Brussels, 11th April 2018

Commissioner Jourová,
Commissioner Avramopoulos,
Commissioner King,
European Commission

Dear Commissioner Jourová,
Dear Commissioner Avramopoulos,
Dear Commissioner King,

On 26 July 2017, the Court of Justice of the European Union (CJEU) found in its opinion on the EU PNR agreement with Canada that the European Parliament may not agree to the envisaged agreement because it is in part not compatible with Articles 7, 8, 21 and 52 of the EU Charter of Fundamental Rights[1]. The Working Party 29 (WP29) welcomed the efforts from the European Commission to seek from the Council a new mandate to renegotiate the draft agreement with Canada reflecting the opinion of the CJEU.

While the mandate was granted, ten months later no significant progress has been made in order to take account of the opinion, neither in respect to the envisaged agreement with Canada, nor with other concluded PNR dossiers, including the PNR agreements with Australia[2] and the United States[3] as well as the EU PNR Directive 2016/681[4] (PNR directive).

The WP29 wishes to express its concern that EU law continues to be applied while not in line with the EU Charter of Fundamental Rights as interpreted by the CJEU. The opinion of the CJEU on the envisaged agreement with Canada may not have a formal legal effect on the other PNR instruments. At the same time, the WP29 is convinced that the reasoning of the

[1] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 150.
[2] Agreement between the European Union and Australia on the processing and transfer of Passenger Name Records (PNR) data by air carriers to the Australian Customs and Border Protection Service, Official Journal of the European Union of 14.7.2012, L 186/4.
[3] Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the Unites States Department of the Homeland Security, Official Journal of the European Union of 11.8.2012, L 215/5.
[4] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name records (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime; Official Journal of the European Union of 4.5.2016, L 119/132.

court is relevant for all PNR instruments, as the following, non-exhausting list of specific deficiencies, as identified by the CJEU, is meant to show:

1. Need for clear and precise description of the data concerned

The CJEU found that some of the 19 PNR data headings used in the annex of the envisaged PNR agreement with Canada are not sufficiently clear and precise.[5] Specifically, the court held that the use of terms like "etc." in heading 5, "all available contact information" (heading 7), or "general remarks including Other Supplementary Information (OSI), Special Service Requests (SSR) information" (heading 17) do not sufficiently describe the data concerned so that the envisaged agreement does not delimit in a sufficiently clear manner the scope of the interference.[6]

The PNR agreements with the United States of America and Australia include PNR data headings identical to those criticised by the court in their respective annexes.

The language in the annex of the PNR directive differs from the one used in the PNR agreements with third countries avoiding in part language criticised by the court while still referring to terms such as "General remarks", or "Frequent flyer information", which without further clarification and specification are likely to be also considered as an insufficiently clear and precise description of the data concerned.

2. Exclusion of sensitive data

As far as the data concerned by the envisaged agreement may cover also sensitive data, the court points out that the pure premiss of possible relevance for the purpose of combating terrorism and serious transnational crime is not sufficient to justify the interference in Art. 7 and 8 of the Charter, read in conjunction with Art. 21 thereof. Rather, the transfer of sensitive data requires a precise and particularly solid justification, based on grounds other than the protection of public security against terrorism and serious transnational crime.[7]

While the agreement with Australia provides in Art. 8 that the processing of sensitive data is prohibited, the agreement with the United States includes a provision very similar to the one in the envisaged agreement with Canada. The WP29 is not aware of an additional justification for the processing of sensitive data as required by the CJEU.

As regards the PNR directive, the EU legislator prohibited the processing of sensitive data.

3. Limits to the retention of PNR data during the stay

The CJEU found that, for as long as the air passengers are in the third country, PNR data may be retained[8]. Access to that data, however, is made subject to an important condition, once the security checks and the border controls checks have been done and the passengers have been allowed to enter the country. During the time period in which the air passenger stays in the

[5] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 154.
[6] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 163.
[7] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 165.
[8] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 197.

country and is still due to leave it again, the CJEU held that, as a general rule, access to the retained PNR data is subject to a prior review either by a court, or by an independent administrative body. In the case of the envisaged agreement with Canada this condition was not met[9].

The WP29 notes that neither the PNR agreement with the U.S., nor with Australia includes an obligation in line with the court's holding on the conditions of access to retained PNR data for that period of time.

With regard to the PNR directive, Art. 12 (3) of the directive makes disclosure of the full PNR data subject to approval by a judiciary authority or another national authority competent under national law to verify the conditions for disclosure, after a period of six months. In view of the WP29, Art. 12 (3) does not appear to be fully in compliance with the court's holding for two reasons: First, neither the term "judicial authority", which includes authorities such as prosecutor's offices, nor the other national authorities referred to as an alternative appear to necessarily require the degree of independence the CJEU is explicitly referring to by saying "courts" and "independent administrative bodies", at least not in all Member States. Although this could be taken into account by Member States while transposing the Directive into national law, the text of the Directive itself appears broad enough to allow for a transposition which would not be in compliance with the requirements of the court. Secondly, the approval according to Art. 12 (3) is only necessary when access is sought to data which has been retained data for more than six months, rather than for the time the passenger remains in the EU.

4. Limits to the retention of PNR data after the stay

A key holding in the court's opinion deals with the deletion of PNR data after the passenger has left the third country again to which the PNR data has been transmitted. The court notes that the continued storage of PNR of all air passengers after their departure from the third country is not limited to what is strictly necessary, as no connection between the PNR data collected and the objective of the agreement can be generally established. For that period of time, PNR data must not be retained except for specific cases for which objective evidence can demonstrate a risk of a passenger[10].

The analysis of the other PNR instruments shows that, while all PNR agreements and the PNR directive provide for the requirement to mask PNR data after a certain period of time, none of the instruments includes an obligation to delete it after the departure of the passenger if no objective evidence demonstrates the potential risk of a passenger in a specific case. As the court did not consider that masking PNR data could justify a longer retention period in the context of the draft agreement with Canada, the reasoning and conclusion of the court would apply to all the other PNR instruments in the same way, should it be PNR agreements or the PNR directive.

5. Limits to disclosures to authorities in third countries

[9] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 202.
[10] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 205 seq.

As regards onward transfer, the CJEU held that third country authorities which have received PNR data may only transfer that data to other authorities in another country if the European Union has either made a PNR agreement with that country or has found that third country to be adequate in the meaning of Art. 25 (6) Directive 95/46[11].

With a view to the other PNR agreements, Art. 19 of the PNR agreement with Australia and Art. 17 of the PNR agreement with the U.S. include - in part – detailed provisions on onward transfers. Both of them, however, do not provide for the limitations expressed by the CJEU. The WP29 would like to add that the natural understanding of the CJEU opinion would be that onward transfers to other third countries also benefiting from a PNR agreement with the EU could only take place where both PNR agreements in place are in compliance with the Charter of Fundamental Rights as interpreted by the CJEU. In consequence, PNR data could only be further transferred from Canada to the U.S. or, vice versa, from the U.S. to Canada, once both of the PNR agreements are in line with the Charter of Fundamental Rights as interpreted by the CJEU.

The PNR directive refers to a series of cumulative conditions in Art. 11, including to the rules foreseen in the data protection directive as regards transfers. Therefore, assuming that the data protection directive will also be applied in compliance with the relevant case law of the court, this provision would not be subject to the same criticism as the PNR agreements which would need additional provisions regarding onward transfers.

6. Oversight by an independent supervisory authority

The CJEU also stressed the necessity of independent oversight of the PNR data protection safeguards of the agreement. Applying its standard of assessing "independence", the court does not regard Art. 10 (1) of the envisaged agreement with Canada to be in compliance with Art. 8 (3) of the Charter of Fundamental Rights, because Art. 10 (1) does not sufficiently ensure that the oversight is performed by a body which is completely independent, as interpreted by the CJEU[12].

While this issue is not problematic with a view to the PNR directive and the agreement with Australia, where compliance will be overseen by the Australian Information Commissioner, the criticism by the CJEU is particularly relevant for the PNR agreement with the United States. Art. 14 (1) of the that PNR agreement provides that compliance with the data protection safeguards is primarily subject to review by the Privacy Officers of the Department of Homeland Security, and thus not by an independent administrative body. While Art. 14 (2) also mention the DHS Office of Inspector General and the Government Accountability Office at the Congress as entities also overseeing the application of the agreement, concerns seem to be warranted whether those entities are sufficiently independent, as required by the CJEU in this context.

Subject to further analysis of the PNR instruments, for which the WP29 offers to further contribute, this short analysis already shows that the PNR agreements with the United States and with Australia suffer from a number of deficiencies the CJEU has identified in the

[11] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 214.
[12] OPINION 1/15 OF THE COURT (Grand Chamber) of 26 July 2017, § 230.

envisaged agreement with Canada. With regard to some of the criteria, both agreements include identical or similar language or omissions respectively.

While the processing, retention and transfer of PNR data is generally subject to stricter rules in the PNR directive, this short analysis has nevertheless shown that the PNR directive is at least partly not in compliance with the requirements expressed by the CJEU in its opinion. In particular, the retention of PNR data and access to them after passengers have been cleared in security and border control checks are in the view of the WP29 not in compliance with the opinion of the CJEU.

Thus, the WP29 calls upon the European Commission to take action in order to ensure compliance with the CJEU's opinion regarding both PNR agreements with the US and Australia as well as regarding the PNR directive. While it is evident that no sovereign country can be forced to renegotiate the PNR agreements, this does not mean that nothing could be done. As the guardian of the EU treaty and thus of EU law, the European Commission is required to make all efforts necessary and to take all steps necessary to ensure compliance of all PNR instruments with the requirements set by the CJEU in its opinion as soon as possible. Thus, the WP29 calls on the Commission to present proposals with a view to amending the PNR agreements as well as proposals amending the parts of the Directive which would need to be modified to align the directive with the requirements of the court, especially concerning the retention period of PNR data.

As a matter of EU data protection law, but also more broadly as a matter of EU law, it would not be acceptable if the opinion of the CJEU were to be continuously disregarded and not complied with.

In addition, the WP29 would be grateful to be updated on the amended proposals and the progress of the negotiations.

Sincerely,

On behalf of the Article 29 Working Party

Andrea Jelinek
Chairperson