

Frans TIMMERMANS

FIRST VICE-PRESIDENT OF THE EUROPEAN COMMISSION

BETTER REGULATION, INTERINSTITUTIONAL RELATIONS, RULE OF LAW AND  
THE CHARTER OF FUNDAMENTAL RIGHTS

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Dimitris AVRAMOPOULOS

MEMBER OF THE EUROPEAN COMMISSION

MIGRATION, HOME AFFAIRS AND CITIZENSHIP

Brussels,

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Dear President,

The Commission would like to respond to the resolution of the European Parliament of 11 February 2015 concerning the consequences of the judgment of the Court of Justice on the Data Retention Directive and its possible impact on the proposed EU Directive on Passenger Name Records (PNR).

The Commission welcomes this opportunity to follow up on the resolution. In the Data Retention judgment, the Court of Justice set out a clear approach for analysing legislation with respect to articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the Charter) as a result of the general collection and processing for law enforcement purposes of personal data of individuals. The ruling therefore offers useful guidance as concerns other legal instruments of this kind, notably the proposed EU PNR Directive.

In the Data Retention judgment, the Court considered that the retention and access by the competent authorities to telecommunication data represents an interference with the right to privacy and the right to protection of personal data set out in articles 7 and 8 of the Charter (points 35 and 36 of the judgment). The Court also stated that, in order to respect article 52 of the Charter, the limitations to the aforementioned rights must be provided for by law, respect the essence of these rights and, subject to the principle of proportionality, must be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (point 38). According to the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation in question and do not exceed the limits of what is necessary in order to achieve those objectives (point 46).

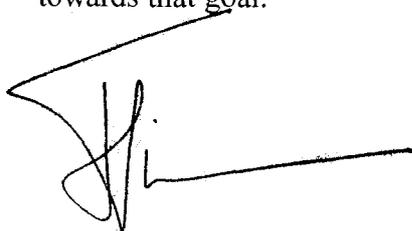
Mr Martin Schulz  
President of the European Parliament  
Altiero Spinelli  
60 rue Wiertz / Wiertzstraat 60  
B-1047 - Bruxelles/Brussels

The system established by the Data Retention Directive was found to meet some of these conditions: it did not adversely affect the essence of these two rights (points 39 and 40 of the judgment), it genuinely satisfied an objective of general interest (point 44), namely the fight against serious crime and, ultimately, public security, and the measures were appropriate for attaining the objective pursued (point 49). Nevertheless, the Court invalidated the Directive for failure to respect the principle of proportionality (point 69). The interference with fundamental rights was held not be strictly necessary for attaining the objectives pursued, in that it failed to lay down clear and precise rules governing the scope and application of the measures in question and to impose minimum safeguards in order to ensure that the interference is limited to what is strictly necessary (points 56 to 69).

The Commission notes that there are differences between the system laid down by the Data Retention Directive and the proposed EU system for the processing of PNR, such as the category of persons whose data are processed, the frequency of the data collection and the nature of the collected data. The collection of PNR from a person that takes an international flight – and is therefore already registered for border control purposes – reveals, in principle, less about that person's privacy than having his or her phone calls or internet connections registered. PNR also only concerns a more narrow set of persons, and is therefore less indiscriminate than data retention (cf. para. 59 of the judgment). Unlike the Data Retention Directive (see point 58 of the judgment), the processing of PNR data does not risk interfering with any obligation of professional secrecy. In line with point 61 of the judgment, the proposed EU PNR Directive contains substantive and procedural safeguards relating to the access and subsequent use of the data retained. PNR data will be collected, stored and analysed only by a specifically created entity, the Passenger Information Unit, and the results of the PNR processing will be transferred to law enforcement authorities only under strict conditions.

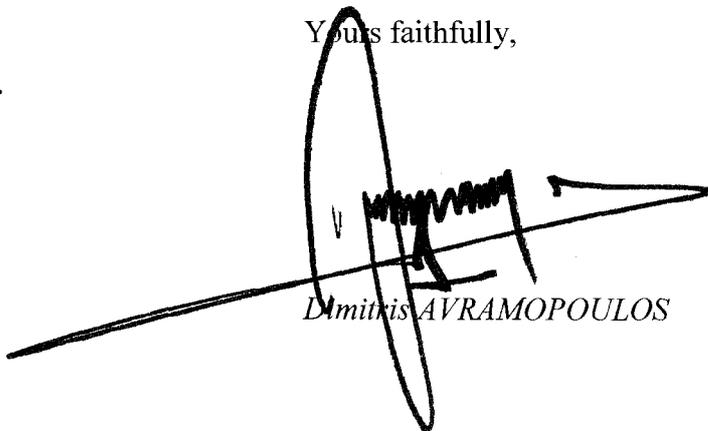
These differences between PNR and data retention must be taken into account in the legal assessment of any future EU PNR system. The EU legislator will need to ensure that any choices made as to the scope of application of the EU PNR system are duly justified and that the necessary safeguards are in place for ensuring the lawfulness of any storage, analysis, transfer and use of PNR data.

In conclusion, the Commission considers that a Directive on the use of EU-PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious transnational crime can be construed in a way that respects the legal requirements of the Charter of Fundamental Rights while providing an efficient new tool at EU level for the fight against such offences, and is ready to work constructively with the legislators towards that goal.



*Frans TIMMERMANS*

Yours faithfully,



*Dimitris AVRAMOPOULOS*