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NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
Subject:	Proposal for a Directive of the Council and the European Parliament on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

State of play negotiations

1. The Commission's proposal on an EU PNR-system was presented in February 2010. The Council agreed in April 2012 on a general approach. The EP rapporteur, MEP Kirkhope (ECR, UK) issued his first report on 14 February 2012, but the vote in the LIBE Committee did not take place until 24 April 2013. The first report was rejected (30 for, 25 against), as the rapporteur had no support among S&D, ALDE and the Greens. On 12 June 2013, the plenary (EPP and S&D majority) sent the file back to the LIBE Committee. The file was not discussed for the rest of the legislature.
2. At the informal meeting of the Heads of State or Government on 12 February 2015 EU legislators were called upon to "urgently adopt a strong and effective European Passenger Name Records directive with solid data protection safeguards".

3. 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".

4. On 15 July 2015, the LIBE Committee adopted the second KIRKHOPE report on the EU PNR Directive (presented on 26 February 2015), as well as the mandate to open negotiations with the Council. For a number of MEPs, the limitations introduced in the Kirkhope report do not go far enough, and the vote on the revised report was narrow: 32 in favour, 27 against, with no abstentions. The mandate to open negotiations with the Council was adopted with a broader majority: 36 for, 14 against, 8 abstentions¹.

5. The negotiations with the EP, which started in September 2015, take place in a highly unusual institutional setting in the sense that the EP report voted on 15 July 2015 by the LIBE Committee was not supported by a majority of the shadow rapporteurs (only the EPP shadow rapporteur supported it), but by a 'heterogeneous' majority of LIBE MEPs across-party lines. This obviously has important repercussions on the ability of the rapporteur to broker a deal with the Presidency.

¹ 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).

State of play negotiations

6. The Presidency has held four trilogues and two technical meetings with the EP on the following dates: 24 September, 29 September, 9 and 17 November. Technical meetings have taken place on 16 October and 13 November. At this stage, two more trilogues are scheduled for 2 and 15 December and two more technical meetings are scheduled for 19 November and 27 November.

Compromises

(A) *Scope: definition of serious crime*

7. 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 European arrest warrant Framework Decision 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.
8. The EP definition is more narrow in two respects. First, it has maintained the transnational element in the definition of serious transnational crime. 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.² The EP has not followed the Council approach of differentiating the scope according to the modality of use of PNR data (checking PNR data against databases for a hit or screening against pre-determined criteria), 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).

² 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.

9. The Presidency has suggested a compromise to the EP based on the following elements:
- a single list of offences (27) for both modalities of use of PNR data, which is more limited than the list of 32 offences of the European Arrest Warrant Framework Decision, but longer than the list set out in Annex II to the April 2012 general approach of the Council; and
 - no requirement that serious crime must be transnational in nature, but an acknowledgment in recital 12 that such crime will often have a cross-border element.

(B) *Inclusion of intra-EU flights*

10. Article 1a of the Council general approach allows 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.
11. Following discussions with Member States at expert level, the Presidency has indicated to the rapporteur that it is not in a position to propose a compromise on this crucial item.

(C) *Data retention*

12. The Commission had proposed an initial storage period of 30 days, followed by a further retention period of five years of masked out data. The EP has followed this approach. The negotiations have shown that an initial storage period of 30 days is generally considered much too short from an operational point of view. Article 9 has been redrafted in such a way that the overall retention period of 5 years is subdivided into two periods: a first period in which the data are fully accessible and a second period during which the data are masked out and where full disclosure of the data is subject to strict conditions. Taking into consideration the operational needs the initial retention period is set at two years. The initial retention period in the 2011 EU-Australia Agreement, to which the Council has agreed and the EP has given its consent, is three years.

13. Following discussions with Member States at expert level, the Presidency has indicated to the rapporteur that that the initial storage period during which the PNR data are not masked out could be reduced to 12 months.

(D) *Data protection*

14. The EP text is considerably more detailed than the April 2012 general approach of the Council and includes an article (3a) on a data protection officer (DPO) in the Passenger Information Unit (PIU). One of the more thorny points of discussion between the institutions concerns the way in which applicability of the current and future general legal framework on data protection should be ensured. The Presidency has argued that this should be done, as was already the case in the April 2012 general approach of the Council, by way of a dynamic reference to the 2008 Data Protection Framework Decision, it will be ensured that the future data protection instruments that will replace the current ones will also become applicable.
15. Following discussions with Member States at expert level, the Presidency has indicated to the rapporteur that it is willing to take on board a number of the EP amendments on data protection. The Presidency has pleaded in favour of maintaining a dynamic reference to the current data protection instruments.

(E) *Inclusion of non-carrier economic operator*

16. 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.

17. Following discussions with Member States at expert level it has become clear that, whilst a significant number of Member State acknowledge the potential added value of such inclusion, the vast majority of Member States is of the opinion that the technical difficulties surrounding the way in which non-carrier economic operators collect air carriers make it impossible to extend the obligations of air carriers as such to them. This is also linked with the preponderant view that such inclusion could only be seriously considered on the basis of a thorough impact assessment, which is lacking.
18. Possible compromises could be based on the following elements:
- an enabling clause which permits, but does not oblige Member State to include non-carrier economic operators or require non-carrier economic operators to provide PNR data to the air carrier, and which is restricted to cases in which only a limited set of PNR data is made available to air carriers for tickets purchased through non-carrier economic operators; or
 - an explicit review clause which calls upon the Commission to review the need to include non-air carrier operators.
19. *Member States are invited to express themselves on the above -mentioned issues, indicating whether they agree with the Presidency assessment of the scope for compromise.*
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