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DRAFT RECOMMENDATION

on the draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security (17433/2011 – C7-... – 2011/0382(NLE))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Sophia in 't Veld

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

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(Consent)

The European Parliament,

- having regard to the draft Council decision (17433/11),
- having regard to the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security annexed to the above-mentioned draft Council decision,
- having regard to the Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries (COM(2010)0492),
- having regard to its resolutions of 14 February 2007 on SWIFT, the PNR agreement and the transatlantic dialogue on these issues¹, of 12 July 2007 on the PNR agreement with the United States of America², of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada³, and of 11 November 2010 on the global approach to transfers of PNR data to third countries⁴,
- having regard to the opinions of the European Data Protection Supervisor of 19 October 2010 on the Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries⁵ and of 9 December 2011 on the proposal for a Council Decision on the conclusion of an Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security⁶,
- having regard to Opinion 7/2010 of 12 November 2010 on the European Commission's Communication on the global approach to transfers of Passenger Name Record (PNR) data to third countries adopted by the Article 29 Data Protection Working Party, and to the letter of 6 January 2012 on the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security,

¹ OJ C 287 E, 29.11.2007, p. 349.

² Text adopted, P6_TA-PROV(2007)0347

³ OJ C 81 E, 15.3.2011, p. 70.

⁴ Texts adopted, P7-TA(2010)0397.

⁵ OJ C 357, 30.12.2010, p. 7.

⁶ Not yet published in the Official Journal.

- having regard to the request for consent submitted by the Council in accordance with Article 218(6), second subparagraph, point (a) in conjunction with Article 82(1), second subparagraph, point (d), and Article 87(2), point (a) of the Treaty on the Functioning of the European Union,
 - having regard to Article 16 of the Treaty on the Functioning of the European Union and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union,
 - having regard to Rules 81 and 90(7) of its Rules of Procedure,
 - having regard to the recommendation of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee of Foreign Affairs (A7-0000/2010),
1. Withholds its consent to the conclusion of the Agreement;
 2. Instructs its President to forward its position to the Council, the Commission and the governments and parliaments of the Member States and the government of the United States of America.

EXPLANATORY STATEMENT

I. Background

PNR data is provided by passengers, collected by air carriers and used for their ticketing, reservation, and check-in systems. Given its collection for a commercial purpose, PNR data contain several kinds of information, ranging from names, addresses, passport numbers, and credit card information to information on other passengers, travel routes, and travel agents.

Following the 11 September 2001 attacks, the US authorities imposed the obligation on airlines to submit electronically to the US Department of Homeland Security (DHS) passenger data contained in the Passenger Name Record (PNR) for flights to, from, or through the US. Airlines not complying with these requests might face heavy fines and even lose landing rights, and passengers might experience delays upon arrival in the US. However, by transferring their PNR data in order to comply with the obligations imposed by the US authorities, the airlines would violate EU data protection legislation (Directive 95/46/EC requires an "*adequate level of protection*" or "*unambiguous consent*" for transfer of personal data to third countries), and could face heavy fines from the national Data Protection Authorities.

To avoid this choice between following EU legislation or the US requirements, and to overcome the legal uncertainty for both air carriers and citizens, the European Commission was called upon to negotiate an international agreement with the United States to ensure that the transfer of PNR data would be in line with EU data protection standards. A European legal framework allowing airlines to transfer passengers' PNR was put in place by the European Commission, consisting of the Adequacy Decision of 14 May 2004, and an International Agreement concluded between the European Union and the United States of America on 28 May 2004.

Following a legal challenge by the European Parliament, the Court of Justice annulled both instruments on 30 May 2006, because Article 95 (internal market) and Article 300 TEC were considered to be the wrong legal bases. In the Court's view, the transfer of PNR data to the US constituted processing operations concerning public security and activities of the State in areas of criminal law. These activities were explicitly excluded from the scope of Directive 95/46/EC according to Article 3(2) thereof.

Subsequently, the framework was initially replaced by the interim Agreement between the European Union and the United States of America of 16 October 2006, and then by the follow-up Agreement signed on 23 July 2007 by the EU and on 26 July 2007 by the US. The Agreement has been applied provisionally from 26 July 2007 pending ratification of the Member States.

With the entry into force of the Lisbon Treaty on 1 December 2009, the ordinary legislative procedure started to apply with regard to negotiating international agreements including a right to consent for the European Parliament. After having received Council's request for consent on 15 February 2010, the European Parliament adopted a resolution on 5 May 2010 to postpone the vote on this request for consent.

In its resolution it urged the European Commission to come up with a coherent approach to the use of PNR, based on a single set of principles - bearing in mind the two other PNR Agreements with Australia and Canada and the rise in requests for the use of PNR data, from countries like Saudi Arabia, South Korea, New Zealand.⁷ This approach, embraced by both Council and Commission, seemed to be the pragmatic option when more and more countries are requiring the transfer of PNR.

With a Communication on the global approach to transfers of PNR data to third countries, and new negotiation mandates approved by Council, the Commission started new negotiations with the US, Australia and Canada in January 2011.

A new Agreement with Australia was signed by the Council on 29 September 2011 and the European Parliament gave its consent on 27 October 2011. Negotiations with Canada are still pending. With regards to the US, an interim negotiation result was discussed with the European Parliament and Council in May 2011. This draft text, seen by the European Parliament's rapporteur and shadows, as well as the opinion of the Commission legal department, and as the interim result did not meet the criteria from the European Parliament resolutions the negotiations had to be continued. After new negotiations, the Commission initialled the Agreement and sent a recommendation to Council on 23 November 2011 to sign and conclude the Agreement. Council adopted the Agreement on 13 December 2011, and the Agreement was signed and sent to the European Parliament with a request for consent.

II. Assessment of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security

On 5 May 2010 and 11 November 2010, the European Parliament adopted with near unanimity its conditions for consent⁸:

- 1) The necessity for mass collection and storage of PNR data must be demonstrated, supported by factual evidence for each of the stated purposes.
- 2) The proportionality (i.e. that the same end cannot be achieved with less intrusive means) must be demonstrated.
- 3) The purpose must be limited clearly and strictly to counter terrorism and the fight against serious transnational crime, on the basis of clear legal definitions based on definitions in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism and in Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant).
- 4) Compliance with data protection legislation at national and European level.
- 5) The method of transfer must be only "push" only.
- 6) PNR data shall in no circumstances be used for data mining or profiling.

⁷ To date, 11 countries have filed a request at the European Commission for PNR data.

⁸ Resolutions of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada, and of 11 November 2010 on the global approach to transfers of PNR data to third countries,

- 7) The onward transfer of data by the recipient country to third countries must be in line with EU standards on data protection, to be established by a specific adequacy finding;
- 8) Results must be immediately shared with the relevant authorities of the EU and of the Member States (reciprocity).
- 9) The legal basis of the Council Decision concluding the agreement must include Article 16 TFEU.
- 10) Appropriate mechanisms for independent review, judicial oversight and democratic control.

Your Rapporteur has assessed the new Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security against these criteria. Your Rapporteur acknowledges the huge efforts of the European Commission in trying to secure a better Agreement, but has to conclude that many of the criteria have not been fulfilled to a satisfactory level. The call for a coherent approach and a single set of principles to govern international agreements on the transfer of PNR data was an approach embraced by the Commission and the Council. However, the Agreement with the US differs fundamentally from this approach as well as from the Agreement with Australia, concluded on 13 December 2011. This Agreement was considered to be sufficiently consistent with the criteria set out by Parliament, while the Agreement with the US departs from the approach that had been agreed by the European Parliament, the Commission and the Council in 2010. Additionally, compared to the first EU US PNR Agreement of 2004, this 2011 Agreement even represents a deterioration on many points. Having in mind that the European Parliament sought annulment of the 2004 Agreement before the Court of Justice, your Rapporteur will recommend the European Parliament to withhold its consent to the conclusion of the Agreement.

Assessment of key issues:

1) On necessity and proportionality

Your Rapporteur and the shadow rapporteurs have received information to justify the use of PNR for specific purposes in well defined circumstances. In your Rapporteur's view, the European Commission has only insufficiently and partially demonstrated the necessity and proportionality of the mass collection and storage of data. Anecdotal evidence and on site visits by delegations of the European Parliament have clarified the use of PNR for some purposes. However, the detailed justification for each of the stated purposes (counter terrorism and fighting serious transnational crime) and for each of the methods of processing (re-actively, real time and pro-actively), as requested by the European Parliament, has yet to be given. Besides, the European Commission has insufficiently explored alternative, less intrusive measures, for example the use of API or ESTA data for the identification of suspects.

2) On the use of PNR (Article 4)

Your Rapporteur believes that the paragraphs of Article 4 on purpose limitation are not restricted to preventing, detecting, investigating, and prosecuting terrorism and serious transnational crimes.

Although Article 4(1) lays down detailed definitions of terrorism and serious transnational crimes (crimes that are punishable by a sentence of imprisonment by three years or more, and that are transnational in nature), these definitions are not exclusive (use of words "including" and "in particular"). Besides, as the Article 29 Working Group notes, *"the definition of transnational crime does not appear to be necessarily related to law enforcement in the US, but it covers all crimes where more than one jurisdiction is involved"*. The EDPS adds that sub b of Article 4(1) *"should contain a specific list of crimes as the threshold [of three years or more] includes different crimes in the EU and the US and in the different EU Member States and US States"*.

In addition, and possibly more problematic in view of your Rapporteur, Articles 4(2), 4(3) and 4(4) are to be read as a further *expansion* of the purposes PNR data may be used for.

Paragraph 2 allows for the use of PNR 'if ordered by a court'. The Commission Legal Service heavily criticized this paragraph in May 2011 by stating that *"this 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.*" The Article 29 Working Party also expressed concerns, stating that *"Article 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"*. The EDPS believes *"that the use of PNR data where 'ordered by a court' should be limited to cases referred to in Article 4(1)"*.

Equally, Article 4(4) provides for the use of PNR data for other crimes if detected in the course of using PNR for the purposes of the Agreement. The Article 29 Working Party is worried as *"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"*.

Article 4(3) is most problematic in your Rapporteur's view. While the reference to border security has been eliminated from this paragraph, the paragraph now reads *"PNR may be used and processed by DHS to identify persons who would be subject to closer questioning or examination upon arrival to or departure from the US or may require further examination"*. This text, in particular when read in conjunction with Recitals 3 and 14, regarding border protection, raises the question if border security is still considered a purpose in its own right. Additionally, the Article 29 Working Party mentions in its opinion that *"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"*. Having in mind the Joint Review Report of 8-9 April 2010, in which *"concerns as regards the broad use of PNR data and in particular the matching of PNR against databases that have immigration and customs policy elements to them"* were raised, your Rapporteur is not convinced that border security is no longer a purpose for the use of PNR.

3) Retention of Data (Article 8)

Although access to the data will be progressively restricted, your Rapporteur notes that since the 2004 Agreement the retention periods got longer with each subsequent

agreement, from three and a half (3,5) years retention in 2004, to indefinite retention in 2011.

The masking out / depersonalization of PNR data after six months is seen as an improvement, as it basically means limitations in terms of accessibility and use of the PNR data after 6 months. However, to your Rapporteur, it is unclear how this relates to data that have already been transferred onwards to third countries.

In the 2004 Agreement, PNR data were destroyed after three and a half years (3,5) if not accessed. If accessed, PNR data were put in a dormant database for another eight years (8) and destroyed afterwards. Back in 2004, this retention period was already heavily criticized by the European Parliament, the EDPS and Article 29 Working Party for being disproportionate. The 2007 Agreement expanded the retention period to a total of 15 years. The current Draft 2011 Agreement, despite masking out the data after six months, retains PNR data indefinitely, even though access to the data is progressively restricted. In addition to the depersonalisation after 6 months, data can be retrieved for a period of 10 years in cases of serious transnational crimes, and 15 years in cases of terrorism. After 15 years, data will no longer be deleted but anonymized. The Article 29 Working Party stresses *"the difficulty of truly anonymizing data and the lack of further explaining why the (anonymized) data is still needed"*.

4) Use of Sensitive Data (Article 6)

Your Rapporteur is worried about Article 6 on the use of sensitive data, as it looks as if this Article does allow for the full and unrestricted use of sensitive data. Having in mind that all relevant EU legislation does not allow for processing of special categories of data (except when this would be strictly necessary and domestic laws provide for appropriate safeguards), the 2004 Agreement banned the use of sensitive data, and the EU PNR proposal and the EU Australia PNR Agreement also prohibit any processing of sensitive data, your Rapporteur believes that it cannot be accepted that the US Department of Homeland Security is allowed to filter, mask out and further process or use sensitive data. Even though sensitive data shall be permanently deleted not later than 30 days, it is unclear how this relates to data that have been transferred onwards to third countries.

5) Method of transfer of PNR data (Article 15)

The European Parliament resolution is crystal clear: PNR data can be transferred exclusively by using the "push"-method. The 2007 Agreement already imposed a deadline on air carriers to switch to push no later than 1 January 2008, but this obligation has not been enforced - indeed the Commission confirms it does not have the means to enforce this obligation (other than the nuclear option of taking a Member State to court). Your Rapporteur would like to draw your attention to the Joint Review Report of 8-9 April 2010, in which *"concerns both as regards the amount of ad hoc requests but also the fact that DHS executes such request by pulling the data"* were raised. Furthermore, data obtained from the carriers show a very high frequency of ad hoc pull requests, up to thousands a month.

6) Onward Transfer of PNR data (Article 17)

With regard to sharing of data with other US agencies, and to the onward transfer to third countries, no progress seems to have been made since the 2004 Agreement.

7) Law enforcement and Judicial Cooperation (Article 18)

Your Rapporteur welcomes the improvement vis-à-vis the 2007 Agreement on the issue of law enforcement and judicial cooperation. In 2007, law enforcement and judicial cooperation was not yet of a binding nature, and in the 2001 Agreement Article 18 ensures that DHS "*shall provide*" information "*as soon as practicable*". Your Rapporteur notes, however, that information only needs to be shared when it concerns cases under examination or investigation relating to terrorism (Article 4(1)(a)) or to serious transnational crimes (Article 4(1)(b)). The other purposes mentioned in Article 4 fall outside of this obligation to cooperate.

8) Legal basis

Your Rapporteur believes that the appropriate legal basis for the Agreement should be, in any case, primarily Art. 16 TFEU (on data protection). However, it is not included in the legal base, and only a general, non binding reference ("mindful of") is included in the pre-amble. As stated above and as stated by the European Data Protection Supervisor in its opinion of 15 July 2011, the purpose of the Agreement is to ensure that the transfer of data is in line with EU data protection standards. Therefore, the Agreement should not be based on Article 82(1)(d) and Article 87(2)(a), but on Article 16 TFEU. If the purpose were police-judicial cooperation, then the EU could theoretically decide against the collection of PNR data. But this is a sovereign decision by a third country. Therefore, it is not EU policy as it is not for the EU to decide. The chosen legal base is clearly not the correct one.

9) Legal Redress for EU citizens and independent oversight (Articles 13 and 14)

Your Rapporteur welcomes the possibility created in Article 13 that "*any individual regardless of nationality, country of origin, or place of residence (...) may seek effective administrative and judicial redress*" but questions very much the practical meaning of this Article as the EU US PNR Agreement is an *executive* Agreement, i.e. the US cannot change its own statutory laws as that would require involvement of Congress. Additionally, Article 21 explicitly states that the Agreement "*shall not create or confer, under US law, any right or benefit on any person*". The EDPS regrets this in its opinion, concluding from Article 21 that "*[the right to judicial redress] may not be equivalent to the right to effective judicial redress in the EU*".

Your Rapporteur welcomes the future involvement of US Congress when it comes to overseeing the application of the EU US PNR Agreement, but notes that Article 14 still lacks independent oversight as required under the jurisprudence of the European Court of Justice⁹ and the Charter of Fundamental Rights.

10) List of PNR data

Annex I of the Agreement contains 19 types of data that will be sent to the US. Most of them are identical to the data fields in the 2007 Agreement and these also comprise the different categories of the types of data in the Annex of the 2004 Agreement. Both lists of data were already considered disproportionate by the EDPS and the Article 29 Working Party. Mainly, the fields '*general remarks including OSI, SSI and SSR*

⁹ The Article 29 Working Party refers to case C-618/07, Commission v. Federal Republic of Germany of 9 March 2010.

information' are regarded problematic, as these categories can reveal data related to religious beliefs or related to health.

11) Impact of the Patriot Act on the PNR data held by airlines in their Computer Reservation Systems

The EU US PNR Agreement applies to transfers of PNR data to the Department of Homeland Security. The Agreement puts, however, no limitations on the ability of the US Government to obtain PNR data directly from airlines with Computer Reservation Systems based in the US or those just doing business in the US by enforcing the Patriot Act. Your Rapporteur believes that this situation needs to be clarified. The European Union must ensure that EU data protection rules are effectively enforced and that US legislation does not take precedence over EU legislation or this Agreement.

With all the above in mind, your Rapporteur recommends the European Parliament to withhold its consent to the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security.