



Council of the
European Union

Brussels, 20 July 2015
(OR. en)

11104/15

LIMITE

GENVAL
AVIATION
DATAPROTECT
ENFOPOL
CODEC

NOTE

From: Presidency
To: Delegations

No. prev. doc.: 8916/12
No. Cion doc.: COM(2011) 0032

Subject: Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record for the prevention, detection, investigation and prosecution of terrorist offences and serious crime - Preparation of the informal trilogues

I: Background

- 1 The most recent events since the general approach on the proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime¹ was reached in April 2012 can be summarised as follows:

18916/12 GENVAL 23 AVIATION 73 DATAPROTECT 52 CODEC 1024.

11104/15

DGD 1C

GS/ACA/sl

LIMITE

1

EN

1. As a follow-up to the statement of the informal meeting of the Heads of State or Government on 12 February 2015 – "EU legislators urgently adopt a strong and effective European Passenger Name Records directive with solid data protection safeguards" – COREPER agreed on 18 February 2015, that the general approach should be used as a basis for informal trilogues with the European Parliament. Reference was also made to a French non-paper, distributed to COREPER on 13 February 2015. During the debates on "Fight against terrorism" at the Council (Justice and Home Affairs) on 12-13 March and 15-16 June 2015, a number of Member States reiterated the crucial importance of soon reaching an agreement on PNR. The Council's readiness to engage in informal trilogues as quickly as possible has equally been repeated at the Presidency appearances in the LIBE Committee.
2. In its resolution of 11 February 2015 on anti-terrorism measures, the EP in point 13:

"commits itself to work towards the finalisation of an EU PNR Directive by the end of the year; therefore urges the Commission to set out the consequences of the ECJ judgment on the Data Retention Directive and its possible impact on the EU PNR Directive; encourages the Council to make progress on the Data Protection package so that trilogues on both – EU PNR Directive and Data Protection Package – can take place in parallel; encourages the Commission to invite independent experts from the law enforcement, security and intelligence communities and representatives of Working Party 29 to contribute views and principles, in light of security needs, regarding the necessity and proportionality of the PNR".
3. The Commission organised the requested experts' meetings on 18 March 2015. Another meeting, including PNR and data protection experts was held already on 13 January 2015.

4. On 26 February 2015, rapporteur KIRKHOPE (ECR, UK) presented a revised draft report to LIBE containing 47 amendments. Another 789 amendments were tabled by the (extended) deadline on 1 April 2015. On 15 July 2015, the LIBE Committee adopted the revised KIRKHOPE report on the EU PNR Directive , as well as the mandate to open negotiations with the Council. Following months of pre-negotiation between the rapporteur and his shadows, the vote on the revised report was narrow: 32 in favour, 27 against, with no abstentions. The mandate to open negotiations with the Council (which already adopted a general approach in April 2012²) was adopted with a broader majority: 36 for, 14 against, 8 abstentions. The EP negotiating team is composed as follows: Mr MORAES (S&D), LIBE Chair, Mr KIRKHOPE (ECR), rapporteur, and the shadow rapporteurs Mr VOSS (EPP), Ms SIPPEL (S&D), Ms IN'T VELD (ALDE), Ms ERNST (GUE/NGL), Mr ALBRECHT (Greens/EFA), Ms WINBERG (EFDD) plus an ENF Member to be confirmed.

II: Issues for discussion

5. The first informal trilogue on this file will take place in September 2015 (exact date yet to be set). In order to prepare for this first informal trilogue, the Presidency would like to obtain the views of the Member States on the orientation vote adopted by the LIBE Committee.
6. To facilitate the discussions, the Presidency has drafted a five column table³. It is to be noted that the third column, containing the EP position may be subject to changes, due to the fact that it is based on a provisional unnumbered document, distributed on the day of the vote, that has not yet, as required, been reviewed by the EP lawyer-linguists.
7. The Presidency would like to focus the discussion on the scope of the Directive, for which the main EP amendments to be considered can be found in/concern Articles 1, 2(h) and 4(2).

28916/12.

311105/15 GENVAL 29 AVIATION 78 DATAPROTECT 123 ENFOPOL 218 CODEC 1067.

(A) Definition of serious (transnational) crime

8. The Council general approach allowed the use of PNR data for the purpose of the prevention, the detection, the investigation and the prosecution of terrorist offences and serious crime, with reference to the EAW (European arrest warrant) list of 32 offences. In view of the sensibility of the use of PNR data against pre-determined criteria (screening), the Council text had further limited the use of PNR data for those purposes to a number of serious crimes and terrorist offences (Article 4(2)(a)(ii)). Only for this particular modality had the GA limited the use of PNR data for serious crime to a more limited list of 20 offences set out in Annex II to the GA.
9. The EP definition is more narrow in two respects. First, it has maintained the transnational element in the definition of serious transnational crime, as proposed by the Commission. Second, it has circumscribed the definition of serious transnational crime by adding a list of offences, which, to a significant degree correspond to the list of offences set out in annex II to the GA. (There are three offences on Annex II of the GA which do not feature in the EP definition: illicit trafficking in hormonal substances, sabotage and trafficking in stolen vehicles. Conversely, the EP has in some cases used broader descriptions of offences and there are also five offences on the EP list which do not feature in Annex II to the GA list: counterfeiting, espionage and crimes within the jurisdiction of the ICC, murder and grievous bodily injury). The EP has not followed the Council approach of differentiating the scope according to the modality of use of PNR data, but envisages that its more narrow definition of serious transnational crime is used for any of three modalities of use of PNR data described in Article 4(2).

(B) Inclusion of prevention of immediate and serious threats to public security

10. In a different regard, the EP has, however, broadened the scope *ratione materiae* by referring to the possible use of PNR data for the prevention of immediate and serious threats to public security (Articles 1(2), 3(1), 4(2)(c), 5(1), (2) and (4), 7(3),(4) and (5), 8(1)).

(C) Inclusion of intra-EU flights

11. Article 1a of the Council general approach allowed Member States to request PNR data from intra-EU flights. The phenomenon of foreign terrorist fighters has reinforced the operational need of such (possible) inclusion since the general approach on the PNR Directive was reached in April 2012. Rapporteur KIRKHOPE has, however, not been able to persuade a majority of the LIBE MEPs of the necessity of such extension.

(D) Inclusion of non-carrier economic operator

12. In a different respect, the EP has broadened the scope *ratione personae* of the Directive, by including non-carrier economic operators, such as travel agencies and tour operators. Under Article 6 of the EP report, these operators shall also be obliged to push PNR data in the same way as air carriers. Their inclusion in the scope is novel, not only with reference to the initial Commission proposal, but also as compared to the PNR Agreements the Union has previously concluded with third countries.

(E) Exchange with EUROPOL

13. In Article 1, the KIRKHOPE report mentions the exchange of PNR data between the Member States and with EUROPOL as part of the subject matter and scope of the Directive. The EP introduced a new Article 7a according to which:

"Europol may submit, on a case-by-case basis, an electronic and duly reasoned request to the Passenger Information Unit of any Member State for the transmission of specific PNR data or the results of the processing of specific PNR data, when this is strictly necessary to support and strengthen action by Member States in preventing detecting or investigating a specific terrorist offence or serious transnational crime referred to in Article 2(h) in so far as this offence is covered by Europol's competence pursuant to Council Decision 2009/371/JHA."

14. Read together with Article 4, it appears that the EP wants to allow EUROPOL, via reasoned requests, to obtain PNR data in specific cases of for the purpose of prevention, detection, investigation or prosecution of a serious transnational or terrorist criminal offence or for the prevention of immediate and serious threats to public security (Article 4(2)(c)). According to Article 4(2)(a) EUROPOL would also be entitled to receive the (result of the processing of) PNR data further to the screening of these data against pre-determined criteria and may compare PNR data with relevant databases.
 15. *Member States are invited to express themselves on the above -mentioned issues, indicating their position on the EP amendments and their views on the scope for compromise.*
-