**Eroding Germany’s Commitment to Data Protection: Policy Entrepreneurs and Coalition Politics in EU Passenger Name Records**

ARIADNA RIPOLL SERVENT and ALEX MACKENZIE

*A history of totalitarian governments and state surveillance appear to have made Germans sensitive towards the uses of personal data. Because of such concerns, Germany often acted as an obstacle to security measures requiring personal data at the EU level. However, we have observed a recent sea-change in Germany over EU Passenger Name Records (EU-PNR), a measure that requires the personal data of airline passengers for security purposes. Many in Berlin have moved from lukewarm at the time of the first EU-PNR proposal in 2007 to advocating it in 2014. We draw on Kingdon’s Multiple Streams Framework (MSF) to examine this change in position, comparing two government coalitions – the CDU/CSU-FDP (2009-2013) with the CDU/CSU-SPD (2013-) – to show how actors within the CDU/CSU have acted as policy entrepreneurs to ensure agreement on EU-PNR. We argue that the composition of governmental coalitions can act as a central condition that facilitates or hinders the success of policy entrepreneurs. While the position of the FDP blocked any progress on EU-PNR in the former coalition, policy entrepreneurs used the willingness of the SPD to show voters their support for tougher security measures, thereby ensuring Germany’s support for EU-PNR.*

A history of totalitarian governments and state surveillance by the Gestapo and Stasi appear to have made Germans sensitive towards the uses of personal data. In a worrying development for many, gathering of personal data has become a hallmark of post-9/11 national security policies, but Germany has often seemed reluctant to adopt such practices. A number of measures requiring personal data have been agreed at the EU level over the past fifteen years, many of which have proven controversial in Germany. Consistent with previous behaviour, Germany was initially lukewarm towards the proposal for an EU Passenger Name Records (EU-PNR), a controversial security tool that has been under discussion in the EU for about a decade. However, over time, Germany has shifted towards a more positive stance on EU-PNR. This article seeks to examine the reasons behind this change in Germany’s stance.

Like other West European states, Germany experienced many terrorist incidents in the second half of the twentieth century and has also faced a number of plots since 9/11, but until recently it has generally maintained its stance on the importance of protecting personal data. By contrast, the UK and Spain have been two of the main drivers in the EU development of EU counter-terrorism and shown less concern about protecting personal data.[[1]](#endnote-1) Wenzelburger and Staff underline the importance of key institutional veto powers like the Bundesrat and the Federal Constitutional Court (FCC) to explain why it has proven difficult for various executives to introduce more repressive policies in Germany.[[2]](#endnote-2) Therefore, in this article, we look to gain more of an understanding of how the positions of the member states come to be and how they interact at the EU level. To help us examine the change in the German position, we adapt the Multiple Streams Framework (MSF)[[3]](#endnote-3) to explain how policy-makers from the CDU/CSU have acted as policy entrepreneurs both at the German and EU level to ensure explicit support for security measures such as EU-PNR. We compare the efforts of these policy entrepreneurs in two coalition governments *–* the CDU/CSU-FDP (2009-2013) with the CDU/CSU-SPD (2013-) *–* in order to explain how changes in the political stream can determine the success or failure of their strategies. We argue that the presence of formal coalition agreements on EU-PNR and the clear-cut position of the FDP on matters of data protection hindered the efforts of the Christian democrats to convince their coalition partners of the necessity to support EU-PNR. In comparison, under the CDU/CSU-SPD coalition, the absence of formal coalition agreements on this issue and the willingness of the social democrats to show voters their support for tougher security measures made it easier for the CDU/CSU to play a more active role at the EU level. Therefore, the changes in the domestic political context made it easier to present EU-PNR as a necessary solution for the growing problem of European foreign fighters highlighted by the terrorist attacks in Belgium and France in 2014 and 2015.

This paper is structured in four sections. The first part presents the MSF and provides the tools to help us explain the change in Germany’s position towards EU-PNR. The second section focuses on the EU’s Area of Freedom, Security, and Justice (AFSJ), Germany’s historic commitment to data protection and civil liberties, and the path to EU-PNR. The third section considers the extent to which the German position has changed on elements of the EU-PNR proposal. The final section assesses the aforementioned reasons behind the shift in the German position.

COUPLING MULTIPLE STREAMS: HOW POSITIONS ARE FORMED AT THE NATIONAL LEVEL

The MSF aims to understand policy outcomes by focusing on the role of policy entrepreneurs and their ability to use windows of opportunity to couple three main streams: problems, policies and politics. The *problem* stream looks at how certain issues become a problem and which actors bring them (successfully) to attention; the *policy* stream looks at how solutions to problems develop in a ‘policy primeval soup’ or are picked up from a ‘garbage can’ filled with half-baked solutions ‘waiting’ to be coupled to a new problem; finally, the *politics* stream focuses on the opportunities of policymakers to turn problems into solutions, looking, for instance, at the national mood or the influence of political parties.[[4]](#endnote-4) In this sense, it focuses on how ambiguity and time constraints affect policy-making and puts a particular emphasis on the relationship between actors and their institutional context.[[5]](#endnote-5) The MSF has been used for different types and levels of government[[6]](#endnote-6), but there are a number of areas that remain under-explored, one of which is coalition politics. Herweg et al. have extended the application of MSF to parliamentary systems by integrating party politics into the process of coupling problems, policies and politics and looking at coalition governments only as a factor for the agenda-setting stage. They consider, for instance, that the content and length of formal coalition agreements might be crucial to set (but not necessarily to determine) the agenda and guide the choice of problems and solutions.[[7]](#endnote-7) However, if we want to know how countries like Germany, where coalition governments are the norm, build a national position, we need to identify the policy entrepreneurs pushing for specific solutions and how they deal with potential conflicts or differences between coalition partners.[[8]](#endnote-8) To that effect, we want to ascertain the conditions under which policy entrepreneurs manage to use EU initiatives as windows of opportunity to push for specific positions and successfully couple policy and politics – that is, how they sell a solution to coalition partners. In addition, we investigate whether we need to widen the typical understanding of policy entrepreneurs as actors placed outside policy-making in such contexts, to include policy-makers (e.g. ministerial bureaucrats or members of the government) as well.[[9]](#endnote-9)

Which conditions can we expect to play a role in facilitating or hindering the efforts of policy entrepreneurs in building a national position under coalition governments? If we look at the problem stream, we can expect an EU proposal to act as a focusing event and provide a definition of the problem. However, this definition can be perceived differently at the national level; if it touches on core values of the member state or requires a deep reform of its policies or structures, we might expect more difficulties in framing a solution. This will be especially so if a coalition agreement contains no clues that can guide the formulation of such solution or if the solution provided in the formal agreement runs contrary to the wishes of the policy entrepreneur. Therefore, we expect that a high misfit between the EU and the member state, a lack of ready-made answers and a conflict of interests between the formal agreement and the policy entrepreneur will make it more difficult to effectively couple politics and policies. The political stream will be easier to couple with the problem and the policy solution if the policy entrepreneur can manipulate the solution so that it is part of an issue ‘owned’ by the party or parties in government or can make it appealing for electoral reasons, so that policy-makers are ready to bandwagon.[[10]](#endnote-10)

In order to better understand the process of building a German position on EU-PNR, we aim to investigate the main political entrepreneurs, the extent to which they had policy-making authority, what strategies they used to (attempt to) couple the three streams, and what conditions determined their success or failure. To do so, we first situate the role of Germany in the EU and specifically in the AFSJ to understand broader national moods and traditions that shaped the context of position-building.

Germany, protecting personal data, and PNR

Germany has been historically committed to high data protection standards. It enacted its first federal data protection law in 1977 and is ‘one of the most active countries in enforcing and regulating personal data collection and also a leader in the protection of its citizens from the power of automated personal data collection and aggregation’.[[11]](#endnote-11) Simultaneously and perhaps in tension with its data protection commitments, Germany has been heavily involved in European counter-terrorism efforts for decades and has on occasion pushed for greater co-operation. Germany’s involvement in the AFSJ has been viewed as a type of ‘venue shopping’, noticeably with the Prüm Convention on cross-border police cooperation in 2005.[[12]](#endnote-12) Even so, concern over the protection of personal data has never been completely dispensed with; Germany has often retained a critical distance from PNR agreements with third states and the EU-US SWIFT agreement, usually by way of abstaining in the Council. In doing so, Germany demonstrated its lukewarm perspective towards various security measures, while also avoiding an open conflict with other member states and the US.

An important example of resistance towards the use of personal data for law enforcement purposes was the German FCC’s decision to abrogate the EU Data Retention Directive (DRD) in 2010. The DRD was adopted in 2006 after the Madrid and London bombings, and it required telecommunication operators to store certain types of data for fighting serious crimes. Ultimately, the FCC ruled that: ‘the protection of communication does not include only the content but also the secrecy of the circumstances of the communication, including especially if, when and how many times some person ... contacted another or attempted to’.[[13]](#endnote-13) This decision initiated a process that culminated in the European Court of Justice (ECJ) invalidating the DRD in April 2014. This ruling will need to be taken into account in future data retention measures, such as EU-PNR, and it is, therefore, helping to shape the debate.

PNR data consist of information collected by air carriers about passengers when they make a booking, including name, seat number, and travelling route.[[14]](#endnote-14) PNR data has been by customs and law enforcement authorities for decades, but technological advances enabled the automation of data transfers. To date, four PNR agreements have been signed between the EU and US. In addition, the EU signed PNR agreements with Canada in 2006 and Australia in 2008. These agreements had to be re-negotiated after the Treaty of Lisbon because of the changed legal and political context, with the EU-US and EU-Australia agreements finalised in 2012 and the EU-Canada agreement referred to the ECJ in 2014. The ECJ’s decision on the EU-Canada PNR agreement could yet bring into question all PNR agreements, including EU-PNR.

A proposal for a Framework Directive on EU-PNR was first put forward by the European Commission in 2007.[[15]](#endnote-15) Pawlak asserts that the Commission used the momentum of the first EU-US agreement to promote a similar EU system.[[16]](#endnote-16) The 2007 proposal elapsed, however, and a new Directive was put forward in 2011. Around that time, it was reported that the UK had gained the support of seventeen other member states, but a clash over civil liberties with the European Parliament (EP) and German government seemed likely.[[17]](#endnote-17) Under the rules of the Treaty of Lisbon, the EP had to be involved under the co-decision procedure. Strong sectors of the Parliament, such as the Alliance of Liberals and Democrats for Europe (ALDE) and the Greens/European Free Alliance (EFA), had been fiercely critical of data sharing and retention, and, indeed, the draft directive for EU-PNR was rejected by the EP’s Civil Liberties, Justice, and Home Affairs Committee (LIBE) in 2013. With EP elections in May 2014, the European Council had to wait until August 2014 to call on the Parliament and Council to finalise EU-PNR. In the meantime, at least fourteen member states started to consider setting up their own national PNR systems, many with the help of the Commission, which provided a total of €50 million in support.[[18]](#endnote-18)

Although there had been some calls for re-launching EU-PNR in Autumn 2014, the Charlie Hebdo attacks in January 2015 were used to raise its urgency. In response to the attacks, the EP committed itself ‘to work towards the finalisation of an EU PNR Directive by the end of the year’ in a resolution from 11 February 2015. In July 2015, the EP’s LIBE Committee voted in favour of amended rules for EU-PNR and to open negotiations with the Council, albeit with a very narrow margin of victory.[[19]](#endnote-19) Since then, the attacks in Paris in November 2015 further heightened the desire for EU-PNR, compelling actors towards agreement on EU-PNR. Interestingly, interviewees believed that EU-PNR would not have happened without the November 2015 attacks.[[20]](#endnote-20) The Brussels attacks in March 2016 then provided further momentum for the introduction of an EU-PNR.

FAILING TO COUPLE THE THREE STREAMS: WHY GERMANY ABSTAINED IN 2012

When EU-PNR was introduced as a Framework Directive in 2007 and then once again in 2011 as a Directive, the German government was lukewarm towards the proposals.[[21]](#endnote-21) Germany was seen as one of the few member states that might be willing to oppose the Directive, arguing that the proposal for EU-PNR did not comply with its high data protection standards.[[22]](#endnote-22) This negative position was maintained until at least 2012, when the Council issued its last state of play. At that point, the Netherlands and Germany abstained from giving support to the Council’s position and Austria voted against it. The German government raised concerns regarding the proportionality of the proposal and the level of data protection.[[23]](#endnote-23) As alternatives, it promoted the use of anonymised or pseudonymised PNR data, the reduction of the retention periods, the provision of high hurdles for the access and use of collected data, and showed concern about transfer of data to third countries.[[24]](#endnote-24) Germany also recognised that it would be difficult to convince the majority of member states in the Council to support them, since most had already pledged to support the UK on EU-PNR. This section aims to investigate why Germany decided to abstain in the EU-PNR debate in 2012. How did an ambivalent position come to be and what does it tell us about the domestic conditions under which it was elaborated?

We argue that the position of the German government in 2012 can be understood by looking at the main policy entrepreneurs and their failed attempts to couple the problem with their preferred policy solution and convince the main policymakers involved in the decision. Indeed, the decision of Germany to abstain reflected a profound split within the CDU/CSU-FDP coalition, which was deeply divided over the use of personal data.[[25]](#endnote-25) While the CDU/CSU was generally in favour of a European-wide PNR (albeit with higher data protection standards than those being discussed in Brussels), the FDP was resolutely opposed to it. This was particularly problematic in a file shared by the Interior Ministry (headed between 2011 and 2013 by Hans-Peter Friedrich, a member of the CSU), and the Justice Ministry, led by Sabine Leutheusser-Schnarrenberger (a member of the FDP) between 2009 and 2013. Whenever a common position could not be reached between the two ministries, the German representative in the Council had to issue a reservation or simply abstain.[[26]](#endnote-26)

In 2011, Friedrich had expressed his support for the collection and analysis of passengers’ data, pointing out that the discovery of an Al-Qaeda cell in Düsseldorf that intended to conduct attacks in Germany would not have been possible without this type of information.[[27]](#endnote-27) Therefore, governmental actors from the CDU/CSU acted as a policy entrepreneur, trying to underline the importance of PNR for German security forces and the fight against terrorism and organised crime. In one of the debates in the Bundestag, Clemens Binninger, a member of the CDU, considered ‘the analysis of passengers’ data indispensable’.[[28]](#endnote-28) In comparison, the FDP was fundamentally opposed to any system that required the retention of personal data. Leutheusser-Schnarrenberger regretted that it was impossible for Germany to prevent an EU-PNR system.[[29]](#endnote-29) Gisela Piltz (FDP member of the Bundestag) declared:

If it was up to the liberals, we would gladly do without such new data retention proposal … Our Minister of Justice did not vote in favour in Brussels and is not going to do so. We [FDP and CDU/CSU] have – as everyone expected – different opinions … regarding PNR.[[30]](#endnote-30)

In fact, the debate on which position to take coincided with the conflict caused by the transposition of the DRD and involved the same two ministers. Leutheusser-Schnarrenberger found herself in the impossible situation of having to transpose the DRD despite having taken legal action against it in 2007 and winning the case at the FCC in 2010.[[31]](#endnote-31) Therefore, opposition to EU-PNR supported and amplified the debate inside the government coalition. One should not forget that the issue of data protection was prominent in the coalition agreement signed in 2009, which explicitly mentioned both data retention (it promised to limit the use of this instrument until the FCC reached a decision on the DRD) and EU-PNR, stating that the EU-US PNR Agreement should not be used as a template due to its data protection standards not being up to German standards.[[32]](#endnote-32) What made the internal situation even more difficult was that the Bundesrat also issued a declaration against EU-PNR.[[33]](#endnote-33) With the help of the formal coalition agreement and the recommendation of the Bundesrat to support their preferences, the FDP did not hesitate to openly criticise the project – thereby preventing Friedrich from successfully coupling his preferred policy and adopting it as Germany’s position.

In response, Friedrich did not hide his feelings towards the FDP, stating that:

… Ms. Leutheusser-Schnarrenberger blocks this proposal with her ideological stubbornness ... Data about who is entering and leaving the European Union has to be collected. Therefore, I plead for a PNR system on a European level. This information could then be, for example, compared with the anti-terror file. It is a shame that both Liberals and Socialists have blocked this proposal in the European Parliament.[[34]](#endnote-34)

Therefore, the domestic context led the German government to keep a low profile in the Council, albeit with some doses of scepticism towards EU-PNR.

SUCCESSFUL MANIPULATION: WHY GERMANY ADOPTED A MORE assertive role IN 2015

Despite the fact that EU-PNR was put on hold by the European Parliament in 2013 and became less salient in the subsequent months, public debates did not disappear. Germany experienced a turbulent period characterised by criticism of mass surveillance. The ECJ’s ruling that invalidated the DRD in 2014 was seen as a success for those groups critical of surveillance and mass data retention. In addition, the Snowden revelations raised the mistrust of German citizens’ towards the US and national authorities, with the tapping of Chancellor Merkel’s phone by US agencies being viewed in a particularly negative light by the German population.[[35]](#endnote-35) At the same time, we have discerned a substantive change in the position of the German government since early 2014, which is particularly noticeable at the discursive level. Thomas de Maizière (CDU), the current Interior Minister, actively called for retention of flight data in the EU in late 2014.[[36]](#endnote-36) This was the first time that EU-PNR was brought to public attention, but de Maizière, along with others in his party, had a track record of pushing for the completion of the file.[[37]](#endnote-37) For instance, in February 2014, de Maizière pronounced a discourse at the European Police Congress, where he insisted on the need to have an EU-PNR system to fight terrorism and drug trafficking and hoped that with the upcoming EP elections, it might be possible to relaunch negotiations.[[38]](#endnote-38) This was taken up again during summer 2014, especially after the attack at the Jewish Museum in Brussels, which led to calls by the European Council and the UN Security Council for a better exchange of passenger data.[[39]](#endnote-39) After that, de Maizière was very active in pushing for EU-PNR, although his message remained cautious. While insisting on the urgency of EU-PNR, the German government continued to put forward the need to ensure that the system adheres to high data protection standards and conforms to the FCC and ECJ rulings concerning data retention. For instance, in answer to a question regarding the position of the government, it considered that ‘a EU-PNR system has to be in accordance with the basic rights and has to acknowledge the data protection hurdles’[[40]](#endnote-40) and even more explicitly, that:

The German Government’s stance on the Commission proposal for the collecting of PNR data has basically not changed since 2007 or 2011. The German Government always spoke out for data protection and the problems of data retention in the Council.[[41]](#endnote-41)

The continuity in its positions was indeed visible in some key aspects of the text. For instance, the German government clearly stated that ‘the possibilities for “re-identification” after anonymisation have to be strictly limited to what is necessary’.[[42]](#endnote-42) Similarly, it was also unsupportive of requests by other member states to extend the purpose of EU-PNR systems so that data could be used for the purpose of migration checks and to enhance border security.[[43]](#endnote-43)

However, in other aspects of the Directive, the position of the government has shifted, making it difficult to pinpoint their strategy at the EU level. Numerous elements suggested hints of departing from previous positions. Notably, when it comes to the retention period of the PNR data, it was often declared that five years is too long (even ‘excessive’); however, there were no specific proposals inside the government for a shorter storage period.[[44]](#endnote-44) We can find a similar case when it comes to the question of internal EU flights. Germany had generally shown a preference for these flights to be excluded, even though this might cause problems when tracking the movements of terrorists and criminals once in the EU. Until the end, it left the question open, but eventually the German government came out in favour of the inclusion of internal flights.[[45]](#endnote-45) Even so, an interviewee suggested that Berlin may have problems with the inclusion of intra-EU flights because the air carriers are based in the Länder, and the Bundesrat previously issued a declaration against EU-PNR.[[46]](#endnote-46)

Therefore, the German government opted for a nuanced position that attempted to hold onto its previous position, while also leaving a door open to change during negotiations. It seems, therefore, that the government, and particularly de Maizière, needed to find a delicate balance between ensuring the success of EU-PNR but without completely abandoning German norms in relation to data protection standards. This game was made even more difficult by the position of Germany in the Council, considered to be in the minority. This is probably why Heiko Maas (SPD), the current Justice Minister, declared that the government ‘cannot overshoot the mark – instead we have to remain within the domain of what is necessary and appropriate’.[[47]](#endnote-47)

In view of this domestic and international context, how can we explain de Maizière’s enthusiastic support for an EU-PNR and the urgency given to its successful adoption? We argue that the CDU/CSU (and particularly de Maizière as interior minister) managed to couple its wish for a more assertive German position on EU-PNR with the political needs of its new coalition partner, the SPD. Its strategy was two-fold: it emphasised growing security challenges to amplify the salience of the problem and framed the need to support PNR as an electoral stake to put pressure on the SPD.

*Closing the Gap: Foreign fighters as a Growing Security Challenge*

The first strategy pursued by the CDU/CSU consisted of manipulating the nature of the problem, which helped to heighten the time pressure and focus the attention of policy-makers on the necessity of finding a unified position on EU-PNR that would help find a solution at EU level quickly. To that effect, the Christian democrats adopted two types of arguments: they pointed to the growing problem of foreign fighters in the Middle East and emphasised the perceived gap in the German security apparatus.

Although it did not experience the same levels of violence as the UK and Spain, a number of terrorist incidents occurred in Germany in the second half of the twentieth century. Terrorism generally declined in Europe in the 1990s, but 9/11 ensured that it leapt to the top of the security agenda in Western states, and Germany was no exception. Germany had been the site of some of the planning for 9/11 with the activities of the infamous Hamburg Cell, which involved some of the hijackers. Other plots emerged in following years, including a failed attack on two commuter trains between Dortmund and Koblenz in 2006; attempts by two German Muslim converts and a Turk to undertake car bombings against US citizens and interests were uncovered in 2007; and in 2011, a story emerged of a Moroccan man who had been trained in Waziristan and was tasked with carrying out mass casualty attacks in Germany.[[48]](#endnote-48) More recently, however, attacks in other European states and growing numbers of foreign fighters are being used to push the security agenda in Germany. Foreign fighters have long been a problem for many European states, but the current situation is unprecedented. In 2015, it was estimated that over 5,000 Europeans had travelled to fight for Islamic State (IS), with four states – Belgium, France, Germany, and the UK – accounting for over 3,700 of this number.[[49]](#endnote-49) Germany was previously one of the countries least affected by this phenomenon, but estimates suggest that the number of German citizens in the Middle East has at least doubled since 2014, with roughly 780 thought to be there as of December 2015 – the second highest in Europe along with the UK.[[50]](#endnote-50) It has also been estimated that 250 have returned to Germany, which may pose a threat.[[51]](#endnote-51) In short, jihadists have for a long time posed a threat to Germany, but entrepreneurs are using an arguably higher threat than in the past to push for their desired security solutions.

These rising security challenges have changed the national mood and helped policy entrepreneurs emphasise a perceived security gap. Paradoxically, the issue of mass surveillance was used to expose the inefficiency of Germany’s security and intelligence systems. In June 2013, a decision was taken to increase the budget of the Federal Criminal Police Office (BKA) by €100 million, claiming that German intelligence services were obsolete and needed updating. Both CDU/CSU and SPD parliamentarians supported the measure, arguing that ‘Germany has an enormous backlog in the area of internet surveillance’.[[52]](#endnote-52) The US was used as an exemplar in order to address this gap.[[53]](#endnote-53) This turn reflected the position of some branches of the CDU/CSU, which saw the US as a role model in the fight against terrorism.[[54]](#endnote-54) Such arguments have helped to push for a new German law on data retention after the invalidation of the DRD.[[55]](#endnote-55)

Similarly, the Interior Ministry insisted that EU-PNR could bring a value added to security agencies. For instance, it claimed that, in the area of terrorism, PNR data could help to identify travel movements, unknown networks, or illuminate stays in terrorist camps.[[56]](#endnote-56) In answer to a parliamentary question, the government affirmed that: ‘[r]eturning jihadists threaten the internal security of the EU. According to the German government, this threat has to be urgently controlled. One element to tackle this internal security challenge is the tracking of suspicious travel movements’.[[57]](#endnote-57) In order to tackle these issues, the ‘grand coalition’ agreed to change key provisions in criminal law to better tackle the financing of terrorist groups or to prevent suspected terrorists from leaving the country by withdrawing their personal identification card.[[58]](#endnote-58) At the same time, the government pointed out that EU-PNR would also be useful to fight other types of crimes, such as drug trafficking or even people smuggling. For instance, the vice president of the BKA, Peter Henzler, values PNR data not just to combat terrorism; it could also be ‘of great value in detecting victims of human trafficking or drug smugglers. They could be identified before their arrival in Germany and Europe and the networks and profiteers behind them could be unmasked’.[[59]](#endnote-59)

In addition, the very fact that other countries made use of PNR data puts pressure on European countries to do likewise. Thus, to some, it seemed a lost opportunity or even an irresponsible act not to make similar use of available data. This led to the development of a myriad of national PNR systems in Europe, thereby putting additional pressure on the German government, which preferred to find a solution at the European level. One of the reasons given to push for EU-PNR with such urgency was the fear that – with the support of the European Commission – there would have been a fractured system of national PNRs with diverging data protection standards. Member states might even have proceeded with exchanging national data bilaterally if the European instrument had not gone ahead.[[60]](#endnote-60) Therefore, EU-PNR was presented as a preferable solution to avoid inconsistencies and even lower levels of data protection.

While it is probably true that Germany is more threatened than it was in previous years, this is not sufficient to explain the shift on EU-PNR; after all, a number of attacks had already occurred in Europe and the US before 2012 and Germany’s stance did not change significantly after these. In addition, Germany’s apparent shift towards a more favourable view of EU-PNR occurred prior to the Charlie Hebdoattacks of January 2015. Therefore, the rise of foreign fighters or the terrorist attacks in Brussels and Paris served to raise the salience of the problem and put pressure on the SPD to find a solution, but they cannot explain on their own why this time the coupling was successful.

*What if There is a Terrorist Attack on German Soil?: Raising the Electoral Stakes for the SPD*

The change of the CDU/CSU’s coalition partners from the FDP to the SPD seems to have been a decisive factor in the successful adoption of a more assertive German position towards EU-PNR. Compared to the FDP, the SPD has held an unclear stance towards issues of data protection and mass surveillance. Indeed, the SPD’s traditional support for a strong state has led it to try to claim internal security – in direct competition with the CDU/CSU.[[61]](#endnote-61) For instance, as Binninger pointed out, the red-green coalition voted in favour of the first EU-US PNR Agreement in 2004.[[62]](#endnote-62) It was also Otto Schily, then SPD Interior Minister, who suggested deepening police co-operation in 2003, ultimately leading to the Prüm Convention in 2005.[[63]](#endnote-63) Ostensibly, then, the political context was easier for the CDU/CSU to successfully couple the three streams and convince the SPD to support an EU-PNR system. The reality, however, was more complex, since the SPD was divided in its view of EU-PNR, with some supporting de Maizière’s efforts and some openly against it. Therefore, in order to be successful, the situation required careful manipulation to stress the costs and benefits for the SPD and to convince them of the necessity of supporting EU-PNR.

This strategy consisted of raising the electoral stakes for the SPD, by pointing out that if there was to be a terrorist attack on German soil and the social democrats had opposed EU-PNR, citizens would blame them for it.[[64]](#endnote-64) These arguments are extremely problematic for a party like the SPD, which does not have a united position on security issues and sits at the centre of the political spectrum. Internal security is, therefore, an issue that risks dividing the party internally and, thereby, alienating citizens (and voters).[[65]](#endnote-65) Indeed, the ability of the CDU/CSU to highlight the salience of the problem and make it appear worse than in the past while also raising the spectre of a potential attack seemed to have an effect on Sigmar Gabriel, the SPD leader. Gabriel immediately put pressure on his colleague Heiko Maas, the Justice Minister, and pushed him to propose a new data retention measure.[[66]](#endnote-66) Maas had previously been a critic of data retention measures and was, therefore, more sceptical than Gabriel towards new measures using personal data for security purposes.[[67]](#endnote-67)

One should not forget that the debates on data retention had direct implications for EU-PNR negotiations. The government had to offer a justification for supporting the use of an instrument that also retained personal data. To this effect, the government has repeated since 2014 that it was examining the matter of EU-PNR’s compatibility with the DRD ruling.[[68]](#endnote-68) At the same time, they reminded members of the Bundestag that ‘it is worth keeping in mind that data retention in relation to EU-PNR is not necessarily the same as data retention as was occurring with the DRD. After all, in contrast to the DRD, the Commission proposal would not collect the data from 80 million Germans or 500 million Europeans, it would only collect data from citizens who cross an EU external border’.[[69]](#endnote-69) A variety of opinions were evident among members of the Bundestag, mostly split along party lines, with those in the CDU in favour of EU-PNR, those in the SPD divided, and those in the opposition against EU-PNR.[[70]](#endnote-70)

Although Maas was perceived as more sceptical than de Maizière[[71]](#endnote-71), he was cautious in his interventions on EU-PNR and left the lead to the Interior Ministry. In order to understand Maas’ position we need to take two elements into consideration: first, the absence of a clear policy on EU-PNR (or data retention) in the coalition agreement and, second, Gabriel’s efforts to portray the SPD as a responsible actor in internal security. Unlike Leutheusser-Schnarrenberger, Maas could not appeal to the coalition agreement or to the party’s ideology to stop de Maizière’s efforts. The 2013 coalition agreement only mentioned that it aimed to implement the DRD at German level but wished to limit the data retention period to three months; there was no mention of EU-PNR or any other similar instruments.[[72]](#endnote-72) Therefore, Maas was in a weaker position when it came to preventing a more assertive German position on EU-PNR: he was not leading the dossier at the European level, his party leader preferred to bandwagon rather than oppose, and he could not appeal to a formal agreement or the party’s ideology to oppose de Maizière. Therefore, his only recourse was to hope that the European Parliament would insist on higher data protection levels.[[73]](#endnote-73)

The reasons for Gabriel’s insistence on data retention and EU-PNR are complex, but there seems to be an agreement that Gabriel was more afraid of the CDU/CSU ‘hardliners’ on security than of his own party colleagues, hence the inclination to demonstrate that the SPD can be tough on security.[[74]](#endnote-74) At some point, he even went to say that: ‘[w]e might even make of Heiko Maas a decent internal security politician’.[[75]](#endnote-75) In other words, Gabriel was afraid of being accused of not having acted if an attack was to occur, as well as gaining credibility as a party that takes security seriously in a bid to compete with the CDU/CSU.[[76]](#endnote-76) Therefore, de Maizière enjoyed a perfect window of opportunity to push for the CDU/CSU’s preferred solution: support and willingness to push ahead from his party and a highly divided coalition partner that was reluctant to oppose it. We had, therefore, a very different political scenario compared to 2012: more auspicious circumstances allowed the CDU/CSU to successfully couple its preferred policy solution (the development of a EU-wide PNR system) with the problem and politics stream; events made it easier to present the security situation as having deteriorated since 2012 and in need of urgent action; and the SPD was less tied by ideology and formal agreements to accept this new interpretation of the problem and felt the need to jump on the CDU/CSU’s bandwagon.

Conclusion

Germany’s history, culture, and circumstances shape what is considered acceptable at the European level. In this sense, it is evident that personal data is a sensitive issue in Germany. This article also considers how co-operation at the European level feeds back into member states. Germany is a particularly significant case because of its historical importance in the project of European integration, as well as its position as the largest and most powerful member state in the EU policymaking process. With the UK due to leave the EU, Germany’s role will become more important still.

In the case of EU-PNR, we observe how the CDU/CSU has employed a long-term strategy that has been complex but also quite successful in diffusing criticism and building support. It is also a strategy that does not reflect a European vs domestic conflict, but rather a clever way to use the electoral stakes of its coalition partner to create compromise and secure a unified governmental position. De Maizière and his colleagues have managed to shift the salience and urgency of the problem by promoting a clear security-led discourse, pointing at the need to cover security gaps and the government’s responsibility towards citizens. It sends a message of being tough on security by defining a clear and apparently growing threat (foreign fighters) and criminalising their activities. Such a discourse is difficult to oppose, especially for the SPD, which does not want to be seen as weak or irresponsible if a terrorist attack occurred in Germany. At the same time, their strategy also provides anchor points for those attached to Germany’s culture of data protection, by ensuring that the government continues to fight for higher data protection shared by all member states.

The comparison of two coalition governments shows us that it is important to examine internal dynamics to understand the position of the German government when it negotiates at the EU level. The more assertive role of de Maizière cannot simply be explained by a change in his position towards EU-PNR or a shift in the broader context. In this sense, we see more continuity than change – the security challenges may have grown, but they existed in 2012 and 2016. Similarly, the positions of Friedrich and de Maizière do not differ substantially when it comes to EU-PNR. What did change was the political stream and the opportunities that it offered. In this sense, the expectations drawn by the MSF hold considerable explanatory power: the existence of a formal coalition agreement that explicitly limited the necessity of EU-PNR, combined with the ideology of the FDP, made it more difficult for Friedrich to couple the three streams and ended with Germany’s abstention. In contrast, de Maizière operated under more favourable conditions, due to the absence of any explicit mention in the coalition agreement and the SPD’s attempts to capture the issue of security and show itself as tough and responsible as the CDU/CSU. At the same time, the fact that EU-PNR was discussed at the EU level helped him bypass potential veto points such as the Bundesrat and the FCC. Finally, we have also seen how policy-makers can act as policy entrepreneurs, placing them in an ideal position of authority to bring about change. Therefore, although civil liberties and data protection are sensitive issues in Germany, we expect that the current political configuration will continue to offer a unique opportunity to strengthen the security agenda at the EU level, which has been the aim of key political actors from the CDU/CSU for a number of years. Therefore, as long as this coalition stays in power, it is likely that Germany will support a greater emphasis on security and might be able to water down the data protection elements that had been important in former coalitions and German culture more generally.

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