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**GENVAL 27
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NOTE

from: Presidency
to: COREPER/Council

No. prev. doc.: 6007/11 GENVAL 5 AVIATION 15 DATAPROTECT 6 CODEC 278 + ADD 1
+ ADD 2 + COR 1
6518/11 GENVAL 10 AVIATION 26 DATAPROTECT 11 CODEC 284

Subject: Proposal for a Directive of the European Parliament and of the Council on the use
of Passenger Name Record data for the prevention, detection, investigation and
prosecution of terrorist offences and serious crime
- The possible inclusion of intra-EU flights

I. Background - draft PNR Framework Decision

1. The Commission submitted the proposal for a Council Framework Decision on the use of Passenger Name Record data (PNR) for law enforcement purposes to the Council on 17 November 2007. On 3 February 2010, the Commission presented a proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. At the CATS meeting of 10 February, the Commission presented the proposal and Member States held a first exchange of views on it.

II. Scope: PNR data of international flights and possibly also on intra-EU flights

2. The scope of the Commission proposal is restricted to international flights, that is flights arriving from or departing to a third (non-EU country). Intra-EU flights are not included, but Article 17(1) of the draft Directive obliges the Commission to submit a report to the EP and the Council within four years following the entry into force of the Directive, on the feasibility of including internal flights in the scope of the Directive. Recital 28 of the draft Directive also states that the Directive "does not affect the possibility for Member States to provide, under their domestic law" for the collection of PNR data regarding internal flights, a possibility which is acknowledged by Article 17.

3. At the CATS meeting of 10-11 February 2011 and at the GENVAL meeting of 8-9 March 2011, the UK, supported by a substantial number of Member States, advocated that Member States be able to collect PNR data on intra-EU travel as well. In the note it submitted¹, the UK delegation proposed an amendment which would make PNR data collection on flights between Member States optional on the part of any Member State, by extending the regime created by the Directive in respect of international flights to internal flights. A Member State which decides to apply the directive to intra-EU flights would also decide the particular intra-EU routes on which it wishes to collect PNR data. At the GENVAL meeting of 7-8 March 2011, this proposal received support from a very substantial number of Member States.

¹ 6359/11 GENVAL 8 CATS 10 AVIATION 21 DATAPROTECT 9.

4. The expediency of including intra-EU flights in the scope of the PNR Directive merits a thorough discussion in view of the main goal of setting up a European PNR system, namely to enhance security. Many Member States have emphasized the operational added-value of including these flights. In its impact assessment, the European Commission has also stressed the importance of including EU flights. Indeed, a majority of flights in Europe are intra EU flights. According to Eurostat, they represent more than 42%¹ of the flights, with national flights accounting for another 22%, whereas only 36% are flights to destinations outside the European Union. In 15 countries, more than 70% of the flights are intra EU flights. Not including intra-EU flights would bring the risk of shifting the threat rather than addressing it. Indeed, analyses made by counter-terrorism entities demonstrate that terrorists often use EU hubs instead of direct international flights and that the complexity of their journeys has increased. Having access to PNR data in advance would provide the opportunity to identify these individuals. On the other hand, it has been argued that regarding intra-EU flights the law enforcement benefits of collecting PNR data may be easily defeated by (potential) criminals who could look for alternative means of intra-EU transport. This argument, however, also holds true, albeit admittedly to a lesser extent, for international flights.

5. At the same time, concerns have been expressed by several Member States regarding the compatibility of the inclusion of intra-EU flights in the scope of the EU PNR Directive with the Schengen Border Code and the free movement of persons². The Council Legal Service has provided a written opinion on these questions³. This opinion will have to be carefully scrutinised, but the Presidency is of the opinion that an inclusion of targeted intra-EU flights surrounded with sufficient safeguards, can be achieved in compliance with EU law on free movement of persons.

¹ http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Air_transport_statistics.

² The Commission has referred to the opinion of the Commission Legal Service, according to which the inclusion of intra EU flights would not infringe the Schengen Border Code or the free movement of persons.

³ 8230/11 JUR 115 GENVAL 29 VIATION 72 DATAPROTECT 21 CODEC 509.

6. The possible costs of including intra-EU flights have also been highlighted. It appears that setting up a European PNR has a fixed cost and variable costs and that the more the system is used, the more the fixed costs per data collected are reduced. Even though if a study has been carried out on this point, the total estimated cost of 10 cents per passenger has been challenged by several delegations. Regarding the fixed costs Member States have asked the Commission to provide more details on the financial support it will offer to Member States to set up a Passenger Information Unit (PIU), including on the scenario under which intra-EU flights were to be included. So far, the Commission has indicated that it will provide substantial help (higher than 50% of the costs) to Member States.
7. The Presidency submits four different options for dealing with the question of the inclusion of intra-EU flights:
 - 1) the *non-inclusion of intra-EU flights*;
 - 2) the *optional inclusion of some intra-EU flights*, on targeted routes. Such solution would not oblige any Member State to collect PNR data on intra-EU flights, but would allow those Member States that deemed there to be an operational need to do so.
 - 3) the *mandatory inclusion of some intra-EU flights*. Such a solution would require the cooperation of *all* Member States, as they would have to define jointly the targeted routes on which PNR data would be mandatorily collected.
 - 4) the *mandatory inclusion of all intra EU-flights*. Under this scheme Member States would have no discretion to decide on which flights PNR data would be collected. The regime for intra-EU flights would thus be completely identical to that for flights to/from third countries: PNR data would always be collected.

8. It is clear that there is little support for option 4, which would entail an enormous investment, both on the part of the Member States authorities and on the part of the air carriers. Option 3 corresponds to the option which the Commission proposes to consider four years after the entry into force of the Directive, but there is no demand to introduce such system immediately. Regarding the choice between options 1 and 2, option 2 offers the advantage that it allows those Member States availing themselves of this possibility to gain valuable experience in the collection and processing of PNR data regarding intra-EU flights. Moreover the Presidency would refer to the outcome of proceedings of the Council of 27 November 2008, where it was stated that:

“The solution [...] should have neither the purpose nor the effect of excluding complementary national choices, taking account of the possibilities and constraints stemming from European legislation. In this respect, possibilities include [...] covering intra-Community air transport [...]. Many Member States seem to wish to maintain this freedom; some have already made such choices and there seems no valid reason why the establishment of a European PNR which responds to certain needs should make those Member States cease responding to other needs recognised at national level.”¹

9. *In order to continue the preparatory work on the draft PNR Directive at expert-level activities, the Presidency deems it necessary that the Council indicate, at a political level, whether the Directive should allow individual Member States the option to mandate the collection of PNR data with regard to targeted intra-EU flights and that the collection and processing of such data should be subject to the legal regime created by the PNR Directive.*

¹ 16457/08 CRIMORG 208 AVIATION 286 DATAPROTECT 100 + COR 1 + COR 2.