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NOTE

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6325/08 CRIMORG 30 AVIATION 39 DATAPROTECT 6
7656/2/08 CRIMORG 49 AVIATION 77 DATAPROTECT 14

Subject: Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes - State of play

1. Background - Informal JHA ministerial meeting

The Commission submitted the above proposal for a framework Decision to the Council on 17 November 2007 and briefly presented its contents to the Multidisciplinary Group on Organised Crime (MDG) on 30 November 2007. At the Informal JHA ministerial meeting on 25 and 26 January 2008, the Home Affairs Ministers discussed a number of general questions regarding this Commission proposal. It emerged from the discussions that there was very broad support for the idea of setting up a European system for using PNR data for law enforcement purposes. The Ministers also expressed strong support for very close involvement of the European Parliament.

The Presidency has also endeavoured to honour the request formulated at the informal ministerial meeting, that legislative work on this issue progress as quickly as possible. The relevant Working Party has conducted two full article-by-article readings of the draft text in less than five months. In addition, general discussions have been held on a number of questions, on which the current note endeavours to give the state of play.

The Presidency also organised a whole-day seminar, where experts from the US, UK, Canada and Australia shared the experience gained with their PNR systems. Separately, DK also presented the process of setting up and use of its PNR system.

AT entered a reservation on the proposal. Whilst all delegations are obviously still in the process of scrutinising the proposal, the following delegations entered general scrutiny reservations on the proposal: BE, BG, CZ, DK, FI, HU, IT, LU, LV, LT, MT, PL, PT and SK. In addition, a number of delegations also entered parliamentary scrutiny reservations: AT, CZ, DK, EE, FR, HU, IE, LT, MT, NL, PL, PT, SE and UK. DE welcomed the fact that the Commission had tabled a proposal on the use of PNR data, as requested by the Council. DE pointed out, however, that specific provisions of the draft Framework Decision still needed thorough examination in order to ensure that it would be compatible with all data protection and constitutional requirements.

2. Limitation of scope:

The Commission proposal's scope is limited in several respects.

2.1. Modes of transport: air carriers only

All Member States seem to be able accept this limitation, but most thought that Member States should be allowed to go beyond this limitation by extending the future PNR (or a similar) system to other modes of transport at national level. Some Member States emphasised this was to be seen as only the first step.

2.2. Geographical scope: flights entering or leaving the EU (no purely intra-EU flights)

A majority of Member States can accept this limitation, but a number of Member States have indicated that this proposal should extend to intra-EU flights as well or should, as a minimum, not preclude those Member States that wish to include intra-EU flights from doing so.

2.3. Purpose limitation - fight against terrorist offences and organised crime.

As to limitation of the scope of the proposal to the fight against terrorism and organised crime, the vast majority of delegations have expressed themselves in favour of an *intermediate option*, whereby the purpose limitation laid down in the draft Framework Decision would be binding as to the risk indicators against which PNR data are screened, but the data could be used, in accordance with domestic law, for the investigation and prosecution of other offences, should the use of these data ultimately reveal indications of other criminal offences. There was also a clear majority tendency towards extending the scope to serious crime (instead of organised crime).

3. No processing of sensitive data:

The Commission proposal absolutely excludes any processing of sensitive data, by stating in Article 6(3) that, to the extent that the PNR of a passenger includes such data, a Passenger Information Unit (PIU) or an intermediary is to delete such data immediately. Whereas some Member States agree with this unqualified prohibition on the use of sensitive data, other Member States are of the opinion that, as in Article 7 of the draft Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (DPFD), the use of such data should be allowed in some cases and under some conditions. While the EU-US PNR Agreement of 23 July 2007 likewise allows the use of such data in 'an exceptional case where the life of a data subject or of others could be imperilled or seriously impaired', the PNR agreement with Canada does not envisage the use of sensitive data.

This issue clearly merits further discussion, also at a political level.

4. Data protection

Adequate rules for data protection are obviously part and parcel of the future European PNR system. Directive 95/46 applies as long as these data are processed by the air carriers for commercial purposes. However, the transmission of the data from air carriers to the PIUs may not be covered by the Directive, nor by the DPFDD. Therefore sufficiently clear data protection rules need to be provided as from the stage of transmission of the PNR data by the air carriers to the PIUs. This can be done either through specific data protection rules in the PNR Framework Decision, or by relying on the solutions in the DPFDD proposal, or through a so-called constituent reference to the DPFDD rules, by which the DPFDD rules would be made applicable. No final choice has been made with regard to either mode, although a clear majority was in favour of specifically identified rules.

Consequently, the Presidency has invested efforts in examining the applicability of existing (Directive 95/46) or draft (DPFDD) data protection instruments to the entire range of data processing operations stemming from the proposal. On this basis, the Presidency proposed a set of specific rules to secure a comprehensive *sui generis* data protection framework for the EU PNR system, while acknowledging the scope of general data protection instruments. This has advanced the discussion on the requisite level of data protection.

5. Decentralised system - exchange of PNR data

The Commission proposal provides for a decentralised system for gathering PNR data by Passenger Information Units (PIUs), set up by Member States. The analysis of these PNR data would equally take place at national level and it is only analysed data, namely 'in such cases and to the extent that such transmission is necessary in the prevention and fight against terrorist offences and organised crime' (Article 7(1)), which are to be transmitted spontaneously to the Member States. (Raw data may also be transmitted, but on request only). A small minority of Member States is in favour of considering the option of centralised collection and processing of PNR data.

6. Other issues that have been discussed include:

1. necessary duration of the retention period (clear trend towards a shorter period from the proportionality perspective);
2. possible impact on relations with third countries (expectations that the EU system would determine the parameters of any future PNR agreements with third countries);
3. method of transmission for non-EU operators (opinions split as to whether it is necessary and appropriate to allow use of the "pull" method where the "push" method is not technically supported);
4. cost and financing of the roll-out of a EU PNR system (discussions on costs for the air carrier industry as well as for public authorities and the ways (Member State or EU level) to finance them).

7. Relations with the European Parliament

As mentioned above, at the informal ministerial meeting there was strong support for very close involvement of the European Parliament in the legislative procedure, going beyond the existing procedural prerogatives of the Parliament. In keeping with this, the Presidency has, on various occasions, briefed the Parliament on the discussions on the PNR proposal in the relevant Council bodies. It has provided the LIBE committee with up-to-date documents of the working group and other documents.

The Presidency has proposed to hold a meeting with the relevant members of the LIBE committee to discuss the working method for this dossier, and on 6 May, the committee expressed its preference for such a meeting to be held at political level. The Presidency will, in close coordination with the incoming French Presidency, consider how to follow up this request.

8. Ways forward

In view of the possible change of legal basis in the future, the Presidency invites delegations to express themselves on the way forward in handling this file. The following options can be envisaged:

- 1) continue with a 3rd reading of the proposal within the Working Party;*
- 2) hold thematical discussions focusing on certain key issues, involving interested parties;*

The Presidency suggests to privilege the last option. At any rate the Parliament will need to be associated as closely as possible.
