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# The EU PNR framework decision proposal: Towards completion of the PNR processing scene in Europe

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## ABSTRACT

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### Keywords:

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The entry into force of the Lisbon Treaty has suspended discussions over the release of a EU PNR processing system. Plans to introduce an intra-EU PNR processing system initiated since 2007, although strongly supported by the Commission and the Council, did not bear fruit before the ratification of the Lisbon Treaty and the, institutional, involvement of the Parliament. While discussions have been suspended since October 2009 and most probably a new draft proposal will be produced, it is perhaps useful to present in brief the proposal currently in place so as to highlight its shortcomings for European data protection and suggest ways individual protection may be strengthened in future drafts.

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## 1. Introduction<sup>2</sup>

The entry into force of the Lisbon Treaty has suspended discussions over the release of a EU PNR processing system. Luckily, according at least to data protection proponents, plans to introduce an intra-EU PNR processing system (in the form of a “Framework Decision on the use of Passenger Name Records (PNR) for law enforcement purposes”) initiated since 2007, although strongly supported by the Commission and the Council, did not bear fruit before the ratification of the Lisbon

Treaty and the institutional involvement of the Parliament in the process.

While discussions have been suspended as per the Parliament’s request since October 2009<sup>3</sup> and most probably a new draft proposal for the regulation of PNR processing within the EU will be presented, it is perhaps useful to present in brief the proposal currently in place so as to highlight its shortcomings for European data protection and suggest ways individual protection may be strengthened in future proposals.

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<sup>3</sup> EU Passenger Name Record talks on hold in Council until Lisbon Treaty is ratified, European Parliament News, 6.10.2009 (ref. 20091006IPR61955).

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## 2. The PNR processing scene

As is widely known by now, the term PNR data denotes records on passengers kept in computer reservation systems.<sup>4</sup> Such records may include the passenger's full name, date of birth, home and work address, telephone number, e-mail address, passport details, credit card details or method of payment, the names and personal information of emergency contacts, as well as details of any special meal requirements or seating preferences or any other similar requests.

Before 9/11, PNR data were mainly used by the air travel industry (arguably, marginally) in order to make an air travel reservation. They were not systematically collected, reservations could be made only with the person's initials and they generally attracted no great attention.

After 9/11, however, in the belief that the processing of PNR data could contribute to keep terrorists out of its country, the US Bureau of Border and Customs Protection (CBP), implementing the US Aviation and Transportation Security Act 2001, started asking since November 2001 international air carriers for access to their PNR data, which also had to improve in standards of accuracy and quantity.<sup>5</sup>

PNR data obviously constitute 'personal data' within the meaning of EU law. Regardless of the point of view adopted (Data Protection Directive, Convention 108, Data Protection Framework Decision<sup>6</sup>), PNR data undoubtedly fall under the category of "any information relating to an identified or identifiable natural person"<sup>7</sup> or "any information relating to an identified or identifiable individual",<sup>8</sup> and hence fall within the scope of the EU data protection texts.

<sup>4</sup> See [http://en.wikipedia.org/wiki/Passenger\\_Name\\_Record](http://en.wikipedia.org/wiki/Passenger_Name_Record); there it is also clarified that "although PNRs were originally introduced for air travel, they are now also being used for bookings of hotels, car rental, railways, etc.". It is also noted that by now few airlines (both in the EU and in the USA) host their own passenger databases; in fact, most 'outsource' the processing of their PNR data altogether to third (data processing) parties that ultimately upload airlines' PNR data to the so-called Global Distribution Systems (SABRE, Galileo, Amadeus, Worldspan), see Hasbrouck E, 'What's in a Passenger Name Record', <http://hasbrouck.org/articles/PNR.html>.

<sup>5</sup> The contribution of PNR data processing *per se* to the international combat against terrorism is widely disputed. However, despite widespread skepticism regarding PNR data processing as an effective anti-terrorist tool no security or other agency anywhere in the world has ever presented any evidence (statistical or other) to its defense; in effect, security agencies customarily ask the public to simply take their word as to their effectiveness on account of "national security" (see Papakonstantinou V & De Hert P, 'The PNR Agreement and transatlantic anti-terrorism co-operation. No firm human rights framework on either side of the Atlantic', *Common Market Law Review*, vol. 46, No. 3, p. 916).

<sup>6</sup> Corresponding thus to the distinction between First and Third Pillar and the respective data protection instruments before the Lisbon Treaty came into effect.

<sup>7</sup> Art. 2 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Data Protection Directive), OJ L 281, 23/11/1995 p.0031ff.

<sup>8</sup> Art. 2(a) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, 28 January 1981.

Because the American request contradicted European airlines' data protection obligations concerning the PNR data they possessed (export to a third country without having first ensured an "adequate" level of protection), air carriers were faced with the dilemma as to which law to break. After repeated attempts at European Community level the issue was reconciled with the USA, an outcome however that only came after three regulatory attempts, in 2004, in 2006 and in 2007 respectively, as will be immediately demonstrated.

In the meantime however PNR data processing became central to security agencies outside the USA. This is why again at EU level, agreements were entered with Canada, in 2005, and Australia, in 2008.

As will be shown, PNR contracting between the EU and third parties has largely been a matter of political power. PNR Agreements have been entered only with EU's larger international partners – if PNR processing were indeed as central to combating terrorism as proclaimed to be, evidently any law-abiding country in the world would have been expected to profit from it. In addition, even among the existing three altogether, PNR processing agreements differences exist that may reflect the lack (or excess) of negotiating power: most notably, the USA is allowed to retain in its systems European PNR data for a period of 15 years, Canada for 6 years and Australia for 5.5 years.

At any event, this international PNR data processing scene would therefore leave intra-EU security agencies essentially as the only ones not profiting from their processing. In this context, at the same time as the last EU–USA PNR agreement was concluded, in June 2007, the Commission declared its intention to present a proposal for a framework decision establishing a EU PNR system; its first draft was presented six months later, in November 2007.

### 2.1. PNR data processing between the EU and the USA

As already discussed it was the USA that initiated the PNR data processing scene. After 9/11 the processing of Passenger Name Records (in practice holding information on more than 30 fields per individual) gained importance in its security policies.

The First PNR Agreement was entered in May 28, 2004 between the European Commission and the USA (Department of Homeland Security).<sup>9</sup> Nevertheless, a couple of months after it was concluded, on July 27, 2004, the European Parliament, which had not been involved in the negotiations, filed against it in front of the European Court of Justice. The Court

<sup>9</sup> Before that the Commission issued its Decision "on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection" (Commission Decision 2004/535/EC, OJ 2004, L 235/11-22) and the Council its own Decision "on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection" Council Decision 2004/496/EC, OJ 2004, L 183/83 respectively. See also Papakonstantinou V & De Hert P, 'The PNR Agreement', *l.c.*, p.907.

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