EUROPEAN COMMISSION
Legal Service
Brussels,18 May 2011
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Note for the Attention of Mr Stefano Manservisi Director General, DG HOME
Subject: Draft Agreement on the Use of Passenger Name Records (PNR) between the EU and the United States

We are writing to you concerning the draft Agreement on the Use of Passenger Name Records (PNR) between the EU and the United States. Your services have transmitted to our services a draft text which they consider to be "close to finalisation", and on which they envisage to inform the Council and European Parliament.

We would like to recall that an international agreement to be concluded by the Union must, like any other act of secondary law, should comply with primary law, including fundamental rights. In the present case, this requires in particular the respect of the right to the protection of personal data enshrined in Article 16 TFEU and Article 8 of the Charter of Fundamental Rights. As already set out in more detail in the note of the Legal Service of 14 December 2010,[1[1]] this means that any restriction of that fundamental right must be limited to what is necessary and proportional.

We need to inform you that we have reviewed the draft agreement on this basis and consider that there are grave doubts as to its compatibility with the fundamental right to data protection. Our most serious concerns are set out hereunder:

• Use of PNR, Article 4 (1) (b): The processing of PNR is allowed for the purposes of preventing and detecting "serious crimes", which are defined by reference to the notion of "extraditable offence" in the EU-US extradition agreement. However, according to that agreement, an offence is extraditable "if it is punishable under the laws of the requesting and requested States by deprivation of liberty for a maximum period of more than one year." Thus, the definition the definition of serious crime is considerably larger than in the EU PNR proposal (maximum period of more than three years) or the draft agreement with Australia (four years). Given the low maximum penalty, it is likely to include a very large number of crimes which cannot be regarded as serious. This point alone puts the proportionality of the agreement in question. It should also be noted that the definition of extraditable offences is not relevant in the present context, since it concerns, unlike PNR, only persons suspected or convicted of a crime, not a priori innocent individuals.

• Use of PNR, Article 4 (2): PNR may also be used "if ordered by a Court". This clause, which seems to be an alternative to the vital interest clause in that same paragraph, would allow use of PNR for just any purpose, provided only it is "ordered by a Court". This cannot be regarded as a meaningful purpose limitation. In this respect, it should be recalled that according to Article 52 (1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law. The Court of Justice has clarified that one of the requirements

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1[1] **Ares (2010)945313.**

flowing from the principle that a measure must be provided for by law is foreseeability 2[2]. The Legal Service considers that this requirement is not met by the clause in question.

- Use of PNR, Article 4 (3): PNR may also be used "to ensure border security", in order to "identify persons who would be subject to closer questioning or examination upon arrival to or departure from the United States". This clause, which is not linked to the purpose of preventing terrorism or serious crime, seems to allow use of PNR also for the purposes of border security, i.e. for preventing or detecting customs or immigration offences, even if they are minor in nature. This again raises serious questions of proportionality.

- Retention period, Article 8. Data shall be retained for an initial period of five years and then in a "dormant data basis" for a period of 10 years. Overall, the data shall therefore be retained for a period of 15 years. During the "dormant" period, access to the data shall be more restricted, however, it can still be authorised for all the purposes of "law enforcement operations" in concrete cases. This retention period goes far beyond the EU PNR proposal (30 days plus five years) or draft agreement with Australia (3 years plus 2.5). It also represents almost no improvement compared to the current EU-US agreement, which the Parliament refused to approve (7 plus 8). The Council Legal Service in its opinion on EU-PNR moreover questioned the necessity of a period of more than 2 years. In sum, it appears highly doubtful that a period of 15 years can be regarded as proportional.

- Redress - Article 13. This article guarantees basically no judicial redress to data subjects, since all judicial redress is made subject to US law, while the forms of redress explicitly guaranteed are administrative only and thus at the discretion of DHS.

- Oversight - Article 14. Oversight of the agreement shall be carried out by DHS privacy officers with "a proven record of autonomy". This does not amount to a guarantee of independent oversight as required by our data protection rules and also obtained in the agreement with Australia.

- Finally, there are still a number of other technical problems with the text, for instance concerning the review clause (Art. 24 para 3), the territorial clause (Art. 27) and the clause on authoritative languages.

It should be noted that all comments were already transmitted to your services in the course of the negotiations.

We therefore come to the conclusion that despite certain presentational improvements, the draft agreement does not constitute a sufficiently substantial improvement of the agreement currently applied on a provisional basis, the conclusion of which was refused on data protection grounds by the European Parliament. Moreover, on one significant point, namely the use of PNR for border

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2[2] Cf. Joined Cases C-465/00, C-138/01 and C-139/01, Rechnungshof and Österreichischer Rundfunk, [2003] ECR 1-5014, para. 77. The Court refers to the judgment of the European Court of Human Rights of 20.5.1999 in Rekvenyi v. Hungary, no. 25390/94, para. 34.

security, the draft agreement even represents a setback from the point of view of data protection.

For these reasons, the Legal Service does not consider the agreement in its present form as compatible with fundamental rights.

Given the sensibility and political importance of the file, and before a final text is presented to Council and Parliament, the Legal Service invites you to contact the Secretary General in order to ensure appropriate collegiate coverage in this regard.

(Signatures)