

ARTICLE 29 Data Protection Working Party



Automated Targeting System (ATS)

Version 21/03/2007

PNR subgroup

New ATS (state of play on March 21, 2007)

Nov. 2, 2006: DHS Chief Privacy Officer publishes the new automated targeting system (ATS) in the US Federal Register

Nov. 30, 2006: PNR subgroup sends comments and questions on ATS to the DHS Chief Privacy Officer

Dec. 30; 2006: comment period expires

Jan. 12, 2007: EU Commission informs PNR subgroup about a DHS letter saying that the proposed "System of Record Notice (SORN) and the Privacy impact Assessment (PIA) recently released by DHS describe the general operation of ATS. They in no way supersede or otherwise alter the PNR Agreement...DHS continues to govern its access to and use of PNR from European flights consistent with the October 2006 Agreement, the Undertakings and my October 2006 letter... This includes the storage and processing of data in ATS"

February 7, 2007: The DHS Chief Privacy Officer informs the PNR subgroup that he is still reviewing several hundred comments and that after this review a new ATS will be published in the Federal Register.

The proposed new ATS has not yet become effective nor is it clear when a final decision will be taken and how the final version will look like.

Problems arising from the current version of the proposed ATS:

The proposed ATS raises several questions and seems in some points not in line with the PNR Agreement and in particular the Undertakings given in 2004 by the US Government.

- The ATS is an analytical tool to screen all passengers entering or leaving the US and not only those on watch lists. Although it does not profile on race, ethnicity or arbitrary assumptions it is not clear in how far the system can be used for general profiling purposes and analysing behavioural patterns.
- The list of data elements goes beyond the 34 elements mentioned in the annex of the PNR Agreement: 1.) Identifiers for free tickets, 2.) number of bags, 3.) number of bags on each segment, 4.) voluntary and involuntary upgrades. In addition to that the restrictions regarding frequent flyer information (data element 11: data related to miles flown and addresses) are missing.
- Unrestricted onward transfer to wide ranging recipients would considerably violate the Undertakings in particular Undertaking 29
- storage period (up to 40 years) would violate Undertaking 15 restricting the storage period to 3.5 years.

The ATS as published in the Federal Register does not mention the PNR Agreement

and so it is ambiguous whether it also covers PNR data derived from European data bases. For that reason DHS' letter of January 2007 was helpful to the extent that it makes clear that it is not interfering with the current PNR Interim Agreement.

However, even in case the current ATS proposal adopted in its present version would not interfere with the PNR Agreement serious concerns remain:

The US has already unilaterally given notice to the EU amending the data elements in the Undertakings, raising concerns about the continued expansion in the direction of the wider extent of the ATS. The increase in data elements without effective consultation is a significant concern.

In order to respect the EU PNR Agreement and the Undertakings the US would need two PNR regimes due to the fact that the ATS contains less stringent data protection rules than the PNR Agreement: One PNR regime would cover PNR data stemming from European data bases and one for PNR data derived from other regions.

Among others the following aspects of such a situation need to be addressed:

How, for example, will data be separated if passengers enter the US once from Europe and once from a non-EU country? Will their record created from the EU PNR and their other record that would be subject to the wider ATS provisions be kept separately, or merged?

What about data of passengers flying to the US that are stored in non-European Reservation systems and transferred to DHS?

How many data elements are stored if a passenger enters the US via a third country using a non-European airline given the fact that the proposed ATS foresees to store more data elements than the current PNR Agreement?

If there are not two separate regimes what about the storage period, right of access and rectification if some PNR data fall under the PNR Agreement others, however, under the ATS?

How are passengers going to be informed that their data may be subject to different data protection regimes given the fact that European carriers are only obliged to inform about the details of the current PNR Agreement?

These issues require further attention by all stakeholders and should be raised During the ongoing negotiations between the EU and the US in order to clarify them prior to the conclusion of the follow-up agreement.