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NOTE

from: Austrian delegation

to: Working Party on General Matters, including Evaluations (GENVAL)

No. Cion prop.: 6007/11 GENVAL 5 AVIATION 15 DATAPROTECT 6 CODEC 278 + ADD 1
+ ADD 2 + COR 1

Subject: Open questions on the Commission proposal for a Directive on the use of
Passenger Name Records (PNR) data for the prevention, detection, investigation
and prosecution of terrorist offences and serious crime

Austria is currently analysing the COM proposal for a Directive on the use of Passenger Name Records (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (hereinafter: the PNR Directive) at national level. Austria agrees with the Presidency that discussions on this proposal should start by looking at a number of crucial elements of the Directive (as set out in 6518/11) before entering detailed discussions on the proposal.

Austria underlines its full commitment in the fight against international terrorism and organised crime. Passenger data can be a valuable tool in assessing risks and preventing and combating terrorism and organised crime. However, Austria reiterates its serious doubts expressed during the negotiations on the draft Framework Decision on the use of Passenger Name Record about establishing a decentralised system.

The report ‘Study on ways of setting up an EU network on exchange of Passenger Name Record (PNR) data for law enforcement purposes’¹ (hereinafter: the study) was issued in 2009 and pointed out that a centralised system would cost the EU approximately 33 million Euro, a decentralised system however would lead to costs for the Member States of approximately 221 million Euro. Also for the Air Carriers, the decentralised scenario is considered to be more expensive than a centralised system.

According to the study any of the solutions in discussion (centralised system, decentralised system or hybrid system) would be technically feasible. Hence, the decentralised system which brings along disadvantages such as not guaranteeing a standardized solution is not only less valuable at EU level but also costs about seven times more than the centralised system. According to the new impact assessment of the COM² the set-up costs are even calculated to be much higher (more than 600 mio. Euro). In addition, the COM estimates that Member States with only few international flights will have to establish a PIU with around 30-50 employees/PIU or respectively on average 70-100 employees/PIU for MS with a larger number of international flights.

Apart from the budgetary implications for the Member States there are several other issues in particular concerning data protection that must be clarified in order to assess the legitimacy of the proposal and its compatibility with fundamental rights. Taking into account the concerns expressed i.a. by the European Parliament, an EU-PNR-system must foresee high-level data protection features, in order to guarantee secure PNR data processing. In particular, the key elements of the comments made by the FRA, the EDPS, the Art. 29 Group and the European Parliament must be thoroughly taken into account.

Moreover, during the last CATS-meeting, questions were raised on the compatibility of the new proposal with the Schengen Border Code and the applicable legal basis, which should also be addressed before entering detailed discussions on this dossier.

¹ Authors: Accenture and SITA.

² 6007/11 ADD 1 GENVAL 5 AVIATION 15 DATAPROTECT 6 CODEC 278.

Austria would therefore kindly ask the COM to answer the following questions:

1.	Given that just a very limited number of Member States have a functioning PNR system already in place does it constitute a real added value that the majority of Member States have to provide financial and personnel resources required to set up a national PIU and risk analyses systems in their country instead of opting for a centralised solution?
2.	Can an added value be expected if risk analyses, as required by Art. 4 of the proposal, are done on the basis of 27 different risk criteria? Can the results of national criteria based on analyses realised by one Member State be useful for other 26 Member States that might use different systems and criteria?
3.	Would not a standardised centralised system be much more appropriate to guarantee an added European value than a decentralised system based on national expertise and national analyse criteria?
4.	With a reference to the opinion of the EDPS isn't it questionable whether a centralised system secures standardisation and uniformity concerning data protection better than 27 different legal regimes and thus bring along a higher data protection level?
5.	Why should preference be given to a decentralised system if the centralised system brings many advantages (higher level of data protection, uniformity, "European solution", standardised analyses etc.) and much lower costs (seven times less)? Why did the Commission opt for a decentralised system taking into account the high costs and many disadvantages of such a system?

6.	<p>How does Art. 4 of the PNR Directive, which requires Member States to provide assessments by comparing PNR data against relevant databases (including international or national databases or national mirrors of Union databases) correspond to Art. 7.2 of the Schengen Border Code, which lays down rules for minimum checks for persons enjoying the Community right of free movement.</p>
7.	<p>Following the intervention of the Council Legal Service during the CATS meeting on 10 February 2011 Austria kindly asks to receive further explanations on the legal basis chosen for this proposal.</p> <p>How is the proposal reconcilable with its envisaged legal base given that the proposed measure is not limited to the mere exchange, storage and collection of already existing police data, but introduces an instrument with new investigatory powers, aiming at the extraction of data previously not available to the national police authorities (cf. Article 87 TFEU)</p>
8.	<p>In the light of Article 8 of the European Convention on Human Rights and Article 7 and 8 of the Charter of Fundamental Rights, any interference with the rights protected therein must be “in accordance with the law”.</p> <p>The, question thus arises, how the “risk criteria” against which personal data shall be processed (Art. 4 (3) a) will be defined in “a law” that satisfies the requirements of precision, accessibility and predictability for passengers?</p>

9.	<p>The question of proportionality can only be assessed on the basis of concrete examples, particularly on the basis of possible responses following an alert pursuant to the legal orders of the Member States:</p> <p>Could you please provide concrete examples of processing and subsequent use of PNR-data which constitute sufficient evidence for the usability of the data for crime-prevention and demonstrate the necessity and proportionality of an interference.</p>
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