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Opinion 5/2007 on the follow-up 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 concluded in July 2007

Adopted on 17 August 2007

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

Executive summary

This opinion aims to analyse the impact on fundamental rights and freedoms and in particular the passengers' right to privacy of the new and third agreement on the transfer of passenger name record (PNR) data to the US Department of Homeland Security (DHS).

The fact that a new long-term agreement has been reached provides for a legal basis for the transfer of passenger data. The Working Party has always supported the fight against international terrorism and international organised crime, and considers it necessary and legitimate. However, any limitation of the fundamental rights and freedoms of individuals, including the right to privacy and data protection, has to be well justified and has to strike the right balance between demands for the protection of public safety and other public interests, such as the privacy rights of individuals. The Working Party is not convinced the agreement succeeds in striking this right balance.

The data protection related issues of the new agreement as analysed in this opinion can be summarised by the following two findings.

- 1 In general, the safeguards provided for under the previous agreement have been markedly weakened.
- 2 The new agreement leaves open serious questions and shortcomings, and contains too many emergency exceptions.

As to point 1:

- a The number of transferable data elements has been increased and includes information on third parties other than the data subject.
- b The filtering of sensitive data continues to be done by DHS even with a "push" system.
- c DHS may now use sensitive data in exceptional cases, which was excluded by the previous agreement.
- d Onward transfers to domestic and foreign agencies are easier and no longer subject to the same data protection safeguards.
- e The retention period has been extended to at least fifteen years and might be even longer.
- f The mechanism for joint review does not mention the involvement of independent data protection authorities.

As to point 2:

- a The safeguards contained in the agreement and in the DHS letter are not formulated in a precise way and leave open for too many exceptions, that can be used under the exclusive discretion of the authorities of the United States.
- b The purposes for which the data can be transferred, including the broad exceptions to these purposes, are not sufficiently specified and are wider than those recognised by data protection standards.
- c The transition from 'pull' to 'push' is finally foreseen for 1 January 2008, but it remains unclear if and under what conditions this new method of transfer will eventually be worked out.

- d It remains unclear how DHS, allowed in exceptional cases to retrieve data other than those listed, may access such data after the transition from a “pull” to a “push” system.
- e It remains unclear when and under what circumstances a joint review will take place.
- f The agreement does not foresee any mechanism aimed at resolving disputes, leaving it up to the contracting parties. This is particularly relevant for a joint review.
- g The data regime of onward transfers by third agencies to other units is unclear.
- h It is unclear what the effects of the provisions on reciprocity mean for the level of data protection in any EU PNR regime.
- i The agreement runs the risk that any change in US legislation might unilaterally affect the level of data protection as foreseen in the new PNR agreement.

The Working Party is dissatisfied that the opportunity to have adopted a more balanced approach based upon real need has been missed. While there has been much comment on the new agreement, the Working Party would have wished for a different outcome of the EU-US negotiations and feels that the new agreement does not strike the right balance to uphold the fundamental rights of citizens as regards data protection.

Since a number of elements of the agreement remain unclear, the Working Party will be seeking written clarification from the Commission on the following.

- The scope of the agreement: to which airlines does it apply?
- The circumstances under which the data can be used for purposes other than those mentioned under (1), (2) and (3) of Art. I of the DHS letter.
- How exceptional "pull" will work, including how control will be exercised over these exceptional powers in the jurisdiction of the EU.
- Assurances that the deadline which is now set for 1 January 2008 will not be postponed again, for example, due to discussions on requirements.
- The 13 airlines that, according to Article VIII of the DHS letter, already push the data and what requirements they are subject to.
- When and how the review process will be prepared and carried out.
- Art. 5 of the new agreement and Article IX of the DHS letter (on reciprocity), containing an ambiguous statement about the US side's expectations.

The Working Party regrets also not being consulted or asked for advice on the data protection elements of the agreement, especially given its role as an official EU data protection advisory body, and given the lack of an equivalent framework or group for third pillar activities. It regrets this fact all the more as the members of the Working Party are the supervisory authorities as regards data protection compliance by the air carriers, which will need to implement the agreement in close co-operation with the EU data protection authorities.

The Working Party would like to continue its constructive relationship with the Council of the European Union and the European Commission, particularly as regards implementing this new agreement. In particular, the Working Party expects to be involved in the preparation and the actual carrying out of the joint review. It also expects to be involved in any discussions as to the definition of sensitive data and other follow-up activities.

OPINION 5/2007 OF THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

on the 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 concluded in July 2007

I Introduction

The new agreement

In July 2007¹ the European Union concluded a follow-up agreement with the United States of America on the transfer of passenger name record (PNR) data and their processing by the United States Department of Homeland Security (DHS), replacing the previous PNR interim agreement with the United States of 19 October 2006 which expired on 31 July 2007.

Pending the agreement's entry into force in the EU Member States, it will apply provisionally as of its date of signature and will expire on the date of a mutually concluded superseding agreement and in any event no later than seven years after signing the agreement.

The agreement intends to provide legal certainty to air carriers operating flights to and from the United States of America, passengers, and data protection authorities of the EU Member States by replacing the interim agreement of October 2006 between the European Union and the US. This interim agreement had been reached following the European Court of Justice ruling of 30 May 2006 annulling the Council Decision 2004/496/EC of 17 May 2004 (on the approval by the European Community of an agreement on the processing and transfer of PNR data by air carriers to the US Customs and Border Protection (CBP)), as well as the Commission Decision 2004/535/EC of 14 May 2004 (the so-called adequacy decision), on the ground of an incorrect legal basis.

The new arrangement consists of the following elements.

- The agreement signed by both parties
- A letter by DHS (DHS letter) giving assurances on the way it intends to protect PNR data
- A reply letter from the EU acknowledging receipt of the assurances and confirming that on the basis of the assurances it considers the level of protection of PNR data in the US as adequate.

The context

The Working Party acknowledges that a new, long-term agreement has been reached, so providing for a legal basis for the transfer of passenger data. It also appreciates the efforts

¹ The agreement was signed on 23 July by the EU and on 26 July 2007 by the US and can be found at the following address: http://www.dhs.gov/xnews/releases/pr_1185470531857.shtm The Agreement has also been published in the Official Journal of 4 August (OJ L 204, 4.8.2007, p.18) <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2007:204:SOM:EN:HTML>

of the EU negotiators in securing any agreement and avoiding a legal lacuna in the face of US reluctance.

The Working Party considers that it is its duty to express its view on privacy matters related to the transmission of personal data to US authorities given that passengers, policy makers and data protection authorities need to be aware of the current level of data protection ensured in the new agreement. Also, PNR data are initially collected and then transmitted by airlines, for whom the national data protection authorities are the supervisory authorities.

The Working Party has always supported the fight against international terrorism and international organised crime. It considers this fight necessary and legitimate. It acknowledges that personal data can be a valuable tool, but is of the view that the collection and processing of passenger data alone may not be able to defeat this phenomenon and that all other available means should be exploited as well to increase security and ensure safe and efficient air travel.

Every year millions of passengers cross the Atlantic, and the number of travellers is expected to increase rapidly following the conclusion of the Open Skies Agreement. Air carriers collect and use passenger data for their own business purposes, and it has to be stressed again that in the fight against terrorism and related crime, respect for fundamental rights and freedom of individuals including the right to privacy and data protection must be ensured and is not negotiable.

Any limitation of such rights and freedoms must be well justified and has to strike the right balance between demands for the protection of public safety and other public interests, such as the privacy rights of individuals. Any unjustified and disproportionate general surveillance by a third country would not be compatible with human dignity and the right to privacy.

In this context, the new long-term agreement has to be measured against the fundamental principles of data protection, such as the principle of proportionality, the principle of data minimisation, the controller's responsibility and the data subjects' rights to information and redress, to come to a proper assessment of the level of data protection provided for by the agreement.

Assessment by the Art. 29 Working Party

This opinion by the Working Party, which comprises the independent EU Data Protection Commissioners, aims to carefully analyse the level of data protection of the new long-term agreement by comparing its provisions with those of the previous arrangements in light of recognised data protection standards, such as those in Directive 95/46/EC² and in Convention 108 of the Council of Europe,³ and the opinions adopted previously by the Working Party on this issue. This opinion intends also to provide an assessment of the privacy implications for passengers flying to and from the United States.

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

³ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data adopted in Strasbourg on January 28th, 1981

Unlike the previous arrangements, the new PNR agreement does not refer to the so-called undertakings, given by CBP in May 2004, rendering them obsolete now. Although those undertakings were by legal definition a unilateral commitment by the US, they were actually the result of lengthy and complicated negotiations aimed at reaching an adequate level of data protection for the use of PNR data on which the European Commission based its so-called adequacy decision 2004/535/EC. The Working Party adopted a number of opinions during and after these negotiations as to the level of data protection.⁴ Now the new agreement and in particular the DHS letter provide so-called assurances aimed at providing data protection safeguards for the use of EU passenger data. These assurances thus replace the undertakings.

This opinion will, therefore, also thoroughly compare the safeguards of the DHS letter with the undertakings of 2004 and draw conclusions as to their privacy standard.

II The new PNR agreement

1 Scope and legal nature

The new agreement states that it applies to airlines operating to and from the US. It is not clear whether this includes, for example, airlines operating from a third country who transit through the EU. It is not clear where the limits are of EU jurisdiction. Is it the processing operation or the data controller who is based in the EU? The agreement does not solve these issues and the Working Party expects the European Commission to provide written clarification on these points.

According to Article 1, the agreement and the DHS letter are binding on both parties. Both the agreement and letter will be published in the Official Journal of the EU (L-version). It is, however, not clear whether the DHS letter will be published in the US Federal Register. If the US does not comply with the agreement, the EU can terminate the agreement under Article 8. The agreement and the letter do not apply directly to private parties, such as airlines or citizens. The agreement applies in Member States subject to provisions of national law.

2 Purpose limitation

The new long-term PNR agreement consists of a number of recitals and 9 articles and regulates the transfer of PNR data by air carriers to the US Department of Homeland Security. The purposes for these transfers are laid down in the recitals: the prevention and fight against terrorism and transnational crime. The DHS letter further explains: preventing and combating (1) terrorism and related crimes; (2) other serious crimes, including organised crime, that are transnational in nature; and (3) flight from warrants or custody for crimes described above.

The purposes mentioned in the new agreement are the same as those in the previous interim agreement. There are no definitions given as to the meaning of terrorism-related crime and serious crimes including organised crimes that are transnational in nature leaving it open to interpretation.

The Working Party still considers this purpose limitation too broad and would have preferred clearer definitions of terrorism-related crime and serious crimes.

⁴ WP 78 adopted on 13 June 2003, WP 87 adopted on 29 January 2004, WP 95 adopted on 22 June 2004

According to the DHS letter, PNR data may also be used in other cases, namely where it is necessary for the protection of the vital interests of the data subject or other persons, which is in line with the former undertakings. PNR data may also be used in any criminal judicial proceedings which suggests that they may also be used in cases of petty crime or offences unrelated to terrorism or serious crimes that are transnational in nature. In addition to that they may be used in other instances as required by US law. This use of the PNR data was also mentioned in the 2004 undertakings. However, this was in relation to onward transfers. In the new agreement this has been given more prominence and included as a specific purpose, rather than as a consequence of onward transfer.

The Working Party is worried about this change in the purpose limitation, especially given it was already considered broad under the previous agreement. The Working Party expects written clarification from the Commission, specifying the circumstances under which the data can be used for other purposes than those mentioned under (1), (2) and (3) above.

3 Recipients of passenger data

While the previous agreement listed in its recitals a limited number of units of DHS entitled to receive PNR data as well as the units not entitled to use passenger data (for example the US Citizenship and Immigration Services as well as the US Secret Services), the new agreement does not contain any such provision. It only states that DHS treats EU PNR data as sensitive and confidential under US law. Those units within DHS previously not clearly defined or even excluded from directly receiving PNR are no longer considered "third agencies" and are no longer subject to conditions governing the onward transfer of PNR data.

The Working Party regrets that the number of potential recipients has been largely increased and would have considered it important to restrict the number of units entitled to use PNR data to control the flow of data. It deems the current situation a significant weakening of the safeguards of the previous regulation.

4 Onward transfers

The onward transfer of PNR data to "third agencies" within DHS, to other US authorities and to foreign government authorities was exclusively regulated by the undertakings, while the previous interim agreement maintained the situation of the first PNR agreement of 2004.

The undertakings provided that EU PNR data could only be transferred to other government authorities including third country authorities on a case-by-case basis for the purposes of preventing and combating terrorism and related crimes, other serious crimes, including organised crimes that are transnational in nature and flight from warrants or custody for crimes mentioned here. Failure to respect the conditions for transfer could be investigated and reported by the DHS Chief Privacy Officer and could make the receiving authority ineligible for subsequent PNR transfers from CBP.

Although certain restrictions apply for the dissemination of PNR data according to Art. II of the DHS letter, the fact that more prominence has been given to broader purposes for which PNR data may be shared means that government agencies in charge of dealing with criminal cases other than those related to the fight against terrorism and related crimes are more likely to also receive and process PNR data. The same applies to cases

where PNR data are necessary in other cases required by US law. There is no longer any specific restriction that data could only be shared on a case-by-case basis, raising the question of whether bulk transfers are possible in the future.

As to the further dissemination of PNR by "third agencies" to other agencies, DHS was considered the owner of the data under the previous agreement and any such disclosure was only permissible with the express prior approval of CBP to control the flow of data. As this useful restriction has been eliminated, concerns arise as to data quality and retention periods once personal information is transferred by a third agency to other recipients. It is no longer clear who can be held responsible for the processing and further dissemination of these data.

The data protection safeguards contained in the new agreement are much less stringent by enlarging, on the one hand, the list of potentially eligible agencies and, on the other hand, by rendering the transfer to other agencies easier.

As to the dissemination of PNR data to third country authorities, the former safeguards of the undertakings restricting the transmission to a case-by-case basis no longer apply either. A level of data protection assumed to be comparable to that of DHS makes third countries eligible for the exchange of personal data. In this context it has also to be questioned how onward transfers of data are controlled once the third country is in possession of the data.

5 Data elements

The list of data elements mentioned in attachment A of the US undertakings of May 2004 has been revised by the new agreement and is now mentioned under Article III of the DHS letter.

The previous arrangement listed 34 individual elements to be transferred as far as they are contained in the airlines' reservation systems. The new agreement cites 19 types of PNR information grouped into sets giving the impression that the amount of transferable data has been markedly reduced. Indeed, the new list does not contain the data element "go show information" as required under the former agreement, but mentions all other 33 data elements of the previous list albeit in a sometimes slightly different form.

In addition, the new list indicates data elements previously not included in the list and so extends the scope of information DHS requires. This is true for a number of data elements.

a Data element 5 (available frequent flyer and benefit information): While the previous agreement limited the frequent flyer information to miles flown and address(es), the new agreement adds details such as the frequent flyer number, free tickets etc to be transmitted as well. The previous agreement did not require any benefit information.

b Data element 7 (all available contact information): Although this data element puts together the previous data elements: address (6), billing address (8), contact telephone numbers (9) and email address (17), it cannot be excluded that additional information will be provided as well, for example, the email address of the employer.

c Data element 15 (all baggage information): While the previous agreement required only information on the bag tag numbers, from now on any additional details related to

the luggage of a passenger, such as the number or size of bags (bulk luggage) must be revealed, so extending again the scope of the previous agreement.

While the Working Party has actively advocated the reduction of data elements considered adequate in the fight against terrorism and related crime,⁵ the new agreement extends the list of data elements by asking for more information on the data subject. This can by no means be justified and must be considered disproportionate.

Personal data of third persons

It also has to be mentioned that under the previous agreement DHS might have asked for information not related to the data subject but to third parties, for example, in the case of billing address, email address, travel agent, received from information etc. The new agreement does not only require more details on the passenger, but also on third parties, for example, when asking for benefit information if contained in the airlines' reservation systems.

The Working Party is concerned at this development because the third party is most likely not aware of the transfer of personal data to DHS let alone their data protection rights in such a case. For that reason the third party cannot exercise their rights conferred on the data subject according to the agreement.

Additional data

Furthermore, it has to be said that according to Art. III, section 3 of the DHS letter additional data elements other than those mentioned in the list but likewise contained in the airlines' reservation systems may be used by DHS in exceptional cases, so enlarging the scope of data elements significantly. The Working Party maintains that there are other legal channels developed under the third pillar⁶ to have access to personal information in such exceptional cases without compromising the privacy of passengers. The Working Party is also concerned about the statement that DHS will inform the European Commission if it has used such data "normally within 48 hours". This implies DHS discretion on when and whether to inform on this matter.

It remains to be seen how DHS will retrieve such additional data elements contained in the airlines' reservation systems once the mode of transmission has changed from a "pull" system to a "push" system. The precise arrangements are not regulated by the new PNR agreement and it seems that even in case of an active "push" system a "pull" system will be maintained in such exceptional circumstances. Therefore, the Working Party expects written clarification from the European Commission explaining how this exceptional "pull" will work, including how control will be exercised over these exceptional powers in the jurisdiction of the EU.

6 Analytical information

Art. IX of the DHS letter states that DHS will encourage the transfer of analytical information flowing from PNR data by competent US authorities to police and judicial authorities of the Member States and, where appropriate, to Europol and Eurojust.

⁵ WP 78 "Opinion 4/2003 on the Level of Protection ensured in the US for the Transfer of Passengers' Data" adopted on 13 June 2003

⁶ Agreement on extradition between the EU and the US and the Agreement on mutual legal assistance between the EU and the US, both signed on 25 June 2003

It is unclear what this analytical information will contain and whether it will include personal data.⁷

Article IX equally addresses DHS' expectation that the EU and its Member States will encourage their competent authorities to reciprocate and provide analytical information flowing from PNR data to DHS and other US authorities. Such a transfer of data to the United States is not covered by the new agreement since the agreement is limited to the transfer of PNR data contained in the reservation systems of the airlines.

Analytical information does not form part of the list mentioned under Article III of the DHS letter which exhaustively lists all transferable data elements. Depending on the nature of the analytical information, a direct exchange of analytical information with other US agencies would considerably enlarge the scope of the list of data elements rendering its exhaustive character obsolete. An exchange of such information should be addressed by other legal instruments but is currently not covered by the agreement. For that reason it is clear to the Working Party that this expectation, as mentioned in the DHS letter, has no legal basis and calls into question its legal value.

7 Method of transfer of PNR data

As in the previous agreement it is foreseen to come to a "push" system for the transmission of PNR data at a later stage, however, only for those air carriers complying with DHS' technical requirements. Otherwise PNR data will continue to be pulled by the US authorities.

In the past the European air carriers invested heavily in a "push" system and confirm that such a system is currently technically feasible. Their efforts were to meet the original deadline imposed by the 2004 undertakings of end December 2006. It has to be pointed out again at this stage that from a data protection point of view a "push" system is the only acceptable way of transferring personal data and that any further delay raises the question of whether DHS really intends to change the current practice. The Working Party, with reference to its previously issued opinions, notes with great concern that the implementation of a "push" system has been delayed since the signing of the first PNR agreement in May 2004. The Working Party expects the European Commission to provide assurances that the deadline which is now set for 1 January 2008 will not be postponed again, for example, due to discussions on requirements. It equally expects clarification from the Commission on which are the 13 airlines that, according to Article VIII of the US letter, already push the data and what requirements they are subject to.

It remains worrying to learn that the move to a functioning "push" system depends unilaterally on DHS' discretion and that the new agreement does not foresee a mutually agreed way to quickly implement a "push" system, nor a mechanism aimed at tackling unresolved problems. Since the air carriers are directly affected by the technical specifications on how they are supposed to transfer PNR data they should be heard as well, and their concerns must be addressed by both contracting parties. Allowing one party to be able to unilaterally decide on what technical requirements are necessary for a change from a "pull" to a "push" system jeopardises the eventual transition to a "push" system.

As to the number of "pushes", the side letter only refers to updates considered necessary without indicating how often air carriers are required to transfer data after the initial push

⁷ WP 136 "Opinion 4/2007 on the concept of personal data" adopted on 20 June 2007

72 hours prior to the departure. The Working Party is of the view that this decision should not be left to DHS' discretion as updates have to be proportionate taking into account the privacy implications for travellers and the financial aspects for air carriers. A mutually acceptable solution should be found as this is preferable to a one-sided decision. In addition neither the agreement nor the DHS letter provide for any reference to a limitation of push requests prior to 72 hours.

8 Sensitive data and filtering

Closely related to the question of how to transfer PNR data is the issue of filtering passenger data (Art. III of the DHS letter).

One of the main principles of data protection is the controller's responsibility for the processing of personal data, such as is enshrined in Directive 95/46/EC (Art. 2 d) in combination with Art. 6 (2) which set out that the person or institution who determines the purposes and means of the processing is considered the controller and so responsible for the data. Similar provisions can be found in Art. 2 (d) and Art. 5 of Convention 108. In the case of passenger data, it is the airlines who collect data and process them for their own business purposes. For that reason it should be up to them to determine that only those data listed in the agreement and DHS letter are transmitted to DHS. The list of PNR data to be transferred as outlined in Article III of the DHS letter does not include any sensitive data. However, sensitive data may be included in data fields listed under no 17 "general remarks, OSI, SSI and SSR" and no 19 "all historical changes to the PNR". As sensitive data are not part of the list of transferable data elements, DHS undertakes to filter them out. It should, however, be the controller's responsibility to filter all data before transmitting them in a "push" system to avoid a transfer of data not covered by the agreement, including sensitive data.

The Working Party considers it contrary to data protection principles that the new agreement absolves the data collectors of responsibility, leaving it up to DHS to filter certain data out. This is even more relevant for sensitive data which will be excluded from processing. However, according to the new agreement DHS may even use sensitive data in its possession where it needs this information in exceptional circumstances.

Although DHS commits to maintain a log of access to any sensitive data and to delete them within 30 days once its retention is no longer required, questions remain over the means how to control the use and the flow of data once DHS has disseminated sensitive data to other domestic or foreign agencies and DHS is no longer the owner of such data.

It must also be noted that sensitive data as defined in Convention 108 or in the Directive will be identified by DHS in consultation with the European Commission. As the notion and relevance of sensitive data might change over time, it is necessary to continuously identify new relevant sensitive data and to subject them to a regular review in close co-operation with data protection authorities and the airline industry to keep the list up to date. This issue remains unaddressed in the new agreement. The Working Party expects to be involved in any discussions as to the definition of sensitive data.

9 Data retention

The new agreement does not contain any provision governing the retention period of PNR data stored by DHS. The retention regime, however, is governed by Article VII of the DHS letter making a distinction between an active analytical database where data are stored for a period of 7 years, so doubling the previous retention period, and a dormant,

non-operational status for an additional 8 years. The 2004 undertakings did specify that data would be transferred to a deleted record file for 8 years, but this only applied to a very limited amount of data that had been manually accessed in the initial 3.5-year period.

From a data protection point of view there is no difference between active and so-called dormant periods of access. As long as personal data are accessible, albeit in only very limited and restricted cases during a dormant period, they remain available in a database and can be accessed and processed by DHS. For that reason the retention period has effectively been extended from 3.5 years to 15 years.

Even this period cannot be considered definite, as the DHS letter goes even further by stating that DHS expects that PNR data shall be deleted at the end of this period and that questions of whether and when to destroy PNR data will be addressed during future discussions, which suggests that the retention period might be extended even further, which is highly worrying and not compatible with recognised privacy standards, such as Art. 5 (e) of Convention 108 and Art. 6 (e) of the Directive.

The Working Party has already considered a 3.5-year retention period disproportionate in the light of the purposes for which passenger data are stored. No operational evidence has been provided that the existing period was necessary (as required by Article 8 of the European Convention of Human Rights), or that it was too short.

Furthermore, the DHS letter sets out that PNR collected under the previous agreement are now subject to the same long-term retention period as data collected under the new agreement. This is contrary to the US undertakings given in May 2004 which provided for a general, mutually agreed storage period of 3.5 years. DHS has unilaterally extended the retention period of those PNR collected under the first PNR agreement (from 28 May 2004 to October 2006). Any data transferred to DHS during that period were transmitted on the understanding that they be destroyed after 3.5 years unless they had been manually accessed. This principle is now overruled by the DHS letter and the DHS' unilateral extension of the period without persuasive evidence is not acceptable.

10 Joint review

According to Art. 4 of the new agreement and Art. X of the DHS letter the contracting parties will periodically review the implementation of the agreement, the DHS letter and US and EU PNR policies and practices with a view to mutually assuring the effective operation and privacy protection of their system. In addition, the DHS letter outlines that during a review any instances in which sensitive data were accessed will be reviewed as well. The review team will comprise the Secretary of Homeland Security and the Commissioner for Justice, Freedom and Security, or such mutually acceptable official as each contracting party may agree to designate. The EU and DHS will mutually determine the details of the reviews.

In comparison with the provisions of the undertakings, the data protection standard related to independent oversight has been considerably weakened.

First of all the undertakings foresaw a joint review on a regular annual basis or more often if agreed by the parties. Under the new agreement it is not clear how often the envisioned review will take place or whether it will take place at all. The DHS letter does not specify a concrete date for a review nor gives any indication when to start with the preparation of the review.

Secondly the DHS letter no longer mentions that the contracting parties must be assisted, in the review process by independent representatives of European law enforcement and/or authorities of the Member States. Independent expertise and oversight in data protection is one of the main pillars of effective privacy protection making sure that shortcomings are properly addressed and that the data subjects' concerns are heard.

Given that one review jointly organised by the contracting parties comprising the independent data protection authorities took place under the first PNR agreement and can be considered a success, the Working Party stresses again the importance of the DPAs being fully involved in any future review. Any lack of independent participation potentially weakens the data protection safeguards for passengers. For that reason the Working Party expects to be involved in the preparation, as well as the actual carrying out of the joint review. It expects the Commission to give urgent written clarification on when and how the review process will be prepared and carried out.

Another problem arises from the fact that a review will take place only if both parties mutually agree on the details of the review. The result is that if the parties cannot agree, or one party unilaterally obstructs the review, it will not take place at all, which effectively means that outstanding issues will not be dealt with properly. The new agreement does not provide for a mechanism intended to resolve such conflicts and gives extensive power of discretion to each party to influence the details of a review and to shape it according to its intentions. The Working Party expects the Commission to clarify this issue as well, also given the fact that no joint review took place under the PNR interim agreement because the contracting parties could not agree on the details for such an exercise.

11 Rights of data subjects including redress

The data protection safeguards regarding the transfer and processing of PNR data by US authorities are not part of the agreement itself but are contained in the accompanying DHS letter explaining the assurances DHS wants to give to the travelling public.

Although the agreement and DHS letter are considered to be legally binding, the letter remains vague in many details, as explained in this opinion, and when it comes to the implementation of the assurances much is left at their discretion, for example, the move from a "pull" to a "push" system and the 15-year retention period. The question arises as to how the assurances of the DHS letter can be legally enforceable if so many details are left open. For that reason the Working Party is of the view that the legal safeguards given in the DHS letter are much weaker than under the previous agreement.

Although Art. V of the DHS letter refers to enforcement measures available to the travelling public, it remains unclear whether the DHS letter will be published in the Federal Register and can form a legal basis for the enforcement of data protection rights in the US. The Working Party, therefore, calls on the European Commission to promote the letter being published in the Federal Register.

Having said that, the Working Party appreciates the fact that DHS has made a policy decision to extend administrative Privacy Act protections to passengers who are neither US citizens nor legal residents in the US. So non-US citizens are no longer discriminated against, reflecting the universal right to data protection. While this is positive step, much work still needs to be done to make sure that these rights can be exercised in practice and this is where national data protection authorities have a role to play.

It also welcomes that the US together with the EU will promote greater visibility for notices describing PNR systems to the travelling public and encourages the air carriers to incorporate these notices in the official contract of carriage. This provision of the new agreement will certainly enhance transparency by informing transatlantic passengers about existing rights and redress mechanisms.

The Working Party representing the national data protection authorities has been instrumental in drafting and promoting the current passenger notices used by airlines and expects to continue this important work in the future.

12 Impact of the agreement on any EU PNR regime

Art. 5 of the new agreement and Article IX of the DHS letter (on reciprocity) contain an ambiguous statement about the US side's expectations of the data protection measures applied to both the US and any future EU PNR regime. While it is expected that this means that the US does not expect lower standards in a future EU PNR regime than the ones in the new agreement, it could also be interpreted as meaning that the DHS are asking the EU not to put in place higher data protection standards in an EU PNR regime, or they will suspend the agreement. This would be a very worrying development and may affect the EU efforts to guarantee a high level of data protection in any future EU PNR regime. It is essential that the European Commission provides written clarification on the precise substance of this point.

It should also be noted that the article on reciprocity is unbalanced since the United States are only obliged to "actively promote" compliance by US airlines, whereas the European Union shall ensure such compliance.

III Conclusion

The Working Party acknowledges that a new long-term PNR agreement with the United States has been struck on the transfer of PNR data to the DHS. The Working Party considered it of utmost importance to have such an agreement in place to avoid legal uncertainties for Member States, air passengers and air carriers alike.

The Working Party appreciates that DHS will enhance the transparency of data procession by promoting the information notices to passengers. The Working Party recalls that it has in the past consulted with the chief privacy officer of DHS on this issue and has subsequently adopted two opinions⁸ to give guidance to air carriers and to raise awareness among the travelling public. The Working Party also welcomes the fact that a DHS policy decision extends the privacy protection to non US-citizens previously not covered by the PNR agreement.

It regrets, however, that these minor improvements are significantly outweighed by the overall reduction of the level of data protection. The assurances given in the DHS letter are much weaker than those given in the undertakings. It also regrets that the EU deemed

⁸ WP 97 "Opinion 8/2004 on the information for passengers concerning the transfer of PNR data on flights between the European Union and the United States of America" adopted on 30 September 2004 and WP 132 "Opinion 2/2007 on information to passengers about transfer of PNR data to US authorities" adopted on 15 February 2007 and a „Short notice for travel between the European Union and the United States”

the agreement adequate in terms of data protection safeguards without consulting any established data protection body for advice, despite the fact that the agreement will have to be implemented by the Member States in close co-operation with the national supervisory authorities.

The Working Party considers the purposes for which passenger data are being transferred too broad and regrets that the purposes are wider than those recognised by data protection standards, and the broad exceptions to these purposes are not sufficiently specified. The Working Party is concerned at the fact that the potential receiving agencies within DHS appear to have been greatly enlarged and that there is no clear list of all those entities within DHS entitled to access PNR data.

Regarding the method of transferring PNR data, the Working Party notes with great concern that the implementation of a "push" system has been delayed since the signing of the first PNR agreement in May 2004, and must not be postponed again. The Working Party does not agree with the provision of the new agreement that the move from a "pull" system to a "push" system can only be implemented at the discretion of DHS without taking into account the legitimate rights of the air carriers concerned. This also applies to the amount of "pushes" which remains at the discretion of DHS. A privacy enhancing solution must be achieved in a mutually acceptable and economically viable way which does not discriminate against others, in particular EU airlines.

Given that the retention period has been significantly extended and that also the list of data elements has been enlarged, likewise the safeguards given in the previous undertakings have been considerably weakened. The fact that the filtering of sensitive data continues to be done by DHS and that DHS may use sensitive data in exceptional cases is not in line with accepted data protection standards, such as those of Convention 108 and the Directive.

The Working Party stresses the need for DPAs to be fully involved in any independent review, both in the preparation and in carrying it out. Clarification is needed from the European Commission on when and how the review process will be prepared and carried out.

There is no legal basis for the transfer of analytical information and the legal value of DHS' expectation in this regard remains questionable.

Finally, the Working Party does not overlook the fact that the new PNR agreement contains some minor improvements in comparison with the previous accord but it is clearly disappointed at the inadequate data protection standard of the new PNR agreement. The new agreement does not even preserve the level of privacy protection of the previous agreement which was already considered weak by the Working Party in its previous opinions.

The new PNR agreement as analysed in this opinion does not compare favourably with accepted data protection standards, such as those of Convention 108 and of the Directive. It will cause understandable concern for all transatlantic travellers who are worried about their privacy rights.

Done in Brussels, on 17 August 2007

For the Working Party
The Chairman
Peter SCHAAR