Translation of letter

Letter dated: 18 March 2011

From: President of the Bundesrat

To: President Barroso

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**
COM(2011) 32 final; Council Document 6007/1

The Bundesrat decided at its 881st meeting on 18 March 2011 to submit the resolution in annex to the Commission.

[Complimentary close]

Bundesrat Document 73/11 (Resolution)

18.03.11

Decision

of the Bundesrat

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

COM(2011) 32 final; Council Document 6007/1

At its 881st meeting on 18 March 2011, in accordance with Articles 3 and 5 of the Law on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG), the Bundesrat adopted the following opinion:

1. The Bunderat recalls its opinion on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes (COM(2007) 654 final, of 15 February 2008 (Bundesrat Official Document 826/07 (Resolution)). The current proposal for a directive fails to take sufficient heed of the reservations expressed in that opinion.

   The Bundesrat points to the following aspects in particular:

2. The Bundesrat agrees with the aim pursued by the proposal, i.e. to develop appropriate EU-wide measures to combat terrorism and organised and serious crime and thus make further progress in fighting against these phenomena. In pursuing that aim a suitable balance must be created between the safeguarding of freedoms and the protection of public order. The current proposal fails to create that balance in spite of major improvements made during the legislative process.

3. The Bundesrat also shares the proposal's concern that, to prevent and prosecute terrorist acts or serious crimes, uniform guidelines must be drawn up for the use of Passenger Name Record data so as to create the greatest possible legal security and a uniform level of protection for personal data.

4. When collecting and processing the amounts of data envisaged in the proposal the highest possible level of data protection must be guaranteed. For that reason the proposal still leaves questions unanswered.

   Serious reservations remain regarding this proposal.

5. The Bundesrat considers that, in the light of the Federal Consitutional Court judgment of 2 March 2010 on data retention, the Passenger Name Record concept in the proposal needs to be thoroughly examined from a constitutional-law perspective. Rigorous attention to the appropriateness, necessity and reasonableness of encroachments on fundamental rights is a basic prerequisite. The need for and proportionality of such a system with a view to the benefits gained from combating serious cross-border crime and terrorism must be carefully examined and proved.

6. There are also some important aspects which weigh against adopting the proposal as it stands. In the following respects the proposal sets the wrong course:

7. The storage of PNR data without a cause, i.e. without a link to attributably reprehensible behaviour, a threat, however abstract, or a similar situation, represents a particularly serious encroachment on the right to informational self-determination and the right to respect of privacy. Such encroachment may only be permissible if it is required in order to achieve the purpose and if it is compatible with the principle of proportionality. To date the Bundesrat has not seen any evidence that this is the case.

8. Among other things, the Commission has not supplied a satisfactory explanation of why the already-permitted use of 'API data' is not sufficient for the purposes set out in the proposal. Neither the proposal nor the accompanying impact assessment contain firm evidence of PNR data's specific added value compared to existing instruments. Alongside the use of API data there are other large-scale systems, i.e. the Visa Information System (VIS) and the Schengen Information System (SIS), designed to monitor the movements of persons within the EU and on its borders, and these could with certain limitations also be used to investigate and prosecute crimes. The Commission's view is that, as identity control and border management systems, these are not suitable for screening persons and finding previously unknown

offenders. This sweeping statement cannot be regarded as satisfactory. As far as can be ascertained, no detailed examination has yet been undertaken of how existing instruments aimed at combating terrorism and serious crime could be utilised.

9. While the proposal would place enormous pressure on the aviation industry, it fails to take adequate account of the economic impact it would have on the airlines. For example, there is no firm evidence of the additional information to be gained from PNR data compared to the API data which the airlines already have to transmit.

10. The Bundesrat regards the planned storage period for PNR data of a total of five years and one month as being unreasonably long. It understands that after 30 days the data must be stored in such a way that the elements identifying the passenger are invisible. However, this is anonymity is purely superficial, as after 30 days access to the complete PNR data is to be allowed under specific circumstances, which means that they are to be stored in a manner which enables repersonalisation at any time.

11. There are also doubts about whether the conditions listed in Article 9(2) of the proposal for reidentification after 30 days are clear enough in legal terms to be compatible with the exceptional character of this interference. For that reason, for reasons of transparency alone, all conditions for reversing the pseudonymisation should be listed in Article 9(2) without giving references to other articles. In order to maintain proportionality, subsequent reidentification must be kept to the absolute minimum necessary. The possibility of accessing data for a further long period following the 30-day deadline is a major factor in this encroachment on fundamental rights. Preventive reidentification must therefore only take place where there is a direct threat to objects worthy of particular legal protection such as life and limb or freedom. In the investigation field, reidentification must be limited to specific, particularly serious crimes where there are sufficient tangible grounds for suspicion.

12. The Bundesrat points out that the proposal fails to define the criteria for the processing of passenger data, so that those involved have no legal security regarding how their data is used. Article 4(3) of the proposal merely states that passengers are to be assessed 'in a non-discriminatory manner on the basis of criteria established by (the) Passenger Information Unit'. The lack of uniform assessment standards makes it difficult for persons identified as 'positive matches' by the Passenger Information Unit to challenge this decision. The Bundesrat rejects the idea, in cases where an automatic comparison of data results in an initial positive match, of storing such matches for up to three years although they subsequently turn out to be 'false positives'. Moreover, the lack of uniform assessment criteria casts doubt on the added value of the planned European PNR system. It is not sufficiently clear, at least from the Commission's

statements to date in the proposal and the impact assessment, what advantage action at EU level will bring over individual Member State regulations if, although PNR Passenger Information Units are set up in all Member States, these assess the data according to criteria which may differ greatly.

13. Although the proposal's main aim is to harmonise the rules in the Member States, it uses a decentralised structure for data collection and transmission, i.e. the airlines may possibly have to use 27 different systems at their own expense. In this case distortions of competition between the European airlines cannot be ruled out.

14. Article 8 of the proposal envisages the transfer of data to third countries. One of the preconditions for this, according to Article 8(c), will be that the third country agrees to transfer the data to another third country exclusively for the purposes set out in Article 1(2) and only with the express authorisation of the Member State. The Bundesrat's view is that this wording is too open. In order to strictly limit the purposes of data use, third countries should not only agree to use the data only for the stated purpose but should be legally bound to do so.

15. The Bundesrat requests that the proposal be amended to state that the person involved shall on principle be informed about the transfer of his or her data to third countries. Exceptions to this rule must be in line with national law (cf. Article 16 of Council Framework Decision 2008/977/JHA for the exchange of data between Member States).

16. The Bundesrat rejects the obligation for the Member States to have collected the PNR data of at least 30% of all flights by the end of the two-year implementation period, since it may not yet be clear which bodies are to be appointed as the Passenger Information Units or the processing 'competent authorities' in the Member States.

17. The Bundesrat calls for the review of the operation of the proposed directive (Article 17(b)) to be carried out at the same time as the review of whether EU internal flights are to be included in the directive's scope (Article 17(a)), after two years. This review must not prejudge the outcome of the procedure and must not be used to justify EU internal flights being included in the scope of the directive after this period. The evaluation must first of all demonstrate whether the directive's aims, i.e. the prevention, detection, investigation and prosecution of terrorist offences and serious crime, have been met to a significant extent while at the same time complying with the principles of proportionality and data protection.

18. The Federal Government is requested to urge that the proposal be amended with this in mind.

19. The Bundesrat assumes, regarding the implementation of the proposal, that the new Passenger Information Unit will be based in a Federal authority and expects that the establishment and operation of the PNR system will not lead to additional costs for the Länder.

20. The Bundesrat also wishes to point out the following: According to Federal Constitutional Court case-law (for example the judgment of 2 March 2010 – 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 -, Note 218, juris), it is part of the constitutional identity of the Federal Republic of Germany that the citizens' enjoyment of freedom may not be totally recorded and registered. This means that the existing data collections must always be seen holistically. The implementation of the proposal would therefore also greatly reduce the constitutional latitude for other collections of data compiled without specific reason, whether already existing (e.g. ELENA) or under consideration (e.g. the retention of telecommunications data). The Bundesrat requests that the Federal Government keep a watchful eye on the citizens' overall burden regarding 'blanket' data collections during each relevant legislative procedure at national and European level, i.e. also during the consultations on this proposal, and that it draw the necessary conclusions when required.

21. The Bundesrat is sending this opinion directly to the Commission.