



Number: U-I-152/17
Date: 3 September 2020

ORDER

At a session held on 3 September 2020 in proceedings to review constitutionality initiated upon the request of the Ombudsman for Human Rights, the Constitutional Court

decided as follows:

1. On the basis of Article 267 of the Treaty on the Functioning of the European Union, the following two questions concerning the validity of Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (OJ L 119, 4 May 2016) are submitted to the Court of Justice for a preliminary ruling, namely:

(a) Is point 8 of Annex I to Directive (EU) 2016/681 compatible with Articles 7 and 8 and with the first paragraph of Article 52 of the Charter of Fundamental Rights of the European Union, considering that it is not clearly evident whether it only includes frequent flyer information or also other information relating to flights and reservations in the frequent flier programme, which could mean that the requirement of the clarity and precision of rules that interfere with the rights to privacy and to the protection of personal data is not observed?

(b) Is point 12 of Annex I to Directive (EU) 2016/681 compatible with Articles 7 and 8 and with the first paragraph of Article 52 of the Charter of Fundamental Rights of the European Union, considering that the required information is not exhaustively listed and also that point 12 does not determine a limitation as to the nature and scope of the information, which could mean that the requirement of the clarity and precision of rules that interfere with the with the rights to privacy and to the protection of personal data is not observed?

2. The procedure for the review of the constitutionality of point 31 of the first paragraph of Article 125 of the Police Tasks and Powers Act (Official Gazette RS, Nos. 15/13, 23/15 – corr., and 47/19) is stayed until the Court of Justice adopts a decision.

REASONING

A

I Proceedings before the Constitutional Court

1. On the basis of the fifth indent of the first paragraph of Article 23a of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, 109/12, and 23/20 – hereinafter referred to as the CCA), the Ombudsman for Human Rights (hereinafter referred to as the applicant) filed a request for the review of the constitutionality of three sets of provisions of the Police Tasks and Powers Act (hereinafter referred to as the PTPA) that are independent of each other. The Constitutional Court has already decided on the request of the applicant as regards two sets, namely concerning unmanned aerial vehicles in the performance of police tasks (the fourth paragraph of Article 113 of the PTPA) and the use of technical means for the optical recognition of licence plates in the performance of police tasks (the third indent of the second paragraph of Article 114a of the PTPA).¹ The third set, which concerns the processing of passenger name record (PNR) data,² was in the process of being amended during the procedure before the Constitutional Court (the Act Amending the Police Tasks and Powers Act (Official Gazette RS, No. 47/19 – hereinafter referred to as the PTPA-B). By Order No. U-I-152/17 dated 3 September 2020, the Constitutional Court rejected the request for the review of the constitutionality of the regulation previously in force concerning the processing of PNR data.

2. The applicant extended the request for the review of constitutionality also to the regulation currently in force (it entered into force on 10 August 2019), but only as regards point 31 of Article 125 of the PTPA. She alleges that this provision violates Article 38 of the Constitution, which guarantees the right to the protection of personal data.

¹ Two Partial Decisions No. U-I-152/17, dated 4 July 2019 (Official Gazette RS, No. 46/19 and No. 48/19).

² In point 31 of Article 125 of the PTPA it is also called the “passenger record from the airline ticket reservation system (PNR).”

II The allegations of participants in the proceedings before the Constitutional Court

The allegations of the applicant in the request for the review of constitutionality

3. The applicant claims that the two items of personal data referred to in point 31 of Article 125 of the PTPA (i.e. the passenger record from the airline ticket reservation system (PNR)) are listed contrary to the right to the protection of personal data, as they are not determined precisely, as is otherwise required by Article 38 of the Constitution. This refers to the following data: “information relating to frequent flier programmes” and “information regarding other possible particularities connected with the passenger.”

4. The applicant draws attention to the fact that also Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (hereinafter referred to as Directive (EU) 2016/681), whose Annex I determines a set of personal data that air carriers must transmit to the competent authorities, is unclear and imprecise. Among them, she underlines the following item of PNR data: “*informacije v zvezi s programi za pogoste potnike*” [“information relating to frequent flier programmes”] from point 8, as phrased in the Slovene version. She draws attention to the fact that the collocation “*v zvezi*” [“relating to”] indicates that the definition is conceptually open and that it can thus include numerous items of personal data regarding which it is not clear whether they are necessary for the purpose pursued by Directive (EU) 2016/681. She opines that this Directive is therefore in this part inconsistent with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (consolidated version, OJ C 202, 7 June 2016 – hereinafter referred to as the Charter).

The reply of the National Assembly of the Republic of Slovenia and the opinion of the Government of the Republic of Slovenia

5. The National Assembly explains that when formulating the information elements in the PNR, the legislature proceeded from international PNR and API information standards. It alleges that the Legislative and Legal Service of the National Assembly also drew attention to the precision of the scope of the data that are subject to transmission, as unclear – but essential for statutory regulation – provisions make it difficult to assess the proportionality of the interference with the constitutionally guaranteed protection of privacy. It claims that both disputed items of information (i.e. headings) entail the transposition of points 8 and 12 of Annex I of Directive (EU) 2016/681.

6. The Government claims that when formulating the PNR and API information elements, in points 30 and 31 of Article 125 of the PTPA it took into consideration the information standards supported by the European Commission, which also encourages other Member States to observe them. These are the data standards formulated by the

International Air Transport Association (IATA), the International Civil Aviation Organization (ICAO), and the World Customs Organization (WCO), and are presented in the "Guidelines on Passenger Name Record (PNR) Data" and in the "Guidelines on Advance Passenger Information (API)".

7. As regards the allegation that the heading "information relating to frequent flier programmes" is imprecise, the Government explained that this heading only means frequent flier status. It namely entails the transposition of point 8 of Annex I of Directive (EU) 2016/681.

8. As regards the other heading, i.e. "information regarding other possible particularities connected with the passenger," the Government explained that it entails the transposition of point 12 of Annex I of Directive (EU) 2016/681, labelled "general remarks" [regarding passengers]. It claims that this heading is clear and determined in accordance with internationally recognised data standards. As an example, it lists what this data element encompasses: information on unaccompanied minors younger than 18 years of age; the contact information of the guardian upon arrival; the relationship of the guardian to the minor; information regarding a representative; information regarding deported persons; whether the person has a permit to carry weapons; and whether the person is travelling with an animal. The Government opines that the data from this heading are collected and processed "by analogy." This legislative approach allegedly does not entail an interference with the right to the protection of personal data that is more serious than if these data had been expressly determined by law.

The reply of the applicant to the allegations of the National Assembly and the Government

9. In her reply, the applicant maintains that the challenged provision is inconsistent with the standards of the protection of human rights as established by the Constitutional Court. Concurrently, she proposes that the Constitutional Court – provided that it also raises doubt as to the conformity of Directive (EU) 2016/681 with the Charter – initiate a procedure for a preliminary ruling in accordance with Article 267 of Directive (EU) 2016/681 (consolidated version, OJ C 202, 7 June 2016 – hereinafter referred to as the TFEU).

III The relevant provisions of EU law

10. Articles 7 and 8 and the first paragraph of Article 52 of the Charter determine the following:

Article 7
Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8
Protection of Personal Data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 52
Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

[...]

11. In its relevant provisions, Directive (EU) 2016/681 states the following:

Article 6
Processing of PNR data

1. The PNR data transferred by the air carriers shall be collected by the passenger information unit of the relevant Member State as provided for in Article 8. Where the PNR data transferred by air carriers include data other than those listed in Annex I, the passenger information unit shall delete such data immediately and permanently upon receipt.

[...]

ANNEX I

Passenger name record data as far as collected by air carriers

[...]

8. Frequent flyer information

[...]

12. General remarks (including all available information on unaccompanied minors under 18 years, such as name and gender of the minor, age, language(s) spoken, name and contact details of guardian on departure and relationship to the minor, name and contact details of guardian on arrival and relationship to the minor, departure and arrival agent)

IV The relevant provisions of the Constitution and of the national legislation

12. Article 38 of the Constitution reads as follows:

Article 38 (Protection of Personal Data)

The protection of personal data shall be guaranteed. The use of personal data contrary to the purpose for which it was collected is prohibited.

The collection, processing, designated use, supervision, and protection of the confidentiality of personal data shall be provided by law.

Everyone has the right of access to the collected personal data that relates to him and the right to judicial protection in the event of any abuse of such data.

13. The provisions of the PTPA below, which also include the challenged provision, were, in addition to the Act Amending the Aviation Act (Official Gazette RS, No. 47/19 – hereinafter referred to as the AA-E)³ and the Personal Data Protection Draft Act (PDPA-2)⁴, a part of the legislative plan for transposing Directive (EU) 2016/681. The legally relevant provisions of the PTPA read as follows:

Article 2

³ The amendment entered into force on 10 August 2019.

⁴ EVA 2018-2030-0045 – at the time of the decision-making of the Constitutional Court, this legislative proposal had not yet been adopted.

(transposition of European Union regulations)

[...]

(2) This Act transposes into the legal order of the Republic of Slovenia Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (OJ L 119, dated 4 May 2016, p. 132), in the part that regulates the processing, collection, use, and retention of PNR data by the competent authority of the state and the exchange of information.

[...]

5. COLLECTION AND PROCESSING OF DATA

**Article 112
(Collection of data)**

(1) In the performance of police tasks, police officers shall collect and process personal and other data [...].

[...]

**Article 112b
(The collection and processing of data from the passenger record from the airline ticket reservation system (PNR))**

(1) The Police shall collect the information referred to in point 31 of the first paragraph of Article 125 of this Act (hereinafter referred to as passenger information from the airline ticket reservation system) for all regular and charter flights of air carriers who perform their transport activity from third states or from EU states to the territory of the Republic of Slovenia and in the opposite direction, or with a stopover in the territory of the Republic of Slovenia.

(2) The Police shall collect and process the information referred to in the preceding paragraph in order to prevent, detect, investigate, and prosecute terrorist and other serious criminal offences determined by Article 112č of this Act.

(3) The personal data of passengers referred to in point 31 of the first paragraph of Article 125 of this Act shall be compared to confirm the real identity of the passengers to whom these data refer.

(4) The national passenger information unit shall process, with the purpose determined by the second paragraph of this Article, passenger information from the airline ticket reservation system:

– by checking and assessing passengers prior to their arrival in the territory of the Republic of Slovenia or prior to their departure from this territory in order to identify those passengers regarding whom the Police and other competent authorities should perform a security check, considering the fact that they might participate in committing a terrorist or some other serious criminal offence;

– by performing analytical processing of such data in order to formulate new non-discriminatory assessment criteria or to update the assessment criteria in force in order to identify those passengers who might participate in committing a terrorist or some other serious criminal offence;

– by transmitting these data in order for the Police or other competent authorities to carry out the necessary activities in individual cases.

(5) The verification and assessment of passengers from the airline ticket reservation system referred to in the first indent of the preceding paragraph shall be performed such that these data are first automatically verified by assessment criteria determined in advance and in the following police records referred to in the second paragraph of Article 123 of this Act:

- the record of criminal offences;
- the record of operational information;
- the record of persons against whom undercover investigative measures have been taken on the basis of the Act governing criminal procedure;
- the record of discreet and specific checks;
- the record of measures ordered by courts.

(6) All the matches that result from the automated processing of data referred to in the preceding paragraph shall also be individually verified by non-automated means in order for their relevance and accuracy to be verified.

(7) The assessment criteria referred to in the second indent of the fourth paragraph of this Article shall be drafted on the basis of analytic processing of data acquired in conformity with law and represent specific travel patterns of the perpetrators of terrorist and other serious criminal offences and of the victims, and hence enable directed work by the Police and other authorities competent to deal with such persons. The assessment criteria are formulated and continuously updated on the basis of a written and reasoned risk assessment by the national passenger information unit in cooperation with other police units and other

authorities from the list referred to in the eighth paragraph of Article 112c of this Act.

[...]

Article 123 (Police records)

(1) The Police shall manage and keep records of personal and other data collected and processed by police employees in the performance of police tasks.

(2) The Police shall keep and maintain the following records in connection with the exercise of police powers:

[...]

31. a passenger record from the airline ticket reservation system (PNR)

[...]

Article 124 (Common personal data in records)

(1) The records referred to in the preceding Article may contain the following common personal data:

- full name;
- birth data (day, month, year, and location);
- personal identification number, or the number, type, and state issuing the identity document for foreign citizens;
- gender;
- address of permanent and/or temporary residence;
- identification code of the person kept in police records;
- nationality.

(2) The records referred to in the preceding Article may contain the following common data of sole proprietors, self-employed persons, legal entities, and state authorities:

- corporate name;
- legal form of organisation;
- head office;
- registration number; and
- tax number.

Article 125 (Content of records)

In addition to the data referred to in the preceding Article, additional personal data and other data, as provided by this Act, shall be processed in individual records:

[...]

31. the passenger record from the airline ticket reservation system (PNR): the date an airline ticket is reserved, the date and location of issuance and other data from the airline ticket, the identification number of the passenger from the air carrier's information system, addresses and other contact data from the airline ticket reservation, any pseudonyms of the passenger, the travel status of the passenger, including confirmations, check-in status, information on unused and uncanceled reservations and information on airline tickets without a reservation, information on the type of payment used to buy the airline ticket, including the billing address, information regarding the seat and baggage of the passenger, information relating to frequent flyer programmes, information on other particularities connected with the passenger, the planned travel date, the full itinerary, information regarding the flight, including information regarding flights with codesharing, the number of other passengers connected to the same reservation and their names, information on the disassociation of a joint reservation of airline tickets due to a change in or cancellation of the itinerary of one or more passengers, information on the travel agency or travelling agent, all subsequent changes to information and all information collected on a passenger who has checked in (API): flight information, the planned and actual date, time, and location of departure and arrival, the total number of passengers onboard, the travel status of the passenger on the plane, the type, number, issuing state, and date of expiry of the travel document, the location where the passenger boards and embarks, the border crossing where the passenger enters the territory of a Member State, information regarding the seat and baggage of the passenger, and the passenger identification number from the air carrier's information system; [...]

B

V The powers of the Constitutional Court and the position of the applicant in the proceedings before the Constitutional Court

14. On the basis of the first and second indents of the first paragraph of Article 160 of the Constitution, the Constitutional Court is competent to decide on the conformity of laws with the Constitution, ratified treaties, and generally accepted principles of international law. The Constitutional Court has the power to abrogate laws in whole or in part (the first paragraph of Article 161 of the Constitution). Such abrogation takes effect immediately or within a period of time determined by the Constitutional Court that is not longer than one year (the second paragraph of Article 161 of the Constitution).

15. The fifth indent of the first paragraph of Article 23a of the Constitutional Court Act in conjunction with the second paragraph of Article 162 of the Constitution determines that the Ombudsman for Human Rights may initiate, by a request, a procedure for the review of the constitutionality of a regulation or general act issued for the exercise of public authority if she deems that a regulation inadmissibly interferes with human rights or fundamental freedoms. The Ombudsman demonstrates her active standing to file a request with the Constitutional Court by merely assessing that there is an inadmissible interference with human rights or fundamental freedoms. By filing the request for a review of the constitutionality of the PTPA, she substantiated her assessment. Thus, the procedural requirements for the Constitutional Court to decide whether the request is well founded are fulfilled.

VI The established case law regarding the right to the protection of personal data

16. From the Personal Data Protection Act (Official Gazette RS, No. 94/07 – official consolidated text – hereinafter referred to as the PDPA-1), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4 May 2016 – hereinafter referred to as Regulation (EU) 2016/679), and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4 May 2016 – hereinafter referred to as Directive 2016/680), which adopted a broad, all-inclusive definition, it follows that any information relating to a determined or determinable individual entails personal data, where a determinable individual is one that can be directly or indirectly determined.⁵ Information from the “passenger record from the airline ticket reservation system (PNR)”⁶ and the “passenger name record data as far as collected by air carriers”⁷ entail personal data, as they evidently refer to a determined individual. Collecting, storing, and other activities or a string of activities performed in connection therewith entail the processing of personal data.⁸ It follows from the case law of the Court of Justice that respect for the right to one’s

⁵ Cf. point 1 of Article 4 of Regulation (EU) 2016/679, point 1 of Article 3 of Directive (EU) 2016/680, and points 1 and 2 of Article 6 of the PDPA-1. See also Opinion No. 4/2007 of Article 29 Working Party on the definition of the term “personal data”.

⁶ Point 31 of Article 125 of the PTPA.

⁷ Annex I to Directive (EU) 2016/681.

⁸ Cf. point 2 of Article 4 of Regulation (EU) 2016/679, point 2 of Article 3 of Directive (EU) 2016/680, and point 3 of Article 6 of the PDPA-1.

private life relating to personal data determined by Articles 7 and 8 of the Charter refers to all information regarding a determined or determinable natural person.⁹

17. In accordance with the established constitutional case law, any processing of personal data entails an interference with the constitutional right to the protection of personal data determined by Article 38 of the Constitution.¹⁰

18. The second paragraph of Article 38 of the Constitution requires that the processing of personal data be subject to statutory regulation.¹¹ An interference with the right to the protection of personal data is admissible if the law, *inter alia*, precisely determines which data may be collected and processed.¹²

19. The requirement that the processing of personal data be subject to statutory regulation does not signify the mere existence of a statutory provision that enables the processing of personal data in a certain manner; instead, such a statutory provision must also be in conformity with those principles of a state governed by the rule of law determined by Article 2 of the Constitution which require that provisions be defined sufficiently clearly and precisely so that they can be implemented in practice, so that they do not allow arbitrary actions by the executive branch of power, and so that they determine in an unambiguous manner and with sufficient precision the legal position of the subjects to whom they refer. In a regulation that refers to the delicate field of information privacy which the state interferes with by collecting personal data, the requirement that provisions be sufficiently clear and precise so as to establish the meaning of the regulation holds special importance.¹³

⁹ See the Judgment of the Court of Justice in the joined cases *Volker and Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, C-92/09 and C-93/09, dated 9 November 2010, Para. 52, and the Judgments of the European Court of Human Rights (hereinafter referred to as the ECtHR) mentioned therein.

¹⁰ Decision of the Constitutional Court No. U-I-411/06, dated 19 June 2008 (Official Gazette RS, No. 68/08, and OdlUS XVII, 43), Para. 19 of the reasoning.

¹¹ Decisions of the Constitutional Court No. U-I-238/99, dated 9 November 2000 (Official Gazette RS, No. 113/2000, and OdlUS IX, 257), Para. 16 of the reasoning, No. U-I-92/01, dated 28 February 2002 (Official Gazette RS, No. 22/02, and OdlUS XI, 25), Para. 25 of the reasoning, No. U-I-298/04, dated 27 October 2005 (Official Gazette RS, No. 100/05, and OdlUS XIV, 77), Para. 7 of the reasoning, No. U-I-57/06, dated 29 March 2007 (Official Gazette RS, No. 33/07, and OdlUS XVI, 22), Para. 62 of the reasoning, and No. U-I-411/06, Para. 62 of the reasoning, and Partial Decision No. U-I-152/17, dated 4 July 2019 (Official Gazette RS, No. 46/19), Para. 22 of the reasoning.

¹² Decisions of the Constitutional Court No. U-I-238/99, Para. 18 of the reasoning, and Partial Decision of the Constitutional Court No. U-I-152/17, dated 4 July 2019 (Official Gazette RS, No. 46/19), Para. 22 of the reasoning.

¹³ See Partial Decision No. U-I-152/17, dated 4 July 2019 (Official Gazette RS, No. 46/19), Paras. 23 and 24, and the case law of the Constitutional Court and the ECtHR cited therein.

20. From the established case law of the ECtHR there follows the requirement determined by the second paragraph of Article 8 of the ECHR that an interference must be lawful; the measure must be predictable in the sense that its provisions are sufficiently detailed, clear, and precise for citizens to be able to know under what conditions and under what circumstances state authorities may carry out the measure in question, while the national law must include, in conformity with the principle of a state governed by the rule of law, appropriate and effective safeguards against arbitrary interferences and abuses.¹⁴ In conformity with the case law of the ECtHR, measures that entail an interference with the right to the protection of personal data must be based on clear and precise norms that determine the scope and employment of the measure, as well as minimum requirements as regards the duration thereof, data retention, use, third party access [to the data], procedures for ensuring the completeness and confidentiality of the data, and the procedure for destroying the data. It is precisely in such a manner that sufficient guarantees against the risk of abuse and discretion are ensured. In accordance with the case law of the ECtHR, only measures that are based on the described legal standards determined by law can be deemed necessary in a democratic society.¹⁵

21. Similar also follows from the established case law of the Court of Justice. The requirement that any limitation of the exercise of fundamental rights be prescribed by law is only fulfilled if the legal basis that enables an interference with these rights determines by itself the scope of the limitation of the exercise of the right at issue. As regards respect for the principle of proportionality, protection of the fundamental right to respect for one's private life requires that any departure from the protection of personal data and the limitation thereof be determined within the limits of what is strictly necessary. To this end, the regulation must determine clear and precise rules that determine the scope and application of the measure concerned as well as the minimum requirements, such that persons whose data have been transmitted have at their disposal sufficient guarantees enabling effective protection of their personal data from the risk of abuse. In particular, the regulation must determine in what circumstances and under what conditions it is possible to adopt a measure that determines the processing of such data, which ensures that the interference is limited to what is strictly necessary. The necessity that such safeguards exist is all the more important if personal data are processed automatically.¹⁶

¹⁴ The ECtHR Judgment in *Benedik v. Slovenia*, dated 24 April 2018, Para. 122 of the reasoning (and the judgments cited therein).

¹⁵ The ECtHR Judgments in *S. and Marper v. the United Kingdom*, dated 4 December 2008, Para. 99 of the reasoning, and *Surikov v. Ukraine*, dated 26 January 2017, Para. 73 of the reasoning.

¹⁶ See Opinion of the Court of Justice No. 1/15, dated 26 July 2017, Paras. 139–141 of the reasoning, and the case law cited therein.

VII The reasons for filing a request for a preliminary ruling (continuity) and the reservations as to the validity of the provisions of Directive (EU) 2016/681

22. By joining the European Union the Republic of Slovenia transferred the exercise of part of its sovereign rights to international organisations on the basis of Article 3a of the Constitution.¹⁷ The third paragraph of Article 3a of the Constitution determines that legal acts and decisions adopted within the framework of the European Union shall be applied in accordance with the legal regulation of the European Union.¹⁸ This provision also obligates the Constitutional Court, when exercising its competences, to observe the law of the European Union, as it is.¹⁹

23. The challenged provisions of the PTPA, as will be explained below, transpose the obligations imposed by Directive (EU) 2016/681, i.e. the exercise thereof entails the application of EU law. Considering that in accordance with the first paragraph of Article 51 of the Charter the provisions thereof are to be applied by Member States when implementing European Union law, this is another aspect [confirming] that the application of European Union law is at issue.

24. The Constitutional Court has already adopted the position that its competence to review the constitutionality of regulations that transpose directives into the internal legal order is not excluded.²⁰

¹⁷ Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ L 236, 23. September 2003, and Official Gazette RS, No. 12/04, MP, No. 3/04).

¹⁸ The third paragraph of Article 3a of the Constitution determines: "Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations."

¹⁹ See Decision of the Constitutional Court No. U-I-146/12, dated 14 November 2013 (Official Gazette RS, No. 107/13, and OdlUS XX, 10).

²⁰ See Order of the Constitutional Court No. U-I-113/04, dated 7 February 2007 (Official Gazette RS, No. 16/07, and OdlUS XVI, 16), and Decision of the Constitutional Court No. U-I-37/10, dated 18 April 2013 (Official Gazette RS, No. 39/13).

25. In view of the fact that the allegations that the statutory provisions are unconstitutional substantively entail an allegation that the provisions of Directive (EU) 2016/681 are inconsistent with the provisions of Articles 7 and 8 of the Charter, the decision on the validity of this Decision is of key importance for the review of the constitutionality of the provisions of the national legislation. On the basis of point (b) of the first paragraph of Article 267 of the TFEU, the Court of Justice has exclusive jurisdiction to adjudicate on the validity of the Directive.²¹ Since in the case at issue a question regarding the validity of Directive (EU) 2016/681 is raised, the answer of the Court of Justice to this question is of key importance for the further decision-making of the Constitutional Court.

26. At the time of conducting the proceedings at issue, the Court of Justice had not yet ruled on the validity of Directive (EU) 2016/681 with respect to its conformity with Articles 7 and 8 of the Charter. However, a question regarding the validity of Directive (EU) 2016/681 has by now already been submitted to the Court of Justice for a preliminary ruling in cases C-817/19, C-148/20, C-149/20, and C-150/20.

Point 8 of Annex I to Directive (EU) 2016/681 – “frequent flyer information”

27. According to the Government and the file from the legislative procedure concerning the PTPA-B and the AA-E, the “frequent flyer information” from the passenger record from the airline ticket reservation system (PNR) referred to in point 31 of Article 125 of the PTPA entails the transposition of point 8 of Annex I to Directive (EU) 2016/681, which in the Slovene language version is called “*informacije v zvezi s programi za pogoste potnike*” [“frequent flyer information”]. The Government claims that this heading only includes the status of a frequent flier.

28. The interpretation of the provisions of Union law also includes a comparison of different language versions.²² A comparison of, for instance, the English (“*Frequent flyer information*”), German (“*Vielflieger-Eintrag*”), French (“*Informations 'grands voyageurs'*”), or Croatian versions (“*Podaci o programima vjernosti*”) does not dispel the reservations as to whether the disputed heading only means what the Government claims it means in the proceedings at issue, i.e. only whether a person has the status of a frequent flier and is included in a frequent flier programme (which is what the German version could perhaps suggest) or, on the contrary, whether it also includes other information (the Croatian version) or information relating to flights and reservations included in such a programme (the English, French, and Slovene versions). The Slovene, Croatian, and French versions employ the plural noun form, although in all three languages there also exists a singular noun form of the nouns “*informacija*” [“information”] or “*podatek*” [“piece

²¹ The Constitutional Court has also stated the same in Order No. U-I-114/04, dated 8 July 2004.

²² The Judgment of the Court of Justice in *Srl Cilfit and Others*, C-283/81, dated 6 October 1982, Para. 18 of the reasoning.

of data”] (as opposed to the English version, in which [information] is a mass noun). This may indicate that this heading can contain more [information] than merely the status of a passenger. In the proceedings, the Government referred to the established international standards and guidelines with respect to the elements of PNR data. From the ICAO guidelines²³ it follows that *frequent flyer information* includes the number of the account and the status of the passenger (*frequent flyer account number and elite status*).

29. On the basis of the above, the question is hence raised whether this heading only means that a person has the status of a frequent flier and is included in a frequent flier programme or perhaps also includes other information relating to flights and reservations from that programme. Since the answer to this question is not manifestly clear, in the opinion of the referring court the mentioned provision raises doubt as to whether it fulfils the requirement that any departure from the protection of personal data and the limitations thereof are determined within the limits of what is strictly necessary, as otherwise follows from the established case law of the Court of Justice.²⁴ In order for this requirement to be fulfilled, a regulation that includes an interference must determine clear and precise rules that determine the scope and application of the measure at issue.²⁵ In the mentioned Opinion No. 1/15, in which the Court of Justice assessed the validity of a draft agreement between the EU and Canada, *inter alia* also as regards the heading “available frequent flyer and benefit information (free tickets, upgrades, etc.)”, it adopted the following position:

155. So far as the data covered by the envisaged agreement is concerned, that agreement should define in a clear and precise manner the PNR data which the air carriers are required to transfer to Canada under the agreement.

156. In this connection, although the 19 PNR data headings set out in the Annex to the envisaged agreement correspond, according to the observations of the Commission, to Appendix 1 to the Guidelines of the International Civil Aviation Organisation (ICAO) on PNR data, it should nonetheless be stated, as the Advocate General has observed in point 217 of his Opinion, that heading 5, which refers to ‘available frequent flyer and benefit information (free tickets, upgrades, etc.)’, [...] do not define in a sufficiently clear and precise manner the PNR data to be transferred.

157. Thus, as regards heading 5, the use of the term ‘etc.’ does not specify to the requisite standard the scope of the data to be transferred. Furthermore, it is not clear from the terms of that heading whether it covers information concerning merely the status of air passengers in customer loyalty programmes or whether,

²³ ICAO Guidelines on Passenger Name Record (PNR) Data (Doc 9944).

²⁴ Opinion of the Court of Justice No. 1/15, dated 26 July 2017, Para. 140 of the reasoning.

²⁵ *Ibidem*, Para. 141 of the reasoning.

on the contrary, it covers all information relating to air travel and transactions carried out in the context of such programmes.

30. In the opinion of the referring court, this finding can also be applied to the case at issue. Even though point 8 of Annex I to Directive (EU) 2016/681 does not contain the term “etc.” the way heading 5 in the draft agreement between the EU and Canada does, it nevertheless remains open what the scope of such information is.

31. In fact, Opinion No. 1/15 of the Court of Justice was adopted after Directive (EU) 2016/681 entered into force. The European legislature did not change or amend this Directive to accord with the requirements that follow from Opinion No. 1/15 of the Court of Justice. However, in the assessment of the Constitutional Court, this does not also mean that the positions in Opinion No. 1/15 of the Court of Justice do not also apply to the PNR measure established by Directive (EU) 2016/681. The exact opposite is true; there exists uncertainty as to whether the Court of Justice would also interpret that measure the same way as in Opinion No. 1/15 of the Court of Justice.

32. Although the subject matter [in that Opinion] was an assessment of an international agreement, the referring court opines that the positions of the Court of Justice are also relevant in the case at issue; since the right to the protection of personal data also requires that the continuity of a high level of protection of fundamental rights and freedoms as determined by Union law be ensured in the event of the transfer of personal data from the Union to third countries,²⁶ the same applies *a fortiori* to the measures that the Union itself adopts.

33. On the basis of the above, the referring court questions whether the mentioned heading is determined so clearly and precisely that any interference with the right to the protection of personal data is limited to what is “strictly necessary”, as follows from the established case law of the Court of Justice. Therefore, the referring court decided to submit the question contained in point (a) of the operative provisions [to the Court of Justice] for a preliminary ruling.

Point 12 of Annex I to Directive (EU) 2016/68 – “general remarks”

34. In the opinion of the Government and the National Assembly, and in accordance with the legislative draft of the AA-E, the second disputable piece of data referred to in point 35 of Article 125 of the PTPA (“information regarding other possible particularities connected with the passenger”) entails the transposition of point 12 of Annex I to Directive (EU) 2016/681, which reads as follows:

12. General remarks (including all available information on unaccompanied minors under 18 years, such as name and gender of the minor, age, language(s))

²⁶ *Ibidem*, Para. 134 of the reasoning.

spoken, name and contact details of guardian on departure and relationship to the minor, name and contact details of guardian on arrival and relationship to the minor, departure and arrival agent).

35. In this respect, the referring court draws attention to the position of the Court of Justice in Opinion 1/15, paragraph 160:

As regards heading 17, that heading refers to ‘general remarks including Other Supplementary Information (OSI), Special Service Information (SSI) and Special Service Request (SSR) information’. According to the explanations provided, *inter alia*, by the Commission, that heading constitutes a ‘free text’ heading, intended to include ‘all supplementary information’, in addition to that listed elsewhere in the Annex to the envisaged agreement. Consequently, such a heading provides no indication as to the nature and scope of the information to be communicated, and it may even encompass information entirely unrelated to the purpose of the transfer of PNR data. Furthermore, since the information referred to in that heading is listed only by way of example, as is shown by the use of the term ‘including’, heading 17 does not set any limitation on the nature and scope of the information that could be set out thereunder. In those circumstances, heading 17 cannot be regarded as being delimited with sufficient clarity and precision.

36. The wording of point 17 of the information element of the draft agreement between the EU and Canada and that of point 12 of Annex I to Directive (EU) 2016/681 otherwise differ. However, also in point 12 the collocation “*vključno z*” [“including”] in the Slovene, “*including*” in the English, “*einschließlich*” in the German, and “*uključujući*” in the Croatian versions may indicate that the information is listed as an example, and [the collocation] does not also determine a limitation as to the nature and scope of the information that it can contain. Hence, the cited position of the Court of Justice can also be applied to the case at issue.

37. Therefore, the question is raised whether point 12 of Annex I to Directive (EU) 2016/681 is determined so clearly and precisely that any interference with the right to the protection of personal data is limited to what is “strictly necessary”, as follows from the established case law of the Court of Justice. On the basis of the above, the referring court decided to submit the question contained in point (b) of the operative provisions [to the Court of Justice] for a preliminary ruling.

B – VIII Staying the proceedings to review the constitutionality of the challenged provisions

38. In view of the reservations as to the conformity of the measure determined by Directive (EU) 2016/681 with primary European Union law, the Constitutional Court cannot decide on the case until the Court of Justice, which has exclusive jurisdiction to adjudicate on the validity of the mentioned Directive, decides on its validity. Therefore, the

Constitutional Court submitted the questions contained in the operative provisions of this Order (Point 1 of the operative provisions) [to the Court of Justice] for a preliminary ruling, and stayed the proceedings to review the constitutionality of the challenged provisions of the PTPA (Point 2 of the operative provisions) until the Court of Justice adopts a decision.

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39. The Constitutional Court adopted this Order on the basis of Article 267 of the TFEU in conjunction with the third paragraph of Article 3a of the Constitution and the second paragraph of Article 41 of the CCA, composed of: Dr Rajko Knez, President, and Judges Dr Matej Accetto, Dr Rok Čeferin, Dr Dunja Jadek Pensa, Dr Špelca Mežnar, Dr Marijan Pavčnik, Marko Šorli, and Dr Katja Šugman Stubbs. The Order was adopted unanimously.

Dr Rajko Knez
President