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**I. BACKGROUND**

1. The GENVAL Working Party started preparing the trilogues on the proposal for the PNR Directive on 24 July 2015 immediately after EP LIBE Committee's adoption of the revised Kirkhope (rapporteur) report of 15 July 2015. The first exchange of views was on the scope of the draft Directive and focussed on the (A) definition of serious (transnational) crime, (B) inclusions of prevention of immediate and serious threats to public security, (C) inclusions of intra-EU flights, (D) inclusion of non-carrier economic operators, (E) PNR data exchange with Europol.
2. The outcome of that exchange of views will be the basis for the first trilogue on the draft Directive to be held on 24 September 2015. The Presidency will suggest to discuss the data protection elements of the proposed Directive at a trilogue on the PNR file in the near future.

3. In order to prepare for the next trilogue, the Presidency would like to obtain the views of the Member States and focus on data protection issues at the GENVAL meeting of 25 September. To that end, the Presidency prepared the below analysis of how the EP amendments differ from the Council GA.
4. Discussions should focus on (II) the period of retention, (III) the rights of access to information of the person concerned and of the public, (IV) the measures regarding confidentiality and security of PNR data, (V) Sensitive data (VI) the penalties against air carriers and non-carrier economic operators, and (VII) control and supervision. Furthermore, the Presidency wants to draw the attention to (VIII) the applicability of provisions of Council Framework Decision 2008/977/JHA with regard to PNR data (Articles 8,11 (1), (2), 12, and 19 (1)).
5. For each of the points below, delegations are invited to indicate where they think the EP amendments could be taken into account.

## **II. PERIOD OF DATA RETENTION (ARTICLE 9)**

### **1. Anonymisation / Masking out (Article 9(2))**

- a) **Period within which the data have to be masked out**
6. The Commission has proposed an initial storage period of 30 days of PNR data after their transfer to the relevant PIU. This period is followed by a second retention period of five years during which the PNR data are partly inaccessible.
7. Since the initial period of 30 days had been considered much too short from an operational point of view, the GA redrafted Article 9 in such a way that the overall retention period of five years was subdivided into two periods: a first period of two years and a second period during which certain elements of PNR are "masked out" and access to the full PNR data set certain data is subject to strict conditions.
8. The EP maintained the Commission proposal of an initial retention period of 30 days and the overall retention period of five years.

**b) Elements which have to be masked out**

9. Access to elements which serve to identify the data subject (passenger) to whom the PNR data relate shall be restricted and therefore be "masked out" upon expiry of the initial retention period. The EP accepted to restrict the access to the four elements proposed by the Commission, i.e.

- name(s), including the names of other passengers on PNR travelling together,
- address and contact information,
- general remarks to the extent that it contains any information which could serve to directly identify the passenger to whom the PNR relate, and
- any collected advance passenger information.

10. However, the Council GA is therefore more protective in this regard as the EP did not take on board the two supplementary elements suggested by the GA, i.e.

- all forms of payment information, including billing address, to the extent that it contains any information which could serve to directly identify the passenger to whom PNR relate or any other persons, and
- frequent flyer information.

**c) Persons which have access to masked out data**

11. According to the EP amendment and in line with the Commission proposal, anonymised PNR data shall be accessible to a limited number of personnel of the PIUs specifically authorised to carry out either analysis of PNR data or, according to Article 4(2)(d), to develop assessment criteria for identifying persons who may be involved in a terrorist offence or serious transnational crime. On the contrary, the GA does not mention at all who will have access to masked out data.

## 2. Re-Identification of masked PNR data

### a) Terminology used in the text proposals

12. In order to avoid disproportionate use and after an initial retention period, access to the stored PNR data set, such as set out in Annex I to the GA, should be filtered, i.e., according to the wording of the GA Recital 21, "depersonalised" by methodologically "masking out" certain data. The "full PNR data" would then only be accessible under strict conditions. The Article 2(k) definition explains that "'depersonalising through masking out data' means rendering certain data elements of such data invisible to a user without deleting these data elements." Access to "full PNR data" would therefore mean access to the complete list of PNR data elements.
13. Instead of "depersonalised", the Commission proposal uses "anonymised", the EP uses "masked out" data in Recital 21. Furthermore, neither the Commission proposal nor the EP amendment talk about access to "full PNR data", neither in Recital 21 nor in the analogue phrase in Article 9(2), but refer to access respectively to anonymised or masked out data.
14. However, the Commission proposal introduces the term "full PNR data" in the last sentence added to Article 9(2), and the EP amendment uses the term in Article 9(2)(2a).
15. This implies that "access to full PNR" data means access to the complete list of PNR data with all elements being visible. The term is synonym to access to anonymised or access to masked out data as long as such access is given both to all of the masked out data and at the same time.

### b) Purposes for which data can be re-identified

16. According to the GA, masked out PNR data should be re-identified during the second retention period only if necessary for the purpose (Article 4(2)(b) of the GA) of responding, on a case-by-case basis, to duly reasoned requests from competent authorities for specific prevention, investigation or prosecution purposes or to provide the competent authorities with the results of such processing.
17. The EP amendment does not provide access to full PNR data for this response purpose since there is no reference to Article 4(2)(c) of the EP text to be found.

18. However, the EP amendment (Article 9(2)(2a)) provides, with reference to Article 4(2)(b) of the EP report, for access to full PNR data for carrying out an assessment of passengers in case of investigating in a "specific or actual threat or risk" relating to terrorist offences, and investigating or prosecuting "serious transnational crime". Further to Article 4(2)(b) of the EP text, a third possibility was added, namely the prevention of an immediate and serious threat to public security. According to this distinction, a period of four years of access is set in cases concerning serious transnational crime, and a period of five years in cases concerning terrorist offences. No period was set for the third case, but presumably the same distinction has to be made here, according to the offence underlying the threat to public security.
  19. The EP amendment, contrary to the GA but in line with the Commission proposal and referring to Article 4(2)(d) of the amendment, does provide access to re-identified data for the purpose of developing or updating of assessment criteria related to the fight against terrorism or serious transnational crime. The Council GA is more protective on this point.
- c) Competent authorities to authorise re-identification**
20. According to the GA (Article 9(3)), disclosure of full PNR data should be permitted when approved by a judicial authority or by another national authority competent under national law to verify whether the conditions for disclosure are fulfilled. With reference to Article 4(2)(b) of the amendment (assessment of passengers in case of counter-terrorism fight against "serious transnational crime"), the EP amendment provides for the national supervisory authority to authorise re-identification of masked out PNR data. Prior to that, the authority, has, however, to consult the data protection officer.
  21. The Commission proposal provides for permission to accede full PNR data only in the case of responding to duly reasoned requests from competent authorities (Article 4(2)(c)). In this case, the Head of the PIU has the right to authorise the access requested.

III. **RIGHTS OF ACCESS TO INFORMATION OF THE PERSON CONCERNED AND OF THE PUBLIC (ARTICLES 6(4A) AND 11(5), (5A))**

22. Article 6 is about obligations on air carriers on the transfer of data to PIUs. The EP amendment adds paragraph (4)(a) to Article 6, referring to the obligation of air carriers and non-economic operators to duly and in an easily understandable format inform passengers of the type of personal data being collected for law enforcement purposes, and their rights regarding their data as a passenger.
23. Article 11(5) is about obligations Member States shall impose on air carriers / non-carrier economic operators to inform their clients, prior to booking a flight or purchasing a ticket, on the transfer of PNR to PIUs and the purposes thereof as well as passengers' data protection rights. The EP amendment adds a specification of these data protection rights. There appears to be at least a partial overlap between Article 6(4)(a) and Article 11(5) of the EP text.
24. However, with regard to the right to complain, the EP amendment does not take on board the GA proposal to channel the complaint to the national data protection supervisory authority. Instead, the person concerned may lodge a complaint to a national supervisory authority of their choice.
25. Neither does the EP amendment take on board the obligation, as set out in the Commission proposal and the GA, on Member States to make available the same information to the public, as proposed by the GA. However, the amendment added a new paragraph (5)(a) on the obligation Member States shall impose on their PIUs to inform the data subject on the rights referred to in paragraph (5) and how to exercise those rights.

IV. **MEASURES REGARDING CONFIDENTIALITY AND SECURITY OF PNR DATA  
(ARTICLE 10 (1A), ARTICLE 4 (4B), ARTICLE 11 (2) ET (2A), ARTICLE 11 (3C))**

26. Article 11 on the protection of personal data refers in paragraph (2) to the provisions of Council Framework Decision 2008/977/JHA regarding confidentiality of processing and data security. The EP amendment added a paragraph (2)(a) referring to Directive 95/46/EC and proposes that if in the framework of that Directive greater rights related to data processing than in the proposed PNR Directive exist those provisions should apply.
27. It has to be noted that, for the purpose of fighting terrorism and serious crime, the draft PNR Directive obliges air carriers to transfer PNR data, but it does not oblige them to collect PNR data. Air carriers already collect and process PNR data from their passengers for their own commercial purposes. Hence, the proposed data protection regime for PNR data is that of Directive 95/46/EC. However, it appears that Directive 95/46/EC is not applicable to the scope of data processing under the proposed PNR Directive.

V. **SENSITIVE DATA (ARTICLE 11(3))**

28. The EP text changes Article 11(3) on the protection of sensitive personal data by adding certain data to the list of sensitive data, whereas the Council had somewhat limited the list of sensitive data from the Commission proposal.

VI. **PENALTIES AGAINST AIR CARRIERS / NON-CARRIER ECONOMIC  
OPERATORS IN CASE OF VIOLATION OF RULES ON DATA PROTECTION  
(ARTICLE 10(1))**

29. The EP amendment to Article 10 on penalties against air carriers in case of non transfer of PNR data adds a provision for sanctions if data to be transferred are not processed in accordance with the data protection rules laid down in the proposed Directive.

## VII. CONTROL AND SUPERVISION

### a) **State of the art and documentation (Article 11(3a)-(3d))**

30. Article 11(3) is particularly on the protection of sensitive data. However, the EP text supplements the paragraph by a detailed list spelling out to which extent Member States shall impose on PIUs obligatory measures to ensure an appropriate level of personal data protection and data security in general.
31. The EP text provides for obligations to (3a) maintain and make available documentation of all processing systems and procedures under their responsibility, (3b) keep records of a number of processing operations, (3c) implement appropriate technical and organisational measure and procedure to ensure a high level of security, and (3d) communicate a relevant breach of personal data to the data subject and the national data protection supervisor.

### b) **Appointment of a data protection officer within the PIU**

32. The EP text adds in a new Article 3a the function of a data protection officer responsible for monitoring the processing of PNR data and implementing the related safeguards. The data protection officer shall be appointed by the PIU.
33. Article 3a(3) and (4) detail the profile, the duties and tasks of the data protection officer and the role of the Member States with regard to the designation of the data protection officer (3a(3) and (3)(d).

### c) **National supervisory authority (Article 12)**

34. The national supervisory authority responsible for advising and monitoring the application of the proposed PNR Directive within its territory is, as set out in Article 12 of the GA, the national supervisory authority established in the implementation of Article 25 of Framework Decision 2008/977/JHA. The further provisions of Article 25, i.e. on the powers and duties of the supervisory authority, are applicable.



35. Although Article 12 of the EP text refers to Article 25 of the Framework Decision 2008/977/JHA, a new Article 12a is added which, contrary to the GA approach, sets out in detail the duties and powers of the national supervisory authority in the framework of the proposed PNR Directive. The first question of understanding to what extent the new Article 12 a provisions elaborate, complement or replace the provisions on the powers and duties of the supervisory authority as set out in Article 25 Decision 2008/977/JHA.
36. According to Article 12a(1) of the EP amendment, the national authority is responsible not only for monitoring the application of the proposed Directive on its territory but also for contributing to its consistent application throughout the Union. In line with that, the EP entrusts to the authority tasks of transnational nature such as in Article 12a(1)(a) or (2).

**d) Disciplinary action (Article 11(7))**

37. National supervisory authorities shall take disciplinary action against persons responsible for any intentional breach of privacy, as appropriate, to include denial of system access, formal reprimands, suspension, demotion, or removal from duty.

**VIII. APPLICABILITY OF THE PROVISIONS OF COUNCIL FRAMEWORK DECISION 2008/977/JHA WITH REGARD TO PNR DATA (ARTICLES 8, 11(1), (2), 12 AND 19(1A) )**

38. The draft Directive is on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offence and serious crime. All three institutions agree that such processing of PNR data at national level should be subject to a standard of protection of personal data in line with the provisions of "Council Framework Decision" 2008/977/JHA<sup>1</sup>. On top of that , the EP amendment to recitals (23) and (24) respectively added "and Union data protection law, including the specific data protection laws laid down in this Directive."

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<sup>1</sup> Since 2008/977/JHA is a "Council Framework Decision", the negotiating parties should agree on coherently using the correct denomination throughout the whole text, i.e. recitals (23), (24), (26), (27) and (32) as well as Article 8, 11, 12