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ANNEX

**ANNEX**

**to the**

**Recommendation for a Council Decision**

**authorising the opening of negotiations on a Framework Agreement between the European Union and the United States of America on the exchange of information for security screenings and identity verifications relating to border procedures and applications for visa**

## **ANNEX**

### **DIRECTIVES FOR THE NEGOTIATION OF A FRAMEWORK AGREEMENT BETWEEN THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA ON THE EXCHANGE OF INFORMATION FOR SECURITY SCREENING AND IDENTITY VERIFICATION RELATING TO BORDER PROCEDURES AND APPLICATIONS FOR VISA**

In the course of the negotiations, the Commission should aim to achieve the objectives set out in detail below.

#### **I. PURPOSE AND SCOPE OF THE FRAMEWORK AGREEMENT**

1. The purpose of the framework agreement is to provide for a legal structure for Member States' bilateral information exchange between their competent authorities and the competent authorities of the United States of America (U.S.) in the context of the U.S. Enhanced Border Security Partnership (EBSP).
2. The framework agreement should provide clear and precise rules on the exchange of information between the Member States and the U.S. on travellers crossing their respective external borders to support the screening and verification of identity of travellers necessary to determine if their entry or stay would pose any risk to public security or public order, and to support the competent authorities in the prevention, detection, investigation and prosecution of crimes and terrorist offences.
3. The objective of the framework agreement is to provide the legal basis and the conditions for the transfer and exchange of personal data between the competent authorities of the Member States and of the U.S. respectively. In particular, the framework agreement should provide clear and precise rules and procedures for triggering a query on a traveller, to preclude a systematic, generalised and non-targeted processing of data for all travellers.
4. The framework agreement should contain definitions of key terms, in particular a definition of personal data.
5. The exchange of information under this framework agreement should be guided by the principle of reciprocity.
6. The exchange of information under the framework agreement should be based on the exchange of the identity information included in the travel document, and the fingerprints of a traveller. Where relevant and under appropriate safeguards, the Parties should also be able to exchange supplementary information relevant to the given individual.
7. The exchange of information under the framework agreement should include third-country nationals in relation to the crossing of the external borders of the Member States and of the U.S., and in the context of the prevention, detection, investigation and prosecution of crimes and terrorist offences.
8. The exchange of information may include exchanges on citizens and their family members, as well as permanent residents, in cases where such exchange of information would be strictly necessary and proportionate for the prevention, detection, investigation and prosecution of crimes and terrorist offences and to the extent that such exchange of information is reciprocal.

## II. CONTENT OF THE FRAMEWORK AGREEMENT

### SPECIFIC ISSUES

9. The framework agreement should establish definitions of key terms, including a definition of personal data that is compliant with the definitions in Regulations (EU) 2016/679 and 2018/1725<sup>1</sup>, and in Directive (EU) 2016/680<sup>2</sup>;
10. The framework agreement should identify the types of databases and the type(s) of data falling within the scope of the that will be subject to access in the context of the EBSP.
11. The framework agreement should spell out clearly and precisely the safeguards and guarantees needed with regard to the protection of personal data as well as fundamental rights and freedoms of individuals, irrespective of their nationality and place of residence, in the exchange of personal data with the U.S. in the context of the EBSP. In particular, the following shall apply:
  - (a) The purposes of processing personal data in the context of the framework agreement should be spelt out clearly and precisely by the Parties. Any processing of personal data should be limited to what is necessary and proportionate in individual cases to identify risks to public security or public order, and contribute to prevention, detection, investigation and prosecution of criminal and terrorist offences.
  - (b) Personal data transferred to the U.S. by the Member States should be processed fairly, on a legitimate basis and only for the purposes for which they have been transferred. Any further data processing incompatible with the initial purpose should be prohibited (purpose limitation). The framework agreement should be accompanied by an annex containing an exhaustive list of the competent authorities in the U.S. to which the Member States may transfer personal data as well as a short description of their competences.
  - (c) Transferred personal data should be adequate, relevant and limited to what is necessary for the purpose for which it has been transferred. It should be accurate and kept up to date. It should not be retained for longer than is necessary for the purpose for which it has been transferred but, in any event, the framework agreement should lay down rules on storage, including storage limitation, review, correction and deletion of personal data. In particular, the framework agreement should limit the retention of travellers' personal data, after their departure from the jurisdiction to that of travellers in respect of whom there is objective evidence from which it may be inferred that there is a continuing risk to public security or public order and a need to retain data to

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<sup>1</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

<sup>2</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.

contribute to prevention, detection, investigation and prosecution of crimes and terrorist offences.

- (d) The framework agreement should specify the criteria on the basis of which the reliability of the source and accuracy of the data shall be indicated.
- (e) The transfer of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, genetic data, biometric data for the purpose of uniquely identifying a natural person, and data concerning a person's health and sex life or sexual orientation, should be allowed only where strictly necessary and proportionate in individual cases for preventing or combating criminal and terrorist offences as referred to in the framework agreement, and subject to appropriate safeguards addressing the specific risks of processing the data. The framework agreement should contain specific safeguards governing the transfer of personal data on minors and on victims of criminal offences, witnesses or other persons who can provide information concerning criminal offences.
- (f) The framework agreement should lay down rules on the information to be made available to individuals and should ensure enforceable rights of individuals whose personal data are processed, in the form of rules on the right to information, access, rectification and erasure, including the specific grounds that may allow for any necessary and proportionate restrictions to those rights. The framework agreement should also ensure enforceable rights of administrative and judicial redress for any person whose data are processed under the framework agreement and should guarantee effective remedies.
- (g) The framework agreement should lay down rules on keeping records for the purposes of logging and documentation as well as on information to be made available to individuals.
- (h) The framework agreement should provide for safeguards in respect of automated processing of personal data, including profiling, and should prohibit decisions based solely on the automated processing of personal data without human involvement.
- (i) The framework agreement should include the obligation to ensure security of personal data through appropriate technical and organisational measures, including by allowing only authorised persons to have access to personal data. It should also include the obligation to notify the competent authorities and, wherever necessary and possible, data subjects, in the event of a personal data breach affecting data transferred under the framework agreement. The framework agreement should also include the obligation to implement measures for data protection by default and by design, to implement data protection principles in an effective manner.
- (j) Onward transfers of personal data from the competent authorities of the U.S., to other authorities in the U.S., should only be allowed for the purposes of the framework agreement, should be made subject to appropriate conditions, including the explicit authorisation of the provider of the information, and should be allowed only with respect to authorities ensuring an essentially equivalent level of protection of personal data as ensured under the framework agreement, unless the onward transfer is necessary for the prevention and investigation of a serious and imminent threat to public security or to protect

the vital interests of any natural person. Onward transfers of personal data to third countries or international organisations should be prohibited.

- (k) The framework agreement should ensure a system of oversight over the use of personal data by one or more independent bodies responsible for data protection in the U.S. with effective powers of investigation and intervention. In particular, the body or bodies should have powers to hear complaints from individuals about the use of their personal data. The framework agreement should provide for a duty of cooperation between such oversight bodies, on the one hand, and the relevant Union supervisory authorities, on the other hand.

## **FRAMEWORK FOR THE EXCHANGE OF INFORMATION**

- 12. The framework agreement should outline the general conditions, criteria, databases and categories of data in scope of the exchange of information between the competent authorities of the Member States and of the U.S. as part of bilateral arrangements. Such information exchange should consist of confirmation of identity information or fingerprints, and additional information associated with the individual under the query and should be limited to what is strictly necessary and proportionate to achieve the required result.
- 13. Under the framework agreement, the Parties should ensure that the technical limitations of the Parties with regard to exchange of information would be respected.
- 14. The framework agreement should outline the consequences of suspension of membership from the VWP, or limitation of the ESTA validity, on information exchange under the framework agreement.
- 15. The framework agreement should provide for a layered query response model, which distinguishes between information retrieved automatically upon performing a query and additional information which could be shared with the requesting Party only upon the explicit authorisation of that Party.
- 16. The framework agreement should include a clause authorising Member States to conclude bilateral agreements or arrangements to implement the information exchange under the EBSP as a requirement under the Visa Waiver Program (VWP). The framework agreement should specify the elements to be contained in the bilateral agreements or arrangements operationalising the information exchange and the procedural and substantial conditions with which the bilateral agreements or arrangements are to comply with.
- 17. The framework agreement should set out the circumstances under which Member States could maintain the bilateral agreements or arrangements concluded with the U.S. prior to the entry into force of the framework agreement.

## **INSTITUTIONAL PROVISIONS**

- 18. The framework agreement should establish a governing body responsible for managing and supervising the implementation and operation of the agreement, facilitating the resolution of disputes.
- 19. The framework agreement should provide for an effective dispute settlement mechanism with respect to its interpretation and application to ensure that the Parties observe mutually agreed rules.

20. The framework agreement should include provisions on the monitoring and periodic evaluation of the framework agreement.
21. The framework agreement should include a provision on the entry into force and validity of the agreement and a provision whereby a Party may terminate or suspend it, in particular where the U.S. no longer effectively ensures the level of protection of fundamental rights and freedoms required under the framework agreement. In the case of termination or suspension, the framework agreement should also specify whether personal data falling within its scope and transferred prior to its suspension or termination may continue to be processed. Continued processing of personal data, if permitted, should in any case be in accordance with the provisions of the framework agreement as applicable at the time of the suspension or termination.
22. The framework agreement may include a clause addressing its territorial application, if necessary.
23. The framework agreement should provide for a mechanism whereby future relevant developments of Union law would, where necessary, be reflected by way of adaptations to the framework agreement. The framework agreement should also include a provision whereby the framework agreement would be terminated by the Union in case such adaptations are not carried out.
24. The framework agreement should provide for a mechanism to evaluate its implementation.
25. The framework agreement should be equally authentic in all official languages of the Union and should include a language clause to that effect.