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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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

In 2022, the United States of America (US) introduced a new requirement for all countries that have been admitted to or aspire to join the U.S. Visa Waiver Program (VWP). This program enables citizens of participating countries to travel to the US visa-free for a maximum of 90 days for the purposes of tourism or business. The new requirement entails the conclusion of an “Enhanced Border Security Partnership” (EBSP) with the US Department of Homeland Security (DHS) as a condition for admission to, and further participation in, the VWP, as a component of the already existing traveller information exchange requirement.

The VWP partnerships are at the forefront of the US international cooperation on border and immigration security. One of their objectives is to establish robust bilateral exchanges of information to enable authorities to authenticate effectively the identity of travellers from partner countries and determine whether they represent a threat to US security.

As part of its VWP partnerships, the U.S. concluded bilateral agreements with EU Member States, such as the Agreements on Enhancing Cooperation in Preventing and Combating Serious Crime (PCSC Agreements). These agreements established information exchange, including biometric data, on individuals who are suspected or convicted of terrorist offences or serious crime.

Under the EBSP, the US intends to establish an information exchange on:

- travellers to the US who may have a connection to the VWP partner country;
- applicants for immigration benefits or humanitarian protection in the US;
- individuals encountered by DHS law enforcement in a border and immigration context in the US.

Such exchanges would concern information, including biometric data, stored in national databases of Member States.

The EBSP agreements are expected to be concluded by 31 December 2026. After this deadline, the DHS will assess each country’s compliance with the EBSP requirement during evaluations for initial and continued participation in the VWP.

Considering the link with the Union’s exclusive competence on the common visa policy, on 12 June 2024, the Member States’ Permanent Representatives in the Committee of the Council of the European Union (Coreper) confirmed Member States’ broad support for a common EU-U.S. framework for information exchange in the context of the EBSP. They also called on the Commission to put forward a proposal for a mandate to negotiate such a framework on behalf of the Union.

The objective of the proposed recommendation is to provide the negotiating directives to the Commission to negotiate a framework agreement that will set out the legal structure and conditions for the exchange of information between the competent authorities of the EU Member States and of the U.S., based on which the Member States would be empowered to establish bilateral agreements for an exchange of information with the U.S. from their national information technology (IT) systems.

One of the key objectives of the framework agreement is to ensure reciprocity in the exchange of information with the US, which would also help to enhance border protection and security of the Union as a whole.

The scope of the exchange of information – categories and type of data, type of persons, and type of offences – will be established during the negotiations to ensure a balanced and reciprocal exchange of information. As a minimum, the negotiations should aim to set an adequate level of information exchange, which should not exceed the level of information that the Member States share among themselves.

Based on the framework for the exchange of information set in the framework agreement, Member States would be able to negotiate and conclude bilateral arrangements operationalising the information exchange with the US.

Such bilateral arrangements would provide details on the exchange of information with competent U.S. authorities considering national legal requirements, the set-up of national databases, and other technical requirements or limitations.

The framework agreement would set safeguards to ensure the consistency with Member States' capacities, building on the existing set up of national databases.

The framework agreement would apply to those Member States which enjoy a visa free status with the U.S. or who wish to join the VWP. The Member States would be allowed to halt information exchange as provided for in the framework agreement in case their status in the VWP changes.

On the Union's competence to conclude an international agreement

Union's common visa policy

The Union has developed a common visa policy for short stays (up to 90 days in any 180-day period) based on Regulation 2018/1806 (hereafter the 'Visa Regulation')¹. The Visa Regulation lists the third countries whose nationals must be in possession of visa when crossing the external borders and those whose nationals are exempt from that requirement. Currently, US nationals enjoy visa-free status in the Schengen area. In parallel, the Union has concluded visa waiver and visa facilitation agreements with several third countries².

The principle of reciprocity is one of the foundations of the Union's visa policy with third countries. Reciprocity means that where the Union has granted to citizens of a third country visa-free access to visit the Schengen area, it expects the third country to reciprocate by allowing Union citizens to travel to that third country without the need for a visa as well. The Union aims to achieve full visa reciprocity with third countries whose nationals are exempted from the visa requirement to enter the Schengen area. Full reciprocity has indeed been achieved with all visa-free third countries, except the U.S. With the exception of Bulgaria, Cyprus and Romania, all Member States participate in the U.S. Visa Waiver Program. Achieving full reciprocity with the U.S. remains a political objective actively pursued by the Union.

¹ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification), OJ L 303, 28.11.2018, p. 39

² The full list of countries is available here: https://home-affairs.ec.europa.eu/policies/schengen/visa-policy_en.

The proposed framework agreement would ensure a consistent approach for all Member States participating in the VWP in relation to the EBSF requirement, including the necessary and appropriate data protection safeguards for such information exchange.

Under Article 3(2) of the Treaty on the Functioning of the European Union (TFEU), the Union has exclusive competence for the conclusion of an international agreement in so far as its conclusion may affect common rules or alter their scope.

The issuance of visas and the mechanism for determining visa reciprocity fall under the Union's exclusive competence. This is also the case for the Union's data protection rules.

Consequently, the conclusion of a framework agreement with the US on the information exchange as set out in the requirements of the US Visa Waiver Program, namely for the Member States to establish an EBSF information exchange, falls within the scope of the Union's exclusive competence.

Union's data protection framework

The exchange of information envisaged under an EBSF differs from the exchange under the established PCSC agreements. Where the objective of an exchange of information under a PCSC agreement is to fight terrorism and serious crime, the purpose of the exchange of information under the EBSF is potentially broader as it also concerns the areas of border management and visa policy.

The processing of personal data by Member States is governed by Regulation (EU) 2016/679³ (the 'GDPR'), except for the processing of data by criminal law enforcement authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties which is covered by Directive (EU) 2016/680⁴. Chapter V of the GDPR and Directive (EU) 2016/680 include strict conditions for the transfer of personal data to third countries. Such transfer must be based on a transfer instrument, such as an adequacy decision with the said third country, an instrument ensuring appropriate safeguards (e.g. an international agreement) or, under Directive (EU) 2016/680, an assessment by the competent law enforcement authority that such safeguards are ensured in the third country, or, failing the above, one of the statutory grounds for data transfers (or derogations) available in specific cases, and not for the systematic sharing of personal data.

For data transfers between criminal law enforcement authorities for the prevention, investigation, detection or prosecution of criminal offenses, including terrorism, the EU-U.S. 'Umbrella Agreement' provides for an international agreement ensuring appropriate safeguards within the meaning of Article 37(1)(a) of Directive (EU) 2016/680⁵.

³ 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.

⁴ 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.

⁵ Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences, OJ L 336, 10.12.2016.

Given the broader scope and purpose of the information exchange intended by the EBSP, and to the extent authorities other than criminal law enforcement would be involved in the transfer, the EU-US ‘Umbrella Agreement’ is not entirely applicable to all the types of transfers envisaged by the US under the EBSP, reinforcing the need for Union action to conclude an additional international agreement.

The framework agreement would define the categories of personal data that could be shared and the specific purposes for which they could be shared, considering in particular the level of reciprocity.

The framework agreement should contain provisions on onward transfers of personal data.

On the relationship with existing or future Member States’ bilateral arrangements

While the conclusion of this framework agreement with the U.S. falls within the Union’s exclusive competence, the framework agreement would include a clause authorising Member States to conclude supplementary bilateral agreements or arrangements.

As regards bilateral agreements or arrangements already concluded by Member States with the U.S. prior to the entry into force of this framework agreement, the framework agreement could include the conditions under which such agreements or arrangements would remain applicable, notably as regards the bilateral agreements or arrangements concluded by Member States which are not yet part of the VWP.

With this proposal for a Council recommendation, the Commission recommends that the Council:

- (a) adopts a decision authorising the Commission, the opening of negotiations for a framework agreement between the Union and the United States of America,
- (b) nominates the Commission as the Union negotiator of the framework agreement,
- (c) sets out directives to the Negotiator, and
- (d) designates a special committee in consultation with which the negotiations must be conducted.

2. LEGAL BASIS, NECESSITY AND PROPORTIONALITY

The legal bases for this recommendation are Article 16(2), Article 77(2) and Article 218(3) and (4) of the Treaty on the Functioning of the European Union (TFEU).

The Union is competent to conclude this framework agreement with the US on the exchange of information in relation to the crossing of the external borders between the EU and the US, including on border procedures and applications for visa.

The framework agreement should set an adequate level of information exchange between the EU and the US, which should not exceed the level of information sharing among the Member States in a bilateral or EU context, subject also to the principles of proportionality and necessity.

The framework agreement should specify the conditions triggering a query on a traveller. These conditions should prevent queries on persons in all cases, without any previous

suspicion. A routine and systemic query concerning all persons travelling between the EU and the US should be excluded.

The framework agreement with the US is required to ensure the common visa policy objective for visa reciprocity and the application of the EU's data protection framework. Hence the negotiating directives annexed to this recommendation to open negotiations with the US on a framework agreement are based on the requirements of the applicable EU legal framework on data protection (namely Regulation (EU) 2016/679 and Directive (EU) 2016/680).

The envisaged framework agreement does not go beyond what is necessary to achieve the objectives at stake since these cannot be achieved by the Member States alone.

- **Choice of the instrument**

Article 218(3) TFEU provides that the Commission or the High Representative of the Union for Foreign Affairs and Security Policy shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations. Given the subject matter of the envisaged agreement, it is for the Commission to submit a recommendation to that effect.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

[As this will be a new agreement, no evaluation or fitness checks of existing instruments could be carried out. No impact assessment is required for the negotiation of this framework agreement.]

4. IMPLEMENTATION PLANS AND MONITORING, EVALUATION AND REPORTING ARRANGEMENTS

The Commission will ensure that the implementation of the framework agreement is monitored properly.

5. OTHER ELEMENTS

- **The choice of the negotiator**

Given that the envisaged agreement exclusively covers matters other than the Common Foreign and Security Policy, the Commission must be designated as the negotiator pursuant to Article 218(3) TFEU.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2), Article 77(2) and Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) The United States of America have introduced a new requirement for admission to and further participation in the U.S. Visa Waiver Program, which enables citizens of participating countries to travel to the United States visa-free for maximum 90 days for the purpose of tourism or business. The new requirement entails the conclusion of an 'Enhanced Border Security Partnership' (EBSP) with the U.S. Department of Homeland Security. There is a need for a common framework for information exchange in the context of the EBSP. Negotiations should therefore be opened with a view to concluding a framework agreement between the Union and the United States of America on the exchange of information for the screening and identity verification of certain travellers crossing the external borders of the Member States.
- (2) The framework agreement should respect fundamental rights and observe the principles recognised by the Charter of Fundamental Rights of the Union, in particular the right to liberty and security recognised by Article 6 of the Charter, the right to private and family life recognised in Article 7 of the Charter, the right to the protection of personal data recognised in Article 8 of the Charter, and the right to effective remedy and fair trial recognised in Article 47 of the Charter. The framework agreement should be applied in accordance with those rights and principles and having due regard to the principle of proportionality in accordance with Article 52(1) of the Charter.
- (3) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council and delivered an opinion on [XX].
- (4) The framework agreement should allow for the conclusion of bilateral arrangements between the United States of America and the Member States on matters covered by it, provided that the provisions of such bilateral arrangements are compatible with those of the framework agreement and with Union law.
- (5) The Commission should be nominated as the Union negotiator.
- (6) In accordance with Articles 1 and 2 of Protocol No 22 on the Position of Denmark annexed to the Treaty on European Union and to the TFEU, Denmark is not taking

part in the adoption of this Recommendation and is not bound by it or subject to its application.

- (7) This Recommendation constitutes a development of the provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC (8); Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, a framework agreement between the 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.

Article 2

The negotiating directives are set out in the Annex.

Article 3

The negotiations should be conducted in consultation with *[the name of the special committee to be inserted by the Council]*.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*