



Council of the
European Union

Brussels, 16 October 2023
(OR. en)

14251/23
ADD 1

LIMITE

IXIM 192
JAI 1323
ENFOPOL 427
CRIMORG 134
JAIEX 65
AVIATION 191
DATAPROTECT 276

NOTE

From: Presidency

To: Delegations

No. prev. doc.: 12803/23 ADD 1

Subject: ANNEX to the Council Decision authorising the opening of negotiations for an Agreement between the EU and Switzerland for the transfer and use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

- Directives for the negotiation

Directives for the negotiation for an agreement between the European Union and the Swiss Confederation on the transfer of Passenger Name Record data from the EU to the Swiss Confederation for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

The negotiations should aim to achieve the following general objectives:

- (1) The Agreement reflects the necessity and importance of the processing of Passenger Name Record (PNR) data in combating serious crime and terrorism by enabling the lawful transfer of PNR data from the Union to Switzerland.
- (2) In order to comply with relevant requirements of EU law, including the Charter of Fundamental Rights of the European Union and the relevant case law of the Court of Justice of the European Union, the Agreement provides a legal basis, conditions and safeguards for the transfer to and processing by Switzerland of PNR data, and ensures that an adequate level of personal data protection is provided.
- (3) The Agreement encourages and facilitates cooperation between the Member States of the Union and Switzerland by establishing arrangements for timely, effective and efficient exchanges of PNR data and of the results of processing of PNR data.

The negotiations should aim to achieve the following on substance:

- (4) The Agreement identifies the designated Swiss competent authority responsible for receiving from air carriers and further processing PNR data under the Agreement.

- (5) The Agreement specifies exhaustively and in a clear manner the PNR data elements to be transferred, in line with international standards as well as with Annex I of Directive 2016/681. Data transfers are kept to the minimum necessary and are proportionate to the purpose specified in the Agreement.
- (6) The Agreement ensures that PNR data is transferred exclusively on the basis of a 'push' system. The frequency and the timing of such transfers do not create an unreasonable burden on air carriers and are limited to what is strictly necessary, such as through the efficient use of common technical solutions where appropriate.
- (7) The Agreement ensures that air carriers are not required to collect and transfer any additional data compared to what they already collect as part of their business.
- (8) The Agreement includes rules on data security, in particular on allowing only a limited number of specially authorised individuals from the designated Swiss competent authority to have direct access to PNR data, and on notifications of data security breaches to the responsible European data protection supervisory authorities.
- (9) The Agreement sets out the purposes of PNR data processing in an exhaustive manner, notably by establishing that PNR data is transferred and processed solely for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, based on definitions laid down in relevant EU law instruments.
- (10) The Agreement provides that sensitive data within the meaning of Union law, including personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership or concerning a person's health or sexual life or orientation, are not processed under the Agreement.

- (11) The Agreement sets out the specific modalities for the processing of PNR data received under the Agreement by the designated Swiss competent authority. It includes safeguards for the automated processing of PNR data to ensure it is based on non-discriminatory, specific, objective and reliable, pre-established criteria and that such automated processing is not used as a sole basis for any decisions with adverse legal effects or seriously affecting an individual. It also ensures that the databases against which PNR data are compared are only those relevant for purposes covered by the Agreement and are reliable and up to date.
- (12) The Agreement provides that PNR data received under the Agreement is subject to periods of retention that are restricted and not longer than what is necessary for and proportionate to the objective pursued, that is, for purposes of preventing, detecting, investigating and prosecuting serious crime and terrorism offences. These retention periods ensure that, in line with the relevant case law of the Court of Justice of the European Union, PNR data can be retained under the Agreement only if an objective connection between the PNR data to be retained and the objective pursued is established. The Agreement requires that the PNR data is deleted upon expiry of the relevant retention periods or rendered anonymous in such a manner that the individuals concerned are no longer identifiable. The Agreement takes duly into account the free movement of persons between Switzerland and the Union.
- (13) The Agreement ensures that disclosure of PNR data by the designated Swiss competent authority to a closed list of other competent authorities of Switzerland or to competent authorities of other States, including Member States of the Union or other Schengen Associated Countries, may only take place on a case-by-case basis and under certain conditions and safeguards. In particular, such disclosure may only take place if the recipient authority exercises functions related to the fight against terrorism or serious crime and ensures the same protections as those set out in the Agreement. Onward transfers to competent authorities of other third countries are limited to those countries with which the Union has an equivalent PNR Agreement or for which the Union has adopted an adequacy decision under its personal data protection law covering the relevant authorities to which the PNR data is intended to be transferred.

- (14) The Agreement ensures a system of oversight by an independent public authority responsible for personal data protection, with effective powers of investigation, intervention and enforcement, to exercise oversight over the designated competent authorities and other competent authorities that process PNR data under the Agreement. That independent public authority has powers to hear complaints from individuals, in particular concerning the processing of PNR data relating to them.
- (15) The Agreement ensures the rights of effective administrative and judicial redress on a non-discriminatory basis, regardless of nationality or place of residence, for any person in respect of whom PNR data relating to that person is processed under the Agreement, in line with Article 47 of the Charter of Fundamental Rights of the EU.
- (16) The Agreement contains provisions to ensure adequate and transparent information to air passengers in relation to the transfer and further processing of PNR data relating to them, as well as the right of individual notification in case of disclosure of such PNR data, and, where appropriate, rectification and deletion, insofar as such notification does not jeopardise any ongoing investigations being carried out by the competent authorities using the PNR data.
- (17) The Agreement fosters police and judicial cooperation through the exchange of PNR data, or results of processing of PNR data, between the designated Swiss competent authority and the competent police and judicial authorities of Member States of the Union, as well as between the designated Swiss competent authority, on the one hand, and Europol or Eurojust within their respective competences, on the other hand.

- (18) The Agreement includes provisions for regular joint review on all aspects of the implementation of the Agreement. It is concluded for a set period of time and includes a provision whereby the Agreement is renewed for similar periods unless a Party notifies its decision to terminate it. The Agreement provides for a dispute settlement mechanism with respect to its interpretation, application and implementation.
- (19) The Agreement is equally authentic in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages and will include a language clause to that effect.
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