

PREVENTION, DETECTION, INVESTIGATION AND PROSECUTION OF TERRORIST OFFENSES AND OTHER SERIOUS CRIMES BY USING PASSENGER NAME RECORD (PNR) DATA. CRITICAL OPINIONS. *DE LEGE FERENDA* PROPOSALS

Assistant professor **Bogdan BÎRZU**¹

Abstract

In this study we have examined (sometimes critically) the provisions of Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution terrorist offenses and serious crimes. Representing an absolute novelty in EU legislation, the European legislative act is examined from the perspective of transposing it into the Romanian law. The innovations that are brought to this study are the examination itself and the de lege ferenda proposals which can be useful to the European legislator, but mostly to the Romanian legislator in the transposition of this legislative act into the Romanian law. The paper can be useful to academics and practitioners in the field of preventing and fighting terrorist offenses and serious crimes.

Keywords: *Passenger Information Unit; Europol; air carriers; data transfer; data protection*

JEL Classification: K14; K33

1. Introduction

As sustained in the doctrine, “the scientific and technical progress and widening the democratization process across several states has created the possibility of easy movement of people and goods, thus leading to the development of human society as a whole. The unquestionably beneficial effect for the whole of humanity has created some advantages in terms of wide possibilities of proliferation of crime phenomena at global level”².

Against this background it was found that “a particular danger to the security of states noticed also by the U.N., is the unprecedented growth of organized crime, in all its manifestation forms.”³

On the manifestation forms of the organized crime, “we can say that both currently and in the future, the most serious threat to the existence of human community is the resurgence of international terrorism, which has reached an unprecedented scale, often affecting the safety of states, destabilizing some national economies, organizations and government institutions, the direct effect of which is to terrify the civilian population and create a sense of mistrust in the qualified institutions of states.”⁴

In this respect, we have as examples “the bloody events in the recent years, culminating with the blow to the US on 11 September 2001 by members of the “Al-Qaida” terrorist network lead by the billionaire Osama bin-Laden (being considered responsible also for the bombs attacks on American embassies in Kenya and Tanzania on August 7, 1998), atrocities that have horrified and at the same time acknowledged by all humanity. In the same context there are also the terrorist attacks in Russia, Spain, England, Italy and Japan, resulting in significant casualties and property damage.”⁵

¹ Bogdan Bîrzu - “Titu Maiorescu” University of Bucharest, birzu_bogdan@yahoo.com

² Boroi, Alexandru & Rusu, Ion, *Cooperarea judiciară internațională în materie penală, Curs master/International judicial cooperation in criminal matters, Master Course*, Ed. C.H. Beck, Bucharest, 2008.

³ Boroi, Alexandru (coord.), Rusu, Ion & Rusu, Minodora-Ioana, *Tratat de cooperare judiciară internațională în materie penală/Treaty of judicial cooperation in criminal matters*, Ed. C.H. Beck, Bucharest, 2016.

⁴ Rusu, Ion & Balan-Rusu, Minodora-Ioana, *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence*, LAP LAMBERT Academic Publishing, Danubius University, Saarbrücken, Deutschland/Germany, 2013, p. 14.

⁵ Boroi, Alexandru; Rusu, Ion & Balan-Rusu, Minodora-Ioana, *The Judicial Cooperation in Criminal Matters in the European Union, EU Judicial Cooperation*, LAP LAMBERT Academic Publishing, DANUBIUS University, Saarbrücken, Deutschland/Germany, 2012, p. 20.

As expected, given the threats of terrorist groups in the recent years, especially in 2015 and 2016, in the European Union there have been numerous terrorist attacks with particularly serious consequences, which consisted of killing and seriously injuring a significant number of people or causing significant material damage.

At this point, we can talk about terrorism as an extremely dangerous phenomenon and increasingly difficult to prevent, especially to combat.

A news release from late August reported that during a meeting, the interior ministers of Germany and France have proposed creating a database to be included persons entering and circulating in the European Union, an issue that should be solved until the end of the year.

No doubt that under the current conditions, the main methods of preventing and combating terrorism and serious transnational crime consist in organizing informative specialized activities, qualified by police units and intelligence services of the Member States and support Profile units at the EU level with concrete tasks in this area, namely Europol and Eurojust.

The main purpose of the activities mentioned above is gathering information to identify suspects, categorize and informative tracking of the organized crime groups and to provide proof in order to prevent and combat such acts with serious consequences.

The Stockholm Programme - An open and secure Europe serving and protecting the citizens¹, invited the Commission to present a proposal for the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offenses and serious crimes.

Against this background it was adopted the Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of Passenger Name Record (PNR) for the prevention, detection, investigation and prosecution of terrorist offenses and serious offenses.²

The main objectives of European legislative act are: providing security, protect the lives and safety of people and creating a legal framework for the protection of PNR data, regarding their processing by competent authorities [Directive (EU) 2016/681, preamble, par. 5].

Under the depositions of the European legislative act, the efficient use of PNR data, such as comparing them with various databases on persons and objects sought, it is necessary for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime, thus strengthening internal security, collection of evidence and, where relevant, to find accomplices of criminals and dismantle the criminal networks [Directive (EU) 2016/681, preamble, par. 6].

Thus, in order to prevent, detect, investigate and prosecute terrorist offenses and serious crime, it is essential for all Member States to introduce provisions that would establish the obligations on air carriers operating flights extra-EU to transfer the collected PNR data, including API data. It is also necessary for the Member States to extend this requirement for intra-EU carriers [Directive (EU) 2016/681, preamble, par. 10].

Meanwhile, processing personal data should be proportionate to the pursued specific objectives of security [Directive (EU) 2016/681, preamble, par. 11].

When deemed necessary, it requires for the Member States to exchange PNR data that they receive between them and Europol, in cases where it is deemed necessary for the prevention, detection, investigation or prosecution of terrorism criminal offenses or serious crimes [Directive (EU) 2016/681, preamble, par. 23].

At the same time, we should note that the scope of the European legislative act is quite limited, since: the retention of PNR data and UIP (Intelligence Unit passengers) for a period that does not exceed five years, after that the data should be deleted; it allows data to be depersonalized by masking the data elements after an initial period of six months; and it prohibits the collection and use of sensitive data. In order to ensure efficiency and a high level of data protection, the Member States are obliged to ensure an independent national supervising authority and, in particular, a data protection officer, they are responsible for advising and monitoring on the way of processing the PNR data. All processing of PNR data should be recorder or documented in order to verify its

¹ Published in OJ C 115 of 04.05.2010, p. 1.

² Published in the Journal of the European Union L 119/132 of 05/04/2016.

legality, self-monitoring and to guarantee the proper integrity and security of data processing. In addition, the Member States should ensure that to the passengers there are offered clear and precise information about the collection of PNR data and their rights [Directive (EU) 2016/681, preamble, par. 37].

In the present study we have examined the provisions of Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of Passenger Name Record (PNR) for the prevention, detection, investigation and prosecution of terrorist offenses and serious crimes.

We believe that such an examination is necessary because preventing and fighting terrorist offenses and serious crimes is one of the main objectives of the EU, without which we cannot discuss of a space of freedom, security and justice.

With the examination of the provisions of this legislative act, we proceeded also into making some critical opinions and *de lege ferenda* proposals intended to contribute to the improvement of the European legal system of in this area.

Considering also the recent adoption of the European legislative act, its examination and formulating critical opinions complemented by appropriate *de lege ferenda* proposals represent a novelty in the legal specialized literature.

2. Purpose and scope

Under the European legislative act, it regulates:

- the transfer by air carriers of Passenger Name Record data (PNR) of the passengers on extra-EU flights;
- the mentioned above data processing, including the collection, use and retention by the Member States and the exchange of data between Member States.

This data may be processed only for the prevention, detection, investigation and prosecution of terrorist offenses and serious crimes.

In the event that a Member State decides to apply the depositions of the examined legislative act for intra-EU flights, this State is obliged to notify the Commission in writing, following this notification to be published in the Official Journal of the European Union.

Also, a Member State may decide to apply the provisions of the European legislative act only to certain intra-EU flights. In making such a decision, the Member State concerned will choose the flights that it deems necessary to further pursue the objectives of this legal instrument.

3. The definition of certain terms

The examined European legislative act provides some definitions, the aim being avoiding other interpretations than those required by the European legislator.

Thus, in the sense of the examined legislative act, the following definitions apply:

- a) *air carrier* - means an air transport company holding a valid operating license or equivalent document which enables it to conduct air transport of passengers activities;
- b) *extra-EU flight* - means any scheduled flight or irregular air carrier with the origin of a third country planned to land on the territory of a Member State or to take off from the territory of a Member State planned to land in a third country, including both cases, flights with any stopovers in Member States or third countries;
- c) *intra-EU flight* - means any scheduled or irregular flight of any air carrier with the provenance from the territory of a Member State and planned to land in one or more Member States, without stopovers on the territory of a third country;
- d) *Passenger* - means any person, including persons in transfer and transit and excluding the crew members, who carries or is to be carried in an aircraft with the consent of the air carrier, such consent being expressed by registering that person on the passenger list;

- e) *Passenger Name Record or PNR* - means a record of the requirements of each passenger's travel requirements, containing the information necessary to enable the processing and control of reservations by the air carriers who do the reservations and by the participants for each trip booked by or on behalf of any person, whether it is contained in reservation systems, departure control systems used to screen passengers at boarding the plane, or equivalent systems providing the same functionalities;
- f) *reservation system* - means the air carrier's internal system, in which PNR data are collected for managing reservations;
- g) *push method* - means the method whereby air carriers transfer PNR data listed in Annex I, in the database of the requesting authority;
- h) *terrorist offenses* - means the offenses under national law referred to in Articles 1-4 of the Framework Decision 2002/475 / JHA;
- i) *serious crimes* - means the offenses listed in Annex II, which are punishable by imprisonment or a measure of deprivation of liberty for a maximum period of at least three years under the national law of a Member State;
- j) *to depersonalize by masking the data elements* - means to make those data elements which could serve to direct identification of the data subject to not be visible to a user [Directive (EU) 2016/681, art. 3].

Therefore, these definitions are valid only for the purposes of European legislative act for other cases they may have a totally different meaning.

We consider it necessary to nominate *terrorist offenses* and *serious crimes*, as they are established in the European legislative act.

Thus, the definition of *terrorist offenses* must take into consideration the provisions of the European legal instrument which refer to art. 1-4 of Council Framework Decision 2002/475 / JHA of 13 June 2002 on combating terrorism.¹

We will also take into account the Council Framework Decision 2008/919 / JHA of 28 November 2008 amending Framework Decision 2002/475 / JHA on combating terrorism², by which there were replaced art. 3 and 4 of Council Framework Decision 2002/475 / JHA.

Lastly we will consider the proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Framework Decision 2002/475 / JHA on combating terrorism, a legislative act which in our opinion will be adopted by the end 2016.

In this context, we will define the terrorist offenses taking into consideration only the proposal for a directive to which we referred above.

Thus for the first time it appears the term *terrorist group*, which means an organized group formed by two or more persons established in time and acting together in order to commit terrorist offenses (art. 2 c) of the draft directive) and the notion of *structured association* which means a group that is not randomly formed for the immediate commission of an offense and that does not necessarily have formally defined roles for its members, continuity in its structure or a developed structure (art. 2 letter d) of the draft directive).

Under art. 3, par. (1), Each Member State shall take the necessary measures in order to ensure that the intentional acts referred to in par. (2) thus defined as offenses under the national law, which, by their nature or context, may seriously damage a country or an international organization, they are defined as terrorist offenses when committed by one or more of the following purposes:

- a) seriously intimidate a population;
- b) unduly compel a government or an international organization to perform or abstain from performing any act;
- c) seriously destabilize or destroy the fundamental political structures, constitutional, economic or social structures of a country or an international organization.

The intentional acts mentioned above are [those under par. (1)]:

¹ Published in OJ L 164/3 of 22.06.2002.

² Published in OJ L 330/21 of 09.12.2002.

- a) attacks upon a person's life which may cause death;
- b) attacks upon the physical integrity of a person;
- c) kidnapping or hostage taking;
- d) failure to cause massive destruction to a Government or public facility, to a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental plateau, a public place or private property likely to endanger human life or major economic loss;
- e) seizure of aircraft, ships or other means of collective transport of passengers or goods;
- f) manufacture, possession, acquisition, transport, supply or use of firearms, explosives or nuclear, biological or chemical weapons, and in terms of biological and chemical weapons research and development;
- g) release of dangerous substances or causing fires, floods or explosions, which would result in endangering human life;
- h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, which would have the effect of endangering human life;
- i) threatening to commit any of the acts mentioned in letter a) - h) [art. 3, par. (2) of the draft proposal].

Also, each Member State shall take the necessary measures to ensure that the following acts when they are committed intentionally are punishable as criminal offenses:

- a) leading a terrorist group;
- b) participation in a terrorist group, including by supplying information or material resources, or by any form of financing means for its activities, with the knowledge that such participation will contribute to the criminal activities of the terrorist group.

We should note that such offenses are considered by the European legislator as offenses relating to a terrorist group (art. 4 of the draft directive).

Another group of offenses referred to in the European legal instrument is the one related to *offenses of terrorist activities*:

This group includes the following offenses:

- a) Public instigation to commit terrorist offenses (art. 5);
- b) Recruitment to Terrorism (art. 6);
- c) Providing training for terrorism (art. 7);
- d) Receiving training for terrorism (art. 8);
- e) Moving abroad for terrorist purposes (Art. 9);
- f) Organizing or otherwise facilitating the travel abroad for terrorist purposes (Art. 10);
- g) Financing terrorism (art. 11);
- h) Aggravated theft in order to commit a terrorist offense (art. 12);
- i) Blackmail in order to commit a terrorist offense (art. 13);
- j) Production of false administrative documents in order to commit a terrorist offense (art. 14).

The European legislator also included sanctioning *the connection with terrorist offenses*, at the art. 15 it is provided that for an offense referred to in art. 4 and Title III to be punishable, it does not need an actually terrorist offense to be committed, or to establish a relation to a certain terrorist offense or, to the extent where there are targeted the offenses set forth in art. 9-11 with certain offenses linked to terrorist activities.

As regards *serious offenses*, there are provided in Annex II of the European legislative act under examination, the following:

- Participation in an organized criminal group;
- Trafficking in human beings;
- Sexual exploitation of children and child pornography;
- Illicit trafficking in narcotic drugs and psychotropic substances;
- Illicit trafficking in weapons, munitions and explosives;
- Corruption;
- Fraud, including fraud affecting the financial interests of the European Union;
- Laundering the proceeds of crime and counterfeiting currency, including euro counterfeiting;

- IT crime and cyber crime;
- Environmental crime, including illicit trafficking in endangered animals and illicit trafficking in endangered species and plant varieties;
- Facilitation of unauthorized entry and residence;
- Murder and grievous bodily harm;
- Illicit trafficking in human organs and tissue;
- Kidnapping, illegal deprivation of liberty and hostage-taking;
- Organized theft and robbery by use of a weapon;
- Illicit trafficking in cultural goods, including antiques and works of art;
- Counterfeiting and piracy of products;
- Forgery of administrative documents and use of false;
- Illicit trafficking in hormonal substances and other growth promoters;
- Illicit trafficking in nuclear or radioactive materials;
- Rape;
- Crimes within the jurisdiction of the International Criminal Court;
- Unlawful seizure of aircraft/ships;
- Sabotage;
- Trafficking in stolen vehicles;
- Industrial espionage.

Therefore the European legal instrument envisages the use of PNR data only in the case of investigating terrorist offenses or serious crimes, as they are mentioned above.

4. The responsibilities of the member states

Under the European legislative act, the Member States have a number of responsibilities on: The passengers information unit, the Data Protection Officer within the IPU, the PNR data processing, competent authorities, obligations of air carriers on data transfers, sharing information between Member States, Europol conditions of access to PNR data, the transfer of data to third countries, the period of data retention and depersonalization, the personal data protection, sanctions and the national supervisory authority.

Given the importance of these responsibilities which in their essence can be identified as attributions, we will proceed with a brief examination of each, with some additions in terms of their interpretation according to the Romanian law.

4.1. Passenger Information Unit

In order to transpose the European legislative act under examination into the national law, each Member State will have to establish or designate a competent authority for prevention, detection, investigation or prosecution of terrorist offenses and serious crime or a branch of such authorities, to act as passenger information unit (PIU).

The main tasks of the IPU are:

- a) collection of PNR data from air carriers, storing and processing data and transfer that data or the result of their processing to competent authorities under the examined enactment (art. 7);
- b) the exchange of PNR data and sharing results of their processing with UIP in other Member States and Europol, in accordance with articles 9 and 10 (in art. 9 it is provided the exchange of information between Member States and art. 10 the conditions of access to PNR data Europol).

IPU staff members may be detached from competent authorities; the Member States will provide PIU adequate resources necessary to carry out their activities.

To simplify the whole activity, the European legislative act provides that two or more Member States (which may be referred to as "participating Member States") may establish or designate a single authority PIU to be established and operate on the territory of a participating Member State, being considered the national UIP of the states that have made that decision; in this

case, the participating Member States will agree on detailed rules regarding the organization and operation of the IPU, in compliance with the European legislative act under examination.

We do also mention that within one month of the establishment of the IPU, each Member State shall notify the Commission in this regard and it may change its notification and at any time.

At the IPU it will appoint a data protection officer to monitor the processing of PNR data and to implement the relevant securities.

The data protection officers will be provided with the necessary means to effectively and independently exercise their functions.

Also, the regarded person has the right to contact the Data Protection Officer, as a single point of contact on all matters concerning the processing of PNR data of the person concerned [Directive (EU) 2016/681, art. 4 and art. 5].

Considering the depositions of the European legal instrument, we consider that it must be completed with some clarifications, which we consider to be absolutely necessary, given that these provisions will be implemented by each Member State.

Thus according to the above provisions, each Member State will establish a new institution or designate an existing institution which among the existing activities they will have to act as Passenger Information Unit.

We consider that for the application of the provision establishing the PIU, each Member State will opt to undertake these tasks the special police units and intelligence services with concrete powers in prevention, detection, investigation or prosecution of terrorist offenses and serious crime.

We believe that it is not recommended the establishment of a new institution to have only the responsibility to collect and centralize information on passengers, because it would cause malfunctions between this unit and the unit responsible for preventing and combating concrete offenses of this kind.

Also, we do not believe that the establishment of such units to serve two or more Member States would be beneficial for the same reasons (as mentioned above).

4.2. Processing PNR Data. The competent authorities

In the event that PNR data transferred by air carriers to the IPU include data or information different from those listed in Annex I of European legislative act, these data will be deleted immediately.

The European legislator had in view the situation where a carrier transmits data other than those listed in the Annex, in which case these can be useful to an investigation, and they will be deleted and not used at all.

This provision is at least questionable, if not difficult to understand because UIP is obliged to protect all data that he receives, not to mention the possibility of the operative value of such data or information in criminal investigations.

Under the European legislative act, UIP process PNR data only for the following purposes:

- a) an assessment of passengers before their scheduled arrival or departure in the Member State in order to identify the persons who require further examination by the competent authorities referred to in art. 7 and, where appropriate, by the Europol, given that such persons may be involved in the commission of a terrorist offense or a serious crime;
- b) offering answers, depends on the case, a request duly justified based on reasonable grounds by the competent authorities aimed at the provision and processing of PNR data in specific cases for the prevention, detection, investigation and prosecution of terrorist offenses or serious offenses and communicating the results of this processing to the competent authorities or, where appropriate, Europol;
- c) analyzing the PNR data to update or define new criteria to be used for evaluations carried out under par. (3), letter b) to identify any persons who may be involved in a terrorist offense or a serious crime.

When performing the assessment referred to above under letter a), UIP can:

- a) compare PNR data with relevant databases in the prevention, detection, investigation and prosecution of terrorist offenses and serious crime, including databases on persons or sought objects or are the subject of an alert in accordance with Union rules and with the international and national rules applicable to such databases; or
- b) process PNR data according to certain predetermined criteria.

However, any assessment of the passengers prior to the scheduled arrival in the Member State or the scheduled departure of the Member State, made under the foregoing provisions of letter b) on the basis of predetermined criteria, will be achieved indiscriminately. Those predetermined criteria should be personalized, proportional and specific. The Member States shall ensure that the IPU establish these criteria and review them periodically in cooperation with the competent authorities under the European legislative act to art. 7. These criteria are not based in any way on race or ethnic origin of a person, political opinion, philosophical religion or beliefs, trade union membership, health condition, sexual life or sexual orientation.

The PIU of a Member State shall transmit the PNR data of the persons identified under the provisions of par. (2), letter a) of art. 6 of the European legislative act or the result of processing the data by the competent authorities of the same Member State, for further examination. Such transfers shall only be achieved depending on the case, and in the case of automated processing of PNR data after individual review by non-automated means.

In every IPU, the Data Protection Officer shall have access to all the data processed by the PIU, and in the case where it considers that the processing was not lawful, it may notify the national supervisory authority.

The consequences of Passenger evaluations mentioned at paragraph (2), letter a) of art. 6 will not jeopardize the right of persons who enjoy the right to free movement within the Union to enter the territory of that Member State in accordance with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of free movement and to stay in the Member States for Union citizens and their family members, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221 / EC, 68/360 / EEC, 72/194 / EEC, 73/148 / EEC, 75/34 / EEC, 75/35 / EEC, 90/364 / EEC 90/365 / EEC and 93/96 / EEC.¹

In the event that assessments are carried out in case of intra-EU flights between Member States to which Regulation (EC) no. 562/2006 of the European Parliament and of the Council of 15 March 2006 on establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)² is applied, these evaluations will respect the concerned regulation.

Besides the obligation to set up the IPU, each Member State shall establish the competent authorities to request or receive PNR data or the result of processing the data from the IPU to further examine this information or to adopt the measures necessary in order to prevent, detect, investigate and prosecution of terrorist offenses or serious crimes.

The mentioned authorities, are competent authorities in the prevention, detection, investigation or prosecution of terrorist offenses or serious crime.

By 25 May 2017 each Member State is obliged to notify the Commission the list of its competent authorities in this matter, list to be published in the Official Journal of the European Union.

The PNR data and the result of processing the data received from UIP may be further processed by the competent authorities of the Member States only for the specific purpose of prevention, detection, investigation or prosecution of terrorist offenses and serious crime.

Under the depositions of par. (6) of art. 7 of European legislative act, the competent authorities shall not only be the basis of automated processing of PNR data no decision producing adverse legal effects on a person or significantly affecting a person. Such decisions are not made on

¹ Published in OJ L 158 of 30.04.2004, p. 77.

² Published in OJ L 105 of 13.04.2006, p. 1.

the basis of race or ethnic origin of a person's political opinions, religion or convictions, his philosophical, membership of a trade union of his health, to sexual activity or sexual orientation (art. 7 of European legislative act).

4.3. Obligations of air carriers on data transfer

The Member States shall take the necessary measures in terms of legislation to ensure that air carriers transfer through "method push" PNR data listed in Annex I to the database IPU Member State in which it arrives or on the territory of which the flight will depart. In case of an extra-EU flight has one or more stopovers in different Member States, air carriers transfer PNR data relating to all passengers by UIP in all Member States concerned; this mode also applies where an intra-EU flight has one or more stopovers in different Member States.

Air carriers shall transfer PNR data by any appropriate means ensuring an appropriate level of security, with 24 to 48 hours before the scheduled flight for the departure and immediately after flight, that immediately after the passengers have boarded in the aircraft in preparation for departure and when no passenger can no longer embark or disembark [art. 8 of Directive (EU) 2016/681].

4.4. Exchange of information between member states

All data relating to persons identified by a PIU will be sent to the PIU of the Member States to be used, which in turn will forward this information to the competent authorities in their States. PIU of a Member State may request for the PIU of another Member State to communicate from the PNR data that are kept in the database of the latter and which have not yet been depersonalized by masking the data elements, or the result of other processing thereof.

Also, the competent authorities of a Member State may apply directly to the PIU any other Member State to communicate PNR data that are kept in the database, only for emergencies, and only under the conditions mentioned above. Such requests must be motivated, a copy of the request will be sent to the requesting UIP of the Member State.

In exceptional case, where the access to PNR data is necessary to respond to a specific and actual threat related to terrorist offenses or serious crime, the PIU of a Member State has the right to request the PIU of another Member State to obtain PNR data and communicate to the IPU of the requesting state [art. 9 of Directive (EU) 2016/681].

4.5. The Europol conditions of accessing the PNR data

Europol has the competence to request the PNR data or the result of processing the data from the PIU in the Member States, within the powers and fulfill its tasks.¹

Depending on the situation, Europol may address the IPU of any Member State via the Europol national unit, an application electronically and properly documented transmission of PNR data or the result of specific processing of the data. Europol may submit such a request when it is strictly necessary to support and strengthen the efforts of Member States to prevent, detect or investigate a particular terrorist offense or serious crimes, as far as the offense covered by Europol's competence under Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Cooperation in Law Enforcement (Europol) and replacing and repealing Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. The request shall contain reasonable grounds on which Europol considers the transmission of PNR data or the result of the processing of PNR data will substantially contribute to the prevention, detection or investigation of the crime concerned.

¹ Currently, Europol is organized and operates under the Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Cooperation in Law Enforcement (Europol) and replacing and repealing the Decisions 2009/371 / JHA, 2009/934 / JHA, 2009/935 / JHA, 2009/936 / JHA and 2009/968 / JHA, published in the Official Journal of the European Union L 135/53 of 24.05.2016.

4.6. Data transfer to third countries

Under art. 11 of the European legislative act, a Member State may transfer to a third country the PNR data and the result of their processing stored in IPU, in compliance with art. 12 and:

- a) there are met the conditions laid down in art. 13 of the Framework Decision 2008/977/JHA; at art. 13 of the mentioned regulation it provides for the possibility of transferring personal data by a Member State to a third country;
- b) the transfer is necessary for the mentioned purposes mentioned in European legal instrument or processing of PNR data, which also implies the collection, use and retention by the Member States and exchange of data between Member States;
- c) the third country agrees to transfer the data to another third country only where it is strictly necessary, with express authorization of the Member State;
- d) the conditions referred to in art. 9, par. (2) of the European legislative act.

The transfer of PNR data without prior consent of the Member State from which they were obtained, it is permitted only in exceptional circumstances and only if:

- Such transfers are essential to respond to a specific and actual threat, related to terrorist offenses or serious crime, against a Member State or third country;
- Prior consent cannot be obtained in a timely manner (art. 11 in European legislative act).

4.7. The period of data retention and depersonalization

The PNR data from air carriers that are provided by the PIU will be kept in a database at the IPU for a period of five years after their transfer to the PIU of the Member State in which it arrives or from whose territory the flight departs.

At the end of the six months of the transfer of PNR data, all the PNR data is depersonalized by masking the following data elements which could serve to identify the passenger directly referred to in the PNR data:

- Names, including the names of other passengers on PNR and number of travelers on PNR traveling together;
- Address and contact information;
- All payment information, including billing address, to the extent that they contain information which could serve to identify the passenger directly referred by the PNR or any other person;
- Profile information "frequent flyer";
- General remarks, to the extent that they contain information that could lead to the direct identification of the passenger to whom PNR relates;
- Any API data which were collected.

After the period of 6 months, complete disclosure of PNR data is only permitted if:

- It is considered reasonably necessary for the purpose stated in art. 6, par. (2), letter b) of the European legislative act;
- Is approved by:
 - a judicial authority; or
 - another national authority competent under the national law to verify whether the conditions for disclosure, subject to informing the Data Protection Officer of the IPU and their subsequent review (art. 12 of the European legislative act).

4.8. Protection of personal data

All processing of personal data will be made under the conditions that every passenger has the same right to protection of his or her personal rights of access, rectification, deletion or restriction and rights to compensation and to pursue an appeal in accordance with European Union law and national law and application of articles 17 to 20 of framework Decision 2008/977 / JHA of

27 September 2008 on the protection of personal data processed within the police and judicial cooperation in criminal matters.¹

4.9. Sanctions. National Supervising Authority

Each Member State shall establish rules on penalties to be applied in case of infringements of national provisions for transposing into national law the provisions of the examined European legislative act, to be considered and financial sanctions against air carriers which do not transmit the provided data.

Also, each Member State shall provide in its internal law that a national authority referred to in art. 25 of the Framework Decision 2008/977/JHA is responsible for advising on the application in its territory of the provisions adopted by Member States under Directive (EU) 2016/681 and the monitoring of that implementation.

5. Critical remarks and *de lege ferenda* proposals

The provisions of art. 1, par. (1) provide that the transfer of PNR data is achieved only for extra-EU flights without being considered the data transmitted by the intra-EU air carriers.

We should mention however, that the perpetrators of recent attacks are European citizens, which requires obtaining data on their movement within the European Union, with the aim of preventing and combating terrorism crimes; we consider necessary to supplement art. 1, par. (1) with provisions which aim at obtaining data also from the intra-EU carriers.

Under art. 4 of the examined European legislative act in each Member State it will be established a new institution with concrete management information received from air carriers or it will designate such an institution.

We believe that the establishment of a new institution with such powers will cause great dysfunctions in the concrete activity of preventing and combating terrorism, which is why we request the deletion of the text from art. 4, par. (1) of the examined European legislative act, the deposition requiring the adoption of such a position of the Member States.

In this context, we believe that the collection of such information must fall within the competence of the institution with concrete responsibilities in preventing and combating crimes of this kind, namely terrorist offenses and serious crime.

When referring to Romania, this task could fall within the competence of the Romanian Police, the Intelligence Service or the intelligence service of the Interior Ministry.

In the provisions of art. 10 it is regulated the Europol competence to request such data and information from the PIU of a Member State, provided that the application must be "duly justified".

Given Europol's tasks, its actions, we believe that the application should not be justified in any way, the IPU should comply with the request without further motivation from Europol; it must therefore be removed from the text of art. 10, par. (2) from the examined European legislative act the deposition requiring the Europol to adequately justify the request of transmitting information by UIP of any member State.

6. Conclusion

The establishment or transfer in the Member States of some units which collect PNR information transmitted by the air carriers represents an objective necessity, which appeared according to the evolvement of crime in terrorism area and other serious crimes.

The European normative act establishes a general legal framework at EU level, so as the Member States to transpose into their national legislation until May 25, 2018.

¹ Published in O J L 350 of 03.12.2008.

The research results consist of the conducted examination and formulation of *de lege ferenda* proposals intended to contribute to improving the European legislation system and can be used both by the European and the Romanian legislator in terms of adoption law from the perspective of their transposition into the national law of Directive (EU) in 2016 / 681.

As a general conclusion, although there were critical opinions expressed in the study, we appreciate the utility of the European legislative act within the complex process of preventing and combating terrorism and serious crime in the European Union and the need to improve the European and the Romanian legislative framework in this area.

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