



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 14 June 2011

11392/11

GENVAL 63

OUTCOME OF PROCEEDINGS

of: Working Party on General Matters, including Evaluation (GENVAL)

on: 11 May 2011

Subject: Summary of discussions

1. Adoption of the agenda

The agenda as set out in CM 2749/11 was adopted.

2. Sixth round of mutual evaluations - Orientation debate on a possible topic for the sixth round

9379/11 GENVAL 45

The Working Party discussed the Presidency note. Several delegations indicated they wanted to have the choice between more than one topic for the evaluation. As alternative topics, special investigative techniques and cybercrime were suggested. The Presidency indicated a revised paper would be submitted to the next meeting of the Working Party.

3. Action-Oriented Paper (AOP) on strengthening the EU external dimension on action against trafficking in human beings - Implementation

9501/11 GENVAL 46 JAIEX 34 RELEX 418 JAI 270 (to be issued)

The Working Party briefly discussed the first implementation report of the AOP and agreed on the recommendations. A revised version will be issued in time for the CATS meeting on 17 May. In addition, the report will go to the JAIEX Working Party on 27 May 2011. Thereafter the Presidency intends to have the document approved at the June Justice and Home Affairs Council.

4. 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

8458/11 GENVAL 33 AVIATION 78 DATAPROTECT 26 CODEC 545

8850/11 JUR 163 GENVAL 38 AVIATION 92 DATAPROTECT 30 CODEC 618

9502/11 GENVAL 47 AVIATION 113 DATAPROTECT 38 CODEC 705

The Council Legal Service presented its opinion on data protection questions related to the draft Directive. One Member State stated that one should examine whether we should opt for an improved API system, combined with a collection of PNR data on targeted flights. It also asked questions on the compatibility of making pro-active use of the data with EU law.

While some delegations stated that they were convinced of the need for collecting and processing PNR data, others indicated that they faced difficulties in convincing national Parliament of such necessity.

The debate focused on the four data protection questions set out in the Presidency discussion note (9502/11 GENVAL 47 AVIATION 113 DATAPROTECT 38 CODEC 705):

Range of data to be collected v proportionality

The Presidency had invited delegations to consider imposing additional data protection limitations to the ones already provided for in the Commission proposal, and in particular whether the collection of PNR data on international flights could be limited to targeted flights. Regarding data collection, following the Council discussion on 11 April 2011 Member States may be given the possibility of collecting and processing PNR data on *targeted* intra-EU flights. For international flights, the Commission proposal provides that, after a transitional period (Article 16), PNR data on *all* flights must be collected. The Commission strongly defended its original proposal. It referred to the fact that all third countries which collect PNR data, do so on all flights. The Commission also was of the opinion that limiting the intra-EU collection of PNR data to targeted flights would render the use of PNR data for all but one of the four purposes set out in Article 4(2) ineffective as crucial data would be missing because they were never collected. In the view of the Commission only the real-time assessment of passengers against pre-determined criteria could still have certain usefulness for targeted flights. The Commission also opposed the proposal for a targeted collection of PNR data on intra-EU flights on the grounds that the information gaps it would create in the collection of data *within* Member States would also hamper the information exchange *between* Member States as the requested Member State might not have collected the requested PNR data. The Commission also queried whether such restriction to targeted flights could be justified on necessity grounds and whether this would not open the possibility for individuals to find out whether any data had been collected on a particular route.

Apart from a few Member States that indicates that they agreed with the Commission point of view, many Member States also expressed qualms regarding the idea of allowing Member States to restrict the collection of PNR data to targeted flights. The lack of a uniform EU approach in this regard was deplored as well as the fear that some Member States might even use this possibility to collect no PNR data at all.

Retention period

The Commission proposed that the retention period be split up in two sub-periods (30 days + five years), with reduced access possibilities during the second sub-period. The Commission clarified that there were essentially two technical possibilities for this so-called masking out of personal data, which could be done automatically: one by which the data allowing the identification of the passenger would be stored in a separate data system and another one in which the data would still be stored in the same database, but rendered invisible. Several delegations stated that they were still unclear about the modalities of masking out data and some doubted the operational effectiveness of such system. In view of these queries, the Presidency invited the Commission to provide further explanations, in writing, of the envisaged system of masking out data.

The discussions showed a divergence of opinions between Member States on what is the appropriate period for retaining data. A few Member States were of the opinion that the initial period of 30 days with full access was too long, whereas several other Member States thought it should be longer. Several Member States emphasised the importance of requiring the authorisation by an independent authority or court in order to grant access during the second retention period.

Purpose limitation

The draft PNR Directive limits the purposes for which PNR data can be used in two ways: by describing the functional activities for which the data can be used (Article 4(2)) and by describing the categories of offences the government seeks to prevent, investigate or prosecute through those activities: terrorist offences and serious crime. Regarding these offences, the Commission has sought to limit the scope of the concept of serious crime in two ways. The first limitation is it allows Member States to exclude minor offences from the list of offences of Article 2(2) of the EAW Framework Decision. Several Member States thought that this possibility should be deleted from the Directive, as the scope of the Directive should be uniformly decided at EU level and not left to individual Member States. Some Member States did agree that the "EAW list" of offences should be reduced, but thought that this should be decided at EU level. The second limitation consists of limiting the possibility of using PNR data for screening passengers against pre-set risk criteria or for developing such criteria for *transnational* serious crime only. During the discussions in the GENVAL Working Party the latter additional qualification of "transnational" was criticised by many Member States as being not operationally practicable.

Link with API (and other available) data

All Member States agreed on the operational importance of combining the use of PNR data with API data. Whereas some delegations suggested that the possibilities (and limitations to) cross-checking API data with PNR data should be described in the PNR Directive and/or the API Directive, others thought it was sufficient to agree on the broad lines in the directive and leave the practical details to the Member States. The Commission indicated that, under the current API Directive, the possibility to check API data against PNR data was contingent upon the way in which Member States had chosen to implement the API Directive; if domestic law allowed to use of API data for law enforcement purposes then this was possible. It was of the opinion that no reference could be made to API data in this directive, but indicated that the API Directive would be revised next year.

5. Any other business

- § The Belgian delegation referred to the EUCPN publication ‘A secure home in a safe community through prevention, community policing and restoration’ following the best practice conference held by the Belgian Presidency last December. The publication will be made available on the Public pages of the EUCP website.

- § The French Delegation referred to the Draft Council Resolution on the creation of an informal network for countering environmental crime - "EnviCrimeNet, which had been discussed in the Law Enforcement Working Party.