

**Opinion adopted from the Article 29 Working Party on the Protection of Individuals with regard to the Processing of Personal Data
Brussels, 14 June 2006**

The ruling by the European Court of Justice of May 30, 2006 annuls both the Commission decision on the adequacy finding and the Council decision on the conclusion of the PNR agreement. The ruling obliges the Community Institutions to terminate the agreement with the United States on the transfer of passenger data at the latest by 30 September 2006. For that reason any transfer of passenger data to the US would be without a legal basis in European law after the termination of the agreement. National legislation may require actions to be taken such as the complete suspension of data flows to 15 authorities.

In the light of this situation, the Article 29 Working Party urges the competent European Institutions to take due note of the following:

- In order to avoid a legal gap as from 1 October 2006 for the transfer of passenger data, And to ensure that the right of passengers continues to be protected the Article 29 Working Party considers a timely adoption of a new agreement with the US on EU level crucial. In order to achieve a harmonised and consistent EU approach, bilateral agreements between the US and the EU Member States should be avoided.
- Such an agreement must at least preserve and integrate the current level of data protection as laid down in the US undertakings so as to make them binding and, in addition, should take into account the critical considerations voiced by the Article 29 Working Party in its previous Opinions on PNR including the reduction of data elements.
- Such an agreement should be based on a push system since all technical requirements are in place.
- A strict purpose limitation is necessary for the transfer of PNR data comprising the onward transfer of these data.
- The Working Party expects that the mechanism of an annual joint review will be maintained in line with the current agreement.
- A new agreement should not have a longer duration than the terminated one, i.e. November 2007.

The Working Party assumes that the national data protection authorities and the EDPS are heard and consulted. It offers any possible assistance to come to a new agreement that meets the above-mentioned requirements.

For the middle-long term the Working Party considers it necessary to develop a more coherent approach towards the exchange of passenger data to ensure on a global level both air traffic security and the respect of human rights. Finally the Court ruling shows once more the difficulties arising from the artificial division between the pillars and the need for a consistent crosspillar data protection framework decision.

Considerations

The ruling by the European Court of Justice of May 30, 2006 annuls both the Commission decision on the adequacy finding and the Council decision on the conclusion of the PNR agreement. For that reason any transfer of passenger data to the US would be without a legal basis after the abrogation of the agreement at the latest on September 30, 2006.

The PNR subgroup after having extensively discussed the ruling by the European Court of Justice comes to the following conclusions:

The current scenario requires apart from an urgent short term solution also a mid-term perspective in order to resolve the outstanding questions related to the court ruling and proposes, therefore, a two-tier approach:

I Short-term Perspective:

A. A new PNR agreement in place on October 1, 2006

- The Art. 29 WP should actively support the rapid conclusion of a successive PNR agreement with the US which is considered crucial in order to avoid a legal gap for the transfer of passenger data and remove any legal uncertainties to passengers and air carriers alike. In case such a successive agreement is concluded under the III pillar regime the EU institutions should nevertheless involve data protection authorities – if not formally consulted as Art. 29 WP but as national supervisory authorities. The national DPAs possess valuable expertise and, therefore, they should be heard and consulted during the negotiations and should not be excluded from discussions with the US in the interest of the passengers concerned.
- Any new agreement which will most probably be modelled after the current agreement should guarantee a level of data protection not watered down in comparison to the existing agreement. At least the current level of data protection should be preserved. Where possible, a new agreement should take into account the demands including the reduction of data elements (see annex) voiced by the Art. 29 WP in their previous opinions on this issue.

- Particular attention should be paid to the mode of transferring PNR data to CBP since the questions regarding the change from pull to push are still not yet resolved and need further attention by the Art. 29 WP. Any new agreement must not contain a pull option. The subgroup recalls that the Canadian PNR agreement runs smoothly with the push system.

- Any new agreement should also foresee an annual review in line with the current agreement. Such a review would assure the public in giving a signal to the outside world that both the Commission and national DPAs are still engaged and taking care of the fundamental rights of citizens living in the EU. It would also show that the US Government remains serious about the need for appropriate data protection and privacy safeguards.

- For the same reason the EU Parliament should be engaged and remain involved even if it didn't have any longer an official say in shaping a future agreement. It should be informed and consulted in the best possible way.

B. No new agreement in place on October 1, 2006

- The Art. 29 WP prefers a EU-wide solution to bilateral agreements and should discourage MS from concluding such bilateral agreements with the US. Not all MS do have direct flights to the US which means that there will be a PNR regime with some MS and other MS will be left out. Such a situation would divide EU nations and weaken the bargaining position of individual states. In case bilateral agreements are concluded the MS could face the situation where one contracting country has a different application of the data protection rules than other countries. This would run contrary to the spirit of the EU Directive seeking to harmonize data protection rules. All passengers travelling from the EU must enjoy the same level of data protection regardless of the point of departure when leaving for the US. Bilateral agreements would not remove legal uncertainties for the airlines and passengers. The DPAs should speak with one voice to make sure that they will have a say even when they are no longer formally engaged as Art. 29 WP in giving an opinion on the level of protection in the US.

- The Art. 29 WP should make it very clear that in case no agreement is in place on October 1, 2006, that national DPAs have to decide on the basis of their respective data protection law on how to proceed with the transfer of PNR data to the US. National legislation may require actions to be taken such as the complete suspension of data flows to CBP which from a political point of view is neither realistic nor feasible. DPAs could consider to reduce the amount of data fields to 19 elements as proposed in opinion no 78 dated June 13, 2003 (see annex). Such a reduction of data elements would also

eliminate data fields which might contain sensitive data and such a step would be in line with the previous opinions adopted by the Art. 29 WP. The subgroup recalls in this connection that the Canadian PNR agreement does not include sensitive data. Any measure taken by individual DPAs should be coordinated with the others and a common harmonized approach should be preferred to isolated actions.

II mid-term perspective

- Any new agreement with the US should and will most probably have a limited duration period. The Art. 29 would appreciate if the new agreement would terminate in September 2007 as agreed in the current agreement: During that time all parties involved should look for an improved data protecting standard of the successive agreement and at the same time look for global solutions. Since the number of other nations seeking PNR data in their fight against terrorism is increasing and PNR schemes vary widely a broader discussion with international bodies such as ICAO and IATA must have an absolute priority. It should be in the interest of all parties concerned to come to solutions acceptable to privacy advocates, consumer associations and law enforcement agencies as well. The collection and transfer of passenger data in a globalized world must be harmonised on an international level. EU institutions and DPAs alike must more actively engage in discussions with international bodies to find global solutions to the phenomenon of PNR transfers.
- The adoption of a framework decision in the III pillar should also be more actively pursued. After the court ruling of May 30, 2006, such a decision is more urgently needed than ever. All parties involved must be persuaded to speed up the process and find acceptable solutions for the benefit of citizens living in the EU.
- The Art. 29 WP should more openly voice its support for the constitutional treaty. A European constitution would not only enshrine data protection as a fundamental right but would also avoid or reduce conflicting situations in which Commission decisions are being challenged by the EU Parliament. The constitutional treaty would abolish the current pillar structure and clarify the competences of the individual EU institutions.
- The EU Court of Justice will certainly in analogy with the current ruling annul the agreement with Canada. The Commission should be encouraged to look for a solution in this case as well.

Annex

In its Opinion 78 dated June 13, 2003, the Art. 29 WP considered the following data elements adequate for the transfer to CBP:

- 1) PNR record locator code
- 2) date of reservation
- 3) date(s) of intended travel
- 4) passenger name
- 5) other names on PNR
- 6) all travel itinerary
- 7) identifiers for free tickets
- 8) one-way tickets
- 9) ticketing field information
- 10) ATFQ (Automatic Ticket Fare Quote) data
- 11) ticket number
- 12) date of ticket issuance
- 13) no show history
- 14) number of bags
- 15) bag tag numbers
- 16) go show information
- 17) number of bags on each segment
- 18) voluntary/involuntary upgrades
- 19) historical changes to PNR data with regard to the aforementioned items