

The proposed EU passenger name records (PNR) directive Revived in the new security context

SUMMARY

After the Paris attacks of January 2015, the fight against terrorism and the phenomenon of foreign fighters is now higher than ever on the EU agenda, with a series of new measures being discussed, and existing ones refocused. In this context, the EU Passenger Name Record (PNR) proposal is once again in the spotlight.

The current proposal dates back to 2011, but was rejected by the European Parliament's LIBE Committee in April 2013. However, given the new security context, and following numerous calls from EU Member States, the European Parliament committed to work towards the finalisation of an EU PNR directive by the end of 2015.

Nevertheless, not everybody is convinced by the efficacy of the proposed measure, and many stakeholders question its necessity and proportionality, whilst highlighting the different fundamental-rights risks inherent in any PNR scheme. It is also argued that legislators should take into account the impact of the recent annulment of the Data Retention Directive by the Court of Justice of the EU.

Privacy and civil liberties activists warn against the measure's intrusive nature, and see it as another step on the road to a surveillance society. On the other hand, air carriers advocate swift adoption of an EU PNR directive, providing harmonised legislation at EU level, rather than a set of diverging national rules. Indeed, more and more Member States are developing PNR data-collection systems, and the European Commission has made EU funding available for this purpose.



In this briefing:

- Context
- The proposal for an EU PNR directive
- Fundamental rights issues
- Business and interest groups on the proposal
- National PNR systems
- Further reading

Context

The 'new old' project

Since the Paris attacks of January 2015, counter-terrorism issues have reached the summit of the political agenda, both in the Member States most concerned and at EU level. Creating an EU-wide system which would make Passenger Name Records (PNR) data transfer to law enforcement agencies possible is among the main measures under debate.

The idea is not new: the possibility of having an EU-wide PNR scheme has been discussed since 2007, when the Commission proposed a [Council Framework Decision](#) on this issue. Moreover, the EU has concluded agreements for transfer of PNR data with the US, Canada and Australia, and several countries are requesting similar arrangements, including, most recently, Mexico and Argentina.

Following the Lisbon Treaty's entry into force, the Commission replaced the proposal for a framework decision, with one for a [Directive](#). However, the legislative procedure has been blocked since the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) [rejected](#) the proposal in April 2013, questioning its necessity and proportionality. In June 2013, Parliament decided in plenary to refer the matter back to the Committee, and in 2015 it has followed up on calls to resume negotiations from the European Council and the Justice and Home Affairs Council, in view of the need to address the phenomenon of [foreign fighters](#). The revised [report](#) (rapporteur: Timothy Kirkhope, ECR, UK) is currently examined by the LIBE Committee.

What are PNR?

A Passenger Name Record is a unique set of data, created whenever a reservation is made for a flight, consisting of information on all components of that reservation. Such data is provided by passengers at the time of booking, check-in or boarding, and held by airlines for their own commercial purposes. The records are complete to various degrees, depending on how much information has been provided by the passenger.¹

PNR are distinct from so-called Advanced Passenger Information (API),² concerning data from the machine-readable zone of the passport, including name, date of birth, passport number and nationality.

PNR and API are analysed concurrently by law enforcement agencies. While API data may serve to identify known terrorists and criminals by using alert systems, PNR allows for a risk assessment of unknown individuals. Travel arrangements recorded as PNR data are used to identify specific behavioural patterns and make associations between known and unknown people. There are three possible ways of using the data:

- Reactively i.e. after the crime has been committed,
- In real time: just before the arrival or departure of the passenger, or

Passenger Name Record: selected fields

Name(s)
Date of reservation
Date(s) of intended travel
Address and Contact information
All forms of payment information, including billing address
Complete travel itineraries for specific PNR
Travel agency
Seat number and other seat information
All baggage information
Number and names of other travellers on the booking

Source: Commission PNR proposal.

- Proactively i.e. for analysis and creation of criteria to be used for assessment of passengers prior to arrival or departure.

As to the transfer of the data to competent authorities, it may be done by:

- The 'push' method, whereby the airline passes the data to the national authority, or
- The 'pull' method, whereby the authority obtains access to the airline reservation system to retrieve the data.

What is at stake?

The PNR proposal has resurfaced in the context of the widely perceived urgency to address the terrorist threat which – it is argued – has acquired a new dimension. Historically, EU counterterrorism action has come in 'waves' following major crises including 9/11, the 2004 Madrid attacks and the 2005 London bombings. The post-*Charlie Hebdo* situation is also seen as a possible trigger for enhanced EU involvement in the fight against terrorism, as illustrated by the [EU's counter-terrorism coordinator](#), Gilles de Kerchove, using the oft-repeated advice: 'never let a serious crisis go to waste'.³

Yet voices can be heard warning against hasty adoption of instruments with far-reaching consequences for fundamental rights of EU citizens – albeit perhaps to a lesser extent than in 2011, when the Commission's proposal was published. It is argued that, in the past, rapid and emergency-led policy responses took precedence over quality and democratically accountable decision-making, and that, once again, measures are being adopted without proper assessment of their necessity.⁴

As the EU PNR debate evolves, the idea of having some form of EU-wide PNR scheme seems to be gaining ground. Its limits are, however, yet to be defined, given the number of unresolved questions about the system's implications for fundamental rights and, most notably, its proportionality and necessity.

The proposal for an EU PNR directive

The key elements

The proposal provides for the transfer, by air carriers, of PNR data from **international flights** (inbound and outbound flights between the territory of a Member State and a third country). It also covers further processing and retention of such data. The Commission proposed assessment of the feasibility and necessity of including **internal flights** in the scope of the Directive within two years following the transposition date.

Under the proposed Directive, air carriers are not required to retain data, and passengers do not have to provide additional information to that already requested from them as part of the reservation or check-in process. So-called **Passenger Information Units (PIUs)** would be set up by each Member State. The data would be transferred by airlines to these units exclusively by the '**push**' method, to avoid Member States having direct access to carriers' IT systems. PIUs would collect, store, and analyse data, and transfer the result of their data processing to the competent authorities.

The data would have to be **anonymised** 30 days after their collection. This means that all elements enabling the identification of the passenger would be masked, and made available only on specific authorisation. Data could be **retained** beyond the 30-day limit, for no more than five years. The collection and use of **sensitive data** directly or indirectly revealing a person's race or ethnic origin, religious or philosophical belief, political opinion, trade union membership, health or sexual life, would be **prohibited**.

Moreover, any decision taken by a Member State producing adverse legal effects on a person, or seriously affecting him or her, could not be taken solely on the basis of automated processing of PNR data.

A PIU or – in the case of urgency – also a competent authority of another Member State could request the transfer of data from the PIU storing it. Data could also be transferred to third countries, but only in very limited circumstances and on a case-by-case basis. Member States would have to ensure the monitoring of PNR data processing by an independent national supervisory authority (**data protection authority**).

Co-legislator positions

The Council

In April 2012, the Justice and Home Affairs Council agreed on a [general approach](#) to the proposal. Two main elements differ from the Commission's original proposal:

- A possibility (not an obligation) for Member States to collect PNR data from selected intra-EU flights, and
- Anonymising data after two years, instead of 30 days.

The European Parliament

In April 2013, the proposal was [rejected](#) by the LIBE Committee by a narrow majority (30 votes to 25). The major points debated at the time included the necessity and proportionality of the Directive, its scope (the list of offences covered and possible inclusion of internal flights), as well as the length of the data retention period.

In its [Resolution](#) of February 2015 on anti-terrorism measures, the EP committed to working towards the finalisation of the Directive by the end of 2015. It urged the Commission to set out the possible impact of the EU's Court of Justice [Data Retention judgment](#) on the PNR proposal. Moreover, it encouraged the Council to make progress on the [Data Protection Package](#), so that trilogues on both the EU PNR Directive and the Data Protection Package could take place in parallel.

The [revised draft report](#) by Timothy Kirkhope (ECR, UK), published in late February 2015, elaborates on the above elements. The changes proposed include:

- Narrowing the scope to cover terrorism and serious 'transnational' crime instead of 'serious crime',
- Inclusion of intra-EU flights,
- Permanent deletion of sensitive data within 30 days from the last receipt of PNR containing such data,
- Reducing access to PNR data from five to four years for serious crime, and
- Making references to the Data Retention Judgment and to the current EU data protection rules.

Fundamental rights issues

Fundamental rights at stake

The proposed EU PNR scheme departs from the widely accepted form of using personal data for law enforcement purposes whereby data transfer is requested – normally on the basis of a court order – for a specific person, suspected of a specific crime, or at least representing a specific threat. The PNR scheme enables, on the contrary, proactive systematic checks on large sets of data concerning all passengers. These may be used for profiling, based on pre-determined general criteria (e.g. nationality), possibly resulting in individuals being refused boarding. Moreover, it provides for a wide

dissemination and lengthy retention of personal data. The system thus defined raises questions as to its impact on fundamental rights including:

- The right to privacy ([Article 7](#) of the EU Charter of Fundamental Rights).
- The right to data protection ([Article 8](#) of the Charter), especially in the context of the ongoing reform of the EU data protection framework. The controversies relate *inter alia* to the lengthy period of data retention, the incomplete nature of anonymisation of data, allowing for its easy retrieval, and the transfer of data to third countries.
- The right to non-discrimination, with indirect discrimination being more likely than direct discrimination, given the prohibition on processing sensitive data under the proposed Directive. One possible remaining risk of direct discrimination is that of transfer of such data contained in the field 'general remarks', covering a whole variety of personal characteristics.⁵
- The right to free movement: According to the EU [Free Movement Directive](#) Member States may restrict the freedom of movement of EU citizens on grounds of public policy or public security. However, such restrictions need to comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. A risk of the breach of this right is highlighted in regard to the extension of the EU PNR scheme to intra-EU flights.

Fundamental rights issues are at the core of the EU PNR debate. This is illustrated not only in the 2013 EP resolution, but also by the opinions on the Commission's proposal presented by other institutional stakeholders, including the [European Data Protection Supervisor](#), the [Article 29 Data Protection Working Party](#), the [Fundamental Rights Agency](#), and the [European Economic and Social Committee](#).

Necessity and proportionality

The **necessity** of the EU PNR system – i.e. the question of whether such scheme is indeed indispensable to effectively address serious crime and terrorism – is widely debated. Evidence of the effectiveness of existing PNR systems is crucial to proving the necessity of having a system at EU level. There seems to be no agreement, however, as to whether PNR systems – and mass surveillance tools in general – are actually efficient.

Whereas the Commission admits that relevant detailed statistics are not available, it points to information from individual countries, and argues that the PNR data has led to 'critical progress' in the fight against terrorism, illegal drugs and human trafficking. The Commission supports this statement with figures related to drug seizures in Belgium, Sweden and the UK. Nevertheless, it has been criticised for inconsistencies in, and the anecdotal nature of, the evidence presented.⁶ Some examples of successful use of PNR have also been provided by the UK, based on experience with the country's e-Borders system.⁷

Moreover, it is held that such scheme can only be considered necessary if the existing measures – which at the EU level include the API Directive, the Schengen Information System and the Visa Information System – have been evaluated as insufficient. Yet such an evaluation has not been undertaken, and less intrusive alternative tools have not been proposed.

[Article 52](#) of the EU Charter of Fundamental Rights requires that any limitation to rights and freedoms recognised by the Charter respect the principle of **proportionality**. This requirement may be difficult to fulfil, considering the large scope of the proposed Directive (all passengers on all international, and possibly also intra-EU, flights, as well as the variety of crime categories covered). 'Article 29' Data Protection Working Party (DPWP) argues that measures impinging on the protection of the rights and freedoms of travellers are only proportionate when introduced temporarily and for a specific threat, which is not the case for this proposal. Systematic matching of all passengers on all flights against pre-determined criteria appears therefore to be particularly problematic.⁸

The impact of the Data Retention judgment

Recently, proportionality and necessity issues have been debated in the context of the 2014 judgment of the Court of Justice of the EU (CJEU) invalidating the 2008 Data Retention Directive ([Digital Rights Ireland](#); joined Cases C-293/12 and C-594/12). The Court formulated a series of requirements, arguably valid for all security measures interfering with the protection of personal data, especially if they provide for data retention. Whereas the Commission – [urged](#) by the Parliament – has [expressed](#) its views on the implications of this judgment for the PNR proposal, some commentators doubt whether these will be fully addressed.⁹

Business and interest groups on the proposal

Civil society

On the civil society side, critical voices are heard on the EU PNR proposal, which is often considered an intrusive measure and a further step towards a surveillance society.¹⁰ Various stakeholders active in the field of civil liberties and fundamental rights have commented extensively on the Commission's draft.

Statewatch is one of many stakeholders to conclude that the proposal not only interferes with the right to a private life and to the protection of personal data, but also contradicts citizens' right to freedom of movement.¹¹

In a critical [opinion](#) issued in 2011, the Meijers Committee (Standing Committee of Experts on International Immigration, Refugee and Criminal Law) advocated for an assessment of existing tools and called for the withdrawal of the EU PNR proposal.

EDRi (European Digital Rights, an international not-for-profit association of 33 digital civil rights organisations from 19 European countries) sees the proposed PNR system as a possible limitation to fundamental rights, such as non-discrimination, the right to privacy and the protection of personal data. It regrets that the PNR proposal is being discussed before finalisation of the revision of the Data Protection framework and recommends its rejection. EDRi also warns against the profiling of innocent citizens based on unknown and unpredictable criteria.¹² In its more recent position, EDRi has criticised the proposed extension of the measure to intra-EU flights, as a direct infringement upon EU citizens' right to free movement within the Union.¹³

Industry

There is no unanimity amongst industrial stakeholders on the future EU PNR system.

The European travel agents' and tour operators' associations (ECTAA) and the Guild of European, Business Travel Agents (GEBTA) are mostly opposed to the proposal. They raise concerns on costs and obligations that the Directive would impose on the travel agents and warn against cost increases for the passengers.¹⁴ ECTAA insists that the scope of data collection should be strictly limited to the data captured electronically by

air carriers in their normal course of business, and to flights between the EU and third countries only. It advocates the proposal's rejection.¹⁵

On the contrary, the International Air Transport Association (IATA) and the Association of European Airlines (AEA) strongly support a swift adoption of harmonised EU PNR legislation, to avoid facing a situation where there are 28 different PNR systems.¹⁶ According to them, the airlines already have to deal with PNR data requests from Member State authorities and from more than 15 non-EU countries. For the AEA,¹⁷ the lack of harmonisation is not only burdensome for the airlines, but also has a negative impact on passengers. While the EU air carriers are in favour of an EU PNR framework, they call for the exclusion of intra-EU flights from the system, as for them this would imply heavy costs and an unfavourable competitive position compared to other transport modes.¹⁸

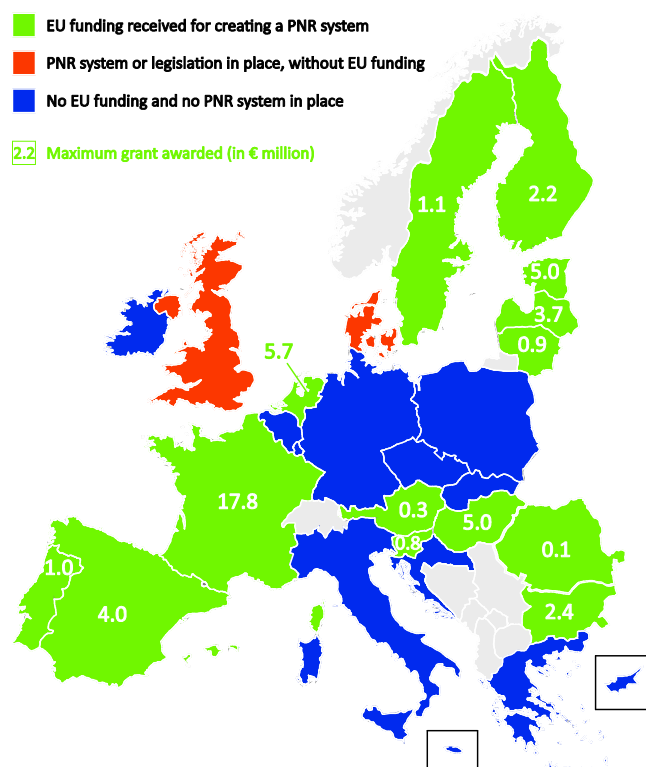
National PNR systems

In 2011, at the time the EU PNR directive was proposed, only the United Kingdom had a fully-fledged PNR data collection system. In 2012, while the proposed Directive was still under examination by the European Parliament, the Commission launched a [call for proposals](#) aiming to establish Passenger Information Units (PIUs) in the Member States, under its 2007-2013 programme 'Prevention of and Fight against Crime' (ISEC).¹⁹ In 2013, a total of €50 million, made available by the Commission, was distributed between [14 EU countries](#) which presented a project for the development of their national PNR scheme.

This funding gave rise to a number of parliamentary questions²⁰ and to criticism by some commentators.²¹ Indeed, the fact that numerous Member States have set up their own PNR systems is used to support EU involvement. It is argued that, in absence of EU regulation, such proliferation of national schemes would result in divergent data protection standards across the EU, as well as security gaps, increased costs and legal uncertainty for both air carriers and passengers. The Commission holds, however, that the funding action within the ISEC programme was not directly linked to the ongoing legislative procedure on the EU PNR proposal and was aimed at Member States willing to set up their own PNR systems under national law.²²

Where do we stand today? The situation in Member States varies greatly, from countries with a

Figure 1 – PNR systems in Member States and EU funding



Source: European Commission, [List of awarded projects](#).

PNR system or legislation in place (with or without EU funding), to those where no PNR scheme is foreseen at all.

As stated above, **the UK** was the first country to set up a PNR data collection system, as part of its [e-Borders programme](#). Under the [Semaphore project](#), PNR data had already been collected and used for law enforcement purposes since 2004, before the e-Borders programme became fully operational. Passenger data are collected and shared according to the [Code of Practice](#) on the management of information, shared by the Border and Immigration Agency, Her Majesty's Revenue and Customs, and the Police, adopted under Section 37 of the [Immigration, Asylum and Nationality Act 2006](#). It is worth noting that the UK uses passenger data not only to combat crime or terrorism, but also for immigration control. **Denmark** has legislation on access to PNR data for external border control and anti-terror investigations ([Aliens Act 2006](#) and [Air Navigation Act](#), as modified under the [Anti-Terrorism Package II](#)), and is [planning](#) to adopt a new law authorising PNR data use for the purpose of the illegal immigration control, namely on the intra-Schengen flights. **Belgium** has been using PNR data for many years, but only on a case-by-case basis in the context of (reactive or proactive) criminal investigations, and is waiting for the adoption of the Directive to set up its PNR scheme.

France announced in January 2015, after the Paris attacks, that its national PNR system would be operational in September 2015. French legislation has allowed the use of API and PNR data since 2006, under its [anti-terrorism law](#), but to date only collected API data. The 2013 [law on military spending](#) established a legal framework for the use of PNR data, while an [implementing decree](#) adopted in September 2014 fixed the rules for the creation and operations of a French passenger information unit, 'API-PNR France system', which will be responsible for the collection, conservation and treatment of both API and PNR data. The decree obliges air carriers to transfer PNR data as from 1 January 2015. In **Sweden**, the national [Police Act](#) provides for police authority access to passenger data when these are 'believed to be of importance in the fight against crime', but no digital databases have been set up for the collection of API and/or PNR data.²³ **Spain** is currently adopting a new security bill, containing a provision on PNR data use, and is setting up a PIU to start collecting data from 1 January 2016.²⁴ As to other countries benefiting from EU funding, the development of their PNR systems is under way, as the awarded projects are to be completed within two years, i.e. by the end of 2015.

Further reading

[The EU PNR](#): keysource, Sofija Voronova, EPRS, 2015.

Endnotes

¹ The Commission proposal identifies 19 fields of information (see [Annex](#) to the document COM(2011) 32 final).

² In the EU, the use of API is regulated by the [Council Directive 2004/82/EC on the obligation of carriers to communicate passenger data](#).

³ Gilles de Kerchove's [address](#) to the EP Committee on Civil Liberties, Justice and Home Affairs, 27 January 2015.

⁴ [The EU Counter-Terrorism Policy Responses to the Attacks in Paris: Towards an EU Security and Liberty Agenda](#), D. Bigo, E. Brouwer, S. Carrera, E. Guild, E-P. Guittet, J. Jeandesboz, F. Ragazzi, A. Scherrer, February 2015. According to the authors, prioritising large-scale surveillance and systematic monitoring of all travellers not only contravenes Schengen, the free movement principle and Union citizenship, but also the EU democratic rule of law, as it questions the scrutiny roles of the European Parliament and the CJEU. They propose instead a comprehensive 'European Agenda on Security and Liberty', firmly anchored in current EU legal principles.

- ⁵ A 'general remarks' field in a PNR record may include sensitive information and therefore it is suggested the Passenger Information Unit remove it automatically upon receipt of the data. See: [Twelve operational fundamental rights considerations for law enforcement when processing Passenger Name Record \(PNR\) data](#), FRA, 2014.
- ⁶ [Ignoring Dissent and Legality: The EU's proposal to share the personal information of all passengers](#), E. Brouwer, CEPS, 2011, pp 2-3.
- ⁷ [e-Borders: Friends of Presidency Group meeting Brussels](#), Presentation by T. Rymer, Head of Joint Border Operations Centre Border & Immigration Agency, 27 March 2008, pp. 27–33.
- ⁸ [Opinion 10/2011](#) of the Article 29 Data Protection Working Party, 5 April 2011, pp.4-5; see also its [letter on EU PNR to the Chairman of the LIBE Committee](#), 19 March 2015.
- ⁹ Bigo et al. [op. cit.](#) p. 14.
- ¹⁰ Towards a Surveillant Society: The Rise of Surveillance Systems in Europe, Thomas Mathiesen, Waterside Press, 2013, pp. 147-155; [Le chantier législatif européen en matière de protection des données : l'apparente priorité accordée à la directive PNR est-elle opportune ?](#), S. Peyrou, Revue des affaires européennes, Vol. 19, n° 2, 2012, pp. 403-416.
- ¹¹ [Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime](#), M. Hynes, Statewatch analysis, 2011, pp.6-8.
- ¹² See the EDRI [comments](#) on the EU PNR proposal, 2012 and its booklet on [EU surveillance](#), published on 23 January 2012 (pp. 6-8).
- ¹³ Proposal for a Directive on an EU Passenger Name Record: No freedoms, no security, [letter](#) from EDRI to the LIBE Committee and [briefing note](#), April 2015.
- ¹⁴ [Common position of ECTAA and GEBTA on the proposal for a Directive on the use of PNR against terrorist offences and serious crime](#), 29 March 2011.
- ¹⁵ ECTAA's [activity report 2012/2013](#), November 2013.
- ¹⁶ [Joint letter to the European Parliament](#), IATA and AEA, September 2014.
- ¹⁷ [Ensuring secure aviation while minimising the hassle for passengers](#), AEA position on security, 6 August 2014.
- ¹⁸ [Airline Perspective on Handling Data Protection Considerations](#) presentation at the 2nd European API-PNR Day, Lufthansa Group, 13 October 2014.
- ¹⁹ For the period 2014-2020, this kind of measure falls under the [Internal Security Fund \(ISF\) Police](#). In the framework of its 2014 call for proposals for ['Law enforcement information exchange'](#), the Commission has foreseen financing of PNR data exchange between Member States.
- ²⁰ See Questions for written answer to the Commission [E-000385/2013](#), [P-000343/2013](#), [E-002559/2013](#), [E-004209/2013](#), [E-004859/2013](#), [E-012865/2013](#) and Question for written answer to the Council [E-000433/2013](#).
- ²¹ See, for example, Statewatch: [Travel surveillance: PNR by the back door](#), 3 October 2014, or EUobserver: [EU funds airline data-sharing despite legal concerns](#), 25 November 2014.
- ²² See Commission answers to Question [P-000343/2013](#) and Question [E-000385/2013](#).
- ²³ [Sweden 'behind' in passenger data sharing](#), The Local, 19 February 2015.
- ²⁴ [El PP da el primer paso para regular el fichero de viajeros en aviones con una enmienda a la Ley de Seguridad Ciudadana](#), Thomson Reuters Aranzadi, 18 February 2015.

Disclaimer and Copyright

The content of this document is the sole responsibility of the author and any opinions expressed therein do not necessarily represent the official position of the European Parliament. It is addressed to the Members and staff of the EP for their parliamentary work. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2015.

Photo credits: © Nomad_Soul / Fotolia.

epers@ep.europa.eu

<http://www.epers.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

<http://epthinktank.eu> (blog)