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**CRIMORG 102
AVIATION 136
DATAPROTECT 48**

NOTE

from: Presidency
to: Multidisciplinary Group on Organised Crime

No. prev. doc.: 7656/3/08 REV 3 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

The Commission submitted a proposal for a Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes in November 2007. The Slovenian Presidency completed two readings of the proposal and submitted a progress report ¹.

The Presidency considers that the introduction of a European PNR system will play a very significant role in building the common security area. It is paradoxical that while the European Union has agreed to transfer PNR data to third countries, it has not yet passed legislation enabling it to reap the benefits itself of such a system, which, as the experience of several Member States reveals, is an effective tool. It is naturally necessary to ensure that the European PNR system reflects the Union's commitment to fully respecting fundamental rights. This is a prime reason for the Ministers' longstanding desire to have the European Parliament closely involved in scrutiny of the Commission proposal.

¹ 7656/3/08 CRIMORG 49 AVIATION 77 DATAPROTECT 14.

Legal basis

The issue of which legal basis should be used for adopting this instrument raises a number of questions.¹

The Court of Justice of the European Communities has been asked to deliver a ruling dealing with similar issues in connection with Directive 2006/24/EC on the retention of telecommunications data.² That judgment ought to shed some useful light on the matter.

The Presidency therefore proposes to focus on the substance of the proposal and to keep the issue of its legal basis for a later stage in the negotiations.

Working method

In the first half of 2008 the Multidisciplinary Group successfully completed two readings of the text of the proposal for a Framework Decision. In its report to the JHA Council meeting on 5 and 6 June 2008 (9514/1/08) the Slovenian Presidency considered that thematic discussions represent the best way of taking work forward. That approach meets the concern expressed by a large number of delegations to step back from scrutiny of the text in order to consider the issues which the initiative raises. The legislative proposal and the work accomplished so far are, of course, an important reference point for the further discussions.

The Presidency's aim is to help the Multidisciplinary Group work towards defining the desired characteristics of a European PNR system, proceeding from the main features to the refinement of detail.

In the interests of a proper shared understanding of the PNR system, the European Parliament, the data protection authorities and sector operators among others should be encouraged to contribute to the process. It would also be very useful to have additional documentation from Member States, the European institutions and the Union's external partners.

The Group's conclusions at the end of the proceedings conducted under the French Presidency will be submitted to the JHA Council.

¹ 16614/07 JUR 462 CRIMORG 194 AVIATION 229 DATAPROTECT 61.

² Case C-301/06 Ireland v. Council of the European Union and the European Parliament. Hearing scheduled for 1 July 2008.

Discussion themes

The Presidency will focus on the key issues identified by the Group. The aim will be to define the options and what those options entail before gradually working out the aspects of a common solution.

- Cross-cutting theme: **FLEXIBILITY**. It is necessary to delimit the margin of manoeuvre that Member States may be allowed in complying with future European standards adopted jointly, without calling into question either the justification for a European PNR system or its equilibrium. The possible alternatives with regard to an optional expansion of the instrument's functional and geographical scope and the discretionary extension of the purposes to which the system may be put, etc. can already be identified. The timeframe for implementation should also reflect the complexity of such a tool.

- **FUNCTIONAL AND GEOGRAPHICAL SCOPE**: At this stage of the proceedings the Group has opted for restricting the application of the European PNR system to air transport, at least initially, while not ruling out the possibility of Member States which so wish using PNR data available in the context of other modes of transport.

The unresolved question is whether, in addition to international flights to and from the European Union, all or some intra-Community flights should be covered. If so, should the system cover transit flights only or should there be blanket coverage of all intra-Community flights? Can any other options be envisaged? The Presidency will ask delegations concerned to submit their positions and arguments to the Group.

- **PURPOSES OF PNR**: Two questions need further consideration; both have been broached in earlier discussions:
 - **The possible inclusion of purposes relating to integrated border management**, given that these are covered by current PNR legislation in some Member States and in several of the Union's third country partners. The Presidency will suggest discussion of the integrated management of the Union's external borders in this connection.

- **Possible extension of the system's purpose of preventing and punishing terrorist and organised crime** - already covered by the Commission proposal- **to other serious crime**, many delegations in the MDG having expressed interest in such extension. The Presidency will propose examining a possible common definition in the context of a European PNR system.

- **FUNCTIONING OF THE EUROPEAN PNR**

The Presidency wishes to continue detailed examination of the following points:

- **Collecting PNR data:** At this stage of the proceedings, the main outstanding questions relate to the commercial operators' transmission procedures and specifically the applicable technical standards, the number of communications and the time limits for transmitting data. In principle the more these aspects are harmonised, the easier it will be for private operators to perform their tasks and the more securely the European PNR system will operate. However, some account will have to be taken of the fact that individual States may have specific requirements over a given period or in relation to a given route. The Presidency will propose considering a two-track approach, which would distinguish between common, generally applicable solutions and the option whereby a Member State could make additional requests on the basis of specific need.
- **Use of PNR data:** The European PNR system needs to be considered in terms of the practical, operational use to which it will be put.

The MDG's discussions highlighted two main uses to which the data may be put:

- Firstly, data can be crossed in real time with data from European and national investigation databases covering persons and property and can be analysed with programs integrating risk indicators at various levels. Here the data prompt police operations which are mainly carried out when the passenger concerned crosses the border (apprehension, in-depth documentary check, passenger's situation examined, customs search, surveillance set up, etc.).

- Secondly, the data may be stored in a database and serve for verification in later investigations, e.g. searches for individuals who have disappeared or escaped and checks on individuals' presence in a country which is sensitive in terms of specific threats. The retention for this purpose of air passenger data, which today are very hard to access, may be considered an essential argument justifying the PNR in a world where air travel is commonplace.

The clear choice in favour of such dual use has a decisive influence on solutions regarding the period of data retention, data protection and the nature of exchanges between PIUs. The rules for using the various types of data for each of the two functions may need to be addressed.

- **The role of Passenger Information Units (PIUs) and their relations with the competent law enforcement authorities:** The composition of PIUs, depending on whether or not they include representatives of the competent authorities, is an essential factor.

- Some other questions, for example **exchanges of data between PIUs, and national and Community risk assessment** may need further examination.

- **PROTECTION OF AIR PASSENGERS' PERSONAL DATA:** Which principles and rules should be mandatory for the European PNR system? Which principles and rules would it be desirable to see applied to it in addition? In due course the Presidency will propose a list of points for discussion. The collection and use of sensitive data will be dealt with in that context.

- **RELATIONS WITH THIRD COUNTRIES:** With the collection and use of PNR data by public authorities spreading rapidly in many third countries, the Union will have in the common model it puts in place a valuable benchmark for concluding international agreements in this area. It will be important to bear this aspect in mind during the discussions. In addition, the question of which rules should apply to cooperation with third countries in connection with PNR data collected by European PIUs also has to be considered.

- **COST:** The cost of implementing the European PNR system in the Member States and possible financial support for those costs is an issue that requires closer examination.

Questions to delegations:

The Presidency would ask delegations to inform it before 15 July 2008

- *whether the method proposed meets with their approval;*
- *whether the themes listed reflect their needs;*
- *of any additional suggestions or comments that they would like to make.*

The Presidency will need the full support of the Member States and the Commission if progress is to be made on this basis. It accordingly intends to take advantage of the JHA Council meeting on 25 and 26 July 2008 to ascertain the importance that Ministers attach to taking work forward on the basis of the method proposed. A document will be issued for that purpose at a later date.

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