



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 6 October 2006

13668/06

**JAI 500
USA 83
RELEX 658
AVIATION 154
TELECOM 93**

NOTE

from :	Presidency
to :	Coreper/Council
Subject :	Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security

1. The Council decided on 27 June 2006 to authorise the Presidency, assisted by the Commission, to open negotiations for an agreement with the United States of America on the transfer to and use of PNR (passenger name record) data by the United States Department of Homeland Security, Bureau of Customs and Border Protection (CBP). The negotiating directives indicated that the new agreement was to maintain an equivalent level of protection with respect to the transfer of personal data as the previous agreement. It should also offer continuity for economic operators and avoid disruption of transatlantic air traffic.
2. The denunciation of the previous agreement was notified through the appropriate diplomatic channels on 3 July 2006. It terminated that agreement on 30 September 2006.

3. These negotiations were concluded on 6 October 2006 and took into account that processing by DHS of personal data contained in the PNR of air passengers travelling to or from the United States is governed by the conditions set out in the Undertakings* of the Department of Homeland Security, Bureau of Customs and Border Protection of 11 May 2004 (hereinafter referred to as the Undertakings) and in United States domestic legislation to the extent indicated in the Undertakings. The resulting draft agreement attached in Annex 2 provides for an equivalent level of protection with respect to the transfer of personal data as the old agreement, while taking into account certain legitimate US requests for clarification; to this end certain interpretations of the existing Undertakings were set forth by DHS in a letter sent by DHS Assistant Secretary for Policy to the Presidency and the Commission (see Annex 3).
4. When taking note of this Letter of Interpretation, the Presidency and the Commission will reaffirm the importance that the EU and its Member States attach to respect for fundamental rights, in particular to the protection of personal data, and will reaffirm that the commitments of DHS to continue to implement the Undertakings allows the EU to deem that, for purposes of the implementation of the Agreement in the Member States, it ensures an adequate level of data protection.
5. In accordance with Article 24 TEU, the Presidency recommends to the Council to approve the signature, subject to conclusion, of the Agreement between the European Union and the United States of America on the transfer to and use of PNR data by the United States Department of Homeland Security, on behalf of the European Union. As provided in point 7 of the Agreement, it will be applied provisionally as from the date of signature
6. Taking into account the aforementioned, the Presidency invites the Council to:
 - adopt the draft Council decision attached in Annex 1, on the signature and provisional application of the Agreement, attached in Annex 2, between the European Union 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;

* US Federal Register, volume 69, N° 131, Friday July 9, 2004, p. 41543.

- Task the Presidency and the Commission to take note of the Letter of Interpretation attached in Annex 3, on the lines indicated in paragraph 4 above, and decide that it be published in the Official Journal of the European Union;
- Adopt the Declaration attached in Annex 4, which will be inserted into the Minutes of the Council.

DRAFT COUNCIL DECISION**Council Decision of ... 2006 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security (2006/.../CFSP/JHA)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Union, and in particular Articles 24 and 38 thereof,

Whereas:

(1) The Council decided on 27 June 2006 to authorise the Presidency, assisted by the Commission, to open negotiations for an Agreement with the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security (DHS).

(2) In view of the Undertakings issued CBP on 11 May 2004[†], the United States can be considered as ensuring an adequate level of protection for PNR data transferred from the European Union concerning passenger flights to or from the United States.

(3) The competent authorities in Member States may exercise their existing powers to suspend data flows to DHS in order to protect individuals with regard to the processing of their personal data if they consider that the processing of PNR data is not in accordance with the standards of protection provided for in the Undertakings given by DHS, or where a competent United States authority has determined that DHS is in breach of those standards, until compliance with those standards is assured.

[†] OJ L 235 of 6.7.2004, p.15.

(4) This Agreement should be signed, subject to its conclusion at a later date.

(5) The provisions of the Agreement should be applied on a provisional basis pending the Agreement's entry into force.

HAS DECIDED AS FOLLOWS:

Article 1

The signing of the Agreement between the European Union 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, is hereby approved on behalf of the European Union, subject to conclusion.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the European Union, subject to conclusion.

Article 3

In accordance with point 7 of the Agreement, the provisions of the Agreement shall be applied on a provisional basis as of the date of its signature, pending its entry into force.

Article 4

1. Without prejudice to their powers to take action to ensure compliance with national provisions, the competent authorities in Member States may exercise their existing powers to suspend data flows to DHS in order to protect individuals with regard to the processing of their personal data in the following cases :

- (a) where a competent United States authority has determined that DHS is in breach of the applicable standards of protection; or
 - (b) where there is a substantial likelihood that the applicable standards of protection are being infringed, there are reasonable grounds for believing that DHS is not taking or will not take adequate and timely steps to settle the case at issue, the continuing transfer would create an imminent risk of grave harm to data subjects, and the competent authorities in the Member States have made reasonable efforts in the circumstances to provide DHS with notice and an opportunity to respond.
2. Suspension shall cease as soon as the standards of protection are assured and the competent authorities of the Member States concerned are notified thereof.

Article 5

1. Member States shall inform the Council and the Commission without delay when measures are adopted pursuant to Article 4.
2. The Member States and the Commission shall inform each other within the Council of any changes in the standards of protection and of cases where the action of bodies responsible for ensuring compliance with the applicable standards of protection by DHS fails to secure such compliance.
3. If the Council considers that the information collected pursuant to Article 4 and pursuant to paragraphs 1 and 2 of this Article provides evidence that the basic principles necessary for an adequate level of protection for natural persons are no longer being complied with, or that any body responsible for ensuring compliance with the applicable standards of protection by DHS is not effectively fulfilling its role, DHS shall be informed and the Council shall take the necessary action with a view to suspending or terminating the Agreement.

Done at Brussels, 2006

For the Council

The President

DRAFT AGREEMENT**between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security**

THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA,

DESIRING to prevent and combat terrorism and transnational crime effectively as a means of protecting their respective democratic societies and common values,

RECOGNISING that, in order to safeguard public security and for law enforcement purposes, rules should be laid down on the transfer of PNR data by air carriers to the [Department of Homeland Security (hereinafter 'DHS'). For the purposes of this Agreement, DHS means the Bureau of Customs and Border Protection, U.S. Immigration and Customs Enforcement and the Office of the Secretary and the entities that directly support it, but does not include other components of DHS such as the Citizenship and Immigration Services, Transportation Security Administration, United States Secret Service, the United States Coast Guard, and the Federal Emergency Management Agency.

RECOGNISING the importance of preventing and combating terrorism and related crimes, and other serious crimes that are transnational in nature, including organised crime, while respecting fundamental rights and freedoms, notably privacy,

HAVING REGARD to US statutes and regulations requiring each air carrier operating passenger flights in foreign air transportation to or from the United States to provide DHS with electronic access to Passenger Name Record (hereinafter 'PNR') data to the extent they are collected and contained in the air carrier's automated reservation/departure control systems (hereinafter "reservation systems"),

HAVING REGARD to Article 6 paragraph 2 of the Treaty on European Union on respect for fundamental rights, and in particular to the related right to the protection of personal data,

HAVING REGARD to relevant provisions of the Aviation Transportation Security Act of 2001, the Homeland Security Act of 2002, the Intelligence Reform and Terrorism Prevention Act of 2004 and Executive Order 13388 regarding cooperation between agencies of the United States government in combating terrorism,

HAVING REGARD to the Undertakings as published in the US Federal Register[‡] and implemented by DHS,

NOTING that the European Union should ensure that air carriers with reservation systems located within the European Union arrange for transmission of PNR data to DHS as soon as this is technically feasible but that, until then, the US authorities should be allowed to access the data directly, in accordance with the provisions of this Agreement,

AFFIRMING that this Agreement does not constitute a precedent for any future discussions or negotiations between the United States and the European Union, or between either of the Parties and any State regarding the processing and transfer of PNR or any other form of data,

HAVING REGARD to the commitment of both sides to work together to reach an appropriate and mutually satisfactory solution, without delay, on the processing of Advance Passenger Information (API) data from the European Union to the United States,

NOTING that in reliance on this Agreement, the EU confirms that it will not hinder the transfer of PNR data between Canada and the United States and that the same principle will be applied in any similar agreement on the processing and transfer of PNR data.

[‡] Vol. 69, No 131, p.41543

HAVE AGREED AS FOLLOWS:

- (1) In reliance upon DHS's continued implementation of the Undertakings as interpreted in the light of subsequent events, the European Union shall ensure that air carriers operating passenger flights in foreign air transportation to or from the United States of America shall process PNR data contained in their reservation systems as required by DHS.
- (2) Accordingly, DHS will electronically access the PNR data from air carriers' reservation systems located within the territory of the Member States of the European Union until there is a satisfactory system in place allowing for transmission of such data by the air carriers.
- (3) DHS shall process PNR data received and treat data subjects concerned by such processing in accordance with applicable US laws and constitutional requirements, without unlawful discrimination, in particular on the basis of nationality and country of residence.
- (4) The implementation of this Agreement shall be jointly and regularly reviewed.
- (5) In the event that an airline passenger information system is implemented in the European Union or in one or more of its Member States that requires air carriers to provide authorities with access to PNR data for persons whose travel itinerary includes a flight to or from the European Union, DHS shall, in so far as practicable and strictly on the basis of reciprocity, actively promote the cooperation of airlines within its jurisdiction.
- (6) For the purpose of the application of this Agreement, DHS is deemed to ensure an adequate level of protection for PNR data transferred from the European Union concerning passenger flights in foreign air transportation to or from the United States.
- (7) This Agreement shall enter into force on the first day of the month after the date on which the Parties have exchanged notifications indicating that they have completed their internal procedures for this purpose. This Agreement shall apply provisionally as of the date of signature. Either Party may terminate or suspend this Agreement at any time by notification through diplomatic channels. Termination shall take effect thirty (30) days from the date of notification thereof to the other Party. This Agreement shall expire upon the date of application of any superseding agreement and in any event, no later than 31 July 2007, unless extended by mutual written agreement.

This Agreement is not intended to derogate from or amend legislation of the United States of America or the European Union or its Member States. This Agreement does not create or confer any right or benefit on any other person or entity, private or public.

This Agreement is drawn up in duplicate in the English language. It shall also be drawn up in the Czech, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish languages, and the Parties shall approve these language versions. Once approved, the versions in these languages shall be equally authentic.

FOR THE UNITED STATES OF AMERICA

Secretary Michael Chertoff
Department of Homeland Security

Date:

FOR THE EUROPEAN UNION

Date:

Via Electronic Delivery

European Commission
EU

ATTN: Director General Jonathan Faull
ADDRESS
Brussels, Belgium]

Presidency of the Council of the

ATTN: Ms. Irma Ertman
ADDRESS
Helsinki, Finland]

[Dear Jonathan and Irma]

This letter is intended to set forth our understandings with regard to the interpretation of a number of provisions of the Passenger Name Record (PNR) Undertakings issued on May 11, 2004 by the Department of Homeland Security (DHS). For the purposes of this letter, DHS means the Bureau of Customs and Border Protection, U.S. Immigration and Customs Enforcement and the Office of the Secretary and the entities that directly support it, but does not include other components of DHS such as the Citizenship and Immigration Services, Transportation Security Administration, United States Secret Service, the United States Coast Guard, and the Federal Emergency Management Agency. We look forward to further reviewing these and other issues in the context of future discussions toward a comprehensive, reciprocal agreement based on common principles.

Sharing and Disclosure of PNR

The Intelligence Reform and Terrorism Prevention Act of 2004 required the President to establish an Information Sharing Environment “that facilitates the sharing of terrorism information.” Following this enactment, on October 25, 2005 the President issued Executive Order 13388, directing that DHS and other agencies “promptly give access to . . . terrorism information to the head of each other agency that has counterterrorism functions” and establishing a mechanism for implementing the Information Sharing Environment.

Pursuant to Paragraph 35 of the Undertakings (which states that “No statement in these Undertakings shall impede the use or disclosure of PNR data in any criminal judicial proceedings or as otherwise required by law” and allows DHS to “advise the European Commission regarding the passage of any U.S. legislation which materially affects the statements made in these Undertakings”), the U.S. has now advised the EU that the implementation of the Information Sharing Environment required by the Act and the Executive Order described above may be impeded by certain provisions of the Undertakings that restrict information sharing among U.S. agencies, particularly all or portions of paragraphs 17, 28, 29, 30, 31, and 32.

In light of these developments and in accordance with what follows, the Undertakings should be interpreted and applied so as to not impede the sharing of PNR data by DHS with other authorities of the U.S. government responsible for preventing or combating of terrorism and related crimes as set forth in Paragraph 3 of the Undertakings.

DHS will therefore facilitate the disclosure (without providing unconditional direct electronic access) of PNR data to U.S. government authorities exercising a counter-terrorism function that need PNR for the purpose of preventing or combating terrorism and related crimes in cases (including threats, flights, individuals, and routes of concern) that they are examining or investigating. DHS will ensure that such authorities respect comparable standards of data protection to that applicable to DHS, in particular in relation to purpose limitation, data retention, further disclosure, awareness and training, security standards and sanctions for abuse, and procedures for information, complaints and rectification. Prior to commencing facilitated disclosure, each receiving authority will confirm in writing to DHS that it respects those standards. DHS will inform the EU in writing of the implementation of such facilitated disclosure and respect for the applicable standards before the expiration of the Agreement.

Early Access Period for PNR

While Paragraph 14 limits the number of times PNR can be pulled, the provision puts no such restriction on the “pushing” of data to DHS. The push system is considered by the EU to be less intrusive from a data privacy perspective. The push system does not confer on airlines any discretion to decide when, how or what data to push, however. That decision is conferred on DHS by U.S. law. Therefore, it is understood that DHS will utilize a method of pushing the necessary PNR data that meets the agency's needs for effective risk assessment, taking into account the economic impact upon air carriers.

In determining when the initial push of data is to occur, DHS has discretion to obtain PNR more than 72 hours prior to the departure of a flight so long as action is essential to combat an offense enumerated in Paragraph 3. Additionally, while there are instances in which the U.S. government may have specific information regarding a particular threat, in most instances the available intelligence is less definitive and may require the casting of a broader net to try and uncover both the nature of the threat and the persons involved. Paragraph 14 is therefore understood to permit access to PNR outside of the 72 hour mark when there is an indication that early access is likely to assist in responding to a specific threat to a flight, set of flights, route, or other circumstances associated with offenses described in Paragraph 3 of the Undertakings. In exercising this discretion, DHS will act judiciously and with proportionality.

DHS will move as soon as practicable to a push system for the transfer of PNR data in accordance with the Undertakings and will carry out no later than the end of 2006 the necessary tests for at least one system currently in development if DHS's technical requirements are satisfied by the design to be tested. Without derogating from the Undertakings and in order to avoid prejudging the possible future needs of the system any filters employed in a push system, and the design of the system itself must permit any PNR data in the airline reservation or departure control systems to be pushed to DHS in exceptional circumstances where augmented disclosure is strictly necessary to address a threat to the vital interests of the data subject or other persons.

Data Retention

Several important uses for PNR data help to identify potential terrorists; even data that is more than 3.5 years old can be crucial in identifying links among terrorism suspects. The Agreement will have expired before Paragraph 15 of the Undertakings requires the destruction of any data, and questions of whether and when to destroy PNR data collected in accordance with the Undertakings will be addressed by the United States and the European Union as part of future discussions.

The Joint Review

Given the extensive joint analysis of the Undertakings conducted in September 2005 and the expiration of the agreement prior to the next Joint Review, the question of how and whether to conduct a joint review in 2007 will be addressed during the discussions regarding a future agreement.

Data Elements

The frequent flyer field may offer addresses, telephone numbers, email addresses; all of these, as well as the frequent flyer number itself, may provide crucial evidence of links to terrorism. Similarly, information about the number of bags carried by a passenger may have value in a counterterrorism context. The Undertakings authorize DHS to add data elements to the 34 previously set forth in Attachment "A" of the Undertakings, if such data is necessary to fulfill the purposes set forth in paragraph 3.

With this letter the U.S. has consulted under Paragraph 7 with the EU in connection with item 11 of Attachment A regarding DHS's need to obtain the frequent flier number and any data element listed in Attachment A to the Undertakings wherever that element may be found.

Vital Interests of the Data Subject or Others

Recognizing the potential importance of PNR data in the context of infectious disease and other risks to passengers, DHS reconfirms that access to such information is authorized by paragraph 34, which provides that the Undertakings must not impede the use of PNR for the protection of the vital interests of the data subject or of other persons or inhibit the direct availability of PNR to relevant authorities for the purposes set forth in Paragraph 3 of the Undertakings. “Vital interests” encompasses circumstances in which the lives of the data subject or of others could be at stake and includes access to information necessary to ensure that those who may carry or may have been exposed to a dangerous communicable disease can be readily identified, located, and informed without delay. Such data will be protected in a manner commensurate with its nature and used strictly for the purposes for which it was accessed.

Sincerely yours,

Stewart Baker
Assistant Secretary for Policy

**DECLARATION TO BE MADE ON BEHALF OF THE EUROPEAN UNION AT THE
TIME OF THE SIGNATURE OF THE AGREEMENT BETWEEN THE EU AND THE USA
ON PNR**

"This Agreement, while not derogating from or amending legislation of the EU or its Member States, will, pending its entry into force, be implemented provisionally by Member States in good faith, in the framework of their existing national laws."
