

Cross-border impact assessment 2017

Dossier 5: Belgian Passenger Name Records Regulation



Maastricht University

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The Institute for Transnational and Euregional cross-border cooperation and Mobility / ITEM is the pivot of scientific research, counselling, knowledge exchange, and training activities with regard to cross-border cooperation and mobility.

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5. Belgian Passenger Name Records Regulation

1. Introduction

In the aftermath of the terrorist attacks in Paris, Brussels, Berlin, and London, national governments in the EU rushed to implement a series of counter-measures to avoid the repetition of such a catastrophe. Many such measures ultimately led to the re-instatement of border controls. The resurgence of routine checks by police forces on highways and train lines that cross internal borders is but one telling example. In addition to these *ad hoc* measures, new rules are being drafted to help national security agencies prevent such tragedies in the future.

The Belgian federal government drafted thirty measures to counter terrorist activity.¹ One of these measures is the gathering of passenger name records (PNR) for non-airborne international travel at the national level.² Adopted on 22 December 2016, this law obliges rail and bus operators that enter Belgian territory to provide records on the passengers transported to the Belgian intelligence services. It draws on existing practice whereby Passenger Name Records (PNR) are maintained for international flights. Being able to cross-check the passengers' name records with known criminal databases would allow the authorities to identify potential suspects and facilitate the prevention of criminal or terrorist attacks. The implications, however, are that flight operators need to set up a system to gather and transmit passenger data to a Passenger Information Unit in the Member States. Member States are required to set up such a unit that can check the data and (potentially) transmit it to the partner countries.

The adopted measure originates from the implementation of an EU directive on the retention of Passenger Name Records for flights.³ That directive prescribes the establishment of a Passenger Information Unit in every Member State and demands that each state collects information regarding passengers on *flights* between Member States and non-Member States. The novelty of the Belgian initiative is not only that it focuses on intra-European flights, but – more importantly – that it also targets transportation by land, which may affect cross-border regions disproportionately.

The original impact assessment of the PNR directive by the European Commission in 2011 did not foresee the application of the measure to intra-EU flights. It only noted that: “The hardware and software required to set up the system would have to have a much larger capacity, and therefore would be much more expensive. A system including internal flights would be too ambitious to adopt as a first step.”⁴ Moreover, the directive and its impact assessment did not anticipate the extension to other modes as it “would go further than the policy of the EU on PNR agreements with third countries [...]. In addition, the idea behind using PNR data is simply to obtain access to the data that is already collected by carriers. Since most train and ships/ferry carriers do not normally collect such

¹ Renard, Thomas (2016) Counterterrorism in Belgium: Key Challenges and Policy Options. Egmont Papers, 89

² Federale Overheidsdienst Binnenlandse Zaken (25.01.2017) Wet van 25 december 2016 betreffende de verwerking van passagiersgegevens. *Belgisch Staatsblad*, pp.12905-12918 (henceforth ‘PNR Regulation’)

³ The European Parliament and The European Council (2016) Directive 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime. Official Journal of the European Union, L 119, 4 May 2016

⁴ European Commission (2011) Impact Assessment PNR. Available at: http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2011/sec_2011_0132_en.pdf Consulted on 29 June 2017 (p.23)

data, it would be disproportionate at this stage to require them to transmit data to public authorities.”⁵

In short, the Belgian interpretation of the EU directive pushes the reporting obligations beyond the original intent of the EU legislators. Part of the mode extension was motivated by the fear that a terrorist travelled through Belgium using an international bus. The Belgian Minister for the Interior, Jan Jambon, claimed that these international busses have been used by different criminal organisations.⁶ Correspondingly, the occurrence of another terrorist incident on the Thalys from Amsterdam to Paris in 2015 was used as a justification for the implementation of the measure for high-speed rail.⁷

The EU’s initial impact assessment did not consider such a widened scope for the PNR directive. It therefore warrants the question as to the possible impact of the Belgian regulation on cross-border mobility. The second section explains in more detail the specificities of this PNR regulation and why it has triggered such intense debate within the transportation sector. The third section delineates the scope of this assessment and elaborates on the chosen research design. The results are presented in the fourth section covering the on-going political (and legal) process, the expected impact on cross-border mobility, and the implications for the planned official impact assessment. This dossier ends with a conclusion and some paths for future research.

2. The PNR Regulation

The PNR regulation contains several provisions on data collection, storage, how the data may be used, and potential sanctions in case of non-compliance. To gain a better understanding of this measure, four provisions that are important in the context of this impact assessment will be discussed here.

The first and most contested aspect of the measure concerns the scope of application in terms of the affected service providers. As mentioned in the introduction, the Belgian regulation extends the scope of the EU directive by including transport by bus, rail, and on water. Still, it does contain several exceptions. As far as transportation by road is concerned, an exception is granted to firms operating under a so-called transportation ‘concession’.⁸ For transport by rail, the scope of application targets international rail transport that makes use of the European high-speed rail network.⁹ The identified exceptions still leave room for interpretation and the large amount of criticism from domestic (TreinTramBus), international (Deutsche Bahn), and supranational stakeholders (European Commission) has made the effective scope for the implementation a subject of discussion. The extended PNR measure is to be implemented in three consecutive policy rounds. This implementation takes place through the promulgation of so-called *Koninklijke Besluiten*. These are executive orders that do not need to be approved by Parliament and that are necessary for the

⁵ Ibid (p.35-36)

⁶ Limburger, Redactie De. (2017). België controleert bussen uit Nederland op terroristen en criminelen, De Limburger. Available at http://www.limburger.nl/cnt/dmf20170325_00038199/belgie-controleert-bussen-uit-nederland-op-terroristen-en-criminelen Consulted on 29 June 2017

⁷ Maurice, Eric. (2015). French train attack poses EU security questions, EUobserver. Available at <https://euobserver.com/justice/129964> Consulted on 29 June 2017

⁸ Art.4 (4) PNR Regulation

⁹ Ibid. Art.4 (5) PNR Regulation

implementation of an act. The first order covers the implementation of PNR in aviation, the second focuses on international trains, and the last round will be covering international busses.¹⁰ The second executive order will await the results of a large impact study conducted by the *Belgisch Instituut voor de Verkeersveiligheid (Belgian Institute for Travel Safety)*. This impact study is set up in collaboration with INNOS.¹¹

Secondly, the act determines that every transporter will be required to collect certain personal data from their passengers. The information that can be collected includes: travel dates, names, payment information, seat information, luggage information and more. The indicators to be collected greatly affect the registration efforts required by the passenger, the databases to be set up by the service provider, and finally the processing capacity of the Passenger Information Unit.

Thirdly, chapter 5 regulates the goal for which information is gathered: the main goals are related to preventing and persecuting terrorism and other grave crimes. This issue is related to privacy concerns as the use for a wider range of objectives is contested under EU law as apparent from the recent CJEU judgment in Opinion 1/15.

Finally, the regulation – as prescribed by the EU directive – foresees the establishment of a Passenger Information Unit. The regulation contains details about its composition (art 14), the management of the database (art 15), the processing of the gathered information, as well as the conditions under which information may be transferred to other agencies within and outside the European Union. Given the focus of this research on the regulation's impact on the mobility of citizens in cross-border regions, we are less interested in the costs associated with setting up a Passenger Information Unit (see *infra*). The impact assessment of the EU's original PNR directive did provide an estimate of average costs associated with setting up a such unit. The widened scope of the regulation implies, however, that – for the Belgian administration – up to seven times as much passenger data needs to be gathered and processed.¹²

3. Objectives of the research, definitions, topics, and indicators

3.1 Specifying the focus of the impact assessment

The Institute for Transnational and Euregional cross-border cooperation and Mobility / ITEM has developed three different broad principles to evaluate the impact of the new regulation on cross-border regions:

¹⁰ Interview TreinTramBus

¹¹ Commissie voor Binnenlandse Zaken. (2017). Integraal Verslag Vergadering 11-01-2017. Retrieved on 29th of May 2017 from <https://www.dekamer.be/doc/CCRI/pdf/54/ic561.pdf>

¹² Based on the 2015 passenger data of the two largest Belgian airports [Brussels airport (data from BRUTrends 2016 available at [this link](#)) and Brussels-South Charleroi (data obtained from [this source](#))] and the yearly travelers of Thalys [data obtained from DeRedactie (01.03.2016) Terreur zindert nog na op resultaten van Thalys. Available at <http://deredactie.be/cm/vrtnieuws/economie/1.2587998>].

1. The cross-border impact from the perspective of individuals, associations, and enterprises correlated with the objectives and principles of European Integration (freedoms, citizenship, non-discrimination),
2. The cross-border impact on socio-economic development/sustainable development and,
3. The cross-border impact on Euregional cohesion and cross-border governance structures.¹³

These three principles are abstract, but they help identify good practices or benchmarks for comparison. In turn, these practices and benchmarks serve as practical guidelines for the formulation of indicators that can be used to assess the impact of a new measure. Table 1 below summarises the principles, the good practices that follow from these principles, and indicators that could allow for measurement of the policy effects in the cross-border region. The third principle of Euregional cohesion and cross-border governance has been excluded from the research as the regulation has no direct impact on local or Euregional governance structures.

Table 1 ITEM's cross-border impact indicators

Goals/Principles	Good practice/Benchmark	Indicators
<p><u>(1) European integration</u></p> <ul style="list-style-type: none"> - Article 21 TFEU: citizenship of the Union is accompanied by 'the right to move and reside freely within the territory of the Member States' - Data protection rights: <ul style="list-style-type: none"> - Article 16 TFEU - Article 8 Charter of Fundamental Rights summarizes the minimum data protection requirements, mainly stemming from Article 8 European Convention on Human Rights (ECHR) 	<ul style="list-style-type: none"> - Free movement of citizens across borders - Non-discriminatory ticketing (no distinction is made based on nation of origin or nation of destination) - Personal freedom not curtailed under the objective of collective and state security¹⁴ 	<ul style="list-style-type: none"> - Is the supply of cross-border mobility services comparable to domestic services? - Are passengers from different nations treated similarly in terms of price, promotions, security checks, etc.? - Can a traveller buy a ticket close to the desired time of departure? - Do passengers feel hindered by the security measures implemented in international travel? - Are privacy rights compromised through collection of data via PNR?

¹³ ITEM. (2016). Grnseffectenrapportage 2016 Samenvatting.

¹⁴ EESC (2009) OPINION of the European Economic and Social Committee on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen COM(2009) 262 final.

Goals/Principles	Good practice/Benchmark	Indicators
<p><u>(2) Sustainable/socio-economic development</u></p> <ul style="list-style-type: none"> - The Euregio Meuse-Rhine (EMR) was erected to promote the permeability of the borders in the region with the goal to improve the accessibility of international services and jobs for people in the region.¹⁵ 	<ul style="list-style-type: none"> - Open borders allow for better socio-economic development of the region by making better use of resources, human capital, and distinctive competitive advantages in the region. - Strengthening the local economies by making sure people from cross-border regions can buy and sell goods and services across the region. 	<ul style="list-style-type: none"> - Will cross-border workers be able to travel easily and regularly to their work in another nation in the cross-border region using public transportation? - Will users of services in other nations of the EMR be able to reach their destination by public transportation? - Will the measure have an influence on the number of people that travel to cities and villages to spend money by buying and selling goods and services?

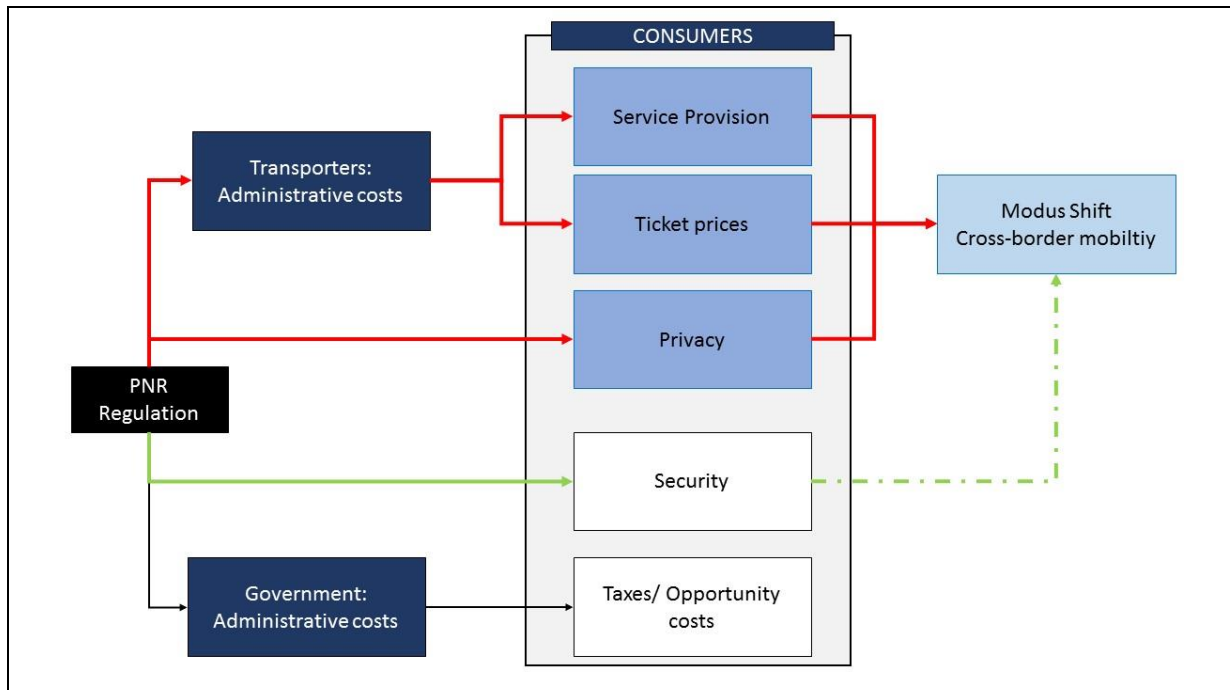
To understand how the Belgian PNR regulation can affect cross-border mobility, causal paths need to be identified. The European Commission’s impact assessment for the PNR directive only focused on the potential administrative costs of the measure for both government and airlines operating in the EU. While informative, it says little about its impact on travellers. We basically identify four effects from the regulation.

The first effect concerns the **administrative costs for the service provider**. The measure has an influence on the operating costs of international travel as investments in ICT will need to be made to facilitate the required data collection. More important for the consumer is how the companies will respond to coping with these increased costs. Two paths emerge from this increased burden on the service providers. A first path is based on potential effects on ticket prices. The original impact assessment of the EU’s PNR Directive calculated an additional cost of EUR 0.20 per flight ticket if the costs were passed on to the consumers. Still, this assessment was based on flight operators who already have a system in place for collecting such information and who face no (fierce) competition from alternative modes of transport, such as cars. The second path is related to the supply of services or the quality with which they are provided. When operating on narrow profit margins, service providers may consider to reduce their service levels if the additional operating costs cannot be offset. Moreover, because the government and/or the transporter require(s) some processing time for the data, passengers may be required to submit their information 24 hours before departure. This could compromise the flexibility of train and bus travel, a comparative advantage it

¹⁵ Knippenberg, H. (2004). The Maas-Rhine Euroregion: A Laboratory for European Integration? *Geopolitics*, 9(3), 608-626.

enjoys over air traffic. The quality of the services supplied inevitably affects the demand and vice versa.

Figure 1: Tracing possible effects of the PNR regulation on cross-border mobility



A second effect concerns **the privacy of the traveller**, and it mostly relates to the first principle of ITEM’s impact indicators. As the measure demands the gathering of personal information, passengers might be deterred from using such services as they object to the collection of their personal data by the government. This could influence the demand for international travel.

Higher ticket prices, reduced service provision, either due to a rationalisation on the supply side or a reduced demand due to the loss in flexibility, and consumer concerns about privacy may trigger behavioural adjustments. In our case, it may imply a modal shift or the reduction of mobility.

The third impact of the PNR measure pertains to the travellers’ **greater sense of security**. This can increase cross-border mobility. Following the train attack in August 2015, operator Thalys saw a sharp decline in ticket sales, which continued to affect sales up until January 2016, when a 6% decline in passengers was noted.¹⁶ Assessing the true scope of this effect is highly complex as it involves both a subjective sense of security and the possibility of the PNR measure to effectively prevent such (rare) incidents from happening.

The fourth and final effect refers to the opportunity costs that arise from the **government’s budget allocation** to implement the measure. In response to a parliamentary question, the Belgian government expected costs for the system to approximate EUR 13.45 million, of which EUR 4.95 million is to be provided by the EU’s Internal Security Fund.¹⁷ The impact of these costs on cross-

¹⁶ DeRedactie (01.03.2016) Terreur zindert nog na op resultaten van Thalys. Available at <http://deredactie.be/cm/vrtnieuws/economie/1.2587998>

¹⁷ Antwoord van de vice-eersteminister en minister van Veiligheid en Binnenlandse Zaken, belast met de Regie der Gebouwen van 30 augustus 2016, op de vraag nr. 1520 van mevrouw de volksvertegenwoordiger Nawal Ben Hamou van 07 juli 2016

border mobility is – at best – both indirect and limited, as all citizens contribute to the government budget, whether they use cross-border services or not. The costs feature most prominently in debates about the cost-effectiveness of the PNR measure as opposed to other preventive measures. In the following, we will focus predominantly on the first three effects.

3.2 Geographic and temporal demarcation

The scope of this research will be limited to the Euregio Meuse-Rhine. The Euregio Meuse-Rhine is a good example of a cross-border region because of both its interconnectedness and its coverage of multiple countries, i.e. Belgium, the Netherlands, and Germany.¹⁸ The impact of the measure – apart from the necessary public expenditures – is mostly experienced by the providers of transportation services. Using the formulated demarcation of the Euregio Meuse-Rhine, a list of regular train and bus lines in the region that enter or leave Belgium is recorded in table 2. The transporters exploiting these routes are important for the identification of affected respondents for our interviews (see *infra*).

At present, the active transporters in the region are: TEC, De Lijn, Deutsche Bahn, Arriva Nederland, Flixbus, Eurolines, NMBS, and Thalys. This is the population of our research and all these transporters were contacted via their press offices.

Table 2: International routes and services from/to Belgium in the Euregio Meuse-Rhine

Route	Type	Number	Transporter
(Hasselt-)Luik-Guillemins (B) - Maastricht (NL)	Intercity Train	IC-13	NMBS
Spa-Géronstère (B) - Aken (G) (Aachen Hbf)	Local train	Route 37	NMBS
Luik-Guillemins (B) - Aachen (G)	High speed train (ICE)	NA	DB
Luik-Guillemins (B) - Aachen (G)	High speed train (Thalys)	NA	Thalys
Maaseik (B) - Susteren (NL)	Local bus	Route 65	Arriva
Maasmechelen (B) - Maastricht (NL)	Local bus	Route 63	De Lijn
Genk (B) - Maastricht (NL)	Local bus	Route 45	De Lijn
Hasselt (B) - Maastricht (NL)	Local bus	Route 20a	De Lijn
Tongeren (B) - Maastricht (NL)	Local bus	Route 62	De Lijn
Kanne (B) - Maastricht (NL)	Public transportation shuttle	Route 460	Arriva
Luik (B) - Maastricht (NL)	Local bus	Route 78	TEC
Eupen (B) - Vaals (NL)	Local bus	Route 396	TEC
Eupen (B) - Aken (G)	Local bus	Route 14	TEC
Luik (B) - Maastricht (NL)	Commercial passenger bus	NA	Flixbus
Luik (B) - Valkenswaard (NL)	Commercial passenger bus	NA	Flixbus

¹⁸ Knippenberg, H. (2004). The Maas-Rhine Euroregion: A Laboratory for European Integration? *Geopolitics*, 9(3), 608-626.

	bus		
Luik (B) - Aachen (G)	Commercial passenger bus	NA	Eurolines
Eupen (B) - Kalterherberg Bahnhof (G)	Local bus (weekends only)	Route 385	Satracom as commissioned by TEC, working with DB BAHN Rheinlandbus

We are aware that bus companies that exclusively work under public service contracts are excluded from the measure, as are international rail service providers that do not make use of the European high-speed rail network. However, we decided to include them to allow for the cross-checking of statements and – potentially – to reduce respondents’ self-interested biases.

3.3 Methodology

The impact assessment is based on interviews and secondary sources. We resort to interviews with the passenger service providers responsible for the implementation of this measure. They play the most important role in explaining potential effects on cross-border mobility. Secondary sources are useful to complement their statements or to add additional insights into the expected impact.

The participants have been purposefully sampled from the population of all transporter agencies active in the Euregio Meuse-Rhine and, as mentioned before, have all been invited for interviews. The interviews were held at a location preferred by the interviewee, so environmental bias did not play a role. The interviews were not transcribed verbatim, but audio recordings and summaries of the answers are available upon request. Out of the eight identified transporters, only three participated in an interview. One transporter claimed they did not know enough about the measure to participate in an interview (De Lijn), one transporter found it too early to comment (Thalys), two transporters did not respond to requests for interviews within the timeframe of the study, despite repeated reminders (Deutsche Bahn & TEC), and lastly, one transporter was ‘too busy’ to comment as they were implementing a new business-to-business and customer-relation system (Eurolines). Due to the limited response rate, this research is restricted, in the sense that not every potential stakeholder has been interviewed.

In the end, Arriva Netherlands, Flixbus Benelux, and NMBS were willing to participate in an interview about the PNR measure and its effect on their companies. Flixbus operates long-distance international buses throughout Europe (Interview Flixbus, 2017). Arriva, a daughter company of Deutsche Bahn, operates several train, boat, and bus lines throughout the Netherlands (Arriva Nederland, 2017). Lastly, NMBS is a Belgian train company that operates trains mainly in Belgium, but also internationally (NMBS, 2017).

Most interviews lasted for about 45 minutes and targeted the assessment of the different causal mechanism identified. They were less satisfactory in providing concrete numbers to describe exact effects of the measure as the provisions were yet unknown to the interviewees and available data on cross-border movements and passenger sensitivity was scarce. Once it became clear the measure

was still under development, a small pivot in the research was deemed appropriate: it became relevant to look at the process of the policy implementation and the way its future effects are investigated. The objective of the study, as such, became more exploratory.

To attain a better understanding of this political process, we contacted the Belgian Ministry of Internal Affairs, the research institutes (BIVV/INNOS) that are conducting an impact study regarding the PNR measure in rail, and the Belgian and European passengers' organizations (TreinTramBus and EPF, respectively). Unfortunately, the project coordinator from the Ministry did not want to participate in the research at this stage in time as he wanted the discussions with transporters to take place in 'serenity and confidentiality' (Ministry of Internal Affairs, personal communication, 12th of June 2017).

The research institutes conducting the impact study were very willing to discuss their study. Nonetheless, there was not much they could tell about their study at this stage as the exact design and assignment had not yet been formalised. It seems likely that the implementation of the PNR measure will be delayed even further as the Minister has stated he wanted to wait for the results of this impact study.

4. Assessing the Belgian PNR regulation

The potential impact of the PNR regulation is contingent on the political process that will specify the scope of the measure in greater detail. This process takes place amidst a debate about the legality of the PNR system within EU law. Therefore, we structure our discussion in three sections. First, we shed light on both the political process that precedes the implementation of the PNR measure as well as recent legal developments. In a second section, we discuss the potential impact on cross-border mobility. A third section builds upon the two sections preceding it by addressing the central question of proportionality.

4.1 Political process and legal sensitivities of the Regulation

The initiative for the measure originated from the Belgian Minister for Internal Affairs, Jan Jambon (Interview NMBS, 2017). Upon the introduction of the initial proposal, there was a massive pushback from transporters, through, among others, the Community of European Railways (Interview NMBS, 2017). This organisation includes railway companies such as the NS (Netherlands), SNCF (France), and the NMBS (Belgium). This heightened salience was echoed in Belgian parliament and resulted in three modifications, according to the NMBS and Flixbus (Interview FB & NMBS, 2017): (1) the creation of an international taskforce to implement PNR in the rail sector, (2) the execution of an impact study towards the effects of the measure in rail, and (3) the reduction of the scope of the measure to high-speed rail and long-distance international buses. The taskforce installed to implement PNR in the rail sector has been set up by the Minister of Internal Affairs to give a voice to the stakeholders in the decision-making process (Interview NMBS, 2017). The impact study is conducted to assess the gravity of the concerns raised and to explore the optimal way of implementing the regulation. Lastly, the limitation of the measure's scope followed on demands by international rail companies that feared the end of 'free travel' in rail (Interview FB & NMBS, 2017).

As exemplified by Arriva Netherlands, not all companies are equally well-informed about the contents of the measure (Interview AN, 2017). Since the measure was limited to high-speed rail and international commercial buses, Arriva did not conduct further investigations into the effects of the measure as it was irrelevant for their business. It is important to note, furthermore, that even though NMBS and Flixbus are quite aware of the ongoing process, neither of them has any certainty about the provisions of the measure and the manner in which the policy will be implemented (Interview FB & NMBS, 2017).

Another interesting dimension of the political process is that it was the Belgian Federal Ministry of Internal Affairs that took the initiative for the measure, rather than the Ministry of Mobility, which is responsible for transportation and mobility (Interview FB & NMBS, 2017). After the terror attacks of 2015, the European Ministers of Internal Affairs agreed on the need for PNR in a conjoined statement on terrorism, while excluding the Ministers of Mobility from that statement.¹⁹ The Ministry of Mobility had also been excluded from the drafting stages of the PNR regulation. However, every *Koninklijk Besluit* – and thus also the implementation of PNR in rail – requires the assent of all relevant Ministers (Interview NMBS, 2017). At this stage, the Ministry demanded more attention for transportation companies and requested the NMBS to be included in a study on the effects of the measure (Interview NMBS, 2017). The Federal Ministry of Mobility is not only responsible for catering to the interests of the transport industry, it is also in charge of defending the rights and interests of passengers. Given the consensual mode of decision-making between the different strands of the executive, we can expect a stronger defense of mobility concerns in the executive orders.

As mentioned above, the lobbying efforts from potentially affected companies led to the creation of an international taskforce. This taskforce includes the Netherlands, Belgium, France, and the United Kingdom. Germany was asked, but declined to be part of the taskforce (Interview FB, 2017). Moreover, the group also involves several affected firms, i.e. Eurostar, Thalys, and Eurostation, to partially facilitate the lobbying companies (Interview NMBS, 2017). Nonetheless, important stakeholders were excluded from this taskforce, which has led to some frustration (Interview NMBS, 2017). The measure's impending implementation has also created interest in other nations for the taskforce. This has led to the investigation of a similar PNR regulation in the Netherlands (Interview FB, 2017). It is important to note, though, that the commitment of the Dutch and French took place amidst elections where pressure from extreme-right parties was particularly high. Whether they will truly implement a similar system remains to be seen (Interview TreinTramBus, 2017). Regardless, coordination to align the design of national PNR systems can help to avoid excessive burdens on service providers.

While the international taskforce was reportedly to present a common approach paper to the Justice and Home Affairs Council of March 2017, it recently indicated at a meeting of the Expert Group on Land Transport Security (LANDSEC) that it would await the results of the aforementioned impact

¹⁹ French Senate Commission for European Affairs. (2015). DÉCLARATION CONJOINTE SUR LA LUTTE CONTRE LE TERRORISME. Consulted on 1st of July through [this source](#)

assessment.²⁰ This impact study was ordered to address stakeholders' demands (Interview NMBS, 2017). After pressure from the Ministry of Mobility, the NMBS was included in this study. The research will be conducted by BIVV in collaboration with a research institute called INNOS.²¹ The results are expected by the end of 2017 (Interview NMBS, 2017).

Besides these political developments, there are also several legal challenges surrounding the implementation of the PNR regulation. These challenges are twofold: on the one hand, the regulation pertains to privacy concerns while, on the other hand, it touches upon the free movement of persons and services. As mentioned above, the processing, retention, and exchange of EU citizens' information has already been enshrined in several international agreements. One of these agreements, the PNR agreement with Canada, has motivated the European Parliament to request an opinion from the Court of Justice of the European Union (CJEU). On the 26 July 2017, a ruling was provided on the legality of the PNR agreement in Opinion 1/15. The Court questioned the legal basis used for the PNR agreement as well as the protections provided to passenger privacy.²² The implications for the EU's PNR Directive may, however, be relatively mild as it already addresses several of the critiques levied against the agreement with Canada.²³ For the Belgian PNR regulation, effects may be further reduced through the executive orders implementing the PNR regulation. The positive advice of the Privacy Commission on the first of such orders (covering air traffic) seems to confirm this view.²⁴ Still, the widened scope of the Belgian PNR regulation may yet cause legal difficulties. The Meijers Committee – an independent group of legal experts that scrutinizes European proposals – raised concerns over the Belgian PNR measure's proportionality, citing the CJEU ruling in *Digital Rights Ireland* and *Seitlinger*.²⁵ What is deemed proportional for the processing and exchange of PNR in air travel may not necessarily apply to transport by land.

A second ground for contestation concerns the freedom of movement within the EU and the introduction of border controls within the Schengen area. The Directives on Free Movement for EU Citizens (2004/38/EC Art. 27) and on Free Movement for Services (2006/123/EC Art. 15§3) only allow the restriction of free movement if it serves an overriding reason of public interest (*in casu*: public security) and if it is deemed to be proportional. While the ruling in Opinion 1/15 provides some support to the idea that the exchange of PNR is proportional to prevent and investigate serious crimes and terrorism,²⁶ the enlarged scope of the Belgian PNR regulation raises new questions regarding its proportionality. Seeing that the rules only apply to a limited set of trains and buses, and seeing that the measure may introduce several hurdles for cross-border mobility (e.g. through identity checks, nominative ticketing, or the requirement to book in advance), the regulation may

²⁰ Minutes of the 15th Meeting of the Expert Group on Land Transport Security (LANDSEC 15), 26 April 2017, Brussels Available at:

<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2821&Lang=NL>

²¹ Commissie voor Binnenlandse Zaken. (2017). Integraal Verslag Vergadering 11-01-2017 Retrieved on 29th of May 2017 from <https://www.dekamer.be/doc/CCRI/pdf/54/ic561.pdf>

²² Kuner, Christopher: Data Protection, Data Transfers, and International Agreements: the CJEU's Opinion 1/15, *VerfBlog*, 2017/7/26, <http://verfassungsblog.de/data-protection-data-transfers-andinternational-agreements-the-cjeus-opinion-115/>, DOI: <https://dx.doi.org/10.17176/20170727-094655>

²³ Bossong, Raphael: Passenger Name Records – from Canada back to the EU, *VerfBlog*, 2017/7/28, <http://verfassungsblog.de/passenger-name-records-from-canada-back-to-the-eu/>, DOI: <https://dx.doi.org/10.17176/20170731-093836>.

²⁴ Commissie voor de bescherming van de persoonlijke levenssfeer (2017) Advies nr 23/2017 van 24 mei 2017.

²⁵ Commissie Meijers 2017 Note on the EU law aspects of PNR in public transport. CM1706

²⁶ Bossong *ibid*.

face contestation for violating the freedom of movement or effectively introducing border controls, which are prohibited in the Schengen area.²⁷

The complexity and sensitivity of this ongoing process are, arguably, part of the reasons for the Ministry of Internal Affairs to refuse participation in this study. The Ministry indicated that it does not want to disturb the ‘discussions’ with transporters and desires ‘serenity and confidentiality,’ which shows the delicate nature of these negotiations (Ministry of Internal Affairs, personal communication, 12 June, 2017).

4.2 Potential effects of the Belgian PNR Regulation

As the executive orders are still in development and as many companies would not be affected by the slimmed-down form of the measure, we resorted to two hypothetical scenarios in our interviews. These ‘scenarios’ were necessary to discuss the potential effects of the measure without having its final proposal. The first scenario (‘limited’) is a scenario in which the government requires the transportation companies to ensure that passengers submit a name when buying a ticket. Upon departure, the transporter must then check whether the names correspond to the names on the ticket (nominative ticketing). In this scenario, the government does not require that the companies submit the passenger name records before departure and does not require much more information than a full name. The second scenario (‘comprehensive’) is a scenario in which the government does require a 24-hour processing period before departure and orders much more data such as date of birth, payment information, address, etc.

I. Influence on the costs of implementing the PNR measure in terms of ICT

Both NMBS and Flixbus affirm that it is impossible to compare international train and bus travel with aviation. The infrastructure of aviation is much more prepared for a PNR measure as it is a ‘closed system’ and people almost always buy tickets beforehand (Interview NMBS, 2017). Moreover, the security agencies are much more pro-active in aviation and execute massive checks, whereas this is not done for busses and trains (Interview FB, 2017). Any comparison based on such a system is therefore problematic.

For Flixbus, a limited scenario would not prove to be too costly as Flixbus already operates a ticketing system that closely resembles this scenario (Interview FB, 2017). Flixbus tickets are sold on a personal basis, and the driver checks whether the name on the ticket corresponds to that on an identification card. The sole costs would lie in operating an IT system that would have to communicate with the Passenger Information Unit in Belgium. Both the NMBS and Arriva are opposed to even the limited scenario as their entire infrastructure is not prepared for such a system (Interview NMBS and AN, 2017). In the Netherlands, for example, it is currently not allowed to match a person’s identity to the ticket they used for transportation due to privacy laws. Both NMBS and Arriva agree that the measure would be costly for them to set up and would seriously interfere with their business model. However, Arriva was unable to provide us with any specific cost projections as they did not perform an impact study themselves. The NMBS allowed us to review an early impact assessment, which, however had not yet been updated with the changes in provisions of the policy and was to remain confidential (see *infra*). All three transporters were opposed to the

²⁷ Commissie Meijers, *ibid*

comprehensive scenario as it would raise the costs for ICT, and they doubted the effectiveness of such a system, which raises the question of proportionality.

II. Flexibility passenger

As far as the flexibility of travel for the passenger is concerned, responses varied. As mentioned, Flixbus already operates a ticketing system in which tickets are non-transferrable. For them, the limited scenario does not change much as one can still buy tickets from the driver if one has some form of identification (Interview FB, 2017). Flexibility, in the sense that a passenger can buy a ticket up to 15 minutes before departure, is one of the main pillars of the Flixbus business model, and they demand that this flexibility is protected. For all three transporters, the comprehensive scenario would seriously limit the possibility for passengers to travel last-minute and would be very problematic for all of them. Massive checks would furthermore lead to high costs and delays. Here, the importance of a fair 'playing field' was emphasised. The transporters are willing to work together to enhance security, but this should be done in such a way that their competitive position does not deteriorate in relation to other methods of transportation. Moreover, they argue for the set-up of an ICT system that is internationally homogenous. This is demanded as the creation of a different ICT system in every nation would raise costs tremendously for transporters that operate internationally. The interest expressed by other Member States in such a broadened PNR system thus warrants additional coordination if costs for transporters are not to spiral out of control.

Flixbus also emphasised that especially in cross-border regions, like the Euregio Meuse-Rhine, demand for international travel would decline if the flexibility of the passenger was compromised (Interview FB, 2017). They argue this way as for many of the routes they operate there is not a good substitute. Especially in the southern part of Dutch Limburg, there are insufficient connections by international train to meet the demand for travel. The two train companies interviewed, Arriva and NMBS, argue that their infrastructure is not at all built for such measures and that flexibility is one of the key tenets of their business model. For all of them, strict security checks would lead to disruptions in their timetables.

The sole comparable case known to us is the introduction of identity checks for train passengers travelling from Denmark to Sweden across the Öresund bridge. Passengers were required to arrive at the train station half an hour before departure. The measure implemented in January 2016 resulted in a drop of commuter tickets by 17% while car traffic across the bridge reached a new peak.²⁸ The measure was ultimately abolished in May 2017.²⁹ In Belgium, stations serving international destinations have already been equipped with security check-points since 19 July 2017, requiring passengers to arrive 20 minutes before departure.³⁰ It is still too soon to assess their impact.

²⁸ The Local. 22.12.2016. *Öresund bridge heading towards new traffic record*. Available at: <https://www.thelocal.se/20161222/oresund-bridge-heading-towards-new-traffic-record>

²⁹ The Local. 2.05.2017. *Sweden to end ID checks at border with Denmark*. Available at: <https://www.thelocal.se/20170502/breaking-sweden-to-end-id-checks-on-trains-from-denmark>

³⁰ Radio2. 19.07. 2017. *Extra controle voor internationale treinen in Antwerpen-Centraal*. Available at: <https://radio2.be/antwerpen/extra-controle-voor-internationale-treinen-in-antwerpen-centraal>

III. Privacy of the traveller

This discussion of privacy is mainly relevant for the possibility of a comprehensive scenario as the limited scenario is restricted to its interference with the privacy of a traveler. In terms of the effects that the measure would have on privacy, Flixbus emphasised that if they were to collect such data, there would need to be a strong legal mandate to do so (Interview FB, 2017). Arriva accentuated that in the Netherlands, up until recently, there had been a tendency to strengthen privacy legislation. Therefore, given this tendency, the entire ICT infrastructure was not built for knowing the personal data of the people using their services.

The NMBS is still strongly controlled by the federal government in some aspects.³¹ Therefore, in some of their answers, the NMBS responded by pointing to the responsible federal government organisations. Discussing the issues that were raised surrounding the privacy of the traveler, NMBS argued that the federal government should simply consult the federal Privacy Commission. The transporters that were interviewed were unsure about how passengers would respond to privacy concerns. However, Arriva commented that simply asking for a ticket already creates tension with passengers. Therefore, asking for identification as well would create even further tensions between Arriva's personnel and the passengers, which would be undesirable.

IV. Security concerns for service providers

A fourth effect of the PNR measure that also emerged is associated with security effects. Several issues were raised here. First, the NMBS was afraid that long queueing lines would become a security issue if any of the two scenarios led to massive security checks (Interview NMBS, 2017). Arriva's largest concern is that the identity checks are expected to be done by someone of their company (possibly a driver) who is not competent and does not have the time to execute such checks. Flixbus doubts whether the measure will achieve greater security as there are still many loopholes in the limited scenario (use of false identity cards, other modes of transportation remain unchecked), while not much data is collected (Interview FB, 2017). That is not to say Flixbus would rather see more data collected, but they doubt the efficiency of the system in its current form. Potentially, terrorists could also attack the security check points and security personnel, instead of attacking the trains and busses themselves.³² Moreover, requiring identification before boarding a train might cause friction with passengers who are unable to provide such identification, which causes more undesirable security concerns for transportation personnel. This is something about which Flixbus was particularly concerned.

V. Security concerns for travellers

Alternatively, the PNR regulation could also stimulate the use of transportation services if consumers are currently dissuaded due to security concerns. Indeed, following the terrorist attack on the Thalys, a decline in ticket sales was observed. However, the effect dissipated over the course of six months.³³ This finding is in line with experiences in the UK following the attacks in the London subway in 2005. Results from the National Rail Passenger Survey show that – even in the immediate wake of the attack – the fear of terrorism only ranks third amongst the security concerns (behind

³¹ Verschuere, B. 03.06.2017. *De overheid en de NMBS moeten met elkaar leren dialogeren*. In: *DeTijd*. Available at <http://www.tijd.be/opinie/algemeen/De-overheid-en-de-NMBS-moeten-met-elkaar-leren-dialogeren/9773433>

³² Jackson, Brian A, Chalk, Peter, Cragin, Kim, Newsome, Bruce, Parachini, John V, & Cragin, R Kim. (2007). Breaching the fortress wall: understanding terrorist efforts to overcome defensive technologies: Rand Corporation.

³³ DeRedactie (01.03.2016) *Terreur zindert nog na op resultaten van Thalys*. Available at <http://deredactie.be/cm/vrtnieuws/economie/1.2587998>

anti-social behavior of other passengers and the lack of visible staff). In less than a year, terrorism was less of a concern than poor on-station lighting.³⁴ Arriva also doubted whether most of the crime in public transportation is actually related to terrorism and thus, perhaps, there should be a different focus in the security policy for public transportation (Interview AN, 2017).

Considering the questionable effectiveness of PNR on terrorism prevention,³⁵ coupled with passengers' limited concern for terrorist attacks, it is implied that the positive effects of the PNR regulation on consumer mobility are relatively minor.

4.3 Questions of proportionality

The transporters that were interviewed all agree on the need for security but think the government should take a more active role in security checks and should not divert that responsibility to the transporters. Their employees are put at risk, they do not have the time, to execute such security checks, and they are not trained to execute those checks. All the transporters interviewed very strongly doubted the effectiveness of the measure when other modes of cross-border transportation (cars, regional trains, local buses) are left unchecked. The Council of Europe's Korff Report (see footnote 35) further pointed to the 'dubious reliability' of any information to be gleaned from PNR regulations.

The question is whether it is conceivable to have a workable PNR regulation that is both effective in attaining its security objectives while simultaneously being minimally distortive to cross-border mobility. This question will also be at the heart of any legal case the regulation may trigger. The revisions made to the original proposals and further refinements introduced through the international taskforce have shaven off the rough edges of the proposal. Thus, we have seen carve outs from the regulation for regional cross-border trains and busses operating under a public service obligation. We are equally likely to observe a more calibrated approach to gather and process the solicited passenger data to avoid legal (and political) contestation. At the same time, many of these revisions have widened the meshes of the net, making it less effective in addressing the security threats for which the measure was originally designed.

In this context, the range of alternative measures that can be taken to increase security on cross-border travel inevitably enters the picture again. The European Commission, with the approval of the EU TTE Ministers Council, commissioned a study from Steer Davies Gleave to examine possible initiatives for improving rail transport security across the EU. Of the thirty-one measures identified and evaluated, only nine received an unfavorable rating. Nominative ticketing and identity checks failed the test due to the expected inconvenience for passengers (i.e. delays), the high costs of implementation, and expected impact on relevant stakeholders.³⁶

³⁴ European Passengers Federation. Presentation by Christopher Irwin at LANDSEC. Brussels September 2015. Available at: <http://www.epf.eu/wp/wp-content/uploads/2015/09/EPF-presentation-LANDSEC-09-2015.pdf>

³⁵ Korff, D. & Georges. M. (2015) "Passenger Name Records, data mining & data protection: the need for strong safeguards." Report prepared for the Council of Europe; National Research Council. 2008. Protecting Individual Privacy in the Struggle Against Terrorists: A Framework for Program Assessment. Washington, DC: The National Academies Press. <https://doi.org/10.17226/12452>.

³⁶ Available at: <https://ec.europa.eu/transport/sites/transport/files/2016-12-options-security-european-high-speed-international-rail-services.pdf>

Why did the Belgian government not await the outcomes of the study before adopting the PNR regulation? The speedy adoption of the PNR regulation suggests that the measure also serves an internal political purpose, i.e. to show that the government was moving along with its security agenda. It is particularly telling that an impact assessment was only ordered after the legislation had been adopted, even though the critiques spelt out in this assessment were known in advance.

5. Conclusions and paths for further research

This research report inquired into the effects of the recent Belgian PNR regulation on the supply and demand of international transport by land in the Euregio Meuse-Rhine. During the study, it became apparent that the exact method of implementation is still subject of an ongoing political process in which many stakeholders are involved. The final scope and extent of the measure is therefore still pending on the resolution of this political process. To grasp the potential impact of the measure on cross-border mobility in the Euregio Meuse-Rhine, a greater understanding of these political processes was deemed necessary.

The only company interviewed to have executed an impact study was the NMBS. However, this impact study was conducted at a very early stage of the measure's implementation and was sent to us on a confidential basis (NMBS, personal communication, 14 June 2017). Given the confidentiality of the study, no quotes or numbers could be taken out of the information provided. The impact study does, however, seem to confirm many of the effects identified in the interviews (e.g. difficulty of practical implementation, deterioration of competitive position towards other modes of transport, need for international consensus on such decisions, etc.) and it affirms the claims that the set-up of the required infrastructure would be expensive for rail services (NMBS, personal communication, 14 of June 2017). The desire for the report to remain confidential again shows the delicate nature of the discussions taking place between the different stakeholders, which the involved actors do not want to disturb.

The lobbying efforts of the different international transporters have led to the commissioning of an impact study. While the current study has not been able to provide conclusive answers, we can derive several recommendations on the basis of our findings.

First, a future impact study should incorporate the welfare effects on the passengers and not just the costs for transporters and government. The measure might have a disproportionate effect on service provision in cross-border regions. For the people in these regions, the possibility to travel internationally can turn out to be essential for the functioning of their economy and fulfilling their mobility demands. The identified 'causal paths' can form a useful starting point for such an exercise. An impact study investigating the actual burden of these effects could allow for a judgement on the proportionality of the measure in relation to its (unintended) consequences.

Second, there is a great need for refined data on cross-border movements and consumer responses to changes in the transportation services' price and quality. Currently, there is a significant lack of data on international EU travel. For example, the Dutch Ministry of Mobility has outsourced the permit process for international bus routes to a private organisation: KIWA register (Interview FB, 2017). The information that this organisation collects is not publicly available, so there is no precise

information about the number of travelers who cross the Dutch borders by public transportation. There is also a need for policy makers to understand the propensity for travelers to switch travel modes in the light of several considerations such as price, time, and privacy. This is necessary to assess the extent to which the measure will effectively result in an increase of car use (thus raising environmental concerns) or a reduction in cross-border movements (compromising the principle of mobility in the European Union).

Third, clarity about the different parameters that are still negotiable can facilitate the creation of a useful impact assessment. At this moment, the decisions on the implementation of the PNR measure are still the object of political conflict between different bureaucratic administrations and even different nations within Europe (Interview NMBS, 2017). Moreover, once we know about the exact scope of data collection, a better evaluation can be made regarding the measure's legality vis-à-vis EU law.



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