Brussels, 9 October 2013

Members of the LIBE Committee
of the European Parliament

Dear Members of the LIBE Committee,

Subject: Proposal for Council Decision on the conclusion of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data

The Article 29 Data Protection Working Party (Working Party) has always followed the evolution of the PNR agreements closely and has previously commented extensively in several opinions and letters on the various PNR agreements and on the Commission's global approach[1] towards the conclusion of such agreements. Considering the highly sensitive data protection aspects and provisions of the present proposal, the Working Party wishes to present its analysis on the European Commission's (Commission) Proposal for Council Decision on the conclusion of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data (Agreement).

As a general comment on the Agreement the Working Party stresses the fact that, as it has already highlighted in previous opinions and letters, the use of PNR data for law enforcement purposes gives rise to serious concerns. Without any doubt, personal data can, under certain circumstances, be efficient tools in combating terrorism and serious transnational crime. However, it should be reiterated that PNR data are data generated for commercial purposes and their reliability is not checked in any case. Furthermore, it has to be underlined that no factual evidence has yet been produced to demonstrate to what extent the use of this system can contribute to better public safety. In the meantime the processing of such data can be very intrusive to passengers. Therefore, the Working Party has always stressed the need for introducing strong data protection safeguards into PNR agreements.

It should be highlighted also that the mere fact that the use of PNR systems is widening does not prove their necessity. A privacy impact assessment would be welcomed in this regard. The Working Party wishes to draw attention to the fact that it has set out specific conditions to be met when setting up new PNR systems in its opinion 7/2010 (WP178).

The Working Party welcomes that the Agreement contains provisions which reflect the recommendations it made in previous opinions such as the exclusive use of the push method

[1] Opinions WP 103 (Canada); WP 138 (US); WP 151 (US - information to passengers); and WP 178 (Commission Global approach). See also letter to Commissioner Malmström of 6 January 2012 on the most recent PNR agreement with the United States.

and a stricter set of rules for the disclosure of PNR data outside of Canada. However it concludes that many of the objections raised by the Working Party have still not been met. As a general assessment it can be concluded that, while the Agreement better reflects the relevant EU and international regulations on data protection than the agreement concluded in 2005 with Canada on the processing of PNR data (based on a set of commitments by the Canada Border Services Agency in relation to the application of its PNR programme[2]), several concerns remain.

Therefore, the Working Party acknowledges the effort of the Commission in introducing data protection safeguards to the Agreement, but stresses the importance of further improving the Agreement's provisions on the following specific provisions:

Art. 2 – Definitions

The principle of data minimisation is of primary importance in respect of passengers' privacy.

As stated in previous Opinions, the Working Party remains critical of the annexed list of PNR data elements. The Working Party notes the fact that the number of the data elements which can be used as PNR data under the Agreement has not increased compared to other recent PNR agreements, but remains worried about the length of the list as well as about certain data elements, as expressed in previous opinions. The Working Party wishes to recommend that the necessity of each data element be reviewed one-by-one with the Canadian side.

Art. 3 – Use of PNR

The Working Party notes that the purpose of the data processing is limited to the prevention, detection, investigation and prosecution of terrorist offences or serious transnational crime. However it reiterates its view that it would be worthwhile to thoroughly re-examine the definitions of those acts as they constitute one of the most important provisions of the Agreement. In their present form the definition of those acts, although better formulated than in other PNR agreements, could be interpreted as not specific enough.

It would first of all be desirable to determine the criteria for: "intention of intimidating the public" as it seems to be unclear what elements (which public, how many persons constitute a public, only intimidating or causing fear too, etc.) are to be met for qualifying an act as such; which party, authority is competent to qualify an act as such, etc.

Art. 3 (4) and 3 (5) are vague. Therefore, the Working Party feels that they extend the scope of the Agreement unnecessarily.

Art. 8 – Use of sensitive data

The Working Party regrets that the Agreement allows the processing of sensitive data by the Canadian Competent Authority.

Art. 9 – Data security and integrity

The Working Party highly recommends that, in the case of data breach or data protection incidents, the Data Protection Authority of the Member States whose citizens' data is

[2] OJ L82/15, 21.3.2006.

involved should also be informed by the Canadian authorities in order to cooperate on mitigating the consequences of the data breach.

Art. 10 – Oversight

The Working Party suggests much more elaborated provisions on the oversight of the implementation of the Agreement including the naming of the competent authority, provisions on responsibility and specific sanctions. The Working Party strongly recommends naming the Privacy Commissioner of Canada as the authority responsible for the oversight of the Agreement.

Art. 11 – Transparency

In the spirit of a more transparent implementation of the Agreement, the Working Party highly recommends that Canada and the EU shall request (instead of work together to promote) air carriers to provide passengers at the time of booking with clear and meaningful information on PNR data processing (reasons, purpose, use, right of access, right of information, right of correction) and in addition to the right of correction they should also provide information on possible redress.

Art. 12-13 – Access for individuals, Correction or Notification for individuals

The right of access is one of the most important rights of a person in defence of their privacy. The Working Party regrets that the Agreement does not make clear to whom the individual should address requests in order to exercise the right to access.

Art. 14 – Administrative and judicial redress

The Working Party suggests a much more elaborated provision on the right of redress including the naming of the competent authority, courts, responsibility, and sanctions. The Agreement must also contain clear provisions allowing non-Canadian citizens to exercise their rights of redress from outside of Canada. It should also be clear which actions of the Canadian authority can be challenged by means of administrative and judicial redress. The Working Party notes that the judicial redress in Art. 14 (2) may be sought "in accordance with Canadian law by way of judicial review". Accordingly, there remains an inappropriate degree of uncertainty as regards the rights of European citizens. The Working Party regrets this. It would have found it necessary to include a much more detailed and reassuring provision setting out a description of the various procedures, the ways to seek redress, time limits, the possible means of communication, etc.

Art. 16 – Retention of PNR data

The Working Party has repeatedly expressed its serious concerns regarding the retention periods foreseen in the PNR agreements and highlights the importance of justifying the necessity to retain the data of innocent travellers. It particularly regrets that the retention period has been extended compared to the agreement concluded with Canada in 2005. The Working Party feels that the 5 years retention period was chosen because other PNR agreements also prescribe a 5 year retention period. It would have welcomed if the Commission demonstrated why such a long period is needed for every, including bona fide, passengers' data. The Working Party acknowledges that after a shorter period the data are masked but regrets that the masking process does not result in total depersonalisation of data and that individuals can still be identified for at least two years This can again be considered a

long period for bona fide travellers and for travellers in cases of whom no investigation is launched.

Art. 18-19 – Disclosure within Canada, Disclosure outside Canada

As already highlighted in our previous opinions, we suggest that the Authorities to which PNR data can be transferred be listed in the Agreement or in its Annex, as this will facilitate the right implementation of the Agreement.

Art. 20 – Method of transfer

The Working Party welcomes the exclusive choice of the *push* method as method of transfer and urges for a consistent use of it in practice.

Art. 30 – Final provisions

As already stated, the Working Party does not see any justifiable reason why the Agreement does not name the Canadian Competent Authority, the independent public authority and the authority created by administrative means. This shall cause unnecessary confusion in the future implementation of the Agreement. We highly recommend that those authorities should be named / listed.

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

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman

cc: Commissioner Cecilia Malmström
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