



1612/06/EN
WP 124

**Opinion 7/2006 on the ruling by the European Court of Justice of 30 May 2006 in
Joined Cases C-317/04 and C-318/04 on the transmission of Passenger Name
Records to the United States and the urgent need for a new agreement**

**Adopted on
27 September 2006**

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

OPINION 7/2006 OF THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

on the ruling by the European Court of Justice of 30 May 2006 in Joined cases C-317/04 and C-318/04 on the transmission of Passenger Name Records to the United States and the urgent need for a new agreement

The ruling by the European Court of Justice of 30 May 2006¹ annuls both the Commission Decision on the adequacy finding and the Council Decision on the conclusion of the PNR Agreement. It 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 action to be taken such as the complete suspension of data flows to the US authorities.

In the light of this situation, the Article 29 Working Party adopted an Opinion on 14 June 2006 (WP 122) urging the timely adoption of a new agreement between the US and EU before the deadline in order to avoid any legal gaps and to ensure the rights and freedoms of passengers continue to be protected at least at the present level. To date no new agreement has been concluded.

Therefore, the Working Party is extremely concerned at the risk of the absence of such an agreement and the potential consequences when the existing arrangements lapse on 1 October 2006. Whilst the Working Party still hopes that a new agreement can be concluded even at this late stage, national data protection authorities must now prepare for a situation where no agreement is concluded and the existing arrangements are no longer in place.

Given these concerns, the Working Party has considered what further steps may be appropriate should no replacement agreement be concluded. This is in order to help national supervisory authorities when considering whether enforcement action is appropriate under their own national law and the sanctions available to them.

The Working Party has in particular noted the following factors:

- The effect that an absence of an agreement may have on establishing a proper legal basis for the transfer of the PNR data
- Uncertainty whether the Undertakings of the US Department of Homeland Security Bureau of Customs and Border Protection dated the 11 May 2004 will still be complied with and whether this will continue into the future
- The lack of acceptance by the US authorities of the move from ‘pull’ to ‘push’ of PNR data even though technological solutions are now in place as is required by the Undertakings (Undertaking 13)

¹ Joined cases C-317/04 and C-318/04.

Taking these matters into account the Working Party calls on the Council, the Commission and the EU-Member States to ensure that even in the absence of an agreement the privacy of all passengers will be duly respected. At least the commitments given by the US in the Undertakings should be abided by. This includes the change from “pull” to “push” in accordance with Undertaking 13 since the air carriers have implemented the necessary technical infrastructure and there are no plausible reasons for any further delay. It should be stressed that whilst the judgement of the European Court of Justice of 30 May 2006 resulted in the annulment of the agreement with the US, it does not affect the obligations to comply with data protection requirements under national law. It is for this reason that the continued compliance with the undertakings is of the utmost importance.

In case a new agreement is not concluded Member States' authorities might consider what action may be appropriate in the context of their national law.

Options that may be particularly relevant include, but are not limited to:

- Action to prevent the processing of personal data held in PNR records for the purposes of transfer (in whole or in part) to the US authorities
- Action to prevent the processing of personal data held in PNR records for the purposes of transfer beyond the 19 data items identified as appropriate by the Working Party in its Opinion WP 78

The Working Party trusts that both the European and US sides are still committed to achieving the objectives of respecting fundamental rights and freedoms, notably privacy, while preventing and combating terrorism and other serious crimes. It reiterates its hope that a new satisfactory agreement can still be concluded so as to make consideration of enforcement actions by national data protection supervisory authorities unnecessary.

Done in Brussels, on September 27, 2006

For the Working Party
The Chairman
Peter SCHAAR