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LEGAL SERVICE OPINION *

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 (6007/11)

- Possible extension of the scope of the Directive to internal flights between EU Member States - Compatibility with the principle of free movement of persons and the Schengen Borders Code

I. INTRODUCTION

1. On 8 and 9 March 2011, following an initial examination of the above proposal, the Working Party on General Matters, including Evaluations (GENVAL) asked the Legal Service for an opinion on whether a possible extension of the scope of the Directive to intra-EU flights, whether to all internal flights or solely to those selected by the Member State concerned, was compatible with the principle of free movement of persons and the Schengen Borders Code.¹

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¹ See Presidency note (6518/11). See also notes from the United Kingdom delegation (6359/11) and the Austrian delegation (7414/11).

II. CONTENT OF THE PROPOSAL FOR A DIRECTIVE

2. The above proposal would place a duty on air carriers to transfer, before departure of the aircraft², the Passenger Name Record (PNR) data of all passengers on international flights between Member States and third countries³. The data would be forwarded to the database of an authority (called the "Passenger Information Unit", hereinafter "Information Unit") which each Member State would have to set up or designate for the purpose (Articles 1, 3 and 6 of the proposal).

The measures are designed to provide a tool for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

3. The Information Unit concerned⁴ is "*responsible for collecting PNR data from the air carriers, storing them, analysing them and transmitting the result of the analysis to the competent authorities*" (Article 3(1) of the proposal). The Information Unit must process the PNR data itself, exclusively for the purposes laid down in the Directive. It transfers the PNR data or the results of processing the data to the competent authorities on a case-by-case basis only (Article 4(4) of the proposal). Four types of PNR data processing are provided for (Article 4(2) of the proposal):

² The data have to be transferred at least twice: the first time 24 to 48 hours before flight departure, and the second time immediately after flight closure (Article 6(2) of the proposal).

³ Article 16 provides for the volume of data transferred to increase gradually, until all international flight data are transferred 4 years after transposition. According to the impact assessment, approx. 500 million passengers entered and left the EU in 2006 (3.3 million flights). There were 4.5 million flights in 2010. Including intra-EU flights would mean a threefold increase in passenger numbers (i.e. approx. 1.5 billion passengers).

⁴ The unit of the Member State of departure or arrival of an international flight.

- The first two processing operations take place before the arrival or departure of the passenger and consist of "*carrying out an assessment of the passengers (...) in order to identify any persons who may be involved in a terrorist offence or [serious transnational crime/serious crime] and who require further examination by the competent authorities*" (points (a) and (b)).

For this assessment, the PNR data are automatically screened, firstly against "*pre-determined criteria*" (point (a)⁵) which, according to the statement of reasons and the impact assessment, will identify persons who were previously "unknown" or not previously suspected, sought or under alert in the relevant databases, and secondly against relevant databases (such as SIS or national databases) which register persons (or objects) already "known", i.e. sought or under alert (point (b)⁶).

- The two other processing operations take place post hoc, i.e. following a duly reasoned request from a competent authority in specific cases, in particular in the context of an investigation (point (c)⁷), or for an analysis of PNR data to update or define new "*pre-determined criteria*" in order to identify any "unknown" persons (point (d)⁸).

According to the explanatory memorandum and the impact assessment, the advantage of PNR data, as opposed to simply comparing data with existing databases of persons sought or under alert, is that it can be used as a criminal intelligence tool to identify persons previously "unknown" to the competent services by means of objective "*pre-determined*" assessment criteria, such as, for example, unusual travel routes giving rise to a suspicion of trafficking in human beings or drugs, unusual means of payment, etc. Only persons identified in this way would be subject to "*further examination by the competent authorities*", although it is not specified what the consequences of this would be, for example regarding entry.

⁵ Applies only to terrorist offences or serious transnational crime.

⁶ Applies to terrorist offences or serious crime (not merely to transnational crime).

⁷ Applies to terrorist offences or serious crime (not merely to transnational crime).

⁸ Applies only to terrorist offences or serious transnational crime.

4. The Member States must ensure that "*any positive match resulting from (...) automated processing is individually reviewed by non-automated means*" (Article 4(2)(a) and (b)) and that the competent authorities do not "*take any decision that produces an adverse legal effect on a person or significantly affects a person only by reason of the automated processing of PNR data*" (Article 5(6)).
5. PNR data are the data contained in the "*record of each passenger's travel requirements*" (Article 2(c) of the proposal). The Annex to the proposal lists 19 data items⁹ which may be included in PNR data, although air carriers are not obliged to collect them all. They forward only those data which they already gather for their own commercial purposes.

These data partly overlap with "API" (*Advance Passenger Information*) data, which air carriers are already required, under Directive 2004/82 ("API Directive")¹⁰, to forward to the authorities responsible for carrying out checks on persons at external borders by the end of check-in, on request. The API Directive is designed to "[improve] *border controls and combat(...) illegal immigration*" (Article 1).

⁹ PNR record locator; date of reservation/issue of ticket; date(s) of intended travel; name(s); address and contact information (telephone number, e-mail address); all forms of payment information, including billing address; complete travel itinerary; frequent flyer information; travel agency; travel status of passenger, including confirmations, check-in status, no show or go show information; split/divided PNR information; general remarks (including all available information on unaccompanied minors under 18 years); ticketing field information, including ticket number, date of ticket issuance and one-way tickets, Automated Ticket Fare Quote fields; seat number and other seat information; code share information; all baggage information; number and other names of travellers on PNR; any Advance Passenger Information (API) data collected; all historical changes to the PNR.

¹⁰ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data (OJ L 261, 6.8.2004, p. 24). Article 3(2) of the Directive provides that API must comprise "*the number and type of travel document used; nationality; full names; the date of birth; the border crossing point of entry into the territory of the Member States; code of transport; departure and arrival time of the transportation; total number of passengers carried on that transport; the initial point of embarkation*".

III. APPLICABLE LAW

A. Free movement of persons

6. The principle of free movement of persons applies to all the Member States, irrespective of whether they are members of the Schengen area.

(a) *General principle*

7. The free movement of persons is one of the aims of the European Union (Article 3(2) of the Treaty on European Union (TEU) and is one of the four freedoms underpinning the "*area without internal frontiers*" formed by the internal market (Article 26(2) of the Treaty on the Functioning of the European Union (TFEU)).

Freedom of movement is one of the rights of citizens of the Union listed in Title V "*Citizens' Rights*" of the Charter of Fundamental Rights of the European Union (Article 45(1)). It is the first civil right listed in Article 20(2)(a) of the TFEU and subsequently spelled out in Article 21(1) of the TFEU: "*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*"

The Court considered that the right to freedom of movement "*follows (...) directly from the Treaty*". It therefore has a direct effect in that it can be invoked before national courts by those entitled to it.¹¹

¹¹ Paragraph 7 of the judgment of 4 December 1974 in case 47/74 Van Duyn v. Home Office [1974] 1337 and paragraph 4 of the judgment of 14 July 1977 in case 8/77 Sagulo et al. [1977] 1495.

8. Directive 2004/38¹², which codifies secondary law concerning the free movement of citizens of the Union and, to a considerable extent, the relevant case law, points out in its preamble that "*Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States*" (1st recital). A Union citizen's family members (as defined in Article 2(2) of Directive 2004/38) who are nationals of third countries also benefit from this right.
9. According to Article 5(1) of Directive 2004/38 (and Article 4 with regard to right of exit) all Union citizens holding a travel document (valid identity card or passport) have the right to enter their territory without any other formality¹³ and "*no entry visa or equivalent formality may be imposed*" (on them).¹⁴

¹² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77.). On 2 July 2009, the Commission adopted a communication on guidance for better transposition and application of Directive 2004/38/EC (COM(2009) 313 final).

¹³ The Court considered that "*the only precondition which Member States may impose on the right of entry into their territory for the persons covered by the abovementioned directives [63/360 and 73/148, the substance of which is taken over by Directive 2004/38] is the production of a valid identity card or passport*" (paragraph 11 of the judgement of 27 April 1989 in case 321/87 Commission v. Belgium [1989] 997).

¹⁴ The Court considered that "*the phrase 'entry visa or equivalent requirement' covers any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity card check at the frontier, whatever may be the place or time at which that leave is granted and in whatever form it may be granted*" (paragraph 10 of the judgment of 3 July 1980 in case 157/79 Regina v. Pieck [1980] 2171).

10. Citizens' family members who are nationals of third countries may also enter the territory of another Member State if they hold a valid passport and a "Residence card of a family member of a Union citizen". If they do not hold such a residence card, only the obligation to hold an entry visa may be imposed on them, which must be *"issued free of charge as soon as possible and on the basis of an accelerated procedure"*, the Member States having to grant *"every facility to obtain the necessary visas"* (Article 5(2) of Directive 2004/38). Similarly, if the necessary travel documents are not produced, the Member State concerned must give persons covered by the right of free movement every reasonable opportunity to prove their right (Article 5(4) of Directive 2004/38).
11. According to the case law of the Court of Justice, provided that controls *"are not a condition of entry into [the] territory"* of the Member State concerned, the carrying out of certain controls (other than the mere production of travel documents) upon entry into the territory is not prohibited unless *"it were found that the controls in question were carried out in a systematic, arbitrary or unnecessarily restrictive manner"*, in which case *"the carrying out of such controls (...) may (...) constitute a barrier to the free movement of persons"*. Controls carried out *"sporadically and unsystematically"* are therefore not incompatible with freedom of movement.¹⁵

(b) Possible limitations

12. Pursuant Article 45(3) of the TFEU, limitations of the freedom of movement of persons *"justified on grounds of public policy, public security or public health"* are possible. Chapter VI of Directive 2004/38 and in particular Article 27(1) provides that *"Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health (.....)."*

¹⁵ Paragraphs 15 and 16 of the above judgement in case 321/87 Commission v. Belgium. Similarly, after the person's entry into its territory, Article 27(3) of Directive 2004/38 allows the Member State concerned *"should it consider this essential, [to] request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have"*. However, *"such enquiries shall not be made as a matter of routine."*

The Court considered that this was a strict interpretation of a derogation from one of the fundamental freedoms enshrined by the treaties.¹⁶

13. Directive 2004/38 lists the conditions with which the public order or public security measures must comply (Article 27(2)):

- they shall "*comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned (...)*" (first subparagraph);
- "*The personal conduct of the individual concerned must represent a genuine, present¹⁷ and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted*" (second subparagraph).

14. The rules in question also apply to entry into the Schengen area. According to the Court's case law¹⁸, a Member State cannot refuse entry into its territory and refuse to issue an entry visa to a family member of a Union citizen simply because there is a SIS alert for that person for the purposes of refusing entry; "*the inclusion of an entry in the SIS (...) does indeed constitute evidence that there is a reason to justify refusing him entry into the Schengen Area. However, such evidence must be corroborated by information enabling a Member State which consults the SIS to establish, before refusing entry into the Schengen Area, that the presence of the person concerned in that area constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*".

¹⁶ Paragraph 18 of the above Van Duyn judgment.

¹⁷ In its above communication of 2 July 2009, the Commission points out that a threat that is only presumed is not genuine (point 3.2). To be present, the threat must exist at the moment when the restrictive measure is adopted (paragraph 79 of the judgment of 29 April 2004 in Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257).

¹⁸ Paragraph 53 of the judgment of 31 January 2006 in case C-503/03 *Commission v. Spain* [2006] ECR I-1097). The Court also pointed out that, with regard to the family members of a Union citizen, "*strict interpretation of the concept of public policy also serves to protect the latter's right to respect for his or her family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*" (paragraph 47).

15. Article 30 of Directive 2004/38 makes it obligatory to notify the person concerned of any restrictive decision *"in writing (...) in such a way that they are able to comprehend its content and the implications for them"* (paragraph 1). *"The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision (...) is based, unless this is contrary to the interests of State security"* (paragraph 2). The notification must also in particular *"specify the court or administrative authority with which the person concerned may lodge an appeal and the time limit for the appeal"* (paragraph 3).

B. Schengen Borders Code

16. Apart from the general provisions on free movement of persons referred to above, the Union (in fact the Member States in the Schengen area) carries out *"checks on persons and efficient monitoring of the crossing of external borders"* and ensures *"the absence of any controls on persons, whatever their nationality, when crossing internal borders"* (Articles 67(2), and 77(1)(a) and (b) of the TFEU). Regulation No 562/2006 (the Borders Code) implements these rules.¹⁹
17. Article 2(9) of the Borders Code defines border control as "the activity carried out at a border, in accordance with and for the purposes of [the Borders Code], in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance". Border checks are "the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it" (point 10). Border surveillance is "the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks" (point 11).

¹⁹ Regulation (EC) N° 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1). On 13 October 2010 the Commission adopted a report on the application of Title III (Internal Borders) of the Code (COM(2010) 554 final).

18. As regards the crossing of external borders, Article 7(2) of the Borders Code stipulates that "*all persons shall undergo a minimum check [which is the rule for persons enjoying the Community right of free movement]²⁰ in order to establish their identities on the basis of the production or presentation of their travel documents. Such a minimum check shall consist of a rapid and straightforward verification, where appropriate by using technical devices and by consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost and invalidated documents, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting*".

Borders guards may, in the case of persons enjoying the Community right of free movement, "*on a non-systematic basis, consult national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to the public health*". However, "*the consequences of such consultations shall not jeopardise the right of entry of persons enjoying the Community right of free movement into the territory of the Member State concerned as laid down in Directive 2004/38/EC*".

Article 7(6) stipulates that "*checks on a person enjoying the Community right of free movement shall be carried out in accordance with Directive 2004/38/EC*".

19. As regards the crossing of internal borders, they "*may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out*" (Article 20 of the Borders Code). The rule therefore applies both to citizens of the Union and to third-country nationals who are in the Schengen area.

²⁰ That is, Union citizens and their family members, and persons who, under international agreements, enjoy equivalent rights (Article 2, point 5, of the Borders Code).

Under the Schengen Convention, third-country nationals who have legally entered the Schengen area may move freely for a period of three months during the six months following their entry to the Schengen area (Articles 19 to 21 of the Convention).²¹

20. At airports, the flows of passengers on internal flights within the Schengen area are separated from the flows of passengers on other flights (point 2.1.1, Annex VI to the Borders Code), so that there is no difference in terms of physical or other controls between an internal flight within a Member State and an internal flight within the Schengen area.
21. However, checks may take place within the territory of the Member States (Article 21 of the Borders Code): "the abolition of border control at internal borders shall not affect the exercise of police powers (...), insofar as the exercise of those powers does not have an effect equivalent to border checks" (point (a) of Article 21). The code lists four (non-exhaustive) cases in which police measures are not considered equivalent to border checks. These are cases where such measures "do not have border control as an objective" (point i); "are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime " (point ii); "are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders" (point iii); "are carried out on the basis of spot-checks" (point iv).²²

Similarly, the abolition of border control at internal borders does not prevent "*security checks on persons carried out at (...) airports, provided that such checks are also carried out on persons travelling within a Member State* " (point (b) of Article 21), or "*the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents* " (point (c) of Article 21).

²¹ Agreement on the gradual abolition of checks at common borders of 14 June 1985, included in the Schengen acquis (OJ L 239, 22.9.2000, p. 13).

²² On these criteria, see the abovementioned Commission report of October 2010, point 3.1.2.

22. According to the case law of the Court,²³ inasmuch as the controls are carried out not "at borders" at the time of crossing, "*but within the national territory and they do not depend on movement across the border by the person checked (...) those controls constitute not border checks prohibited under Article 20 of [the Borders Code], but checks within the territory of a Member State, covered by Article 21 of that [code].* The fact, for example, that a check on compliance with the "*obligation to hold or carry papers and documents*" under Article 21, point (c), of the code is confined to a border area is not in itself sufficient to make this a measure having equivalent effect prohibited under Article 21, point (a). On the other hand, "*as regards controls on board an international train or on a toll motorway*", the fact that they apply solely in the border area "*might constitute evidence of the existence of such an equivalent effect*".²⁴
23. Article 67(2) of the TFEU and Articles 20 and 21 of the Borders Code preclude "national legislation which grants to the police authorities of the Member State in question the power to check, solely within [the border area] the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks". Such a framework would have to be detailed and set limitations on the power conferred "in particular in relation to the intensity and frequency of the controls which may be carried out".²⁵

²³ Points 68 and 71 of the judgment of 22 June 2010, Melki and Abdeli, C-188/10 and C-189/10 (not yet published).

²⁴ Point 72 of the Melki judgment.

²⁵ Points 73 and 75 of the Melki judgment.

IV. LEGAL ANALYSIS

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