

EU PNR – the way forward

Following the Orientation Debate of 21 January 2015 on the European Agenda on Security

The Orientation Debate on the European Agenda on Security held by the College on 21 January 2015 confirmed **the call for further work** on the existing Commission proposal for a Directive on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious transnational crime.

This note is aimed at allowing the Commission to take an **informed decision** about the best way forward to respond to the different calls for a **swift adoption of the EU PNR proposal** by the co-legislators. The note and its annex therefore present what it might be looked at as a **workable compromise** between the positions expressed so far by the political groups of the European Parliament, on one side, and by the Council in its General Approach of April 2012, on the other. The proposed compromise takes due account of the judgment of the Court of 8 April 2014 on the Data Retention Directive, as far as the judgment appears applicable to PNR. The revised text is in line with a paper presented by the EU Fundamental Rights Agency on the requirements for the processing of PNR data¹.

The **annex** to the note is a **first attempt** for a revised version of the 2011 Commission proposal. This revised version builds upon the amendments already agreed in the GRI fiche of 28 November on EU PNR² and makes a number of further substantial suggestions, aimed at obtaining a text that aims at responding to the concerns of all the parties involved. The objective of these suggestions is to strengthen the data protection safeguards, while preserving the operational effectiveness of the PNR proposal to fight terrorism and serious transnational crime.

As compared to the 2011 proposal, the main proposed changes concern:

- **narrowing the purpose limitation** to only include **terrorism and "serious transnational crime"**. The amendment would therefore eliminate the notion of "serious crime", thus avoiding the overlapping of the two notions in the 2011 proposal. Moreover, the reference to the crimes covered by Framework Decision 2002/584/JHA on the European Arrest Warrant is replaced with a **shorter list of offences** that are **relevant to international travel** (Articles 1 and 2, and new list in Annex II). A narrowing down of the purpose limitation has been requested by several members of the Parliament and the Fundamental Rights Agency. The Council also added a specific list of offences to its April 2012 General Approach.

¹ "Twelve operational fundamental rights considerations for law enforcement when processing Passenger Name Record (PNR) data"

² SP(2014)720

- **reducing the retention period of the full PNR data to 7 days** (instead of 30 days in the 2011 proposal and 2 years in the Council's general approach) **before the data are depersonalised**. Moreover, while all the (depersonalised) PNR data would continue to be retained for 5 years, the data shall only be accessible for **4 years** in cases linked to serious transnational crime (as opposed to cases linked to terrorism, for which the PNR data will be accessible for the whole period of 5 years). This amendment represents a balanced compromise between calls of Members of Parliament for a shorter retention period and the Council's request for the availability of data for operational purposes (the Council is expected to strongly oppose the 7 days retention period).
- **establishing stricter conditions for access to PNR data**. These amendments foresee the appointment of a **Data Protection Officer** within the national units responsible for the processing of PNR data (Passenger Information Unit – PIU). This function will be exercised independently (Article 3bis). He/she will ensure the internal supervision of the PIU's activities and will notably oversee the transfer of PNR data to other competent authorities, to other Member States or to third countries (in the latter case, with the power to refuse the transfer). **Optionally**, such transfers can also be overseen by a **judicial authority** of the Member State concerned (new Article 4bis). In addition, the amendments envisage reinforcing the supervisory role of the national data protection authority. This is one of the main requirements expressed in the Court's judgment on the Data Retention Directive.
- **explicitly spelling out the rights of passengers** to have access to their PNR data (retained by the PIU) and to request the modification or erasure of their data. This reinforces and adds clarity to the safeguards afforded to passengers and anticipates guarantees set out in the Commission proposal for a Data Protection Directive for the law enforcement sector. This is particularly in line with the Court's request for sufficient guarantees, as laid down in its ruling concerning the Data Retention Directive.
- **channelling the exchange of PNR data** between Member States through their PIUs, using Europol's existing Secure Information Exchange Network Application (SIENA) (Article 7), and establishing the **possibility for Europol to request access to PNR data** (new Article 7bis) within the data protection framework under which Europol currently operates (to be further reinforced under the new legal basis, including the role of EDPS)

Point for further discussion:

- The introduction of the possibility for Member States to collect and process PNR data concerning **intra-EU flights** is the most important request expressed by the Council in

its General Approach of April 2012³. On the other hand, the European Parliament is strongly opposed to it. The issue needs further assessment because it might raise legal questions, notably as far as the Schengen *acquis* is concerned, as highlighted in a note issued by the Legal Service on 20 October 2010.

If included, opposed to the collection and processing of international (extra-EU) flights, this could be **optional, not mandatory**⁴.

2. Impact in terms of timing of a modified EU PNR Commission proposal

Following the request at Orientation Debate of last Wednesday to further work of the EU PNR with a view to its swift adoption, it is therefore relevant to assess what would be the impact in terms of timing of a modified EU PNR Commission proposal.⁵

Timing in case of an amended proposal:

The Commission can modify its proposal as long as the first reading is not concluded (Art 293(2) TFEU). If the Commission adopts its modified proposal as early as in its meeting on 10 February 2015, the Council working group would then need to start examining the modified proposal. Such careful examination by 28 Member States is expected to take **between 4 and 6 months**, given the important changes to be included in the new proposal, **before Coreper can grant a mandate to start the trilogues**. Consequently, the trilogues would most likely not start during the Latvian Presidency in this scenario. Additional Member States are expected to have national PNR laws adopted by then⁶.

On the Parliament side too, the examination of the proposal would begin afresh. In formal terms the Parliament has not taken any position so far, so in practice it could, if the political will is there, reach the point of adopting a negotiating mandate roughly in parallel with the Council's proceedings.

³ France has since last year legislation already in place for collection and process of PNR for intra-EU flights

⁴ The 2011 Commission proposal provides for a review within two years after the date of transposition of the Directive of the feasibility and necessity of including intra-EU flights in its scope.

⁵ Following the Paris attacks, only one political group MEPs (ALDE) has asked the Commission to present a new proposal on EU PNR. At the same time, in the Paris Joint Statement of 11 January 2015, the Ministers of the Interior further highlighted the "*crucial and urgent need to move toward an European PNR*"

⁶ 14 Member States are currently setting up national PNR systems which will be regulated through national laws on PNR. Some Member States have already adopted national PNR laws (including France) and others are preparing them. A growing number of Member States are expected to have PNR laws in place in early 2016 when most PNR projects co-funded by the EU under a targeted call will finish.

It is to be signalled that, in case the Commission would adopt its revised proposal without an accompanying Impact Assessment, the EP or in any case some political groups would likely express their criticism, given the important implications derived on PNR from the ECJ ruling on DRD.

Timing in case the discussions on the existing proposal continue:

If the discussions were to continue on the current proposal, the Council would base its position on the general approach adopted in April 2012. It is expected that the Council position has not changed substantially.

The Council would therefore be ready to start informal trilogues as soon as LIBE has adopted its report. This could allow for the **start of trilogues in April** and a discussion at the June JHA Council meeting to take a position on the progress made so far. The rapporteur expressed his intention to present his draft report by the end of February.

It is therefore possible to say that, should the Commission were to present a modified proposal, informal trilogues would start at the earliest under the Luxembourg Presidency. This most likely would delay the possible adoption of an EU PNR directive for at least 6 to 9 months.
