

# CM2304

## COMMENT ON THE LEGISLATIVE PROPOSALS PROVIDING FOR COLLECTION AND TRANSFER OF ADVANCE PASSENGER INFORMATION (API)

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**MARCH 2023**

On 13 December 2022, the European Commission published two closely related legislative proposals regarding the collection and transfer of advance passenger information (API). In this comment, the Meijers Committee reviews the latter API proposals. While the Meijers Committee notes that the proposals contain several rules to ensure the protection of personal data, it finds that the proposals still raise issues with the right to the protection of personal data and freedom of movement. Both proposals introduce new obligations for the collection and transfer of API data. The proposals also oblige the development of a router (a technological device to exchange data) for the transmission of API data between air carriers, on the one hand, and border guard authorities and Passenger Information Units, on the other hand. The proposed measures are a serious interference with the fundamental rights of passengers, most importantly the rights to privacy and the protection of personal data as guaranteed by the Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. To the extent that the obligation to transfer API also applies to intra-EU flights, it interferes with the freedom of movement as guaranteed by Article 3(2) TEU and Article 45 of the EU Charter. This comment sets out several recommendations for the EU legislator to better safeguard the protection of personal data and freedom of movement in the API proposals.

The logo for the Meijers Committee features a stylized blue horizontal line on the left that curves upwards and then downwards, resembling a bracket or a stylized 'M'. To the right of this graphic, the words "Meijers" and "Committee" are stacked vertically in a large, bold, blue serif font.

**Meijers  
Committee**

Standing committee of experts on international  
immigration, refugee and criminal law

## Comment on the legislative proposals providing for collection and transfer of advance passenger information (API)

### 1. Introduction

On 13 December 2022, the European Commission published two closely related legislative proposals regarding the collection and transfer of advance passenger information (hereinafter: 'API').

The Proposal for a Regulation of the European Parliament and of the Council on the collection and transfer of advance passenger information (API) for enhancing and facilitating external border controls, amending Regulation (EU) 2019/817 and Regulation (EU) 2018/1726, and repealing Council Directive 2004/82/EC (COM (2022) 729) (hereinafter: 'API Border control proposal') will repeal and replace the API Directive.<sup>1</sup>

The API Directive obliges air carriers to transmit API data at the request of a border guard authority. However, the API Directive does not oblige Member States to request API data. As a result, only some Member States systematically collect API data and national API systems differ. The API Border control proposal introduces an obligation for air carriers to collect API data to facilitate border control and combat illegal immigration, thereby going beyond the obligation for air carriers to collect API data only at the request of a border guard authority and harmonising how API data are collected.

The Proposal for a Regulation of the European Parliament and of the Council on the collection and transfer of advance passenger information for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, and amending Regulation (EU) 2019/818 (COM(2022) 731) (hereinafter: 'API Law enforcement proposal') will complement the PNR Directive.<sup>2</sup> The PNR Directive obliges air carriers to transfer passenger name records (hereinafter: 'PNR') of extra-EU flights to combat terrorist offences and serious crime. Such PNR data include API data to the extent that air carriers have already collected such data in the normal course of their business. However, the PNR Directive does not lead to the systematic collection of all API data to combat terrorist offences and serious crime. The API Law enforcement proposal introduces an obligation for air carriers to collect API data on extra-EU flights and selected intra-EU flights and to transfer that data to the Passenger Information Units established under the PNR Directive. The proposed rules for the collection and transfer of API data to combat terrorist offences and serious crime copy the rules that apply to the collection and transfer of PNR data under the PNR Directive.

Both proposals introduce new obligations for the collection and transfer of API data. The proposals also oblige the development of a router (i.e. a technological device to exchange data) for the transmission of API data between air carriers, on the one hand, and border guard authorities and Passenger Information Units, on the other.

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<sup>1</sup> Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data.

<sup>2</sup> 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 of terrorist offences and serious crime.

The two proposals raise several concerns with regard to the protection of fundamental rights. Similar concerns have been addressed by the Court of Justice of the EU (hereinafter: 'CJEU') in its case *Ligue des droits humains* on the PNR Directive.<sup>3</sup> Taking the considerations by the CJEU into account, the Meijers Committee submits that the proposed measures are a serious interference with the fundamental rights of passengers, most importantly the rights to privacy and the protection of personal data as guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (hereinafter: 'EU Charter'). To the extent that the obligation to transfer API also applies to intra-EU flights, it interferes with the freedom of movement as guaranteed by Article 3(2) TEU and Article 45 of the EU Charter.

As a general concern, the Meijers Committee emphasises the complexity and opaqueness of the architecture that will be developed for the collection and processing of API data under these proposals. Given the interaction between EU and national authorities, as well as the different purposes for which data is collected, the applicable data protection regime will be equally opaque and complex, being based on either the General Data Protection Regulation (hereinafter: 'GDPR'), Law Enforcement Directive (hereinafter: 'LED'), or Regulation EU 2018/1725 (hereinafter: 'EUDPR'). This raises questions with regard to the ability of competent data protection authorities to ensure the protection of these rules.

The proposals are closely linked. In fact, it is submitted that they could have been presented in a single text, as both legal bases provide for the ordinary legislative procedure. In light of their interconnectedness, both proposals will be discussed in this commentary.

## 2. Improvements on data protection

Although the choice for a regulation as legislative instrument can be questioned from the point of view of subsidiarity, the Meijers Committee welcomes the stronger and uniform harmonisation of provisions for the protection of personal data. Both proposals oblige air carriers to collect API data using automated means instead of manual data collection. This obligation is meant to improve the accuracy of the data (accuracy principle) as required by Article 5(1)(d) GDPR and Article 4(1)(d) LED.

The API Border control proposal provides that the router may only be used by air carriers to transfer API data and by competent border authorities and Passenger Information Units to receive API data.<sup>4</sup> This provision may help to prevent function creep, which is understood as the use of the router to transmit other types of data or transmit API data for other purposes than border control or law enforcement purposes by air carriers, border authorities, or Passenger Information Units. In addition, the proposals oblige air carriers and eu-LISA to have a logging system, ensure the security of the data, and prevent unauthorised access to these data.<sup>5</sup> These obligations contribute to the integrity and confidentiality of the data and may facilitate oversight. Finally, the API Border control proposal also includes a chapter with

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<sup>3</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*).

<sup>4</sup> Art. 10 API Border control proposal.

<sup>5</sup> Art. 13 API Border control proposal and Art. 6 API Law enforcement proposal.

specific rules on the protection of personal data. These rules are an improvement compared to the API Directive, which contains limited personal data protection rules.

The Meijers Committee has more specific comments and questions, which will be discussed in more detail below.

### 3. Suggestions for amendments of the proposals

The Meijers Committee is concerned about the following issues as regulated in the two proposals and recommends to include several amendments, which will be listed below.

#### 3.1. *Audits of processing of API data*

The API Border control proposal provides that national data protection authorities should audit the processing of API data performed by border guard authorities at least once every four years.<sup>6</sup> Likewise, the proposal requires that the European Data Protection Supervisor audits the processing of API data performed by eu-LISA for the purposes of both proposals at least once every year.<sup>7</sup> The API Law enforcement proposal does not contain a similar rule on audits of API data processed by Passenger Information Units for the purpose of combating terrorist offences and serious crimes. The PNR Directive, which applies once Passenger Information Units have received the API data, foresees in audits of the processing of PNR data (which may include API data).<sup>8</sup> However, this rule leaves more discretion to the relevant national supervisory authorities as to the frequency of such audits.

**The Meijers Committee recommends that the rules on audits of the processing of API data in the API Law enforcement proposal should be aligned with the rules in the API Border control proposal, by requiring an audit of the processing of API data by Passenger Information Units at least once every four years.**

#### 3.2. *Role of data protection authorities*

The API Border control proposal requires that the audits mentioned in section 3.1 are performed by national data protection authorities and the European Data Protection Supervisor concerning the role of eu-LISA.<sup>9</sup> Considering the ever expanding responsibilities of national data protection authorities and the European Data Protection Supervisor, also within the context of other national and EU measures concerning the use of personal data and privacy-sensitive technologies, the Meijers Committee emphasises the necessity for Member States to ensure that these organisations are equipped with sufficient human, financial and technical resources to adequately fulfil their supervisory tasks. In that context, the Meijers Committee notes that Chapter 4 in the Explanatory Memorandum of the API Border control proposal reflects only on the budgetary implications for eu-LISA and Member States' competent border authorities and remains silent on the budgetary implications for the European Data Protection Supervisor and national data protection authorities.

**The Meijers Committee recommends that the budgetary implications of the proposals for national data protection authorities and the European Data Protection Supervisor must be**

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<sup>6</sup> Art. 19(1) API Border control proposal.

<sup>7</sup> Art. 19(2) API Border control proposal.

<sup>8</sup> Art. 15(3)(b) PNR Directive.

<sup>9</sup> Art. 18 API Law enforcement proposal.

taken into account. It recommends that provision should be made for these authorities to adequately carry out their supervisory tasks in relation to the processing of API data.

3.3. *Definition of ‘terrorist offences and serious crimes’ – excluding ordinary crimes*

The API Law enforcement proposal introduces an obligation for air carriers to provide API data for intra-EU flights for the purpose of fighting terrorist offences and serious crime. The proposal refers to Directive 2017/541 on combating terrorism and the PNR Directive for the definitions of ‘terrorist offences’ respectively ‘serious crime’. In *Ligue des droit humains*, the CJEU found that the Directive on combating terrorism defined ‘terrorist offences’ in a clear and a precise manner. However, the CJEU held that Member States should ensure that ‘the application of the system established by the PNR Directive is effectively limited to combating serious crime and that that system does not extend to offences that amount to ordinary crime.’<sup>10</sup> In other words, the current definition of ‘serious crime’, which results from the interplay between EU and national law, is not sufficiently clear and precise to exclude ordinary crimes.<sup>11</sup>

**The Meijers Committee recommends that the EU legislator include a sufficiently clear and precise definition of ‘serious crimes’ in the API Law enforcement proposal.**

3.4. *Extension to intra-EU flights – Articles 7 and 8 CFR and freedom of movement*

The API Law enforcement proposal extends the obligation for the transmission of API data to intra-EU flights. Taking into account the concerns expressed by the CJEU in *Ligue des droits humains* concerning the proportionality of the processing of PNR data of passengers on intra-EU flights, the proposal provides further limitations, ensuring that API data will only be processed for intra-EU flights selected by the Member States. Member States must submit the lists of selected flights to eu-LISA, regularly review these lists, and provide an update if necessary.<sup>12</sup> The information contained on those lists should be treated confidentially.<sup>13</sup>

The CJEU ruled in *Ligue des droits humains* that Member States must verify on the basis of a prior assessment that the extension of the use of PNR data to intra-EU flights does not go beyond what is strictly necessary.<sup>14</sup> In the case of PNR data, the CJEU required that Member States limit the collection of such data on intra-EU flights, inter alia, to ‘certain routes or travel patterns or to certain airports in respect of which there are indications that are such as to justify that application’.<sup>15</sup>

The Meijers Committee notes that the API Law enforcement proposal, similar to the current API Directive, grants Member States wide discretionary powers to select intra-EU flights and to subsequently amend this selection. The proposal does not include criteria for the assessment made by Member States for the selection of intra-EU flights. It also lacks criteria to establish the scope of ‘terrorist threat’ or ‘serious offences’, which could justify the extension to intra-EU flights.

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<sup>10</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 152.

<sup>11</sup> See in this context also the current pending CJEU case C-402/22 in which the referring court seeks an interpretation of the concept of ‘particularly serious crime’ in Article 14(4)(b) of Directive 2011/95/EU.

<sup>12</sup> Art. 5(2) API Law enforcement proposal.

<sup>13</sup> Art. 5(2) API Law enforcement proposal.

<sup>14</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 168-171.

<sup>15</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 174.

Regarding the selection of intra-EU flights, the proposed confidentiality of the lists and information to be submitted to eu-LISA hampers the foreseeability of the processing of personal data (as required under Articles 8 ECHR and 7 and 8 of the EU Charter) and effective oversight to ensure the strict necessity of this measure.

Furthermore, the CJEU in *Ligue de droits humains* held that the systematic and continuous transfer and processing of PNR data of passengers of intra-EU flights entails a restriction of the freedom of movement of EU citizens.<sup>16</sup> Such an interference with freedom of movement can be justified only for the purpose of combating terrorism and serious crime, and only when based on objective considerations, proportionate to the legitimate aim of the data processing, and consistent with the fundamental rights guaranteed by the EU Charter.<sup>17</sup> Moreover, the CJEU held in *Ligue des droits humains* that an obligation on air carriers to transmit API data of intra-EU flights for the purpose of facilitating border controls and combating illegal immigration ‘would amount to allowing the competent authorities, when internal borders of the said Member State are crossed, to ensure systematically that those passengers can be authorised to enter its territory or to leave it and would thus have an effect equivalent to the checks carried out at external borders with third countries’.<sup>18</sup>

**The Meijers Committee recommends that the EU legislator should delete the provision on confidentiality of the lists of selected intra-EU flights or should amend the provision such as to ensure an independent administrative, parliamentary, and/or judicial oversight mechanism.**

**The Meijers Committee recommends the EU legislator to include clear assessment criteria in the API Law enforcement proposal for the collection and transfer of API data of intra-EU flights.**

### 3.5. *The use of statistics – risk of discrimination and stigmatization*

The API Border control proposal obliges eu-LISA to publish statistics on the functioning of the router.<sup>19</sup> To generate these statistics, eu-LISA may access API data on, amongst others, the nationality and sex of the traveller, initial point of embarkation, type of travel document and the three-letter code of the issuing country of the travel document.<sup>20</sup> The Meijers Committee assumes that eu-LISA may report on these characteristics in its statistics. The Meijers Committee is concerned that these statistics could be used for automated and non-automated risk assessments of travellers, for example by the Passenger Information Units. For example, if eu-LISA’s statistics suggest that travellers of specific nationalities or with travel documents issued by specific countries are involved with illegal immigration more often than other travellers, then competent border authorities could select travellers of these nationalities or with these travel documents for extra controls after a risk assessment. The publication of statistics on the functioning of the router and their possible use for profiling or predictive risk assessment, could thus lead to discriminatory border control, meaning that some travellers may have to endure increased and repeated checks based on, for instance, their nationality or point of embarkation.

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<sup>16</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 278-279.

<sup>17</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 280-281.

<sup>18</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 290.

<sup>19</sup> Art. 31(1) API Border control proposal.

<sup>20</sup> Art. 31(5) API Border control proposal.



In *Ligue des droits humains*, the CJEU held ‘that any advance assessment against pre-determined criteria is to be carried out in a non-discriminatory manner and [...] that those criteria are in no circumstances to be based on a person’s race or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, health, sexual life or sexual orientation’.<sup>21</sup> Furthermore, the CJEU underlined that such pre-determined criteria ‘must be defined in such a way that, while worded in a neutral fashion, their application does not place persons having the protected characteristics at a particular disadvantage’.<sup>22</sup> According to the CJEU, competent authorities must ensure the lawfulness of the automated processing, in particular its non-discriminatory nature, as well as that of the individual review.<sup>23</sup>

**The Meijers Committee recommends that the EU legislator restricts the use of statistical data for specific defined purposes, explaining the purpose and necessity of generating these data and ensuring the non-discriminatory result or effect of any advance assessment against pre-determined criteria.**

### *3.6. Extension of the API proposals to other means of transport*

The two proposals cover the collection and transfer of API data by air carriers. The Meijers Committee is concerned that in the legislative negotiations, the scope of both proposals will be extended to other means of transport, such as train, bus, or boat. Similar to the collection of API data for intra-EU flights, the collection of API data for transport by train, bus, or boat would interfere with the right to the protection of personal data, and therefore should only be possible under the strict conditions laid out above. Moreover, it restricts the freedom of movement of EU citizens, which, as explained above, is only allowed for the purpose of combating terrorism and fighting organised crime, and under strict conditions. For the purpose of facilitating border and migration control, it would amount to a reintroduction of internal border controls which is contrary to EU law.

**The Meijers Committee advises against any further extension of API data collection to other means of transport for the purposes of combating terrorism and fighting serious crime without any prior and substantiated assessment of the strict necessity of such extension, and points out that such extension for the purpose of facilitating border and migration control would run counter to the obligation to abolish checks at the internal border.**

## **4. Questions about the proposals**

The Meijers Committee has three further questions regarding choices to be made by the Commission in the proposals:

1. The API Border control proposal obliges air carriers and border authorities to store API data for a period of 48 hours and to delete API data after the expiry of that time period.<sup>24</sup> Why has this time been increased from 24 hours as provided in the current API Directive? The Meijers Commission misses an argument in the Explanatory Memorandum on why the extension of the storage period is necessary and proportionate.

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<sup>21</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 196.

<sup>22</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 197.

<sup>23</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 209.

<sup>24</sup> Article 8 API Border control proposal.

2. The Explanatory Memorandum for the API Border control proposal states that API data are collected on 65% of inbound flights. Under the current legal framework, border authorities may already request API data from air carriers, but these numbers suggest that border authorities do not need API data in 35% of inbound flights. In *Ligue des droits humains*, the CJEU emphasised once more that ‘derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary’.<sup>25</sup> If current practice shows that the exchange of API data is not needed in relation to every inbound flight, how can a new obligation to collect API data on all flights be ‘strictly necessary’?
3. The API Law enforcement proposal provides that if a flight is ‘code-shared’ between one or more air carriers, the obligation to transfer the API data is on the air carrier that operates the flight.<sup>26</sup> What is the purpose of this provision and why has such provision not been included in the API Border control proposal?

## 5. Conclusion

While the Meijers Committee applauds the improvement of the protection of personal data under the proposal as compared to the lack thereof under the current API Directive, it has highlighted a number of concerns in relation to the protection of personal data and the and freedom of movement of EU citizens, especially in light of the CJEU's ruling in *Ligue de droits humains*.

Therefore, the Meijers Committee recommends that the EU legislator should:

- align the rules on audits of the processing of API data in the API Law enforcement proposal with the rules in the API Border control proposal, by requiring an audit of the processing of API data by Passenger Information Units at least once every four years.
- take into account the budgetary implications of the proposals for national data protection authorities and the European Data Protection Supervisor and make provision for these authorities to adequately carry out their supervisory tasks in relation to the processing of API data.
- include a sufficiently clear and precise definition of ‘serious crimes’ in the API Law enforcement proposal.
- delete the provision on confidentiality on the lists of selected intra-EU flights or amend the provision such as to ensure an independent administrative, parliamentary, and/or judicial oversight mechanism.
- include clear assessment criteria in the API Law enforcement proposal for the collection and transfer of API data of intra-EU flights.
- restrict the use of statistical data for specific defined purposes, explaining the purpose and necessity of generating these data and ensuring the non-discriminatory result or effect of any advance assessment against pre-determined criteria.
- not further extend API data collection to other means of transport for the purposes of combating terrorism and fighting serious crime without any prior and substantiated assessment of the strict necessity of such extension.

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<sup>25</sup> CJEU [GC] of 21 June 2022, C-817/19 (*Ligue des droits humains*), para. 115.

<sup>26</sup> Article 4(1) API Law enforcement proposal.