

ASSEMBLY OF THE REPUBLIC
COMMITTEE ON EUROPEAN AFFAIRS

DRAFT RESOLUTION

European Motion

Proposal for a Framework Decision COM (2007) 654 final SEC (2007) 1422 and 1453, on the use of Passenger Name Record (PNR) data for law enforcement purposes

I

Pursuant to Law 43/2006, of 25 August 2006 the Government referred the Proposal for a Framework Decision COM (2007) 654 final SEC (2007) 1422 and 1453, presented by the European Commission, on the use of Passenger Name Record (PNR) data for law enforcement purposes, to the Assembly of the Republic for issue of an opinion. It did so because the subject of the motion falls within the legislative remit of the Assembly of the Republic.

The Committee on European Affairs is competent in such situations to give an opinion of the conformity of the proposal with the principle of subsidiarity.

Consultations also took place with the Committee on Constitutional Affairs, Rights, Liberties and Guarantees and the Committee on Foreign Trade and Portuguese Communities, both of which approved the relevant opinions.

The legal basis of the Proposal for a Framework Decision is the Treaty on European Union, specifically Articles 29(1)(b), 30 and 34(2)(b) thereof.

II

The Proposal in question is COM (2007) 654 final SEC (2007) 1422 and 1453, on the use of Passenger Name Record (PNR) data for law enforcement purposes against terrorism and organised crime. It seeks to counter terrorism and raise the level of security in the European area. For this purpose it considers close co-operation essential between Member States and their services, and with Europol and, where appropriate, with the national authorities of third countries.

The Commission's proposal states that, since 11 September, authorities around the world have come to realise the added value of collecting and analysing so-called PNR data in combating terrorism and organised crime. PNR data are related to travel movements, usually flights, and include passport data, name, address, telephone numbers, travel agent, credit card number, history of changes in the flight schedule, seat preferences and other information.

The Proposal drawn up by the Commission also states that carriers already capture the PNR data of passengers for commercial purposes. It considers that the collection and analysis of PNR data will allow the law enforcement authorities to identify high risk persons and to take appropriate measures.

Meanwhile, the proposal explains that, until now, only a limited number of Member States have adopted legislation to set up mechanisms to oblige air carriers to provide the relevant PNR data.

Recently, arrangements for the transmission of PNR data in the context of the fight against terrorism and transnational organised crime have been concluded between the EU, the United States and Canada in relation to travel by air. These require air carriers to transmit PNR data to the competent authorities of the USA and Canada.

III

Currently air carriers have an obligation to communicate Advance Passenger Information (API) to the competent authorities of the Member States, under Council Directive 2004/82/EC. This measure aims to enhance control and to fight illegal immigration.

Under this Directive, Member States are obliged to take the necessary measures to ensure that air carriers transmit, at the request of the authorities responsible for carrying out checks on persons at external borders, information concerning the passengers of their flights. Such information includes only the API data, which is almost exclusively biographical. Such data include the number and type of travel document used, nationality, full name, the date of birth, the border crossing point of

entry, code of transport, departure and arrival time of the transportation, total number of passengers carried on that transport and the initial point of embarkation.

On the other hand, the PNR contains more data elements, which are available more quickly than API data. The proposal considers such data elements extremely important for carrying out risk assessments of the persons carried, for obtaining intelligence and for making associations between known and unknown people.

IV

The Proposal for a Framework Decision aims to harmonise Member States' provisions on the obligation for air carriers operating flights to or from the territory of at least one Member State to transmit PNR data to the competent authorities for the purpose of preventing and fighting terrorist offences and organised crime.

The Framework Decision states that sanctions, including financial penalties, should be provided for by Member States against those air carriers or intermediaries which do not transmit data or transmit incomplete or erroneous data or otherwise infringe the national provisions adopted pursuant to the Framework Decision.

On the other hand, the Framework Decision allows continued application of bilateral or multilateral agreements or arrangements in force. Similar legal instruments may be concluded after its entry into force, provided that they are compatible with its objectives. It does not oppose Member States supplying PNR data to third countries for the purpose of preventing and fighting terrorist offences and organised crime, in accordance with the national law of the Member State concerned and any applicable international agreements (Article 19(1) and (2)).

V

The Framework Decision states that several meetings and consultations were organized with the authorities of the Member States responsible for data protection.

The data protection authorities of the Member States, meeting as a consultative body to the Commission under the umbrella of the Article 29 Working Party, have issued a number of opinions on the use of PNR data as well. The Working Party is a group for the protection of persons with regard to the processing of personal data. It is

consultative and independent, as provided under Article 29 of Directive 95/46, of 24 October 1995, of the European Parliament and of the Council.

The explanation of reasons states that the Article 29 Working Party was not convinced of the necessity of such a proposal and had therefore stated its opposition to the proposal.

It should be pointed out that the European Data Protection Supervisor has submitted an opinion. This was published in the Official Journal of the European Union on 1 May 2008, and is important reading. It sets out various and highly relevant concerns about data protection and the necessity of the proposed measures.

Among many important questions, in the conclusions of this opinion, in point 112, the EDPS "*stresses the major impact in terms of data protection of the present proposal (...) Under the present circumstances, the proposal is not in conformity with fundamental rights, notably Article 8 of the Charter of the Fundamental Rights of the Union, and should not be adopted.*"

In point 116 of the same opinion it says that "*the fight against terrorism can certainly be a legitimate ground to apply exceptions to the fundamental rights to privacy and data protection. However, to be valid, the necessity of the intrusion must be supported by clear and undeniable elements, and the proportionality of the processing must be demonstrated. This is all the more required in case of extensive intrusion in the privacy of individuals, as foreseen in the proposal*" (point 117). It adds that "*these elements of justification are missing in the proposal and the necessity and proportionality tests are not fulfilled*" (point 118). It goes on to stress "*(...) the essential character of the necessity and proportionality tests developed above. They represent a condicio sine qua non to the entry into force of the proposal.*" (point 119)

On 20 November 2008, the European Parliament passed a resolution by 512 votes to 5, with 19 abstentions, on a motion by the Committee for Civil Liberties, Justice and Home Affairs. In it, the Parliament expresses "*strong reservations*" as to the necessity for, and added value of, the proposal for the establishment of a PNR scheme and the data protection safeguards which it contains. It should be emphasised that no

Portuguese MEP voted against or abstained in this vote.

The European Parliament states that: "*such a massive infringement of the right to protection of personal data [must] be legitimate and justified by a pressing social need.*" It considers that there is "*no evidence of the usefulness*" of the PNR data. Thus the Parliament affirms that, if the Council intends to continue to examine the Commission's text, it must duly justify the conditions of pressing social need which could make this new EU intervention necessary.

The Parliament also considers it worrying that the proposal basically amounts to giving "*law enforcement authorities access to all data without a warrant.*" It warns that "*the mere availability of commercial databases does not automatically justify their use.*"

The European Parliament is also highly critical of the supposed harmonisation of the system. It states that the proposal does not harmonise the national systems, since only a few countries have the PNR system, but it does "*create the obligation for all Member States to set up such a system.*"

The same position of the European Parliament contradicts some of the statements in the explanation of reasons. MEPs said that "*the US have never conclusively proven that the massive and systematic use of PNR data is necessary in the fight against terrorism and serious crime*" They add that "*there is no evidence that PNR data are useful for massive automated searches and analyses on the basis of risk criteria or patterns (...) in seeking potential terrorists.*"

Thus the opinion of the European Parliament cannot be ignored. As stated, it expresses its "*strong reservations*" about the proposal for a framework decision. While the fight against terrorism and organised crime is fundamental, the rights and guarantees of persons must be respected.

In fact the opinion given by the European Parliament on 20 November 2008 is highly relevant, and must be borne in mind, not least because of the convincing vote. It is that the need for Community action has not yet been sufficiently demonstrated. The

European Parliament questions the claim by the European Commission that the stated aim of the proposal is harmonisation of national schemes, when only a few Member States have a system for the use of PNR data for law enforcement and other purposes. It is also understood that the Commission's proposal does not harmonise national systems (as they are non-existent), but merely creates the obligation for Member States to set up such a system.

VI

In view of the foregoing, the Committee on European Affairs of the Assembly of the Republic considers:

That the need for Community action is not sufficiently demonstrated, and that it is important to consider that the proposal seeks to harmonise systems, although only a few Member States have, or are planning to set up, a system for the use of PNR data. The proposal merely creates an obligation for Member States to set up such a system.

Thus, in the terms of Law 43/2006, of 25 August 2006, and taking account of the conclusions described above, the Assembly of the Republic resolves to recommend the Government to inform the Presidents of the European Parliament, of the Council and of the European Commission of the content of the present draft resolution on the proposal for a Framework Decision COM (2007) 654 final SEC (2007) 1422 and 1453, on the use of Passenger Name Record (PNR) data.

Assembly of the Republic, 21 July 2009

The Deputy

[Signed]

João Semedo

Chairman of the Committee

[Signed]

Vitalino Canas

ASSEMBLY OF THE REPUBLIC
EUROPEAN AFFAIRS COMMISSION

OPINION

Proposal for a Framework Decision COM (2007) 654 final SEC (2007) 1422 and 1453, on the use of Passenger Name Record (PNR) data for law enforcement purposes in the fight against terrorism and organised crime.

1. Explanation of reasons

In the terms and for the purposes of Article 2(1) and (2) of Law 43/2006, of 25 August 2006, the Government referred the Proposal for a Framework Decision COM (2007) 654 final SEC (2007) 1422 and 1453 (presented by the European Commission) on the use of Passenger Name Record (PNR) data for law enforcement purposes, to the Committee on European Affairs, for issue of an opinion.

It also sent the above document to the Committee on Constitutional Affairs, Rights, Liberties and Guarantees and the Committee on Foreign Trade and Portuguese Communities, both of which approved the relevant opinions, in which no objections were raised.

2. The Proposal for a Framework Decision

a) Grounds and context

The proposal in question seeks to counter terrorism and to raise the level of security in the European area. For this purpose it considers close co-operation essential between Member States and their services, and with Europol and, where appropriate, with the national authorities of third countries.

The proposal states that, since 11 September, authorities around the world have come to realise the added value of collecting and analysing so-called PNR data in combating terrorism and organised crime. PNR data are related to travel movements, usually flights, and include passport data, name, address, telephone numbers, travel agent, credit card number, history of changes in the flight schedule, seat preferences

and other information. The Proposal also explains that the PNR data of a certain passenger does not contain all fields, but only those that are actually provided by the passenger on check-in or boarding.

The proposal emphasises that carriers already capture the PNR data of passengers for commercial purposes. It considers that the collection and analysis of PNR data will allow the law enforcement authorities to identify high risk persons and to take appropriate measures.

Meanwhile, the proposal explains that, until now, only a limited number of Member States have adopted legislation to set up mechanisms to oblige air carriers to provide the relevant PNR data, which would allow the competent authorities to analyse it. It says that this means that the potential benefits of an EU-wide scheme in preventing terrorism and organised crime are not realised.

Recently, arrangements for the transmission of PNR data in the context of the fight against terrorism and transnational organised crime have been concluded between the EU, the United States and Canada in relation to travel by air. These require air carriers to transmit PNR data to the competent authorities of the USA and Canada. The proposal considers that the EU has learned from this experience and from the pilot project in the UK, which made possible numerous arrests, the identification of human trafficking networks and the gaining of valuable intelligence in relation to terrorism.

It is also pointed out that the European Council of 25 - 26 March 2004 invited the Commission to bring forward a proposal for a common EU approach to the use of passengers' data for law enforcement purposes. This invitation has been reiterated twice, namely on 4 - 5 November 2004 in The Hague Programme, and at the extraordinary Council meeting of 13 July 2005. A European policy in this area had also been announced already in the Commission Communication "Transfer of Air Passenger Name Record (PNR) Data: A global EU approach" of 16 December 2003.

Currently air carriers have an obligation to communicate Advance Passenger Information (API) to the competent authorities of the Member States, under Council Directive 2004/82/EC. This measure aims to enhance control and to fight illegal

immigration.

Under this Directive, Member States are obliged to take the necessary measures to ensure that air carriers transmit, at the request of the authorities responsible for carrying out checks on persons at external borders, information concerning the passengers of their flights. Such information includes only the API data, which is almost exclusively biographical. Such data include the number and type of travel document used, nationality, full name, the date of birth, the border crossing point of entry, code of transport, departure and arrival time of the transportation, total number of passengers carried on that transport and the initial point of embarkation. The information contained in the API data may also help to identify known terrorists and criminals by running their names against alert systems, such as the SIS.

On the other hand, PNR data contain more data elements and are available more quickly than API data. The proposal considers such data elements extremely important for carrying out risk assessments of the persons carried, for obtaining intelligence and for making associations between known and unknown people.

b) Description and purpose of proposal

The Proposal for a Framework Decision aims to harmonise Member States' provisions on the obligation for air carriers, operating flights to or from the territory of at least one Member State, to transmit PNR data to the competent authorities for the purpose of preventing and fighting terrorist offences and organised crime.

It emphasises that the Council Framework Decision on the Protection of personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters should be applicable to all the data processed in accordance with this Framework Decision. Such data may only be processed by the Passenger Information Units and the competent authorities of the Member States, referred to in Article 4 of the Framework Decision, to prevent or combat terrorist offences and organised crime, for the following purposes:

- to identify persons who are or may be involved in a terrorist or organised crime offence, as well as their associates;
- to create and update risk indicators for the assessment of such persons;

- to provide intelligence on travel patterns and other trends relating to terrorist offences and organised crime; and
- to be used in criminal investigations and prosecutions of terrorist offences and organised crime.

It stresses that the Passenger Information Units and competent authorities cannot take any enforcement action solely on the basis of the automated processing of PNR data.

On the other hand, the Framework Decision states that sanctions, including financial penalties, should be provided for by Member States against those air carriers or intermediaries which do not transmit data or transmit incomplete or erroneous data or otherwise infringe the national provisions adopted pursuant to the Framework Decision.

The Framework Decision allows continued application of bilateral or multilateral agreements or arrangements in force. Similar legal instruments may be concluded after its entry into force, provided that they are compatible with its objectives. It does not oppose Member States supplying PNR data to third countries for the purpose of preventing and fighting terrorist offences and organised crime, in accordance with the national law of the Member State concerned and any applicable international agreements (Article 19(1) and (2)).

The proposal for a Framework Decision states that several meetings and consultations were organised with the authorities of the Member States responsible for data protection.

The data protection authorities of the Member States, meeting as a consultative body to the Commission under the umbrella of the Article 29 Working Party, have issued a number of opinions on the use of PNR data as well. The Working Party is a group for the protection of persons with regard to the processing of personal data. It is consultative and independent, as provided under Article 29 of Directive 95/46, of 24 October 1995, of the European Parliament and of the Council.

The explanation of reasons states that the Article 29 Working Party was not

convinced of the necessity of such a proposal and was therefore opposed to the proposal, but it noted that, once the necessity was established, or several Member States considered the possibility of developing a national PNR system, then harmonisation of such measures at an EU level should be preferred.

It should be pointed out that the European Data Protection Supervisor has submitted an opinion. This was published in the Official Journal of the European Union on 1 May 2008, and is important reading. It sets out various and highly relevant concerns about data protection and the necessity of the proposed measures.

Among many important questions, in the conclusions of this opinion, in point 112, the EDPS "*stresses the major impact in terms of data protection of the present proposal (...) Under the present circumstances, the proposal is not in conformity with fundamental rights, notably Article 8 of the Charter of the Fundamental Rights of the Union, and should not be adopted.*"

In point 116 of the same opinion, it also says that "*the fight against terrorism can certainly be a legitimate ground to apply exceptions to the fundamental rights to privacy and data protection. However, to be valid, the necessity of the intrusion must be supported by clear and undeniable elements, and the proportionality of the processing must be demonstrated. This is all the more required in case of extensive intrusion in the privacy of individuals, as foreseen in the proposal*" (point 117). It adds that "*these elements of justification are missing in the proposal and the necessity and proportionality tests are not fulfilled*" (point 118). It goes on to stress "*(...) the essential character of the necessity and proportionality tests developed above. They represent a condicio sine qua non to the entry into force of the proposal*" (point 119).

However, this is not the only criticism being made of the proposal for a Framework Decision. On 20 November 2008, the European Parliament passed a resolution by 512 votes to 5, with 19 abstentions, on a motion by the Committee for Civil Liberties, Justice and Home Affairs. In it, the Parliament states "*strong reservations*" as to the necessity for, and added value of, the proposal for the establishment of a PNR scheme and the data protection safeguards which it contains. It should be emphasised that no Portuguese MEP voted against or abstained in this vote.

The European Parliament states that: "*such a massive infringement of the right to protection of personal data [must] be legitimate and justified by a pressing social need.*" It considers that there is "*no evidence of the usefulness*" of the PNR data. Thus the Parliament affirms that, if the Council intends to continue to examine the Commission's text, it must duly justify the conditions of pressing social need which could make this new EU intervention necessary.

The Parliament also finds it worrying that the proposal basically amounts to giving "*law enforcement authorities access to all data without a warrant.*" It warns that "*the mere availability of commercial databases does not automatically justify their use.*"

The European Parliament is also highly critical of the supposed harmonisation of the system. It states that the proposal does not harmonise the national systems, since only a few countries have the PNR system, but it does "*create the obligation for all Member States to set up such a system.*"

The same position of the European Parliament contradicts some of the statements in the explanation of reasons. The MEPs state that "*the US have never conclusively proven that the massive and systematic use of PNR data is necessary in the fight against terrorism and serious crime.*" They add that "*there is no evidence that PNR data are useful for massive automated searches and analyses on the basis of risk criteria or patterns (...) in seeking potential terrorists.*"

Thus, with due respect for the opinion of the Committees on Constitutional Affairs, Rights, Liberties and Guarantees and on Foreign Trade and Portuguese Communities, we are bound to quote this opinion of the European Parliament which expresses its "*strong reservations.*" While the fight against terrorism and organised crime is fundamental, the rights and guarantees of persons must be respected.

3. Legal background

1 Legal base

The legal base of the proposal for a Framework Decision is the Treaty on European Union, and in particular Article 29(1)(b), Article 30 and Article 34(2)(b).

Subsidiarity principle

In the terms of Article 5(2) of the Treaty on European Union, "under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

In the opinion of the Committee on Constitutional Affairs, Rights, Liberties and Guarantees, the objectives of the Framework Decision cannot be sufficiently achieved by the Member States. An EU-wide scheme is necessary to coordinate efforts against terrorism, guarantee international cooperation and impose legal obligations on air carriers flying to and from the EU, with adequate harmonisation.

The harmonised approach under Article 27 of the Treaty on European Union makes it possible to ensure EU-wide exchange of the relevant information and to present uniform legislation to third countries. That Committee considers that the principle of subsidiarity is assured.

Meanwhile, a word of concern must be expressed about the European Parliament's opinion that the need for Community action has not yet been sufficiently demonstrated. The European Parliament questions the claim by the European Commission that the stated aim of the proposal is harmonisation of national schemes, when only a few Member States have a system for the use of PNR data for law enforcement and other purposes. It also understands that the Commission's proposal does not harmonise national systems (as they are non-existent), but merely creates the obligation for Member States to set up such a system. It also notes that the Commission is proposing a 'decentralised' scheme, which means that the European added value is even less clear.

Legislative instrument

Considering that the authors of the proposal seek to harmonise the laws of the Member States, the proper Community instrument is the Framework Decision, under legal cover of Article 34(2)(b) of the Treaty on European Union.

4. Conclusions

- a) The present Framework Decision has been sent to the Committee on Constitutional Affairs, Rights, Liberties and Guarantees, which has found in favour;
- b) It was also referred to the Committee on Foreign Trade and Portuguese Communities, which has also found in favour;
- c) On 20 November 2008 the European Parliament passed a resolution at the motion of the Committee on Civil Liberties, Justice and Home Affairs, which expressed "strong reservations" about the present Framework Decision;
- d) The present proposal for a Framework Decision seeks to harmonise the use of Passenger Name Record data in the various Member States, for the enforcement of internal law against terrorism and organised crime;
- e) The proposal also seeks to ensure that the Member States provide for sanctions (including financial penalties) against air carriers or intermediaries which do not transmit data or transmit incomplete or erroneous data or otherwise infringe the national provisions adopted pursuant to the Framework Decision;
- f) The need for Community action has not been sufficiently demonstrated. It is important to consider that the stated aim of the proposal is harmonisation of national schemes, when only a few Member States have a system for the use of PNR data for law enforcement and other purposes. The proposal merely creates the obligation for Member States to set up such a system. It is therefore considered that the subsidiarity principle is not assured;
- g) Given the aims of the authors of the proposal, and although the Protocol on the Application of the Principles of Subsidiarity and Proportionality prefers the directive as a legislative instrument, the Committee on Constitutional Affairs, Rights, Liberties and Guarantees and the Committee on Foreign Trade and Portuguese Communities consider that the Framework Decision seems to be the more suitable form of legislative instrument in the case in point.

Opinion

In view of the foregoing and of the above opinions, the Committee on European Affairs considers that the principle of subsidiarity is not assured.

Assembly of the Republic, 20 May 2009

Deputy Rapporteur

[Signed]

João Semedo

Chairman of the Committee

[Signed]

Vitalino Canas

ASSEMBLY OF THE REPUBLIC
COMMITTEE ON CONSTITUTIONAL AFFAIRS, RIGHTS, LIBERTIES
AND GUARANTEES

REPORT AND OPINION

Proposal for a Council Framework Decision COM (2007) 654 final SEC (2007)
1422 and 1453, on the use of Passenger Name Record (PNR) data for law
enforcement purposes

1. Procedure

Pursuant to Law 43/2006, of 25 August 2006, on accompanying, appraisal and ruling by the Assembly of the Republic, in the context of the process of construction of the EU, the Committee on European Affairs referred the Proposal for a Framework Decision of the Council on the use of Passenger Name Record (PNR) data for law enforcement purposes, backed by the relevant working documents, to the Committee on Constitutional Affairs, Rights, Liberties and Guarantees, for issue of an opinion on the subject-matter within its competence.

The Committee on Constitutional Affairs, Rights, Liberties and Guarantees therefore has the task of analysing the proposal, with special regard to the principles of subsidiarity and proportionality, and issuing its opinion, which must then be forwarded to the Committee on European Affairs.

2. The Proposal

Grounds

Terrorism currently constitutes one of the greatest threats to security, peace, stability, democracy and fundamental rights, values on which the European Union is founded, as well as a direct threat to European citizens. The threat of terrorism is one of the gravest threats to life, democracy, the free exercise of human rights and economic and social development.

In the Maastricht Treaty, the European Union set itself the objective of affording citizens a high level of security in an area of freedom and justice. The pursuit of that objective not only requires effective criminal law in force in Member States against

terrorism, but also the adoption of measures to strengthen international cooperation in this field.

Since 11 September, law enforcement authorities around the world have come to realise the added value of collecting and analysing so-called PNR data in combating terrorism and organised crime.

PNR data are related to travel movements, usually flights, and include passport data, name, address, telephone numbers, travel agent, credit card number, history of changes in the flight schedule, seat preferences and other information. The collection and analysis of PNR data allow the law enforcement authorities to identify persons who may be classed as high risk in legal terms, and to take appropriate measures.

Until now, only a limited number of Member States have adopted legislation to set up mechanisms to oblige air carriers to provide the relevant PNR data, thus allowing the competent authorities to analyse it. This means that the potential benefits of an EU-wide scheme in preventing terrorism and organised crime are not fully realised.

The EU has finally understood the value of PNR data and its potential for law enforcement purposes. This has happened through the exchange of information with the United States and Canada and, mainly, through experience gained by the UK with its pilot project. This made possible numerous arrests, the identification of human trafficking networks and the gaining of valuable intelligence in relation to terrorism.

The European Council of 25 - 26 March 2004 invited the Commission to bring forward a proposal for a common EU approach to the use of passengers' data for law enforcement purposes. This invitation has been reiterated twice, namely on 4 - 5 November 2004, in The Hague Programme, and at the extraordinary Council meeting of 13 July 2005.

Currently air carriers have an obligation to communicate Advance Passenger Information (API) to the competent authorities of the Member States, under Council Directive 2004/82/EC. This measure aims to enhance control and to fight illegal

immigration. Under this Directive, Member States are obliged to take the necessary measures to ensure that air carriers transmit, at the request of the authorities responsible for carrying out checks on persons at external borders, information concerning the passengers of their flights. Such information includes only the API data, which is almost exclusively biographical. Such data include: the number and type of travel document used, nationality, full name, the date of birth, the border crossing point of entry, code of transport, departure and arrival time of the transportation, total number of passengers carried on that transport and the initial point of embarkation. The information contained in the API data may also help to identify known terrorists and criminals by running their names against alert systems, such as the SIS.

Aims

The proposal for a Framework Decision specifically aims to harmonise Member States' provisions on the obligation for air carriers operating flights to or from the territory of at least one Member State to transmit PNR data to the competent authorities, for the purpose of preventing and fighting terrorist offences and organised crime.

The Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters should be applicable to the processing of PNR data. Such processing may only be carried out by the Passenger Information Units and by the competent authorities of the Member States, referred to in Article 4 of the Framework Decision, to prevent or combat terrorist offences and organised crime, for the following purposes:

- to identify persons who are or may be involved in a terrorist or organised crime offence, as well as their associates;
- to create and update risk indicators for the assessment of such persons;
- to provide intelligence on travel patterns and other trends relating to terrorist offences and organised crime; and
- to be used in criminal investigations and prosecutions of terrorist offences and organised crime.

It is stressed that the Passenger Information Units and competent authorities cannot,

however, take any enforcement action solely on the basis of the automated processing of PNR data.

The proposal also seeks to ensure that sanctions, including financial penalties, are provided for by Member States against those air carriers or intermediaries which do not transmit data or transmit incomplete or erroneous data or otherwise infringe the national provisions adopted pursuant to the Framework Decision.

3. Analysis of proposal

Legal base

The legal base of the proposal for a Framework Decision is Article 29(1)(b), Article 30 and Article 34(2)(b), all of the Treaty on European Union.

Subsidiarity principle

Terrorism is a global and international threat which calls for a concerted international response. The European Union's policies against terrorism lack the coordinated efforts of the Member States and also international cooperation, in order to achieve the set objectives. The different laws of the various Member States frustrate the necessary coordination of efforts at EU level and make international cooperation difficult.

Thus EU-wide action will more effectively achieve the proposal's objectives. This will both prevent terrorists from exploiting any gaps and differences in national laws and facilitate operations by the police against cross-border criminal activities. It will also provide a base common to all Member States, which will not only facilitate international cooperation, but also strengthen the EU's position in international bodies.

Moreover, action by Member States would not be sufficient to achieve the set objectives because the Member States, as such and by themselves, could not sufficiently harmonise the legal obligations in this field to be imposed on all air carriers flying to and from the European Union.

Besides, a harmonised approach makes it possible to ensure EU-wide exchange of the

relevant information and to provide for a harmonised approach towards the outside world. The qualitative indicator which demonstrates that the objective can be better achieved by the Union is the fight against terrorism and organised crime.

Therefore, the proposal respects the principle of subsidiarity.

Proportionality principle

The proposal also satisfies the proportionality principle contained in Article 5(3) of the Treaty on European Union.

In fact the scope of the proposal is limited to those elements which require a harmonised EU approach - including the definition of the tasks of the PNR Units, the data elements which need to be collected, the purposes for which the information may be used, the communication of the data between the PNR units and the Member States, and the technical conditions for such communication.

On the other hand, the proposed action is a framework decision which leaves as much scope as possible to the national decision makers in the choice of how and where they implement the provisions of the Decisions. Member States are only tied in terms of the results to be achieved.

Legislative instrument

Although the Protocol on the Application of the Principles of Subsidiarity and Proportionality prefers the directive as a legislative instrument, the Framework Decision seems to be the more suitable form of legislative instrument to achieve the set objective, which is to harmonise the laws of the Member States.

4 Conclusions

- 1) The Committee on European Affairs referred the present proposal to the Committee on Constitutional Affairs, Rights, Liberties and Guarantees, for a specific finding on the principles of subsidiarity and proportionality;
- 2) The present proposal for a Framework Decision seeks to harmonise the use of Passenger Name Record data in the various Member States, for the enforcement

of internal law against terrorism and organised crime;

- 3) The proposal also seeks to ensure that the Member States provide for sanctions (including financial penalties) against air carriers or intermediaries which do not transmit data or transmit incomplete or erroneous data, or which otherwise infringe the national provisions adopted pursuant to the Framework Decision;
- 4) The Member States cannot unilaterally achieve the aims of the present proposal sufficiently. They are more effectively achievable at European Union level. In this regard, no infringement of the principle of subsidiarity has been noted;
- 5) Also, the proposal for a Framework Decision does not exceed the bounds of what is strictly necessary to achieve these aims. This means, also, that it appears not to cause any infringement of the principle of proportionality;
- 6) Finally, and although the Protocol on the Application of the Principles of Subsidiarity and Proportionality prefers the directive as a legislative instrument, the Framework Decision seems to be the more suitable form of legislative instrument to achieve the set objective in the case in point.

In view of the foregoing, the Committee on Constitutional Affairs, Rights, Liberties and Guarantees is of the

Opinion

that, having regard to the above considerations and conclusions, in the terms of Law 43/2006, of 25 August 2006, the present report must be referred for appraisal to the Parliamentary Committee on European Affairs.

Palace of St. Benedict, 4 June 2008

Deputy Rapporteur

[Signed]

Nuno Magalhães

Chairman of the Committee

[Signed]

Oswaldo de Castro

ASSEMBLY OF THE REPUBLIC

Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes.

OPINION

1. Preface

In the terms and for the purposes of Article 2 items 1 and 2 of Law 43/2006, of 25 August 2006, the government referred the proposal for a Framework Decision on the use of Passenger Name Record (PNR), for law enforcement purposes, to the Committee on European Affairs.

The Chairman of the Committee on European Affairs decided that this proposal for a framework decision should be sent to the Committee on Foreign Trade and Portuguese Communities, on 2 June 2008, for whatever purposes might be deemed fit.

The Committee on Constitutional Affairs, Rights, Liberties and Guarantees was asked to give its opinion on the same Community instrument. On 18 June 2008 it approved the relevant report and opinion, which raises no obstacle of any kind to the proposal for a framework decision, under the auspices of the Council, on the use of Passenger Name Record (PNR) data for law enforcement purposes.

2. Legal background

i Legal base

The Treaty on European Union, specifically Articles 29(1)(b), 30 and 34(2)(b).

ii Subsidiarity principle

The aims of the proposed Framework Decision are not only not sufficiently achievable by the Member States: they can be achieved better by action by the European Union.

In fact the Member States acting alone cannot achieve proper harmonisation of the legal obligations in this field and impose them on carriers operating into or from the

European Union.

The harmonised approach, in the context of Article 27 of the Treaty on European Union, guarantees an exchange of relevant information at EU level and presents uniform legislation towards third parties.

It is found that the principle of subsidiarity is assured.

iii Proportionality principle

As a framework decision, the proposal leaves as much scope as possible to the national decision-makers in the choice of how and where they set up their PNR systems and in deciding the related technical aspects. In fact, the aspects of the aim of harmonisation are limited to what is strictly necessary, like the technical aspects of the communication systems essential to exchange data with other Member States.

The principle of proportionality is also assured.

iv Choice of instruments

Given the aim of harmonising the laws of the Member States, the most suitable Community instrument for the desired purpose is the framework decision.

The chosen instrument of the framework decision is legally covered by Article 34(2)(b) of the Treaty on European Union.

3. Considerations

1. The proposal for a Decision seeks to harmonise the arrangements of the Member States of the European Union in relation to the obligations of airlines, flying to or from the territory of at least one Member State, to forward data relating to the use of Passenger Name Records (PNR) to the competent authorities, in the context of the prevention and fight against terrorism and organised crime.
2. The identification of passengers in the proposed terms (collection of passport data, name, address, telephone numbers, travel agent, credit card number, history of changes in the flight schedule, seat preferences and other information) does not

conflict with the laws and constitutional standards in force in our country. It does not, either, undermine respect for the fundamental principles of democracy and limited government.

3. On the other hand, it raises the level of security in Europe, and also lends substance to the construction of the so-called Third Pillar, which includes police and judicial co-operation in criminal matters. It should also be noted that, given the political agreement reached during the Portuguese presidency of the European Union, the instrument in question will have to be harmonised with the future framework decision on data protection included in the Third Pillar.

4. The Framework Decision allows continued application of bilateral or multilateral agreements or arrangements in force. Similar legal instruments may be concluded after its entry into force, provided that they are compatible with its objectives. It does not oppose Member States supplying PNR data to third countries for the purpose of preventing and fighting terrorist offences and organised crime, in accordance with the national law of the Member State concerned and any applicable international agreements (Article 19(1) and (2)).

4. Conclusions

1. The present Framework Decision was also referred to the Committee on Constitutional Affairs, Rights, Liberties and Guarantees, which found in favour and approved the report written by the Deputy, Nuno Magalhães.

2. The Framework Decision respects the provisions on fundamental rights, especially the protection of personal data and defence of the privacy of the persons in question.

3. From the point of view of the Committee on Foreign Trade and Portuguese Communities, the Community legal document put to us for a report is a suitable instrument to produce effective results in the fight against terrorism and organised crime operating on a global scale.

4. Recently, arrangements for the transmission of PNR data in the context of the

fight against terrorism and transnational organised crime have been concluded between the EU, the United States and Canada. These require air carriers, which have already been collecting these passenger data for commercial purposes, to transmit them to the competent authorities of the USA and Canada. These arrangements will enable the European Union to adjust the scale of the exchange and the sharing of information between Member States in terms of the use of Passenger Name Record data, with a view to the security of European citizens against the many threats of the modern world.

5. The Framework Decision allows Member States to supply PNR data to third countries, in the context of the fight against organized crime and international terrorism. This must take place in accordance with the national law of the Member State concerned, and any applicable international agreements.

6. The Framework Decision does not oppose Member States continuing to apply bilateral or multilateral agreements or arrangements in force. Similar legal instruments may be concluded after its entry into force, provided that they are compatible with its objectives.

7. The instrument in question is the legislative response put forward by the Council, acting on a proposal of the Commission, after repeated calls at the European Councils of 25 - 26 May 2004, 4 - 5 November 2004 and 13 July 2005. It sanctions a European policy on the transfer of passenger name record data.

4 Opinion

Having regard to the above considerations and conclusions, this report must be passed for appraisal to the Parliamentary Committee on European Affairs, in the terms of Law 43/2006 of 25 August 2006.

Palace of St. Benedict, 7 October 2008

Deputy Rapporteur

[Signed]

José Vera Jardim

Committee Chairman

[Signed]

Henrique Rocha de Freitas