Ref. Ares(2012)15841 - 06/01/2012

ARTICLE 29 Data Protection Working Party

Brussels, 6 January 2012

Members of the LIBE Committee of the European Parliament

By email

Dear Members of the LIBE Committee,

On 28 November 2011 the European Commission and the United States of America initialled a new draft agreement on the transfer and use of Passenger Name Records, known as PNR data.

The Article 29 Working Party has been asked for its analysis and assessment of this new draft agreement. It has decided to express its view in the form of an open and thus publicly available letter addressed to the Members of the LIBE Committee of the European Parliament. Since the agreement would have implications for millions of European citizens, for the Working Party, there should be no doubt as to the transparency of the discussions on the draft agreement and of the approval procedures within the relevant institutions of the European Union. It regrets that this view does not seem to be shared by all relevant stakeholders.

As a general assessment, the Working Party notes (modest) improvements in the draft agreement, but does not see its serious concerns removed.

In many opinions, the Working Party has expressed its concerns about the various previous PNR agreements, not only with the US, but also with other countries[1]. The criticism expressed in these opinions remains valid and does not need to be revisited in this letter. The purpose of this letter is to highlight what the Working Party still finds most troubling about the agreement and, in particular, to assess those amendments to the draft agreement which the European Commission has presented as a significant improvement from an EU data protection point of view. In this context, the Working Party would also like to draw attention to the recent opinion of the European Data Protection Supervisor of 9 December 2011. Its findings and conclusions are fully shared and supported.

When assessing any new PNR agreement between the European Union and any third country, it remains important to reflect upon one fundamental concern implied in all these agreements. By concluding them, the legislators oblige carriers and computer reservation systems to make

[1] Opinions of WP: WP 103 (Canada); WP 138 (US); WP 151 (US - information to passengers); and WP 178 (Commission global approach). WP 145 and 181 deal with the setting up of an European PNR scheme.

PNR data of all their passengers – nearly all of them being innocent and unsuspected citizens - available to foreign law enforcement agencies. This, in itself, remains quite an unusual phenomenon and requires very careful consideration. If acceptable at all, it requires not only a legal base, which the agreement is meant to be, but also irrefutable proof that the agreement is necessary and proportionate and that safeguards are sufficiently elaborated, all in the meaning of and in full compliance with the EU Charter on Fundamental Rights.

Necessity and Proportionality

Since the negotiations of the first PNR agreement, the Working Party has expressed its doubts that sufficient evidence has been provided to demonstrate the necessity and the proportionality of mass transfer and use of PNR data for law enforcement purposes. Similarly, when delaying its decision on the former agreement, the European Parliament in its Resolution of 5 May 2010 also asked for a privacy impact assessment to accompany a new draft agreement. The Working Party notes that no new evidence is offered now. The Commission proposal only contains the statement that "the fundamental rights [are respected] and the principles [are observed]" without further explanation in what way or to what extent this is the case (consideration (4)).

Use of data (Art 4)

The heading of Art 4 suggests that the provision would clearly specify how DHS is allowed to use the transferred PNR data. However, that is not done. There remains a high degree of uncertainty about what DHS is intending to do with the transferred data.

The agreement lacks clarity when defining the limits within which PNR data can be used. As to the definitions in Art 4(1), it is troubling that all definitions provided are not exclusive ("including", "in particular"). The definition of transnational serious crime does not only appear to be quite wide-ranging (see Art 4(1)(b)v.), it also appears not to be necessarily related to law enforcement in the US. It covers all crimes where more than one jurisdiction is involved.

Additionally, Art 4(2) and Art 4(4) leave open to what extent PNR data may be used in cases other than relating to terrorism and serious transnational crime. Art 4(2) provides that "on a case-by-case basis" PNR can be used for all crimes regardless of whether they are serious, and even for other actions not related to crimes at all, if ordered by a court. Equally, Art 4(4) provides for the use of data for other crimes if detected in the course of using PNR for the purposes of the agreement. While the Working Party cannot condone law breaking, it is not clear what other offences might be discovered and what information DHS has access to on minor offences that the PNR data might be run against. In consequence, it is difficult to foresee the use of PNR data under these provisions, but it appears to be rather clear that it will also be used for cases other than relating to terrorism and serious transnational crime and the Working Party considers this use disproportionate.

Art 4(3) is a provision of particular relevance and, at the same time, of particular obscurity. The systematic interpretation of Art 4(3) leads to the conclusion that it adds something to those ways of using PNR which are mentioned in Art 4(1) and (2). If the European Commission says in the FAQ accompanying the presentation of the draft that the process described in Art 4(3) can also speed up border control, this suggests that PNR data are also used for running against profiles as part of border control. Taking into account that the (assumed) possibility to detect potential criminals is generally viewed as the particular added value of a PNR scheme, it is only realistic to assume that DHS runs all passenger data of all

US-related flights against crime profiles. The agreement does not prohibit the profiling of passengers. Art 7 only says that the US shall not make automated decisions that produce significant adverse actions affecting the legal interests of individuals based solely on automated processing and use of PNR. The Working Party believes that the agreement should clearly state what the purpose of Art 4(3) is and what practice it is meant to approve.

It is worth noting on these points that the European Parliament clarified in its Resolution of 5 May 2010 that PNR may only be used in cases of organised and transnational serious crime and terrorism of a cross-border nature, and that PNR may in no circumstances be used for data mining or profiling. Additionally, it held that "data must be limited to specific crimes or threats, on a case-by-case basis".

Finally on this point, the Working Party would also like to add that these provisions, if interpreted here correctly as including the profiling of all passengers, will raise serious constitutional concerns at least in some MS. General profiling activities have been found constitutional only, at least in some MS, if applied in a situation of a specific threat.

Sensitive data (Art 6)
The Working Party has always preferred sensitive data filtering to be done by carriers. This is not what the agreement says, and thus the criticism remains valid. It is especially worrying that sensitive data received by DHS only need to be masked, not deleted.

Retention (Art 8)
The Working Party acknowledges that the European Commission has been successful in convincing the US government to add certain features to the agreement, such as the masking of data and the de-personalisation of data. However, despite these improvements the fact remains that the agreement provides for the storage of all data for up to 15 years. What the European Commission has reached in the negotiations are limitations in terms of accessibility and use of the PNR data. In other words: the improvements of the agreement do not remove the fact that data of unsuspected citizens is stored for up to 15 years, only its use would be more limited. The Working Party cannot see how these long retention periods can be substantiated and justified. It considers them to be excessive and disproportionate.

In addition, it should be noted that the agreement does not require the deletion of the data after 15 years, but only its anonymisation. Taking into account the difficulty of truly anonymising data and the lack of further explaining why the (anonymised) data is still needed, the Working Party thinks it should simply be deleted.

Finally, it is unclear and not convincing why Art 8(6) singles out the 10-year dormant period of retention as subject for specific evaluation.

Access and redress (Arts 11-14)
For many years, the Working Party has expressed doubts as to whether US law and the agreements concluded with the US provide for the right of access and redress mechanisms in line with requirements of fundamental rights under EU law. Without specific knowledge of US law, it is difficult to see in what sense the draft agreement makes significant progress on this point. As it was the case with previous and other agreements, it should be noted and stressed that the agreement explicitly stipulates in Art 21 that it shall not create any right or benefit under US law. Having that in mind, the agreement says that administrative as well as judicial redress can be sought in accordance with US law. Since the US Privacy Act does not

apply to European citizens, the agreement mainly refers to the Freedom of Information Act. New to the draft agreement is the reference to the concept of judicial review. Doubts remain, however, whether these Acts put European citizens in the position to make effective use of their rights as enshrined in EU law. It is the Working Party's view that European citizens should be appropriately informed what their rights under US law (in application of the agreement) are. Since the European Commission states it is convinced that adequate redress mechanisms are in place under US law, it should accept the responsibility to share this knowledge with the European Parliament and European citizens.

In this respect, it is worth noting too that the oversight structure referred to in Art 14 lacks an independent body as required under the jurisprudence of the European Court of Justice (see ECJ, Commission vs. Federal Republic of Germany of 9 March 2010, C-618/07) and as explicitly stated in Art 8 of the Charta on Fundamental Rights.

Transmission (Art 15)
The Working Party acknowledges that the carriers will be required to use the "push method". It is surprising and disappointing that carriers have another two years before the push method is finally obligatory. Given that "the push method" was supposed to be achieved under the previous two agreements, all parties should already be operating "push" and it is difficult to understand why carriers are given another two years to implement something that should already be in place.

Despite the requirement of using the "push method", the agreement does not appear to be entirely clear on whether and, if so, under what conditions, DHS would still be allowed to pull data under Art 15(5). Art 15(5) provides that DHS may in exceptional circumstances "require carriers to otherwise provide access". A fair understanding of the text appears to be that carriers, in specific circumstances only, are obliged to allow for a different way to access their data. In any case, if the pulling of data remains technically and legally possible under that provision, it is highly critical and requires, if acceptable at all, rigorous independent monitoring (of the log files).

Additionally, the agreement lacks clarity as to what the frequency of PNR transfers is. Therefore, Art 15(3) should be specified.

Domestic sharing and onward transfer (Arts 16, 17)
The European Parliament stated in its Resolution of 5 May 2010 that also the onward transfer of PNR data to third countries shall be in line with EU standards on data protection. While the Working Party notes that the provisions on domestic sharing and onward transfer refer to the "safeguards" (Art 16) or the "terms" (Art 17) of the agreement, it regrets that the agreement is not more specific on how compliance with these terms or safeguards can practically be ensured, particularly with respect to retention periods. Additionally, the Working Party believes the agreement should also provide that such transfers shall be done on a case-by-case basis only.

Adequacy (Art 19)
Art 19 is a somewhat hidden, but very important provision. It has to be read jointly with the purpose of the agreement. It is critical because it says that the data protection level in the US is adequate despite its excessive retention periods and its lack of independent supervision.

Joint review (Art 23)
The Working Party is of the opinion that a joint review of US and European representatives is appropriate. However, it regrets that it is not explicitly provided in Art 23 that the representatives of the European Union shall include representatives of the Member State's data protection authorities. Should the current draft remain as it is, it urges to the European Commission to make sure such representatives will at least be invited when establishing the European review team.

Taking into account the experiences made with the joint review under the TFTP Agreement between the EU and the US, the Working Party hopes that by the time the joint review team of the PNR agreement will be presenting its findings, it will be able to work within a framework of provisions which allow for appropriate briefing of the European Parliament while fully respecting the confidentiality of the information provided by DHS.

In addition to these points, the Working Party is of the opinion that the agreement should also make clear that it is the exclusive legal base for transmitting passenger data to US law enforcement or border control agencies, and that Advanced Passenger Information shall not be transmitted via a different channel or on a different legal base.

Finally, the Working Party would like to stress that many of the fundamental concerns expressed in this letter are also valid for the already concluded PNR agreement between the European Union and Australia. It urges the European Commission, the European Council and the European Parliament to take them into consideration when negotiating and deciding upon the PNR agreement with Canada.

The Working Party remains available for any further input into this matter.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman of the Article 29
Working Party