ARTICLE 29 Data Protection Working Party

pull – push

Version 21/03/2007

PNR subgroup

An overview and state of play

1- The first PNR Agreement concluded in May 2004 foresaw the change from a pull system to a push system in Article 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 the transmission of such data by air carriers.**"

The unilateral Undertakings given by the US in 2004 and being a cornerstone of the PNR Agreement provide that:

> 12. With regard to the PNR data which CBP access (or receive) directly from the air carrier's reservation systems for purposes of identifying potential subjects for border examination, CBP personnel will only access (or receive) and use PNR data concerning persons whose travel includes a flight into or out of(4) the United States.
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> **13. CBP will «pull» passenger information from air carrier reservation systems until such time as air carriers are able to implement a system to «push» the data to CBP.**
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> 14. CBP will pull PNR data associated with a particular flight no earlier than 72 hours prior to the departure of that flight, and will re-check the systems no more than three (3) times between the initial pull, the departure of the flight from a foreign point and the flight's arrival in the United States, or between the initial pull and the departure of the flight from the United States, as applicable, to identify any changes in the information. **In the event that the air carriers obtain the ability to 'push' PNR data, CBP will need to receive the data 72 hours prior to departure of the flight, provided that all changes to the PNR data which are made between that point and the time of the flight's arrival in or departure from the United States, are also pushed to CBP(5).** In the unusual event that CBP obtains advance information that person(s) of specific concern may be travelling on a flight to, from or through the United States, CBP may pull (or request a particular push) of PNR data prior to 72 hours before departure of the flight to ensure that proper enforcement action may be taken when essential to prevent or combat an offence enumerated in paragraph 3 hereof. To the extent practicable, in such instances where PNR data must be accessed by CBP prior to 72 hours before the departure of the flight, CBP will utilise customary law enforcement channels

Note (5) provided specifically that: "***In the event that the air carriers agree to push the PNR data to CBP, the agency will engage in discussions with the air carriers regarding the possibility of pushing PNR data at periodic intervals between 72 hours before departure of the flight from a foreign point and the flight's arrival in the United States, or within 72 hours before the departure of the flight from the United States, as applicable***. CBP seeks to utilise a method of pushing the necessary PNR data that meets the agency's needs for effective risk assessment, while minimising the economic impact upon air carriers."

2- The Article 29 Working Party remarked the following in its Opinion WP 95 adopted in June 2004:

> *"The Commission has only partially taken into account the demands made by the Article 29 Working Party regarding, in particular, the scope of the data to be transferred, their retention period and the way in which they are used (Opinion 4/2003 of 13 June 2003, WP 78, Opinion 6/2002 of 24 October 2002, WP 66).*
> Until these issues have been resolved, the Working Party considers the following practical measures to be essential to keep encroachments on passengers' rights as minimal as possible.
> 1. *Airlines should replace the 'pull' method of transferring data with the 'push' method as soon as possible*. It is a matter of general data protection principle that recipients should only be given the data they actually need. In the 'pull' method used until now, recipients are given all data. It is then their duty to filter out and use only the data for which they have authorisation under an agreement. *Since all parties agree on the change of method, it is now a matter of making the changeover as quickly as possible. The Commission is called upon to influence the airlines to this effect*. The filtering software to be used by the air carriers has to sort out data fields which do not figure in the positive list defined by the international agreement as well as those data of a sensitive nature which are stored in fields contained in the positive list as far as they can be identified by means of a computer program."

3- Following the Judgment by the European Court of Justice (Grand Chamber) of 30 May 2006, setting aside the decision on adequacy taken by the Commission, the Article 29 Working Party issued Opinion WP 122 emphasising the urgent need for a new agreement and expressing its concern about 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)*. 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."

4- The interim PNR Agreement concluded in October 2006 provides the following:

> "(1)In reliance upon DHS's continued implementation of the aforementioned Undertakings as interpreted in the light of subsequent events, the European Union shall ensure that air carriers operating passenger flights in foreign air transportation to or from the United States of America process PNR data contained in their reservation systems as required by DHS.
> (2) Accordingly, *DHS will electronically access the PNR data from air carriers' reservation systems located within the territory of the Member States of the European Union* ***until there is a satisfactory system in place allowing for transmission of such data by the air carriers***."

In the statements made by the then Finnish president of the Council as well as by the Vice-president of the European Commission, Mr. Franco Frattini, it was unquestionable that the shift from pull to push would have to take place by the end of 2006:

-Speech by Paula Lethomaki, President-in-Office of the Council (FI), on 11 October 2006:

"We have other good news for airlines. During the negotiations, the United States undertook to test systems where airlines can themselves store PNR data on the databases of the US authorities, starting this year. This has always been an important objective for us."

-Statement by Mr. Franco Frattini, Vice-President of the EU Commission:

"The other element which is important in my opinion is, on the one hand, the impossibility of direct access and, on the other, the change in the modalities of accessing data. Many honourable Members have in the past frequently emphasised the malfunctioning or the inadequate guarantees of the so-called 'pull' system: that is to say, the system that permits the user to extract data direct from databases. We have in consequence requested that the system should be changed and replaced by a system of the 'push' type, as has been requested on numerous occasions by parliamentary authorities; this has been agreed.

The 'push' system means, as the work clearly indicates, that the data is not extracted but supplied on request. It has been agreed that the new mechanism, as we have written in the covering letter to be sent by the United States, will come into operation no later than December 2006,that is within a month and a half at the latest. The mechanism will be tested at the beginning to check its functioning, but in any case it will be operational – I repeat – by the end of this year."

5- The side letter by the US DHS (setting out additional "understandings" with regard to the interpretation of the Undertakings) accompanying the interim PNR Agreement states:

'This letter is intended to set forth our understandings with regard to the interpretation of a number of provisions of the Passenger Name Record (PNR) Undertakings issued on May 11, 2004 by the Department of Homeland Security (DHS). We look forward to further reviewing these and other issues in the context of future discussions toward a comprehensive, reciprocal agreement based on common principles.

Early Access Period for PNR

While Paragraph 14 limits the number of times PNR can be pulled, the provision puts no such restriction on the "pushing" of data to DHS**. The push system is considered by the EU to be less intrusive from a data privacy perspective**. The push system does not confer on airlines any discretion to decide when, how or what data to push, however. That decision is conferred on DHS by U.S. law. **Therefore, it is understood that DHS will utilize a method of pushing the necessary PNR data that meets the agency's needs for effective risk assessment, taking into account the economic impact upon air carriers**.

In determining when the initial push of data is to occur, DHS has discretion to obtain PNR more than 72 hours prior to the departure of a flight so long as action is essential to combat an offense enumerated in Paragraph 3. Additionally, while there are instances in which the U.S. government may have specific information regarding a particular threat, in most instances the available intelligence is less definitive and may require the casting of a broader net to try and uncover both the nature of the threat and the persons involved. Paragraph 14 is therefore understood to permit access to PNR outside of the 72 hour mark when there is an indication that early access is likely to assist in responding to a specific threat to a flight, set of flights, route, or other circumstances associated with offenses described in Paragraph 3 of the Undertakings.

In exercising this discretion, DHS will act judiciously and with proportionality.

DHS will move as soon as practicable to a push system for the transfer of PNR data in accordance with the Undertakings and will carry out no later than the end of 2006 the necessary tests for at least one system currently in development if DHS's technical requirements are satisfied by the design to be tested. Without derogating from the Undertakings and in order to avoid prejudging the possible future needs of the system any filters employed in a push system, and the design of the system itself must permit

any PNR data in the airline reservation or departure control systems to be pushed to DHS in exceptional circumstances where augmented disclosure is strictly necessary to address a threat to the vital interests of the data subject or other persons."

6- European Commission's letter in response to the side letter by DHS

"Dear Stewart,
On 11 October 2006 we received, by electronic transmission, your letter to the Council Presidency and the Commission, concerning the interpretation of certain provisions of the Undertakings issued by DHS on 11 May 2004 in connection with the transfer by air carriers of passenger name record (PNR) data. *While taking note of the content of your letter, we wish to reaffirm the importance that the EU and its Member States attach to respect for fundamental rights, in particular to the protection of personal data*.
The commitments of DHS to continue to implement the Undertakings allow the EU to deem that, for purposes of the implementation of the Agreement, it ensures an adequate level of data protection.
Yours sincerely,
Irma ERTMAN Jonathan FAULL"

It is not clear for which reasons the push system has not yet been implemented so far and which further steps need to be taken to realise the transition from pull to push. Neither after the conclusion of the first PNR Agreement nor after the conclusion of the interim agreement the contracting parties have established what a "satisfactory system" means and who defines this notion. Since this is an indeterminate legal term both sides should strive to come to a common solution. It would thus be unacceptable if one contracting party unilaterally tried to impose its interpretation of this term on the other contracting party. Diverging interpretations further delaying the implementation of a push system should be avoided and should be settled prior to the conclusion of the follow-up agreement.
On the air carriers' side, great effort has been made to take the necessary steps to fulfil their legal obligations regarding the transition from pull to push. They have repeatedly said that there is no technical obstacle to the implementation of 4 pushes (scheduled pushes) within 72 h of departure which raises the question on whom it depends when the move to a push system will eventually happen. At this moment the question arises whether a push system will be realised prior to the conclusion of the follow-up agreement.

Outstanding issues related to the move from push to pull

Although the move from pull to push is already feasible from a technical standpoint, and a system taking account of the specific requirements made by US authorities has been designed and made available by Amadeus, the US authorities seem to have failed to test this system successfully as provided for in the Agreement. Thus, the deadline for bringing about the shift from pull to push, as mentioned above, has expired without any indications when the testing will finally be concluded.
It should be recalled that a push-based system was accepted and implemented by the Canadian authorities, apparently with excellent results.

The non-implementation of the push system has the following major effects in both legal and economic terms.

Legal effects: As already pointed out by the WP29, the pull system entails the risk that personal data of US-bound passengers including those using non-EU carriers, are accessed well beyond the list of the 34 data categories specified in Annex A of the Undertakings. In this connection, attention should be drawn to the wording contained in the side letter by DHS as to expanding the list of accessible data (including frequent flyer programme data). Reference should also be made here to sensitive data, which are currently filtered out by US authorities rather than by air carriers and airline reservation systems. In a real push system only the airlines as data controllers are responsible for sending those passenger data agreed in the Undertakings to the US authorities which includes the filtering of sensitive data. The list of sensitive data should be jointly defined by the air carriers after consultation with the European Commission and the data protection supervisory authorities. Such a push system would allow the necessary protection of passengers data while fulfilling the demands of DHS on the other side.

Economic effects: Amadeus and European air carriers have incurred major costs to implement the push system, which was submitted to US authorities – so far to no avail – and would appear to fully meet the requirements set

out in the Undertakings. Neither Amadeus nor the air carriers are likely to be in a position – whether logistically nor economically – to bear additional charges that may arise from the development of different systems. This point is raised explicitly in the side letter referring to the development of a solution that can be satisfactory to US authorities "taking into account the economic impact upon air carriers".