European Commission
attn. Mr M. Šefčovič
Wetstraat 200
1049 Brussels
Belgium

COURTESY TRANSLATION

Dear Mr Šefčovič,

In their committee meeting of 11 April 2023, the members of the standing committee for Justice and Security of the Senate of the States General discussed the proposals of the European Commission for new rules on advance passenger information (API) data in order to facilitate external border controls[1] and enhance internal security[2] and the assessment of these proposals by the Dutch government, as set out in the files of the Working Group for the Assessment of New Commission Proposals (BNC files).[3] In the context of the political dialogue, the members of the parliamentary parties of **GroenLinks** (the GreenLeft Alliance), **PvdA** (the Labour Party) and **D66** (Democrats 66) jointly wish to raise a number of questions about the proposals. Questions are also raised by the members of the parliamentary party of the **PVV** (the Freedom Party).

Questions jointly raised by the members of the GroenLinks, PvdA and D66 parliamentary parties

The members of the GroenLinks, PvdA and D66 parliamentary parties jointly understand from the explanatory memorandums to the proposals that they largely contain powers that were already part of previous EU legislation, but that the present proposals mainly extend the scope of these powers to intra-EU flights and introduce a data collection obligation. This prompts these members to ask some questions about the necessity and effectiveness of the proposals. Moreover, in view of CJEU judgment C-817/19[4] and the newly created router system, they have some questions about the right to privacy.

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[1] COM(2022) 729.
[2] COM(2022) 731.
[3] *Parliamentary Papers, House of Representatives* 2022/23, 22112, no. 3608 and *Parliamentary Papers, House of Representatives* 2022/23, no. 3609.
[4] CJEU judgment of 21 June 2022 in case C-817/19, *Ligue des droits humains*.

Necessity and effectiveness

Many of the powers included in the proposals are already part of the current statutory framework, but are not mandatory and/or not applied uniformly everywhere. How does the European Commission assess the added value and effectiveness of these proposals in the light of the obligation they introduce? If Member States did not make use of the previous powers, does this not suggest that they considered such data collection and processing to be unnecessary? If so, why should these Member States be subjected to an obligation to do so now?

As regards the law enforcement proposal, the Commission indicates in the explanatory memorandum that the use of API data for fighting crime and terrorism is already possible under the current passenger name record (PNR) Directive. In view of this, can the Commission explain in more detail what the added value of this proposal is?

Use central router for the transfer of API data

The members concerned note that implementing a central 'router' for exchanging API data is an important part of the proposals.[5] Does the Commission see it as a risk that such a central exchange point or central database may become an attractive target for malicious state actors or cybercriminals? If not, why not? If so, has this risk been explicitly included in the assessment of whether the exchange and processing of API data in this way constitutes a proportionate and subsidiary infringement of passenger privacy? What other ways of arranging the exchange of API data have been considered?

Flight selection criteria

In his Opinion of February 2023, the EDPS recommends that the Commission adopt clear criteria for the selection of intra-EU flights from which API data should be collected.[6] Does the Commission agree with the members that in the absence of such criteria there is a risk that Member States will make such a selection on a discriminatory or otherwise undesirable basis? If not, why not? If so, is the Commission considering adopting criteria at EU level to mitigate this risk?

Compatibility with higher law

In its judgment in case C-817/19, the Court of Justice of the European Union (CJEU) voiced strong criticism of the predecessor of the proposed regulations, namely the PNR Directive.[7] Can the Commission indicate what changes to the PNR Directive have been made in the current proposals in order to remain within the frameworks set by the CJEU in the aforementioned judgment? And can the Commission indicate how new elements of the proposed regulations, which were not part of the PNR Directive, remain within the relevant frameworks specified in the CJEU judgment and the EU Charter of Fundamental Rights?

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[5] *Parliamentary Papers, House of Representatives* 2022/23, 22112, no. 3609, p. 3.
[6] European Data Protection Supervisor (EDPS), Opinion 6 on the Proposals for Regulations on the collection and transfer of advance passenger information (API), 8 February 2023, p. 2.
[7] CJEU judgment of 21 June 2022 in case C-817/19, *Ligue des droits humains*.

Questions raised by the members of the PVV parliamentary party

The members of the PVV parliamentary party note that the government's assessment (BNC assessment file) of the 'API Regulation on border controls' contains the following passages: '*It concerns, for example, passengers without valid travel documents or passengers who do not comply with the entry requirements for some other reason, for example because their names have been added to national alert lists in accordance with applicable regulations.*'[8] and '*The Commission believes that higher quality and verified API data will be of benefit not only in assisting bona fide air travellers but also in identifying travellers with a risk profile through automated and information-driven border checks.*'[9] How does the Commission envisage ensuring that the expressions 'non-compliance with entry requirements' and 'risk profile' are not used in any way to discriminate against EU citizens and visitors from outside the EU who hold certain political views?

According to the BNC assessment file, the government finds as follows: '*The Commission emphasises that the current proposal is part of a broad European legislative package to strengthen the EU's external borders. These include the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS) and the interoperability of information systems for borders and visas, the aim being to ensure that these systems are more closely aligned with one another and can share each other's data. Strengthening external border controls, for example by using information flows and data systems, is an important objective of European integrated border management.*'[10] Is artificial intelligence (AI) being used? If so, how is it used and how are privacy, human rights and information security safeguarded?

According to the BNC assessment file, the data retention period is to be extended: '*The Commission proposes to extend the maximum period for the retention of data by airlines and border control authorities from the departure of the flight to 48 hours, because the current retention period of 24 hours is too short to carry out pre-checks effectively in all cases (particularly for long-haul flights). Thereafter, the data must be immediately and permanently deleted.*'[11] In response, the members of the PVV parliamentary party would like to know how the immediate and permanent deletion of the data is to be guaranteed and enforced.

According to the BNC assessment file, the government notes that '*The Commission's proposal was partly the result of a public consultation and various workshops with experts from the Member States and other parties.*'[12] Can the Commission indicate on what grounds these experts were selected for the workshops and to what extent comments and criticism on privacy, human rights and information security were adopted?

The members of the PVV parliamentary party note from the BNC assessment file read that an evaluation provision has been included: '*The Commission provides for an overall evaluation four years after the date of entry into force of the regulation, and every four years thereafter. In this*

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[8] *Parliamentary Papers, House of Representatives* 2022/23, 22112, no. 3608, p. 3.
[9] *Parliamentary Papers, House of Representatives* 2022/23, 22112, no. 3608, p. 5.
[10] *Parliamentary Papers, House of Representatives* 2022/23, 22112, no. 3608, p. 3.
[11] *Parliamentary Papers, House of Representatives* 2022/23, 22112, no. 3608, p. 4.
[12] *Parliamentary Papers, House of Representatives* 2022/23, 22112, no. 3608, p. 8.

evaluation it will assess the application of the regulation, the extent to which the regulation has achieved its objectives, and the impact of the regulation on fundamental rights. The evaluation report will be shared with the Council, the European Parliament, the European Data Protection Supervisor and the European Agency for Fundamental Rights. The government is in favour of wide-ranging and regular evaluations. The proposal does not contain a sunset clause.'[13] In view of the possible impact on fundamental rights, the members would like to know why the Commission has not opted for a wide-ranging evaluation two years after the date of entry into force and every two years thereafter.

The members of the PVV parliamentary party would be grateful to receive a reasoned answer to the above questions.

The members of the standing committee for Justice and Security await your reply with interest.

Yours sincerely,

M.M. de Boer
Chair of the standing committee for Justice and Security

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[13] *Parliamentary Papers, House of Representatives* 2022/23, 22112, no. 3608, p. 12.