

DFF

Digital
Freedom Fund

The Digital Freedom Fund (DFF) supports partners in Europe to advance digital rights through strategic litigation. This is one of a series of case studies, which highlight the work of DFF's grantees working to protect digital rights.

Key actors

Gesellschaft für Freiheitsrechte (GFF)

GFF, based in Germany, uses strategic litigation to ensure that human rights are respected and protected in Germany and across Europe. GFF argues that the *Fluggastdatengesetz*, the law implementing the Passenger Name Record Directive in Germany, violates the Charter of Fundamental Rights of the EU. GFF is pursuing two lines of litigation: through administrative courts and through civil lawsuits.

epicenter.works

epicenter.works, based in Austria, seeks to uphold and protect digital rights. epicenter.works is filing fifteen administrative complaints with the Austrian Data Protection Authority against the Austrian police, which is the agency in Austria responsible for storing, processing and forwarding PNR data. It argues that the Austrian implementing law, the *PNR-Gesetz*, violates the Charter of Fundamental Rights of the EU as well as Austrian constitutional law and data protection laws.

De Capitani and others v. Federal Republic of Germany, Criminal Police Office of Austria and others

Case facts at a glance

Co-ordinating NGOs

Gesellschaft für Freiheitsrechte (GFF), Germany,
and epicenter.works, Austria.

Case goal

The primary objective is to get the Court of Justice of the European Union to invalidate the Passenger Name Record (PNR) Directive.

Case background

A Passenger Name Record (PNR) is a unique set of data that captures information about airline passengers. It covers personal data, such as email addresses, phone numbers, credit card data, travel companions, IP addresses and even on-board meal choices.

In 2016, the Council of the European Union enacted EU Directive 2016/681 (known as “the PNR Directive”), which requires EU states to collect PNR data for flights in and out of the EU. Some states are even collecting PNR data for flights within the EU as well.

The information is transferred to a passenger information unit (PIU) in each EU country, where it is analysed and compared with other data sets to target suspects and wanted persons. After six months, the data is depersonalised and after five years the data is deleted.

GFF and epicenter.works are concerned that the collection and analysis of PNR data amounts to illegal mass surveillance. They are supporting cases that argue that the PNR Directive could lead to discrimination and violations of the right to privacy.

“ **The PNR Directive violates the basic right to privacy and puts everyone under generalised suspicion. The data collection is vast, and there is potential to misuse the data sets.** ”

Sabrina Burtscher, student of Media and Human Centred Computing at Vienna University of Technology, and a lead plaintiff in Austria

Travel data, surveillance and the right to privacy

Counter-terrorism is high on the agenda within the EU; particularly following terrorist attacks in major cities such as Paris and London. This has prompted measures to ensure the detection, prevention, investigation and prosecution of terrorist offences.

The PNR Directive is one such measure. On the face of it, the Directive responds to a legitimate goal to protect our society from terrorism. But a growing number of people and organisations are questioning how necessary and proportionate the measure really is.

When travelling from place to place, all airline passengers deserve to feel safe and protected. They also have the right to be free from discrimination and to have their privacy respected. The PNR Directive risks being deeply intrusive by collecting mass-scale personal data. There is a risk that the algorithms used to analyse the data could result in misleading and discriminatory conclusions, based on erroneous assumptions from data such as names, countries that a person has travelled from, onward destinations and food choices.

“ **The EU PNR Directive is so ambiguous that it violates the principle of legal certainty as defined by the European Court of Human Rights and by the Court of Justice.** ”

Emilio de Capitani, former head of the secretariat of the Committee on Civil Liberties, Justice and Home Affairs in the European Parliament, and a lead plaintiff for GFF's case against the German Federal Police

Preventing illegal mass surveillance and raising awareness of data privacy

GFF and epicenter.works hope to demonstrate that full-scale data retention is illegal and violates human rights. They consider this a pan-European problem, which is why they have collaborated on litigation with a view to taking the issue to the Court of Justice of the European Union.

The primary objective of the litigation is to get the Court of Justice to invalidate the PNR Directive. But even if the cases are successful, there are still likely to be national implementation laws to contend with at a later date.

The organisations also hope to raise awareness about the PNR Directive through their litigation. They want to encourage discussion with the general public to demonstrate that many people, not just politicians and NGOs, are interested in and affected by this topic.

“ **There is talk of expanding the PNR to all transnational transportation, like trains and ferries. We hope that this litigation could help avoid such an expansion of data collection to other areas.** ”

Malte Spitz, GFF

DFF's support



Financial assistance

DFF provided financial assistance to GFF and epicenter.works, which enabled them to bring cases before the first instance courts and data protection authorities in Germany and Austria. DFF's support allowed the organisations to expand their strategy and bring multiple cases.



Strategy meeting

GFF discussed their work on the case at DFF's 2018 strategy meeting. GFF and epicenter.works explored avenues for future collaboration at the meeting, which subsequently led to mutual litigation support and a joint communications strategy.



Litigation retreat

DFF organised a litigation retreat in Montenegro which was a valuable opportunity to connect with others working on strategic litigation in similar areas.

“ **Without DFF funding we would not have been able to take on the cases. The DFF litigation retreat was also a very positive experience. It provided the opportunity for us to meet other lawyers and exchange strategies and ideas with others engaged in similar litigation efforts.** ”

Angelika Adensamer, epicenter.works