



Brussels, 27 September 2007

Mr. Franco Frattini
Vice-President of the
European Commission
Rue de la Loi 200
1049 Brussels

Dear Mr Frattini,

Following the adoption of Opinion 5/2007 (WP 138) on the conclusion of the new long-term PNR Agreement between the EU and the US, adopted on 17 August 2007 I am writing to get more information from the Commission on unclear relevant provisions regarding the interpretation and implementation of the new long-term agreement. The Opinion is attached for further reference.

1 Scope

The new agreement states that it applies to airlines operating to and from the US. It is not clear, however, whether this includes, for example, airlines operating from a third country which transit through the EU and which have their reservation system based in the EU. It is neither clear where the limits of EU jurisdiction are. Does the scope depend on the processing operation or the data controller based in the EU?

2 Legal nature

Art. V of the DHS letter refers to enforcement measures available to the travelling public, but it remains unclear whether only the provisions of the agreement can be enforced or whether the DHS letter will also be published in the Federal Register and can form a legally binding basis for the enforcement of data protection rights in the US. The previous agreement of 2004 set out in its recitals that the undertakings containing then the privacy safeguards had to be published in the Federal Register while there is no similar provision in the new agreement regarding the DHS letter. Unclear is also whether the agreement can be terminated according to Art. 8 of the agreement if the US does not breach the provisions of the agreement itself but no longer implements or severely restricts the safeguards of the DHS letter, for example, due to changes in US legislation.

3 Purpose limitation

PNR data may be used in other instances as required by US law, but this is no longer in relation to onward transfers as foreseen in the agreement of 2004, but is included as a specific purpose (rather than as a consequence of onward transfer). The Working Party asks for details specifying the circumstances under which passenger data can be used for other purposes than those mentioned under (1), (2) and (3) of Art I of the letter.



4 Onward transfers

As to the dissemination of PNR data to third agencies and to third country authorities
The Working Party would like to know whether bulk transfers of data are possible in the future. It would also appreciate more information as to the safeguards once third agencies transfer passenger data to other agencies and DHS is no longer considered the owner of the data as foreseen in the previous deal.

As to the transfer of passenger data to a third country, the Working Party would appreciate more clarification on how onward transfers of data are going to be controlled once the third country is in possession of the data. Can a third country receive PNR data on a bulk basis given that the DHS letter no longer restricts the transfer to third countries on a case-by-case basis? When does the US consider the data protection level of a third country comparable to those of the EU-PNR agreement?

5 Additional data

It remains unclear how DHS, allowed in exceptional cases according to the DHS letter to retrieve data other than those listed, may access such additional data after the transition from a “pull” to a “push” system. Even with an active "push" system how could a "pull" system be maintained in such exceptional circumstances?

Who defines such exceptional cases and who decides whether there is a common understanding of this notion making sure that these exceptions don't become the rule. Further clarification is also needed on how these additional data will be accessed and where there are exceptional "pulls", how control over these exceptional powers in the jurisdiction of the EU will be exercised.

6 Method of transfer of PNR data

The change from a “pull-system” to a functioning “push-system” is long overdue. How will the Commission make sure that the deadline set for 1 January 2008 at the latest will not be postponed again, for example, due to discussions on DHS' unilateral requirements. Have the concerns expressed by EU carriers in their letter of May 2007 to the Commission regarding this change been addressed?

Can the Commission name those 13 airlines that according to Art. VIII of the DHS letter already push data and what requirements they are subject to?

As to the number of "pushes", the side letter refers to “updates” considered necessary without indicating how often air carriers are required to transfer data after the initial push 72 hours prior to the departure. Neither the agreement nor the DHS letter provide for any reference to a limitation of push requests prior to 72 hours. How can a mutually acceptable solution and economically viable way be found which does not discriminate against others, in particular EU carriers?

7 Sensitive data and filtering

As sensitive data are not part of the list of transferable data elements and DHS undertakes to filter them out the Working Party would like to know how the list of sensitive data will be defined and updated in the future and how the data protection authorities and airlines will be involved in this important task.



8 Joint review

The Working Party asks the Commission for clarification on when and how future reviews will be carried out and which role the independent data protection authorities can play in the preparation and carrying out of these reviews.

9 Retention Period

The storage period for passenger data has been effectively extended to 15 years. Given that the retention period is already disproportionate the Working Party asks the Commission for confirmation that this storage period cannot be further or unilaterally extended by DHS.

10 Impact of the agreement on any EU PNR regime

It is unclear what the effects of the ambiguous provisions on reciprocity mean for the level of data protection in any future EU PNR regime. Given the ongoing discussion on a future EU PNR regime the Working Party considers it essential that the Commission provides further clarification on the precise substance of this point. Let me also emphasize in this connection that I do not consider this agreement a model for a future European PNR system.

Finally I want to stress that the Working Party remains committed to its constructive relationship with the European Commission in particular as regards the interpretation and the speedy implementation of this new agreement as well as any necessary follow-up activities. This requires, however, clarification of the above mentioned issues for the benefit of all stakeholders, the transatlantic passengers, the air carriers concerned and the national supervisory authorities.

I look forward to hearing from you

Yours sincerely,

Peter Schaar
Chairman

Copies of this letter and the Opinion have also been sent to the Presidents of the European Parliament and LIBE Committee and the Portuguese Council Presidency.

ARTICLE 29 Data Protection Working Party



This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 01/43.

Website: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm