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From:	Presidency
To:	Delegations
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Subject:	Potential to extend the scope of the proposals on advance passenger information (API) to other modes of transport

Introduction

In the context of discussions in the Council Working Party on JHA Information Exchange (IXIM) on the Commission proposals[1] on the collection and transfer of advance passenger information (API) by air carriers, some Delegations have requested extending the proposals to other modes of transport. This request has so far to a large extent been put forward in general terms, without specifying which types of transport operators should be made subject to new reporting obligations and for what purpose.

To decide on the way forward in the work in IXIM on the Commission proposals, it appears necessary to outline different options on how an extension to other transport modes could be realised. This includes the necessity to be more specific on the actual operational needs related to other modes of transport. To that end, it also appears necessary to distinguish between maritime transport and land transport (rail, buses).

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[1]   COM(2022) 729 final (13.12.2022) and COM(2022) 731 final (13.12.2022).

As a general remark at the outset, Delegations should bear in mind that any extension of the current scope of these proposals to other transport modes would require further analysis of the impacts on transport operators, competent authorities and travellers. Extending the scope would also entail a significant amount of work to amend the proposals, thus delaying the Council in its work to reach a negotiating mandate. It is also likely that an extension of the scope would lead to more complicated negotiations with the European Parliament. Taken together, the consequences would potentially make it impossible to conclude these two important files during the current legislature.

Maritime transport

Given the inherent complexity of extending the scope of the API proposals, a base-line option for handling maritime transport could be to not amend the scope of the current proposals, but to initiate a process whereby the Commission launches a study on how to regulate the collection, transfer and processing of API data from maritime transport, taking into account the ongoing developments within the International Maritime Organisation (IMO) and the implementation of the European Maritime Single Window. This approach would allow the Council to continue working on the Commission's proposals with a view to reach an agreement for air transport with the European Parliament during the current legislature.

If, nevertheless, Member States would like to include maritime transport within the scope of the current API proposals, three cumulative options containing a description for doing so can be found below in the Annex.

The Presidency invites delegations to express themselves on which (if any) of these options the Council should continue to work on.

Land transport

As regards land transport the situation differs. Contrary to the air and maritime transport sectors, there are no international standards nor currently any EU obligations in force for the collection of passenger data from land transport operators such as rail or bus.

Rail transport has specific characteristics in terms of infrastructure, passenger journey and density of networks. Such observations can also be extended to the bus transport sector, composed of a variety of small to medium sized companies. Compared to the air transport sector, the collection of passenger data is more challenging as the issuing of nominative tickets is not a standard practice. Furthermore, rail transport usually includes a number of other characteristics for example intermediate stops where passengers can embark or disembark, sharing of platforms among different types of trains, high number of passenger stations, of travel, etc. To introduce a systematic collection and use of API data for rail and/or bus transport would require heavy investments in the physical infrastructure of operators as well as to modify, for example, reservations systems and check-in processes, with substantial consequences on their economic model and on passengers.

The Presidency's conclusion is therefore that it does not seem feasible to extend the Commission proposals to land transport. Instead, and taking into account the operational needs expressed by some Delegations, there is a need for further analysis of the necessity, proportionality and technical feasibility of processing passenger data on rail and bus transport to fight serious crime and terrorism. Such an assessment should take full account of the legal requirements on data protection and freedom of movement as well as the CJEU case law. It should start with and build on the experience that some Member States have made at national level with the collection of traveller data for rail and bus transport. The Council could call on the Commission to carry out such an assessment.

Maritime transport

The current state of play

The Schengen Borders Code[2] obliges maritime operators to draw up a list of the crew and any passengers containing the information required in the forms 5 (crew list[3]) and 6 (passenger list[4]) of the Convention on Facilitation of International Maritime Traffic (FAL Convention), and to communicate the lists to the border authorities.[5] This obligation applies to Schengen inbound and outbound maritime transport, with the exception of ferries.[6]

The Schengen Borders Code also provides a legal basis for the further processing of the passenger data by border authorities by way of checks against the Schengen Information System, Interpol's Stolen and Lost Travel Documents (SLTD) database and national databases containing information on stolen, misappropriated, lost and invalidated travel documents.[7] It also allows, where applicable, checks against the Visa Information System (VIS)[8], the Entry-Exit System (EES)[9] and the European Travel Information and Authorisation System (ETIAS).[10] Complementing this reporting obligation under the Schengen Borders Code, the European Maritime Single Window environment[11] provides a network of maritime National Single Windows with harmonised reporting interfaces that maritime operators use to fulfil their reporting obligation under the Schengen Borders Code.[12]

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[2]   Regulation (EU) 2016/399 (Schengen Borders Code).
[3]   The so-called FAL Form 5.
[4]   The so-called FAL Form 6.
[5]   See point 3.1.2. of Annex VI of Regulation (EU) 2016/399.
[6]   The obligation set out in point 3.1.2. of Annex VI of Regulation (EU) 2016/399 does not apply to ferry connections with ports situated in third countries – see point 3.2.9.(i). Instead, for ferry connections with ports situated in third countries, the reporting obligation under Council Directive 98/41/EC applies.
[7]   See Article 8(2e) of Regulation (EU) 2016/399.
[8]   Regulation (EC) 767/2008.
[9]   Regulation (EU) 2017/2225.
[10]   Regulation (EU) 2018/1240.
[11]   Regulation (EU) 2019/1239.
[12]   The Schengen Borders Code is listed as part of the reporting obligations stemming from legal acts of the Union that are covered by the European Maritime Single Window environment – see point A.2. of the Annex of Regulation (EU) 2019/1239. This also applies to the reporting obligation under Council Directive 98/41/EC (see footnote 6).

As demonstrated in the Commission's presentation and the subsequent interventions by some Delegations at the IXIM meeting of 8 February, the combined use of the EU legal framework complemented by Member States themselves laying down requirements under their national law already allows for the use of passenger data provided by maritime operators for both border management and law enforcement purposes. Best practices exist in a number of Member States in that respect.

Moreover, the Facilitation Committee of the International Maritime Organization (IMO) will consider, at its upcoming meeting[13] in March 2023, whether the crew list declaration (FAL Form 5) and the passenger list declaration (FAL Form 6) should be extended to include additional data elements from the API information requirements.[14] Such an extension of FAL Forms 5 and 6 would automatically apply to the reporting obligation under the Schengen Borders Code.

Potential for extension of the API proposals' scope to maritime transport

Beyond the existing EU legal framework on reporting obligations on maritime operators, and with the aim to structure the discussion on the possible way forward in IXIM, ***Table 1*** sets out **three cumulative options to extend these reporting obligations on maritime operators**. All three options would do so in the context of the Commission proposals on the collection and transfer of API data by air carriers, even if the provisions applicable to maritime operators would differ considerably from the proposed provisions applicable to air carriers. Notably, for all three options, the transfer of data by maritime operators would take place based on the **existing FAL Forms** as the established format to comply with reporting obligations on maritime operators, and by making use of the **European Maritime Single Window environment**. *Table 1* indicates the implications and requirements of each option.

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[13] 47th Session of the Facilitation Committee (FAL 47). The Council Shipping Working Party will consider the draft EU position paper on 9 March 2023.
[14] See IMO Document FAL 47/7, point 3.14.

Beyond that, for all three options, there would be a **need for a proper analysis of impacts and legal implications** on public authorities, maritime operators and citizens. This would include the requirement to pass a 'proportionality test' for the processing of personal data under each option, taking into account the CJEU case law. It would also include a consultation of the maritime industry as well as quantifying the economic burden on maritime operators.

– *Option 1: external border control*

Option 1 would **extend the reporting** obligations related to FAL Forms 5 and 6 **to ferry connections** with ports situated in third countries – which are exempted today from the related obligation under the Schengen Borders Code.[15] In addition, option 1 would more generally introduce an obligation on maritime operators in EU law to **collect the data** elements contained in FAL Forms 5 and 6 **by automated means**. Under this option, the purpose of the collection of data would be border management only. Data processing for law enforcement purposes would not be possible.

The extension of the rules on collection and transfer by ferries would, in effect, entail a deletion of the exclusion clause for ferries provided for in the Schengen Borders Code and thus an (indirect) amendment thereof. In addition, the introduction of rules on automated collection in the API borders proposal would lead to a situation whereby the obligation to collect and transfer is provided for in one legal instrument (namely, for maritime operators other than ferries, the Schengen Borders Code) whereas the obligation to do so by using automated means is provided for in another legal instrument (namely, the revised API borders regulation). This option thus risks negatively affecting the logic, coherence and clarity of the legal framework, including by raising potentially complex questions regarding how those obligations relate to each other and regarding the supervision and enforcement thereof.

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[15]   See point 3.2.9.(i). of Annex VI of Regulation (EU) 2016/399.

–   *Option 2: external border control + subjecting that data to processing for law enforcement purposes*

Option 2 would raise important **questions on data protection** as it would expand the purpose of the processing of the personal data contained in FAL Forms 5 and 6 to law enforcement purposes. This would require demonstrating the necessity and proportionality of the processing of that personal data on EU inbound and outbound maritime transport for law enforcement purposes. The fact that the CJEU has accepted, in principle, the need to impose collection and transfer obligations for law enforcement purposes in respect of air travel does not necessarily mean that it will also do so in respect of maritime transport of persons. That question arises all the more so in the absence of related passenger name record (PNR) data on maritime transport. In the aviation sector, the combined processing of both API and PNR data has proven effective in the fight against serious crime and terrorism.[16] It is precisely this need for such combined processing that underpins the API law enforcement proposal as it now stands.

Establishing an obligation to collect the personal data contained in FAL Forms 5 and 6 for law enforcement purposes – as provided for under option 2 – would also **require setting detailed rules at EU level on the subsequent processing of that data by national law enforcement authorities**. While EU rules exist on the processing by national law enforcement authorities of API data collected and transferred by air carries[17], no such rules exist at EU level for data collected by maritime operators. Such detailed EU rules on the subsequent processing at national level would need to take account of the interpretations by the CJEU in its recent case law[18] related to the processing of passenger data, e.g. with regard to the retention of the data.

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[16]   While the data elements contained in FAL Forms 5 and 6 are similar to the API dataset, and the integration of further data elements from API into FAL Forms 5 and 6 are considered (see footnote 14), there is no equivalent to PNR data in the maritime sector.

[17]   The rules are provided for by the PNR Directive (EU) 2016/681.

[18]   CJEU judgment in Case C-817/19 (*Ligue des droits humains*).

- *Option 3: external border control + subjecting that data to processing for law enforcement + processing data derived from intra-EU travel for law enforcement purposes*

Option 3 would raise an additional set of challenges, as it would introduce an obligation to collect the personal data contained in FAL Forms 5 and 6 for law enforcement purposes on maritime transport <u>within</u> the EU. This would not only **aggravate the impact on data protection, since covering domestic travel can trigger greater implications for fundamental rights, but also affect freedom of movement**. Again, this would require demonstrating the necessity and proportionality of the processing of personal data on intra-EU maritime transport for law enforcement purposes, also in the absence of related PNR data on maritime transport. It would also require setting detailed rules at EU level for the subsequent processing by national law enforcement authorities of passenger data on intra-EU maritime transport. In that respect, the CJEU has set detailed requirements, notably the **requirement that national authorities process personal data only on selected intra-EU transport operations**.[19] In particular, according to the CJEU, in the absence of a terrorist threat such extension should be limited to selected routes or travel patterns and be regularly reviewed by the Member States.

The Commission proposal on the collection and transfer of API data by air carriers for law enforcement purposes provides a legal and technical solution – based on (a) building on the choices made by Member States under Article 2 of the PNR Directive and (b) an EU-level router that deletes non-selected intra-EU flights – that complies with the requirements set by the CJEU.[20] In respect of intra-EU maritime transport of persons, there could be no such reliance on the PNR Directive and the European Maritime Single Window environment would not provide the functionality of deleting data relating to non-selected transport operations which would have to be developed from scratch by the Member States.

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[19] CJEU judgment in Case C-817/19 (*Ligue des droits humains*), point 291.
[20] See also the opinion of the European Data Protection Supervisor on the Commission proposals (Opinion 6/2023 of 8 February 2023).

Table 1: Options to expand the API proposals to maritime transport

Description of the option	Implications and legal requirements
Option 1: extending API to maritime for external border management • data processing based on the Schengen Borders Code • data collection and transfer with FAL Forms 5 and 6 • data transfer through the European Maritime Single Window environment	**a) implications** amending the **API borders proposal** (COM(2022) 729 final) in order to: • establish an **obligation on ferries** to collect and transfer the data elements contained in the FAL Forms 5 and 6 (similar to the obligation set out in the Schengen Borders Code on all other maritime operators) • set rules on the **automated collection** of the data, with a similar scope as Article 5 of the API borders proposal but according to the specificities of maritime transport **b) legal requirements** • demonstrating the **necessity and proportionality** of deleting the exemption for ferries and of introducing obligations relating to automated data collection, also in view of the considerable **economic impact** on maritime operators • address risks for the **overall logic, coherence and clarity** of the legal framework

Description of the option	Implications and legal requirements
Option 2: extending API to maritime for law enforcement purposes: EU inbound & outbound • data collection and transfer with FAL Forms 5 and 6 • data transfer through the European Maritime Single Window environment • subsequent processing by the Passenger Information Units	**a) implications** amending the **API law enforcement proposal** (COM(2022) 731 final) in order to: • establish an **obligation to collect** the data according to the specificities of maritime transport (e.g. using FAL Forms 5 and 6) • set rules on the **automated collection** of the data (as in option 1) • set rules on the **transfer** of the data by maritime operators through the European Maritime Single Window environment (similar to the way in which the European Maritime Single Window environment applies to the reporting obligations under the Schengen Borders Code) • set rules on the **subsequent processing** of the data by the Passenger Information Units, with a similar scope as the provisions of the PNR Directive but according to the specificities of maritime transport, and in compliance with the requirements set in the CJEU judgement in Case C-817/19 (*Ligue des droits humains*) **b) legal requirements** • demonstrating the **necessity and proportionality** of the processing of API data on EU inbound and outbound maritime movements to counter serious crime and terrorism, in the **absence of PNR data** for maritime transport, and also in view of the considerable **economic impact** on maritime operators • setting **detailed rules regarding the subsequent processing** of the API data, ensuring in particular compliance with EU data protection law

Description of the option	Implications and legal requirements
Option 3: extending API to maritime for law enforcement purposes: intra-EU • data collection and transfer with FAL Forms 5 and 6 • data transfer through the European Maritime Single Window environment • subsequent processing by the Passenger Information Units	**a) implications** amending the **API law enforcement proposal** (COM(2022) 731 final) in order to: • establish an **obligation to collect** the data (as in option 2) • set rules on the **automated collection** of the data (as in option 2) • set rules on the **transfer** of the data from maritime operators (as in option 2) • set rules regarding collection and transfer for **selected intra-EU maritime transport** **b) legal requirements** • demonstrating the **necessity and proportionality** of the processing of API data on intra-EU maritime transport to counter serious crime and terrorism, with regard to the fundamental right to the **protection of personal data**, the fundamental right to **freedom of movement** and the **fundamental right to conduct business**, and in the absence of PNR data for maritime transport • setting **detailed rules regarding the subsequent processing** of the API data, ensuring in particular compliance with EU data protection law • setting **rules regarding the selection** of relevant intra-EU maritime transport as such • setting detailed rules ensuring that the **collection/transfer of API data remains limited to the selected intra-EU maritime transport only**