



Brussels, 19 January 2011

Commissioner Cecilia Malmström
Commissioner for DG Home
B - 1049 Brussels
Belgium

Subject: EU PNR agreements with the US, Canada and Australia – new negotiations

Dear Mrs Malmström,

At the December meeting of the Article 29 Working Party the European Data Protection Authorities were informed by the Commission that the negotiating mandates for the three PNR agreements mentioned above were finalised and agreed, and that negotiations will start in January 2011.

The Working Party has previously commented extensively in several opinions on the various PNR agreements and on the Commission's approach¹. It understands that the negotiating mandates are confidential and that it will not be possible for the Working Party to receive a copy of them. In the absence of these mandates it feels it would be helpful to reiterate our main points of concern on the three agreements, which have been previously communicated to your predecessor Mr Jacques Barrot, to Mr Jonathan Faull, and to the LIBE Committee of the European Parliament². The European Data Protection Authorities hope that their concerns have been taken on board and reflected in the mandates. They would be grateful for any information you are able to provide on this matter.

¹ Opinions WP 103 (Canada); WP 138 (US); WP 151 (US - information to passengers); and WP 178 (Commission Global approach).

² Letter to Mr Barrot, 3 October 2008 on Australia; letter to Mr Faull, 23 September 2009 on Canada; letter to Mr Barrot, 4 December 2009 on the US and Australia; letter to Mr López Aguilar, 5 February 2010 on the US and Australia; letter to Mr Faull, 10 March 2010 on Canada.

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 (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 06/36.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

EU-US PNR agreement

One of the main concerns yet to be addressed is that of the US authorities having direct access to PNR data in the EU by using terminals in their offices in the US, despite the existence of the push system. Through these terminals officials could pull data from the reservation systems of carriers and so access all the data on all the flights of a particular airline. There were no logs kept to show what data had been accessed. The Working Party has been informed that a filtering mechanism was to be put in place by November 2010 so that only data on US-related flights could be accessed. Although it has not had any further information on this filtering mechanism, the Working Party considers it fundamental that any future agreements provide for data to be pushed to the US authorities, with no possibility for US officials to separately access the data.

EU-Canada PNR agreement

One of the main concerns with the agreement with Canada relate to the MoU between Canada and the US that was discovered during the November 2008 joint review. The Working Party hopes that future agreements do not allow for the circumvention of safeguards in the agreement through such bilateral agreements.

The Working Party is also concerned by the Passenger Protect Program and the subsequent list matching activity carried out by airlines (this is referenced in the letter to Mr Faull of 10 March 2010).

EU-Australia PNR agreement

The Working Party has very little information on how the agreement with Australia is working in practice. To date there has been no joint review, which it considers an essential part of the evaluation of the agreement and that should be carried out before a new agreement is negotiated.

In particular the Working Party is interested to understand whether the filtering of sensitive data has been carried out, given the Australian authorities stated it was not necessary. The European Data Protection Authorities are also keen to see how the hybrid push-pull approach functions in practice, as this could be a more privacy friendly approach if it does not involve extensive storage and retention by the Australian authorities.

The Working Party remains concerned that the Australian authorities may be asking for more data than is in the agreement (this is referenced in the letter to Mr Barrot of 4 December 2009).

It would also hope to see the future agreement covering non-EU carriers that have reservations systems and passenger data processed in the EU, such as Qantas.

General comments

In addition to the comments above relating to the specific agreements, the Working Party would like to highlight the general features it would hope to see in any future PNR agreement with any third country. This is a brief summary of the content of opinion WP 178 on the Commission's global approach to PNR.

- Demonstration of the necessity of the use of PNR data.
- The agreement to include all the relevant provisions and safeguards, eliminating the need for side letters, unilateral declarations and similar documents.
- Provisions to prevent the circumvention of the agreement by approaching the CRS service providers directly.

- Data minimisation principle – only the data items necessary to achieve the purpose should be used.
- Privacy by design - technologies safeguarding the privacy of legitimate travellers should be put in place as soon as possible.
- Proportionate and justifiable retention periods.
- Provisions for the filtering of sensitive data.
- Provisions for a joint review, to include representatives of EU data protection authorities.
- Provisions to ensure there is no legal gap between the end of an agreement and its renewal or the negotiations for a new one.
- Provisions for access and redress rights for individuals.
- A dispute resolution mechanism in case either party fails to adhere to any part of the agreement.
- Provisions regarding further use and onward transfers. Ideally recipients should be listed as an annex.
- Provisions relating to information given to passengers and clarification of the minimum content and where these responsibilities lie.

The Working Party would also stress the need to make sure that any new agreement is in line with in line with appropriate and relevant EU and international level instruments on data protection, which could include, for example, the Framework Decision 2008/977/JHA and any new EU-US data protection agreement on law enforcement matters.

The Working Party, as always, remains available for any further input into this matter and appreciates the Commission's intention to keep us informed of developments in the negotiations.

On behalf of the Article 29 Working Party

Jacob Kohnstamm
Chairman

Copy to:
Vice-President Reding, Commissioner for Justice

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Mr Juan Fernando López Aguilar, Chairman of the Committee on Civil Liberties, Justice and Home Affairs

Mr Stefano Manservigi, Director General DG Home