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from: The Senate of Netherlands
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to: Council

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
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[COM(2011) 32 final]
- Opinion¹ on the application of the Principles of Subsidiarity and Proportionality

Delegations will find attached the above mentioned Opinion.

Encl.

¹ This opinion is available in English on the interparliamentary EU information exchange site (IPEX) at the following address: <http://www.ipex.eu/ipex/cms/home/Documents/pid/10>

Dear Mr Šefčovič,

The Senate has noted with interest that the European Commission has now put forward a new proposal based on the provisions of the Treaty of Lisbon to regulate the use of Passenger Name Record (PNR) data at EU level¹ in place of the proposal of 6 November 2007 on this subject, which had not yet been adopted by the Council on the date of entry into force of the Treaty and had thus become obsolete.² The new proposal implements an intention expressed in the Stockholm Programme. In principle, the efforts to harmonise the various arrangements that exist in the different Member States deserve a positive approach. However, the members of the Senate still have a number of questions.

Various databanks containing passenger data already exist in Europe. These are the Schengen Information System (SIS), the Visa Information System (VIS) and the Advanced Passenger Information system (API). The question that now arises is whether yet another system is actually necessary.

According to the European Commission, the proposed PNR directive would have an added value in combating terrorism and serious crime (see recital 9 of the preamble). Can the Commission substantiate this claim? What part does the PNR data play in the prosecution of such crime?

The Senate also wonders what relevant databases (relating to terrorism and serious crime) are involved in the search for a match between the PNR data and other data (see the proposed article 4 (2)(c)). Are these limited to the databases that contain information relevant to terrorism and serious crime?

¹ COM(2011)32.

² COM(2007)654.

Next, the Senate wonders whether the proposal complies with the requirements of proportionality. It is, after all, aimed at the prevention, detection, investigation and prosecution of terrorist offences and serious crime. The latter term is unclear and is not sufficiently defined by the requirement of a prison sentence of at least three years. Moreover, this involves the retention of data of persons who are not guilty of committing a criminal offence and where the manner of processing could lead to the preparation of profiles (cf. article 4). In addition, the arrangements made to anonymise retained data appear inadequate; for example, the provisions for masking information about the manner of payment (including credit card numbers) are not watertight.

By reference to what criteria are the PNR data examined and what combination of data warrants further examination? Although the retention of ‘sensitive data’ such as data concerning a passenger’s race or ethnic origin, religious or philosophical belief, political opinion, health or sexual life is prohibited, details about the reservation and travel itinerary are kept. These data include information about meals, which could be indicative of a particular religious conviction or medical condition. How should such data be dealt with? Why is nationality too not excluded as a basis for assessment? After all, Article 21 (2) of the Charter of Fundamental Rights prohibits any discrimination on grounds of nationality.

According to the European Commission, the PNR data are used mainly by intelligence services prior to the departure of passengers. Nonetheless, the Commission proposes a maximum retention period of 5 years. The Senate would like the choice of this period to be explained more fully.

Yours sincerely,

P. René H. M. van der Linden
President of the Senate of the States General



EUROPEAN COMMISSION

Brussels, 11 OCT. 2011
C/2011/ 6300

Dear President,

The Commission would like to thank the Senate of the Dutch Parliament for its opinion on the proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime {COM(2011) 032}.

The Commission would like to provide the following elements in response to the issues raised by the Senate of the States General:

The EU adopted measures for the collection and exchange of personal data between law enforcement and other authorities. Although these measures have proven useful, they tend to focus on data relating to persons who are already suspected - i.e. persons who are "known" to law enforcement authorities. The Schengen Information System (SIS), the second-generation Schengen Information System (SIS II) and the Visa Information System (VIS) are examples of such measures. The Advance Passenger Information Directive is another example, even though it is focused on border control and migration rather than law enforcement issues. However, these measures do not enable law enforcement authorities to identify suspects whose names do not appear in other databases in the way that the analysis of PNR data does. The use of PNR data would enable law enforcement authorities to address the threat of serious crime and terrorism from a different perspective than through the processing of other categories of personal data.

Crime and terrorism continue to cause very serious harm to victims, to the economy and to citizen's feeling of security in the EU. Illegal drugs alone cost thousands of lives each year within the EU, and in 2008, 22 Member States reported that drug-related crime cost them 4.2 billion EUR.

PNR data has proved successful in preventing and fighting this kind of serious crime, as well as terrorism, and that is why this proposal is so important.

PNR data is already being used in many Member States. To give an idea of the necessity of this kind of data, Belgium reported to the Commission that 95 percent of the illegal drugs seized in 2009 were exclusively or predominantly due to the processing of PNR

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data. In Sweden, the corresponding figure was 65-75 percent. The analysis of PNR data has also proven very important for identifying and dismantling terrorists' networks.

As regards the analysis of PNR, it is envisaged that this is done by (i) matching PNR against relevant databases. It is of course self-evident that such databases should contain information relevant to terrorism and serious crime, as this is the purpose limitation applying to the whole of the proposal, and (ii) on the basis of criteria pre-determined by each Member State.

The Commission believes that the scope of the proposal is sufficiently clear and precise. Terrorist offences and serious crime are defined on the basis of pre-existing EU definitions in order to provide the necessary legal certainty.

As regards sensitive data, the proposal contains an absolute prohibition of their use. Details about special meals and medical conditions contained in the PNR are exactly the type of data that should be considered to be 'sensitive' and hence deleted and not used.

Finally, on the length of the data retention period, according to the Commission's assessment, 5 years represent the right balance between law enforcement needs and data protection. It is noted that the Commission included for the first time the depersonalisation of the data just 30 days after their receipt, a principle that reinforces the proportionality of the proposal.

The Commission hopes that these clarifications address the questions raised in your opinion. I look forward to pursuing the political dialogue with the Senate of the States General.

Yours faithfully,

*Maroš Šefčovič
Vice-President*