CAIDP Update 3.14 (June 23, 2022) – *CJEU PNR Ruling Prohibits Machine Learning Techniques*

The Court of Justice of the European Union has ruled, in a case concerning the Passenger Name Records Directive, that Member States may continue to collect the personal data of air travelers but on a narrowed basis. (Case 817/19). In essence, the Court ruled that respect for fundamental rights required that data collection be limited to that which is strictly necessary. The practical consequence will be to significantly limit the scope of the controversial Directive which allows broad access to personal data without individualized suspicion. The Ligue des droits humans (LDH) challenged the Directive, arguing that the law infringes on the right to privacy and the right to data protection. Several experts and NGOs anticipated that the Court would strike down the PNR Directive.

Nonetheless, in upholding the Directive, the Court of Justice has made several important determinations about the use of machine learning techniques for processing of personal data. The Court effectively prohibited the use of machine learning techniques to make determinations as to who may be detained under the authority of the Directive. The Court explained that the very wording of the Directive requires "pre-determined" criteria. (Par. 194) As the Advocate General earlier observed, "that requirement precludes the use of artificial intelligence technology in self-learning systems ('machine learning'), capable of modifying without human intervention or review the assessment process." The Court said this also precluded modification of the assessment criteria as well as the weighting of those criteria.

The Court further stated "given the opacity which characterises the way in which artificial intelligence technology works, it might be impossible to understand the reason why a given program arrived at a positive match." (Par. 195). As a consequence, the "use of such technology may deprive the data subjects also of their right to an effective judicial remedy."

The Court emphasized the error inherent in automated processing. The Court said that member states must set out "clear and precise rules" capable of providing guidance and support. (Par. 205). The Court reiterated that a person's race or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, health, sexual life or sexual orientation could not provide the basis for a determination. The criteria must "target, specifically, individuals who might be reasonably suspected of involvement in terrorist offences or serious crime covered by that directive" and such criteria must "take into consideration both 'incriminating' as well as 'exonerating' circumstances." (Pars. 198, 200) The Court emphasized the need for effective judicial remedies in the case of adverse decisions. (Par. 210)

An earlier *CAIDP Update* observed that the rulings of the European Court of Justice are likely to have global consequences for AI law and policy. (*EU Privacy Decision Will Have Global Consequences*, CAIDP Update 1.01). With other countries now considering the deployment of AI systems for profiling and screening, the opinion of the European Court of Justice in the PNR case sends a clear message: machine learning techniques may simply be incompatible with the protection of fundamental rights.