought to be a global response to a global risk.

Let's therefore see whether adjustments to specific aspects of the previous Commission's proposal - retention of the data, data transfers, spelling out passengers' rights (para 39) – could reduce the intrusiveness for individuals.

In other words, let's work closely together on privacy by design and data protection by design: a principle which this Committee overwhelmingly endorsed when it voted on amendments to the General Data Protection Regulation last year.

Chair, Members of the Committee,

I have spent some time on the PNR question, but my points would apply equally to other massive data gathering measures.

The appalling events of this month are a test of the EU's resolve and of its values. It is clear that we cannot protect freedom of expression by undermining the right to privacy.

I look forward to working with you more closely towards the right solutions.
