



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.03.2004
COM(2004)190 final

2004/0064 (CNS)

Proposal for a

COUNCIL DECISION

on the conclusion of an Agreement between the European Community 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, Bureau of Customs and Border Protection

(presented by the Commission)

EXPLANATORY MEMORANDUM

Throughout 2003, the Commission has been working with the United States of America to try to put in place a sound legal framework for the transfers of PNR data to the United States Department of Homeland Security, Bureau of Customs and Border Protection (CBP).

As outlined in the Communication from the Commission to the Council and the Parliament of 16 December 2003¹, this legal framework should take the form of a Decision (“Adequacy Finding”) by the Commission under Article 25 paragraph 6 of the Data Protection Directive (95/46/EC), accompanied by an international agreement between the European Community and the US. The latter is necessary to deal with such legal problems as are not addressed by the adequacy finding.

On 23rd February 2004, the Council of the European Community authorised the Commission to negotiate such an Agreement with the US and issued a series of negotiating guidelines.

The Commission now calls on the Council to conclude the Agreement reached with the US. It thus submits the relevant proposal for a Council Decision.

¹ COM (2003) 826 final, «Transfer of Air Passenger Name Record (PNR) Data: a Global EU Approach»

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof, in conjunction with the first sentence of the first subparagraph of Article 300 (2) thereof,

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Parliament³,

Whereas on 23 February 2004 the Council authorised the Commission to negotiate, on behalf of the Community an Agreement with the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection;

Whereas the Agreement should be approved.

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Community 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, Bureau of Customs and Border Protection is hereby approved on behalf of the Community.

The text of the Agreement is attached to this Decision.

² OJ C , , p. .

³ OJ C , , p. .

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 Community.

Done at Brussels,

*For the Council
The President*

ANNEX

Agreement between the European Community 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, Bureau of Customs and Border Protection

THE EUROPEAN COMMUNITY AND THE UNITED STATES OF AMERICA,

Recognizing the importance of respecting fundamental rights and freedoms, notably privacy, and the importance of respecting these values, while preventing and combating terrorism and related crimes and other serious crimes that are transnational in nature, including organized crime;

Having regard to U.S. statutes and regulations requiring each air carrier operating passenger flights in foreign air transportation to or from the United States to provide the Department of Homeland Security (hereinafter, "DHS"), Bureau of Customs and Border Protection (hereinafter "CBP") with electronic access to Passenger Name Record (hereinafter "PNR") data to the extent it is collected and contained in the air carrier's automated reservation/departure control systems;

Having regard to 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, and in particular Article 7(c) thereof;

Having regard to the Undertakings of CBP issued on ... 2004, which will be published in the Federal Register (hereinafter "the Undertakings");

Having regard to Commission Decision ... adopted on, pursuant to article 25(6) of Directive 95/46/EC, whereby CBP is considered as providing an adequate level of protection for PNR data transferred from the European Community (hereinafter "Community") concerning flights to or from the U.S. in accordance with the Undertakings, which are annexed thereto (hereinafter "the Decision");

Noting that air carriers with reservation/departure control systems located within the territory of the Member States of the European Community should arrange for transmission of PNR data to CBP 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 and negotiations between the United States and the European Community, or between either of the Parties and any State regarding the transfer of 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 Community to the U.S.;

HAVE AGREED AS FOLLOWS:

1. CBP may electronically access the PNR data from air carriers' reservation/departure control systems ("reservation systems") located within the territory of the Member States of the European Community strictly in accordance with the Decision and for so long as the Decision is applicable and only until there is a satisfactory system in place allowing for transmission of such data by the air carriers.
2. Air carriers operating passenger flights in foreign air transportation to or from the United States shall process PNR data contained in their automated reservation systems as required by CBP pursuant to US law and strictly in accordance with the Decision and for so long as the Decision is applicable.
3. CBP takes note of the Decision and states that it is implementing the Undertakings annexed thereto.
4. CBP shall process PNR data received and treat data subjects concerned by such processing in accordance with applicable U.S. laws and constitutional requirements, without unlawful discrimination, in particular on the basis of nationality and country of residence.
5. CBP and the European Commission shall jointly and regularly review the implementation of this Agreement.
6. In the event that an airline passenger identification system is implemented in the European Union which requires air carriers to provide authorities with access to PNR data for persons whose current 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
7. This Agreement shall enter into force upon signature. Either Party may terminate this Agreement at any time by notification through diplomatic channels. The termination shall take effect ninety (90) days from the date of notification of termination to the other Party. This Agreement may be amended at any time by mutual written agreement.
8. This Agreement is not intended to derogate from or amend legislation of the Parties; nor does this Agreement create or confer any right or benefit on any other person or entity, private or public.

Signed at, on.....

This Agreement is drawn up in duplicate in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic. In case of divergence, the English version shall prevail.

FOR THE EUROPEAN COMMUNITY

FOR THE UNITED STATES OF AMERICA

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Tom Ridge
Secretary of the United States Department of
Homeland Security