



**COUNCIL OF
THE EUROPEAN UNION**

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REV 1**

LIMITE

**CRIMORG 157
AVIATION 211
DATAPROTECT 70**

NOTE

from: Presidency
to: Council

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

This note summarises the initial results of ongoing discussions to identify the essential features of a future European PNR system, in accordance with the wish expressed by the JHA Council on 25 July 2008.

Eight guidelines have already emerged from that detailed discussion; the Presidency would like to determine whether they are a sound basis for the relevant preparatory bodies to continue their work. At this stage the intention is not to achieve definitive and detailed conclusions, but rather to seek the Council's overall view of the direction the work is taking **(I)**.

If the Council's response is positive, the Presidency intends:

- to continue consideration of the pending issues;
- and also, above all, to look more closely at the issue of the safeguards to be provided in terms of personal data protection.

An overall result will be submitted to the JHA Council for endorsement at its next meeting on 27 and 28 November 2008.

The Presidency would also like to draw the Council's attention to the ongoing discussion regarding reference in the future instrument to intra-Community flights **(II)**.

I – PROGRESS MADE

The Multidisciplinary Group focused on the conditions for collection and use of PNR data. As a basis for its deliberations, the Group heard a large number of persons with expertise in areas where the use of PNR data raises issues. The European Data Protection Supervisor, the European Union's Counter-Terrorism Coordinator, the two main professional organisations of air carriers, and representatives of a large travel reservation centre and of a major provider of airport IT services all contributed. Experts from the police and customs services of various Member States, who use PNR data in various ways, were also heard. A detailed record of those proceedings may be found in 13319/08 CRIMORG 144 AVIATION 187 DATAPROTECT 62 and 13860/08 CRIMORG 159 AVIATION 216 DATAPROTECT 71

Eight guidelines have emerged:

1 – Inclusion of air traffic between the EU and third States, including data on transit passengers

- (a) The scope of the instrument would be restricted, at least initially, to air transport. This restriction would not prevent those Member States which wished to do so from using PNR data available in the context of other modes of transport. The question of whether this leeway should be referred to in the preamble to the instrument, as already supported by a very large majority of delegations, will need to be decided later.
- (b) All PNR data for flights between the territory of at least one EU Member State and that of a third State would be covered¹. Of that data, the data relating to transit passengers, i.e. those making a journey by air which included at least one segment outside the Community and one or several segments inside the EU, would be transmitted by the operator to each of the Member States concerned.

¹ The issue of the inclusion of intra-Community flights remains pending; see section (II) below.

2 – List of data to be aligned on the international standards applied by IATA, without creating a requirement for air carriers to collect data

The instrument would explicitly make the requirement to transmit data conditional on the actual prior collection of that data by air carriers in the course of their commercial activities. The structure of the list of data should be aligned on that adopted by the International Civil Aviation Organisation (ICAO). Subject to some ongoing adjustments, the list proposed by the Commission is an excellent basis on which to work¹.

3 – Phasing in of the system with the aim of achieving 100 % data coverage at the end of a transitional period to be determined

To avoid gaps in the collective operation of the future European PNR system, it was felt that systematic transmission of PNR data for all flights within the scope of the instrument was preferable to selective data collection. After all, the effectiveness of a European PNR system would seem to be based on the availability of all data in respect of all Member States. This majority view needs to be reconciled with the different approach of the United Kingdom, which favours leaving States to choose the data to be collected. Account must also be taken of the technical constraints involved in putting such a complex tool in place. The following arrangement has therefore been worked out:

- The instrument would set an objective of collecting 100 % of PNR data at the end of a period to be determined;
- a timetable would be laid down for the phasing in of the system;
- a review clause would be inserted, whereby the systematic collection option could be reviewed on the basis of experience over a number of years.

4 – Objective of exclusive use of the PUSH method at the end of a transitional period

The transitional period during which an airline could continue to use other transmission methods, especially the pull method, remains to be specified.

¹ Without prejudice to ongoing discussion on the specific question of sensitive data.

5 – European harmonisation of arrangements for the transmission of data by carriers

- (a) PNR data would be transmitted twice for each of the flights concerned.

The instrument would also, by way of exception, allow a Member State to require additional transmissions in order to cope with a particularly urgent or dangerous situation.

- (b) The date of first transmission would be 48 hours before flight departure. Member States would still be free to set airlines a time bracket rather than a fixed time, provided that it did not alter their legal obligations on this point.
- (c) The second transmission would take place when the flight was closed, when all the passengers were on board. The question of whether the second transmission should cover all data relating to the passengers on the flight concerned, or only changes to the first transmission, remains to be clarified.
- (d) Airlines' transmission protocols would be aligned on existing international standards, as established in the International Civil Aviation Organisation and applied by IATA.

6 – Purposes of data collection under the instrument: Counter-terrorism and combating serious crimes as defined for the purposes of the European Arrest Warrant

The purpose of the European instrument would be the prevention, detection, investigation, prosecution and punishment of terrorism and a group of other serious offences, defined by reference to the list in the Framework Decision on the European Arrest Warrant. Any appropriate marginal changes to that initial list could still be envisaged.

The instrument would of course cover the reporting and prosecution of other offences brought to light during controls.

7 – Designation by each Member State of a public authority responsible for the collection, analysis and storage of PNR data, distinct from the law enforcement authorities responsible for controls and investigations

A clear and precise division of responsibilities between the "Passenger Information Unit" and the competent authorities which would be using the PNR data in the course of their work, without hampering close cooperation between them, was felt to be a basic guarantee of the transparency of the European PNR system, which was indispensable in the light of requirements regarding respect for privacy and personal data protection.

The data collected would be for analysis to assist with investigations conducted by the competent law enforcement authorities: the Group is currently considering the details of the PIU's tasks in this respect, and its links with the law enforcement authorities.

The composition and siting of PIUs would be left to national law, to take account of the variety of air traffic and the crime structure and resources of each Member State.

8 – Definition of a procedure for analysis of the terrorist and criminal threat

The MDG agreed that the processing of PNR data should be based on the one hand on a strategic analysis based on risk indicators which had been pre-established by the competent authorities, and on the other hand on a comparison with the main national, international and European files on wanted persons or objects being sought or subject to an alert by the law enforcement authorities (missing persons, minors not authorised to leave national territory, etc.).

There was also consensus on the fact that the selection of air connections and of the processing to be carried out with regard to the types of risk identified should be left to the discretion of the Member States. Similarly, the strategic risk analysis would rest primarily on the choice of national risk indicators, which would be adapted to the characteristics of crime in each country. In parallel, the conditions for cooperation within the Council to develop common methods and indicators should be determined.

II – MAIN PENDING ISSUE: INTRA-COMMUNITY FLIGHTS

The Presidency would also like to draw the Council's attention to the state of ongoing discussions regarding PNR data relating to intra-Community flights.

A large majority of Member States do not want the European instrument to impose the collection and use of such data. A minority of Member States would be interested in such data, but most of them could accept that, at least initially, the European PNR instrument would not provide for its compulsory inclusion, on condition that the leeway to make this choice at national level would be explicitly recognised. Inclusion in the instrument of transit flights, and the assurance that the European text would not call into question the exercise of investigative powers granted to the competent authorities by national legislation, have still not entirely resolved this issue.

The Presidency therefore invites delegations to examine the following compromise:

- (a) Accept that the cost/benefit ratio of including PNR data relating to intra-Community flights is an issue, and that therefore this needs to be evaluated before deciding to include it in the European instrument;
- (b) Refer in the preamble to the instrument to the fact that such data is collected in certain States, at national discretion, and that experience gained in those States could be useful in any subsequent evaluation of the European PNR system;
- (c) Insert in the instrument a clause providing for the review of this specific point (amongst others) once the European PNR system has been in operation for a few years; the timing of this review remains to be determined.