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CONTRIBUTION OF THE LEGAL SERVICE *

No. Cion prop. : 14922/07 CRIMORG 169 AVIATION 193 DATAPROTECT 49
COM(2007) 654 final

Subject : Proposal for a Council Framework Decision on the use of Passenger Name
Record (PNR) for law enforcement purposes
- legal base, respective competences of the Community and the Union

I. INTRODUCTION

1. On 6 November 2007, the Commission submitted the above mentioned proposal for a Framework Decision to the Council. In the view of the Legal Service, the proposal raises questions as to the legal base and, in particular, as to the respective competences of the EC and the EU to adopt the measures contained in the proposal. The present contribution presents a legal analysis of this issue.

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II. LEGAL BASIS

2. The Commission has proposed Articles 29, 30 (1) (b) and Article 34 (2) (b) TEU as the legal base for the Framework Decision.

3. According to the case-law of the Court of justice, the choice of the legal base must rest on objective factors which are amenable to judicial review, those factors include in particular the aim and the content of the measure.¹

4. Moreover, as set out on Articles 29 and 47 TEU, the exercise of legislative powers by the Union shall be without prejudice to the powers of the European Community and shall not affect the powers which the TEC attributes to the Community².

III. AIM AND CONTENT OF THE PROPOSAL

5. The proposal envisages the setting up of a European system of collection, transmission and analyses of Passenger Name Records (PNR). Its aim is to achieve that Member States adopt or harmonise legal requirements for air carriers operating flights to or from the territory of at least one Member State regarding the transmission of PNR data to the competent authorities for the purpose of preventing and fighting terrorist offences and organized crime; intra-EU flights are not to be covered by the proposed Framework Decision, except those segments connecting two EU-airports which are part of an international flight.

¹ See for example, Case C-155/91 Commission v. Council [1993] ECR I-939, paragraph 7, and Case C-42/97 Parliament v. Council [1999] ECR I-0000, paragraph 36.

² The Court of Justice has stated that it has jurisdiction to ascertain whether acts, adopted pursuant to Title VI TEU, affect the powers of the Community within the meaning of Article 47 TEU, and to annul such acts if it appears that they should have been based on, and adopted in accordance with, the TEC. In his opinion in Case- C-170/96 (ECR 1998, p. I-02763), the advocate-general Fennelly has pointed out that the provisions of Title VI TEU may not be applied so as to restrict in any way the scope of the provisions of the EC Treaty. "*There is no discretion for the Council to resort to Title VI in cases where the conditions for the application of a power under the TEC are met*". In Case C-176/03 (ECR 2005, p. I-07879), the Court ruled that Framework Decision 2003/80/JHA of the Council of 27 January 2003 on the protection of environment through criminal law infringed Article 47 TEU as it encroached on the powers which Article 175 TEC confers on the Community.

6. According to the proposal, each Member State shall have to designate a competent authority - referred to as Passenger Information Unit (PIU). PIUs shall be responsible for collecting the PNR data from air carriers or from intermediaries designated by air carriers in relation to international flights which arrive or depart from the territory of the Member States and which they carry out.
7. Each PIU shall be responsible for analysing the PNR data it has received and for carrying out a risk assessment in order to identify persons requiring further examination for the purpose of preventing or combating terrorist offences and organized crime. Each PIU shall transmit those data to competent authorities responsible for the prevention or combating of terrorist and organised crime. These authorities shall be designated by each Member State (Articles 3 and 4).
8. Article 5 of the proposed Framework Decision provides that Member States shall ensure that air carriers make available the PNR data of the persons of international flights to the national PIU of the Member State which the flight is entering, departing or transiting. Each air carrier shall make available the PNR data specified in the Annex to the Framework Decision to the extent that they are collected and processed in that carrier's reservation system.
9. By virtue of Article 6, the air carriers may designate an intermediary to which they make the PNR data available instead of making them directly available to the PIU. The intermediary shall further transmit the PNR data to the relevant PIU.
10. Article 7 organises the exchange of PNR data between national PIUs.
11. Article 10 provides that Member States shall provide for dissuasive, effective and proportionate sanctions in respect of air carriers and intermediaries which do not transmit data or transmit incomplete or erroneous data.
12. Article 11 provides that Member States shall ensure that the Council Framework Decision on the Protection of Personal Data Processed in the framework of police and judicial co-operation in criminal matters is applicable to the processing of data under the proposed Framework Decision, whereas Article 12 contains further rules on data security to be observed by PIUs, intermediaries and national competent authorities.

IV. LEGAL ANALYSIS

Competence of the Community

13. **DELETED**

14. **DELETED**

15. **DELETED**

DELETED

DELETED

16. **DELETED**

17. **DELETED**

18. **DELETED**

19. **DELETED**

Consequences for the proposed provisions on data protection

20. **DELETED**

Competence of the Union

21. **DELETED**

22. **DELETED**

23. **DELETED**

24. **DELETED**

25. **DELETED**

26. **DELETED**

Legal consequences for the establishment of a European PNR system

27. **DELETED**

Legal consequences for the exercise of external powers

28. **DELETED**

29. **DELETED**

V. CONCLUSION

30. In conclusion, the Legal Service is of the view that:

DELETED
