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NOTE

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Subject:	Preparation of trilogues

I. BACKGROUND

1. The GENVAL Working Party started preparing the trilogues on the proposal for the PNR Directive immediately after EP LIBE Committee's adoption of the revised Kirkhope (rapporteur) report of 15 July 2015. GENVAL's first exchange of views focussed on the scope of the draft Directive (24 July 2015), the second exchange of views on data protection issues (25 September 2015).
2. In order to prepare the next trilogue, the Presidency suggests to discuss Article 4 with regard to different types of PNR data processing, Article 5 on competent authorities, Article 7 on exchange of information between Member States, and Article 8 on the exchange of PNR data with third countries.
3. *For each of the points below, delegations are invited to indicate where they think the EP amendments could be taken into account.*

II. PROCESSING OF PNR DATA (ARTICLE 4)

4. Article 4 is about how Passenger Information Units (PIUs) should deal with PNR data, transferred by air carriers (and non-carrier economic operators) with reference to Article 6.
5. Upon receipt of PNR data, PIUs should collect these data. In case of an erroneous transfer of PNR data, that is a transfer of data beyond those listed in Annex (Annex I of the GA), these data should immediately be deleted. The EP amendment added that these data should also be "permanently" deleted.
6. Article 4(2) of the draft Directive lists three types of processing, that is for the purpose of
 - carrying out an assessment of passengers, prior to their scheduled arrival or departure, suspected to be involved in terrorism or serious crime and who require further examination by the competent authorities referred to in Article 5,
 - responding, on a case-by-case basis, to duly reasoned requests from competent authorities to provide and process PNR data,
 - analysing PNR data in order to update or create new criteria for carrying out assessments on passengers in order to identify suspicious persons.
7. The Commission proposal, the EP amendment as well as the GA are identical as to these three purposes. However, Article 4(2) is differently structured.
8. As to the first purpose, the EP amendment follows the Commission proposal and did not take on board the simplified and concise GA drafting which
 - is structured along the lines of the three purposes,
 - avoids redundant wording of (a) and (b) of the initial proposal and the EP amendment,
 - sets out the two suggested assessment methods namely either processing PNR data against pre-determined criteria or by comparing PNR data against relevant databases, in one paragraph (a) with subparagraph (i) and (ii) referring to either of these methods.

9. Whereas the GA does not refer to any specific national or international database, the EP amendment is more explicit in this regard and mentions the Schengen Information System and the Visa Information System. As to the rules to be respected when comparing PNR data against relevant databases, the EP amendment, refers not only to the applicable Union, international and national laws, such as COM proposal and GA, but also to the requirements set out in paragraph 3.
10. As to the second purpose, the EP wording ('responding, on a case-by-case basis based on sufficient evidence, to duly reasoned requests...') is not clear and could be clarified by aligning it to the EP amendment to Article 8.1: "...on a case-by-case basis, subject to a duly reasoned request based on sufficient evidence".
11. As to the assessment of passengers against pre-determined criteria, the EP amendment adds a qualification of these criteria as "targeted, specific, justified, proportionate and fact-based". Furthermore, these criteria should regularly be reviewed, with the involvement of the data protection officer. With regard to sensitive data in this context, the EP amendment is more detailed than the COM proposal or the GA.
12. Finally, the EP report adds Article 4(4)(c) providing for Member States bearing the costs of "use, retention and exchange of PNR data". This is in line with recital 11(b) newly added by the EP report. That recital sets out that, on the one hand, Member States should be responsible for running and maintaining their own PNR system, whereas, on the other hand, "airlines bear the costs of transferring PNR data to national law enforcement agencies and competent authorities." The wording of this latter obligation is unprecise and, furthermore, the EP amendment, contrary to the GA, does not provide for co-financing such as expressed by recital 13(a) of the GA according to which costs related to the "establishment" of the national PIU should be co-financed by the Internal Security Fund.

III. COMPETENT AUTHORITIES (ARTICLE 5)

13. According to Article 5 of the draft Directive, each Member State shall adopt a list of the competent authorities (i.e. authorities competent for the prevention, detection, investigation or prosecution of terrorist offences or serious crime) entitled to request or receive PNR data or the result of the processing of PNR with a view to further law enforcement (including prosecutorial) action. These "2nd step"-authorities get PNR data from PIUs on a case-by-case basis and, according to the EP, by "human action" (see EP amendment Art. 4.4).
14. Article 5.1 of the EP report specifies that these competent authorities are entitled to request or receive (a) "masked out" PNR data or the result of the (b) systematic processing of PNR data. It is unclear whether this could be read as meaning that, whilst that data area masked out after the initial retention period, competent authorities are nevertheless entitled to accede the full data set.
15. The EP amendment of Article 5.3 follows the COM proposal to notify these national authorities within a period of 12 months instead of 18 months after the entry into force of the Directive as suggested by GA. Furthermore, unlike the GA, the EP amendment does not refer to Article 7(4) as the latter provision has been deleted in the EP report. Article 7(4) provides for the exceptional case that national competent authorities may circumvent their national PIUs and directly address the PIUs of another Member State to provide it with PNR data kept in the latter's database.
16. Article 5.4 provides for the further processing of PNR data by the competent authorities. The EP amendment provides for such processing (a) "upon request", without, however, being precise as to who requires what, adds (b) that such processing should be "in accordance with Article 4(2)" which refers, however, in 4(2)(a) and (b) to the mandatory PIUs individual review by non-automated means of positive matches resulting from automated processing PNR data, and adds to the scope (c) the prevention of an immediate and serious threat to public security.

17. At the end of Article 5.5, the EP amendment replaces in the case of incidentally detected offences „such processing“ by „processing for which it was originally intended“ thereby stronger underlining the link between the enforcement action and the previous processing of data triggering that action.
18. Article 5.6 of the EP amendment, although more detailed, follows the COM proposal and id not as the GA deletes the second phrase. However, there is some lack of clarity as to the logical connection of both phrases. If the understanding is that categorically no decision entailing negative effects on the data subject should be taken, neither on the basis of automated processing of PNR data, nor, secondly, upon review of the outcome of automated processing, on the basis of sensitive personal data, the EP position is different from that of the Council.

IV. **EXCHANGE OF INFORMATION BETWEEN MEMBER STATES (ARTICLE 7)**

19. PIUs are responsible for transmitting PNR data on suspicious persons or the result of the processing thereof not only domestically to the competent authority tasked with follow-up measures, but also to the PIUs of other Member States. Article 7 provides for rights and obligations of PIUs as either a transferring or a requesting unit. The proposed Directive is deliberately based on the premise that PNR data exchange should primarily be dealt with by PIUs. Article 7 channels cross-border information exchange through PIUs by default. It allows, however, cross-border information exchange between national competent authorities, as referred to in Article 5, and PIUs under exceptional circumstances.
20. Neither the Commission proposal nor the GA or, for that matter, the EP report provide for a cross-border exchange of PNR data in bulk. Instead, PNR data exchange among Member States is on a case by case basis, and where deemed necessary for the purpose of prevention, detection, investigation or prosecution of terrorist offences or serious crime.

21. The EP amendment adds an initial sentence to Article 7(1). It seems to function as a supplementary header on cross border data exchange but it blurs the clearly distinguished presentation of rights and obligations of a transferring/receiving unit as set out in Article 7.1, on the one hand, and, on the other hand, of those of a requesting/requested unit as set out in Article 7(2) to (5).
22. The initial sentence provides for "automatically" exchanging data. However, the meaning of "automatically" is not clear.
- If it means "by automated means", the right place of this amendment would be Article 4(6). But it would nevertheless remain contradictory to the amended Article 4(4) which provides for a domestic transfer of such data "by human action".
 - If, however, it means "proactively" and "without delay" as set out in the following sentence of Article 7(1), the term is redundant in the first sentence and the meaning of the sentence would then be reduced to the basic overall statement that PIUs are dealing with PNR data exchange.
 - If, finally, it means "electronically", the issue would be covered by Article 13.
23. Secondly, the EP report does not define the term "proactively" in the context of cross-border information exchange. Moreover, the term seems not to cover the necessity criteria which have to be considered by the transferring PIU and which, contrary to COM proposal and the GA, is no more mentioned at all by in the amended Article 7(1). Whereas the EP report keeps silent as to the necessity criteria with regard to the transferring PIU, it stresses this criteria by adding in Article 7(2) that a cross-border request "shall be strictly limited to the data necessary the specific case".
24. The EP amendment adds the specification that transmittable results of the processing of PNR data are either analytical information, or the result of processing data of suspicious passengers transferred to the national competent authority for follow-up measures.
25. The EP adds the obligation to enter, where appropriate, an alert into the SIS in accordance with Article 36 of Council Decision 2007/533/JHA.

26. Article 7(2) of the GA and Article 7(2) and (3) of the EP report set out the right to request PNR data across borders such as stored during the initial retention period, and the right to request data such as stored after the initial retention period. The GA concisely deals with this issue in one Article.
27. The EP report adds that replying to cross-border requests should be done by "using the common protocols and supported data format", without however specifying what that implies in terms of information technology at this place. The issue of common protocols and supported data formats is dealt with by Article 13 with regard, however, to only transfers of PNR data by air carriers to PIUs. These protocol and formats will be adopted by the Commission.
28. It, furthermore, adds the obligation that a cross-border request shall be justified in writing.
29. As to the question on how to handle cross-border requests relating to PNR data stored after the first retention period, the GA leaves it up to the discretion of the transferring PIU under certain conditions. Abiding in principle by the COM proposal, the EP report limits the right to access to data stored after the initial retention period to only "the most" exceptional circumstances in response to a specific "real-time" threat
30. Article 7(4) on the exception from the rule of exclusive PIU to PIU data exchange which allows under certain circumstances for a direct contact between a competent authority as referred to in Article 5 and a PIU of another Member State, has been deleted by the EP.
31. Article 7(5) of the EP amendment adds something which is implicit in the COM and GA version, namely that the exceptional early access procedure shall cover only request for PNR data already collected and retained by the addressed PIU.
32. Finally, the EP amendment introduces a new Article 7(6a) providing for complying with the safeguards of paragraph 1 in the case of the transfer of analytical information.

V. **EXCHANGE OF PNR DATA WITH THIRD COUNTRIES (ARTICLES 8 AND 19)**

33. The draft Directive relates to the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offence and serious crime. All three institutions agree that processing of PNR data at national level should be subject to a standard of protection of personal data in line with the provisions of "Council Framework Decision" 2008/977/JHA¹. Pending the ongoing discussions on the draft data protection package² to be taken into account when discussing the draft PNR Directive, it has to be noted as a general issue that Article 13 of Decision 2008/977/JHA is about the transfer of personal data to competent authorities in third States "or to international bodies".
34. Since "international bodies" are not at stake in the proposed PNR Directive, it should be discussed whether the straight forward approach as set out Article 8(a) of the GA and the Commission is appropriate at all in the current context or whether it should be nuanced.
35. Article 8 provides for the transfer of PNR data and the results of the processing of PNR data to a third country. The transfer should be done on a case-by-case basis and if, as set out in the GA and the Commission proposal, the conditions laid down in Article 13 of Council Framework Decision 2008/977/JHA are fulfilled. The EP did not take over those provisions as straight forwardly as in the Council GA and the Commission proposal, and, moreover, amended Article 8 as proposed by GA and Commission on different levels.
36. Article 8 is split into five paragraphs and while the EP explicitly refers to Framework Decision 2008/977/JHA in recital 26, the amended version of Article 8 of the EP text does not. Instead, Article 8 is drafted in such a way that, without quoting Decision 2008/977/JHA, Article 8(1) it refers and spells out to a large extent the provisions of Article 13 of that Decision.

¹ Since 2008/977/JHA is a "Council Framework Decision", the negotiating parties should agree on coherently using the correct denomination throughout the whole text, i.e. recitals (23), (24), (26), (27) and (32) as well as Article 8, 11, 12

² Both EU acts on data protection, i.e. Directive 95/46/EC of the European Parliament and the Council, and Council Framework Decision" 2008/977/JHA, referred to in the proposal are currently being revised by the co-legislators.

37. Article 8(1)(a) of the EP text refers to 2008/977/JHA Article 13(1)(d), Article 8(1)(b) to Article 13(1)(c) and (2); Article 8(1)(b) refers to, Article 13 (1)(c) and (2) and adds information, logging and ex-post verification obligations with regard to transfers without prior consent of the Member States from which the data were obtained. The amendments of Article 8(2), (3), (4) and (5) have no equivalent provisions in Article 13 of Framework Decision 2008/977/JHA at all.
38. The amended Article 8(1) agrees with the concept, agreed upon by all parties, of a PNR transfer only on a case-by-case basis. In the following, it lays down the conditions referring, on the one hand, to the conditions set out in 2008/977/JHA, Article 13 (1)(a) on the necessity for data transfer and Article 13 (1)(b) on the competencies of the receiving authority of the third State, and adding, on the other hand, the obligation of a "duly reasoned request based on a sufficient evidence".
39. The principle set out in Article 8(1) that PNR data should be transferred to third countries only on a case-by-case basis is in line with the logic for exchange of PNR data on a government-to-government basis and relates, as such, to the exchange of PNR data held by a national PIU with a third country. The last sentence of the EP version of Article 8(1)(b) provides for a derogation from that principle in favour of systematic transfers. However, such a provision has no bearing on the draft PNR Directive because such transfers already allowed for by specific EU agreements which relate to PNR data held by air carriers. In the current context, the last sentence of the EP version of Article 8(1)(b) is therefore confusing.
40. It has further to be noted, that the amended Article 8(1)(a), instead of explicitly referring to Decision 2008/977/JHA, explicitly refers to Directive 95/46/EC of the European Parliament and the Council, insofar the third country has to ensure the level of data protection of Directive 95/46/EC as a necessary pre-condition, complementary to all other conditions laid down in the proposed Directive. It is questionable whether Directive 95/46/EC is applicable at all in the context of law enforcement.

41. Contrary to the COM proposal and the GA, the EP amendment to Article 8 does neither refer to Article 1(2) of the draft PNR Directive, nor to Article 7(2) as suggested by the GA (Article 8 (d)) to assure that similar conditions as those ruling the transfer of data between Member States are fulfilled. It is, however, probable that the EP Amendment Article 8(2) is covering the above mentioned provisions.
42. Contrary to the COM proposal and the GA (Article 8(c)), Article 8(3) as amended by the EP does not allow for onward transfer of PNR data to other third countries at all.
43. The EP introduces the obligation (Article 8(4)) that a Member State transferring PNR data of a non-national to a third country, has to inform the national competent authority of the data subject concerned of the matter at the earliest appropriate opportunity. Further information obligations are incumbent on the data protection officer (Article 8(5)). Each time, a Member State transfers data to a third country, the data protection officer has to be informed who, subsequently, will inform the national supervisory authority of the transmission.

VI. **RELATIONSHIP TO OTHER INSTRUMENTS (ARTICLE 19(2))**

44. The EP amendment to Article 19(2) does not take on board the GA suggesting that the proposed Directive is without prejudice to any obligations and commitments not only of the Union but also of the Member States by virtue of bilateral and/or multilateral agreements with third countries.
