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Department of Homeland Security US Immigration and Customs Enforcement

Discussion Document US-EU PNR Dialogue

Jurpose

To provide talking points and background information on the Passenger Name Record (PNR) ssue and related developments concerning (4.8 enforcement information sharing with the

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Article 15 of the draft Framework Directive, which would have the force of law within the European Union, lays out procedural rules for information sharing between individual EU member states.³

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- (V) <u>Background</u> (WHAT FOLLOWS IS BACKGROUND ONLY NOT FOR DISSEMINATION):
- Two converging events in Europe the recent European Court of Justice decision on the legality of the EU-US PNR Agreement and a draft EU Framework Decision on Exchange of Criminal Data -- have major implications for US law enforcement and security.
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- 2 This concern is consistent with Executive Order 13388 and the President's Memorandum issued on December 16, 2006 to Heads of Executive Departments and Agencies on "Guidelines and Requirements in Support of Information Sharing Environment."

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US Immigration and Customs Enforcement

Discussion Document US-EL PNR Dialogue

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¹ For example, the Draft Decision contains provisions on time limits for retention of shared data, ensuring the accuracy of shared data, logging and audit trails, as well as restrictions limiting further use of the data to the original purpose for which it was first transmitted. In effect, it borrows heavily from the PNR Agreement and the Undertakings.

Department of Homeland Security US Immigration and Customs Enforcement Discussion Document US-EU PNR Dialogue

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- The ECJ PNR Case. The European Parliament (EP) filed two suits in the European Court of Justice (ECJ) challenging the information sharing arrangement.
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Department of Homeland Security
US Immigration and Customs Enforcement
Discussion Document
US-EU PNR Dialogue

Purpose: To provide talking points and background information on the Passenger Name Record (PNR) issue and related developments concerning law enforcement information sharing with the European Union (EU). Formatted: Bullets and Numbering Deleted: the PNR agreement and Formatted: Bullets and Numbering Formatted: Bullets and Numbering Formatted: Bullets and Numbering h5 Formatted: Bullets and Numbering Formatted: Indent: Left: 0.5" Bulleted + Level: 2 + Aligned at: 0.75" + Tab after: 1" + Indent at: 1", Tabs: 0.75", List tab + Not at 1 USG.¶ The Agreement was intended to resolve a perceived conflict between EU law (which limits personal information collected by commercial entities from being shared with governmental entities) and US law (which required the collection and dissemination of PNR data). The PNR Agreement was challenged by the European Parliament as insufficiently protective of EU privacy rights, and on May 30, 2006, the European Court of Justice (ECJ) struck down the Agreement. The ECI nullified the agreement on the procedural grounds that it was signed under the wrong EU legal authority - the one that deals with commercial issues rather than the one that deals with law enforcement and public security. The EU notified the US that it will terminate the current Agreement on (September 30, 2006 and has set a goal of establishing a new agreement by this date. On 7/17 the European Commission provided a proposed replacement text.

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Department of Homeland Security US Immigration and Customs Enforcement

Discussion Document US-EU PNR Dialogue

Purpose:

To provide talking points and background information on the Passenger Name Record (PNR) issue and related developments concerning law enforcement information sharing with the European Union (EU).

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The Agreement was intended to resolve a perceived conflict between EU law (which limits personal information collected by commercial entities from being shared with governmental entities) and US law (which required the collection and dissemination of PNR data).

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- The PNR Agreement was challenged by the European Parliament as insufficiently protective of EU privacy rights, and on May 30, 2006, the European Court of Justice (ECJ) struck down the Agreement.
 - The ECJ nullified the agreement on the procedural grounds that it was signed under the wrong EU legal authority the one that deals with commercial issues rather than the one that deals with law enforcement and public security.
- The EU notified the US that it will terminate the current Agreement on September 30, 2006 and has set a goal of establishing a new agreement by this date.

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Background

- Two converging events in Europe the recent European Court of Justice decision on the legality of the EU-US PNR Agreement and a draft EU Framework Decision on Exchange of Criminal Data -- have major implications for US law enforcement and security.
- The EU-US PNR Agreement. As noted, in May 2004, after substantial negotiations, the Department of Homeland Security entered into an agreement relating to the sharing of PNR

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| information collected by air carriers flying to the United States from Europe. Central to the Agreement was a set of Undertakings made by Customs and Border Protection (CBP) regarding how it would treat the PNR data transmitted to it. Several of the limitations in those Undertakings significantly restrict US opportunities to use information for investigative and law enforcement purposes. | | | | |
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The ECJ PNR Case. The European Parliament (EP) filed two suits in the European Court of Justice (ECJ) challenging the information sharing arrangement.

On May 30. 2006. the ECJ issued its opinion in the lawsuits. The opinion did not address the merits of the EU-US PNR Agreement or the role of the Parliament. Rather, the decision turned on the lack of competence of the Commission and Council to enter into the Agreement in the first instance. The EU had based its authority on the so-called "First Pillar," which allows the EU to regulate trade and commercial matters. The ECJ held (as the US had argued earlier) that the requirement that PNR data be sent to the US was a law enforcement and national security matter. Such transfers, the court held, were excluded from the data protection directive governing commercial data exports. If they are to be regulated, the court implied, it would have to be done under the "Third Pillar."

- That is what the EU proposes to do. It has obtained authority from its Member States to erect substantially the same agreement on a new foundation. In order to meet the European Court of Justice deadline the Commission will seek to codify its position over the next couple of weeks and then will call for agreement on the new arrangement by September 30.
- EU Proposals on Sharing Law Enforcement Information. The PNR negotiations will be closely intertwined with a broader effort to establish restrictive, EU-wide rules for information sharing in the area of law enforcement. Last October the EU put forward two draft documents that concern data sharing and protection in the law enforcement context. They consist of a draft Framework Directive of the European Parliament and Council on the retention of data and a proposed Council decision on the protection of personal data in criminal matters.
- ² This concern is consistent with Executive Order 13388 and the President's Memorandum issued on December 16, 2006 to Heads of Executive Departments and Agencies on "Guidelines and Requirements in Support of Information Sharing Environment."

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3 For example, the Draft Decision contains provisions on time limits for retention of shared data, ensuring the accuracy of shared data, logging and audit trails, as well as restrictions limiting further use of the data to the original purpose for which it was first transmitted. In effect, it borrows heavily from the PNR Agreement and the Undertakings.

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Department of Homeland Security US Immigration and Customs Enforcement

Discussion Document US-EU PNR Dialogue



Purpose

To provide talking points and background information on the Passenger Name Record (PNR) issue and related developments concerning law enforcement information, tharing with the European Union (EU).

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• The EU notified the US that it will terminate the current Agreement on September 30, 2006 and has set a goal of establishing a new agreement by this date.

2. On 7.17 the European Commission provided a preposed replacement text.

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Background

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Two converging events in Europe - the recent European Court of Justice decision on the legality of the FU-US PNR Agreement and a draft EU Framework Decision on Exchange of Criminal Data -- have major implications for US law enforcement and security

The EU-US PNR Agreement. As noted in May 2004, after substantial negotiations, the Department of Homeland Security entered into an agreement relating to the sharing of PNR information collected by air carriers flying to the United States from Europe. Central to the Agreement was a set of Lindertakings made by Customs and Border Protection (CBP) regarding how it would treat the PNR data transmitted to it. Several of the limitations in those Undertakings significantly restrict US opportunities to use information for investigative and law enforcement purposes.

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The most significant of these limitations, from the DHS perspective, are the following (WHAT FOLLOWS IS BACKGROUND ONLY - NOT FOR DISNEMINATION):

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- The ECJ PNR Case. The European Parliament (EP) filed two suits in the European Court of Justice (ECJ) challenging the information sharing arrangement.
- On May 30, 2006, the ECJ issued its opinion in the lawsuits. The opinion did not address the merits of the EU-US PNR Agreement or the role of the Parliament. Rather, the decision turned on the lack of competence of the Commission and Council to enter into the Agreement in the first instance. The EU had based its authority on the so-called "First Pillar," which allows the EU to regulate trade and commercial matters. The ECJ held (as the US had argued earlier) that the requirement that PNR data be sent to the US was a law enforcement and national security matter. Such transfers, the court held, were excluded from the data protection directive



This concern is consistent with Executive Order 13388 and the President's Memorandum issued on December 16, 2006 to Heads of Executive Departments and Agencies on "Guidelines and Requirements in Support of Information Sharing Environment."

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governing commercial data exports. If they are to be regulated, the court implied, it would have to be done under the "Third Pillar."

That is what the EU proposes to do. It has obtained authority from its Member States to erect substantially the same agreement on a new foundation. In order to meet the European Court of Justice deadline the Commission will seek to codify its position over the next couple of weeks and then will call for agreement on the new arrangement by September 30.

EU Proposals on Sharing Law Enforcement Information. The PNR negotiations will be closely intertwined with a broader effort to establish restrictive. EU-wide rules for information sharing in the area of law enforcement. Last October the EU put forward two draft documents that concern data sharing and protection in the law enforcement context. They consist of a draft Framework Directive of the European Parliament and Council on the retention of data and a proposed Council decision on the protection of personal data in criminal matters.

Article 15 of the draft Framework Directive, which would have the force of law within the European Union, lays out procedural rules for information sharing between individual EU member states.³

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³ For example, the Draft Decision contains provisions on time limits for retention of shared data, ensuring the accuracy of shared data, logging and audit trails, as well as restrictions limiting further use of the data to the original purpose for which it was first transmitted. In effect, it borrows heavily from the PNR Agreement and the Undertakings.





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Department of Homeland Security US Immigration and Customs Enforcement

Discussion Document US-EU PNR Dialogue

To provide talking points and background information on the Passenger Name Record (PNR) issue and related developments concerning law enforcement information sharing with the European Union (EU).

The Agreement was intended to resolve a perceived conflict between EU law (which limits personal information collected by commercial entities from being shared with governmental entities) and US law (which required the collection and dissemination of PNR data).

The PNR Agreement was challenged by the European Parliament as insufficiently protective of EU privacy rights, and on May 30, 2006, the European Court of Justice (ECJ) struck down the Agreement.

The ECJ nullified the agreement on the procedural grounds that it was signed under the wrong EU legal authority - the one that deals with commercial issues rather than the one that deals with law enforcement and public security.

The EU notified the US that it will terminate the current Agreement on September 30, 2006 and has set a goal of establishing a new agreement by this date.

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- <u>Background</u> (WHAT FOLLOWS IS BACKGROUND ONLY NOT FOR DISSEMINATION):
- Two converging events in Europe the recent European Court of Justice decision on the legality of the EU-US PNR Agreement and a draft EU Framework Decision on Exchange of Criminal Data -- have major implications for US law enforcement and security.
- The EU-US PNR Agreement. As noted, in May 2004, after substantial negotiations, the Department of Homeland Security entered into an agreement relating to the sharing of PNR information collected by air carriers flying to the United States from Europe. Central to the Agreement was a set of Undertakings made by Customs and Border Protection (CBP) regarding how it would treat the PNR data transmitted to it. Several of the limitations in those Undertakings significantly restrict US opportunities to use information for investigative and law enforcement purposes.
 - The most significant of these limitations, from the DHS perspective, are the following



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- The ECJ PNR Case. The European Parliament (EP) filed two suits in the European Court of Justice (ECJ) challenging the information sharing arrangement.
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Department of Homeland Security US Immigration and Customs Enforcement

Discussion Document US-EU PNR Dialogue

Purpose.

To provide talking points and background information on the Passenger Name Record (PNR) issue and related developments concerning law enforcement information sharing with the European Union (EU)

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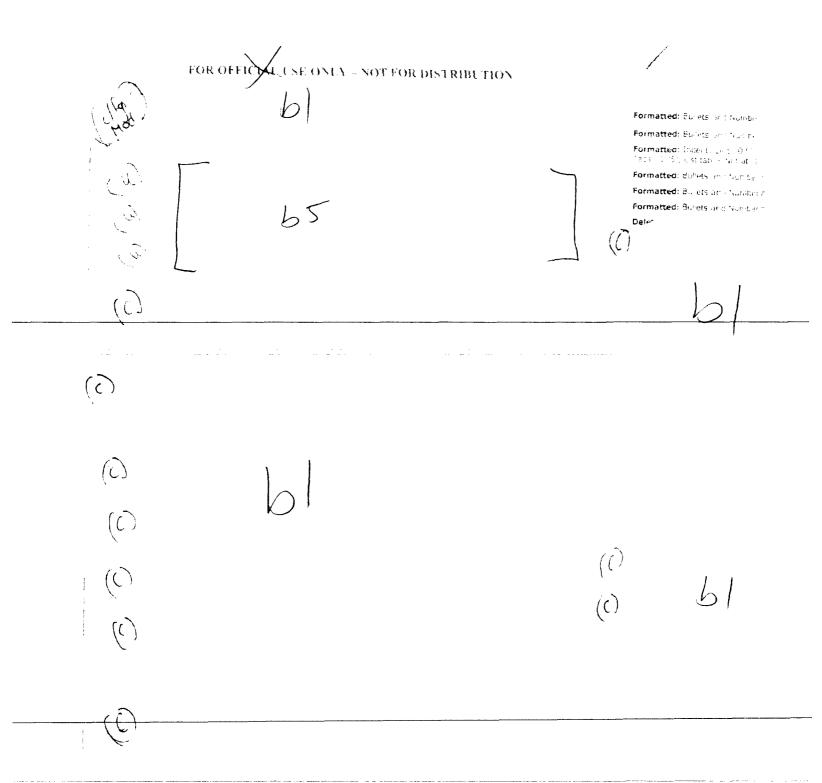
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Background

Two converging events in Europe - the recent haropean Court of Justice decision on the legality of the EULS PNR Agreement and a draft EUF ramework Decision on Exchange of Criminal Data -- have major implications for US law enforcement and security

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- governing commercial data exports. If they are to be regulated, the court implied, it would have to be done under the "Third Pillar."
- That is what the EU proposes to do. It has obtained authority from its Member States to erect substantially the same agreement on a new foundation. In order to meet the European Court of fustice deadline the Commission will seek to coulfy its position over the next couple of weeks and then will call for agreement on the new arrangement by September 30.
- EU Proposals on Sharing Law Enforcement Information. The PNR negotiations will be closely intertwined with a broader effort to establish restrictive, EU-wide rules for information sharing in the area of law enforcement. Last October the EU put forward two draft documents that concern data sharing and protection in the law enforcement context. They consist of a draft Framework Directive of the European Parliament and Council on the retention of data and a proposed Council decision on the protection of personal data in criminal matters.

Article 15 of the draft Framework Directive, which would have the force of law within the European Union, lays out procedural rules for information sharing between individual EU member states.



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For example, the Draft Decision contains provisions on time limits for retention of shared data, ensuring the accuracy of shared data, logging and audit trails, as well as restrictions limiting further use of the data to the original purpose for which it was first transmitted. In effect, it borrows heavily from the PNR Agreement and the Undertakings.

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FROM:

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RE:

Passenger Name Records and Lat. Enforcement Information Sharing - Negatiations With The European Cililon

Purpose

To provide you with background information on the Passenger Name Record (PNR) issue and related developments concerning law enforcement information sharing with the European Union (EU) in preparation for a mid-July "un-DC."

Summary

Before September 11, the government knew very little about the people getting on planes bound for the United States. After the attacks, airlines were required to provide information about their U.S.bound passengers. This information - name, contact information, and the like - was drawn from information supplied to the airline as part of the reservation process. DHS uses the information to screen for no-fly violators and terrorist suspects before the plane takes off, projecting against midflight hijackings and bombings.

ΞЪ For flights between Europe and the U.S., the data must be has long prohibited the export of personal data to countries whose regar protections are not "adequate" in the view of European data protection authorities. While the C.S. has many privacy laws, it does not have an overarching data protection regime that matches every aspect of European law. It has therefore been condemined as inadequate by European standards, and commercial data transfers to the U.S. have long been restricted. European airlines leared (with reason) that European data protection agencies would view the PNR transfers in the same light and would impose fines and other penalties on airlines that provided the PNR data to the U.S. Government.

To ease these fears in May 2004, the United States entired into an agreement with the EU regarding the transmission of PNR data from European air patriers to the USG. The Agreement declares US law "adequate" by European standards as long as the US adheres to numerous detailed prescriptions set by EU negotiators. L

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Agreement was insufficiently protective of EU privacy rights. On May 30 the European Court of Justice (ECI) struck down the Agreement, not on substantive grounds but on procedural ones. Under EU law, commercial issues are within the competence of the EU and fait under the 'First Pillar' authority – the authority that the EU had relied on in entering the Agreement. The ECI held that the US wanted PNR data for law enforcement and public security reasons. Law enforcement and public security are not completely outside the EU's authority, but they fall within the "Third Pillar." where the authority of EU central institutions (the Compussion, Parliament and Court of

Justice) is more limited and more author ty is left to the Member States

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The EU now plans to seek authority from the Member States to renegotiate the PNR Agreement under the Third Pillar. The Commission has portrayed this as a technical change that would put the same agreement back in place, albeit under a different legal authority.

The PNR Agreement was challenged by the European Partiament, which contended that the



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Background

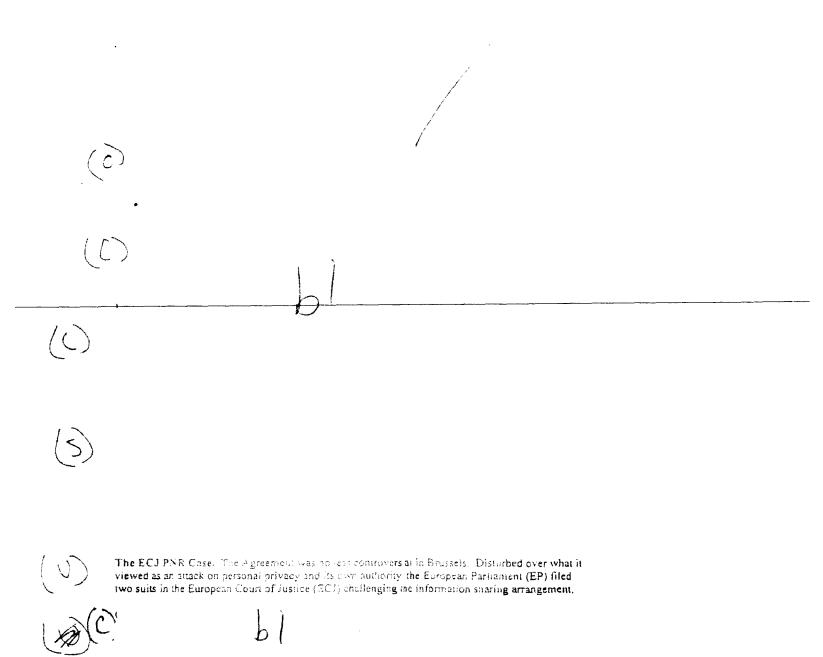


Two converging events in Europe – the recent European Count of Justice decision on the legality of the EC-US PNR Agreement and a draft EU Framework Decision on Exchange of Criminal Data -- have major implications for US law enforcement and security.



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| (C). | | Formatted: Space After: 5 pt Deletad: |
| (0) | o be used and transferred to address significant health risks under this authorization the EU's Article 29 Working Party has conclude ealth-related purposes violates EU law. | , |



This concern is consistent with Executive Order 13388 and the President's Mentormodum issued on December 16, 2006 to Heads of Executive Departments and Agencies on "Goldelines and Requirements in Support of Information Sharing Environment."

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Acting under the First Pillar, the EU has also entered into a PNR sharing agreement with Canada. In light of the EU's determination that the US Undertakings provided "adequate" privacy protections, the EU-Canada agreement authorizes Canada to share PNR data received from the EU with the US. Even though the EU has struck down the EU-US agreement, the EU contends that its similar agreement with Canada remains in effect. Some Canadian government sources are concerned, however, that the obsence of an "adequacy". Inding (which is a first Pillar concept) may now have the effect of prohibiting US-Canada information sharing derived from EU-originated flights.

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Analysis & Recommendation



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If adopted, the Draft Decision could conflict with a number of binding and non-binding information sharing arrangements that the United States has signed. For example, we have signed a 2003 Mutual Legal Assistance Agreement (MLAT) with the European Union and a 2001 information sharing agreement with Europol (the EU-level police agency); with respect to member states, we signed a 2003 MLAT with Germany, which builds on numerous other MLATs already in force with other EU member states. The United States also has many executive agreements and memoranda of understanding with member states under which critical information is currently being shared. Under EU law, directives supersede bilateral treaties and agreements and member states must conform their existing agreements with the directive.

Unlike in 2003, this risk is present now because the Court has conclusively ruled that the transfer of PNR data is a law enforcement matter. While European integration has been the greatest in areas associated with the Common Market, law enforcement and public security is a relatively new area of activity at the community level and many responsibilities still fall to the EU Member States. The ECI firmly placed PNR in the area of law enforcement and public security, and as result any actions taken in his area are likely to set precedents for further community involvement in other has enforcement matters.

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| | Conclusion | |
| | The USG has a paramount interest in ensuring that law enforcement and border control information continues to flow to the United States. In creating the Information Sharing Environment we are working to break down walls that restrict the sharing of information between Federal agencies. | |
| } | The PNR Agreement that the US signed with the EU in 2004 is an example of the old-style artificial | |
| رر | limitation. We entered into the PNR Agreement based upon the EU's argument that the export of | |
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Memorandum

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Passenger Name Records and Law Enforcement Information Sharing - Negotiations

With The European Union

Purpose



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For flights between Europe and the U.S., the data must be made available from Europe. EU law has long prohibited the commercial export of personal data to countries whose legal protections are not "adequate" in the view of European data protection authorities. While the U.S. has many privacy laws, it does not have an overarching data protection regime that corresponds to every aspect of European law. It has therefore been viewed as "inadequate" by European standards, and commercial data transfers to the U.S. have long been restricted. European airlines feared (with reason) that European data protection agencies would view the PNR transfers in the same light and would impose fines and other penalties on airlines that provided the PNR data to the U.S. Government."

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To ease these fears, in May 2004, the United States entered into an agreement with the EU regarding the transmission of PNR data from European air carriers to the USG. The Agreement is accompanied by a determination that \$\mathbb{L}_{\mathbb{L}_{\mathbb{D}}} \frac{1}{2} \text{adequate" by European standards as long as the US adheres to numerous detailed prescriptions worked out with EU negotiators (but unilaterally implemented by DHS).

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The PNR Agreement was also controversial in Europe. It was challenged by the European Parliament as insufficiently protective of EU privacy rights. On May 30 the European Court of Justice (ECJ) struck down the Agreement. But it chose a ground that was highly procedural - the equivalent under US law of the Supreme Court ducking a Fourth Amendment challenge by finding a law invalid because it exceeded Congress's Commerce Clause power. Under EU law. commercial issues fall within the jurisdiction of the EU as part of its "First Pillar" authority. This is the authority that the EU relied on in entering the Agreement. The ECJ, however, held that the US wanted PNR data for law enforcement and public security reasons. Law enforcement and public security are only partly within the EU's authority: they fall under the "Third Pillar," where the authority of EU central institutions (the Commission, Parliament and Court of Justice) is more limited and more authority is left to the Member States. Because the agreement was entered under the wrong authority, the Court ruled it invalid but delayed the effective date of its decision until September 30 in the hope that the jurisdictional problem could be quickly solved. To cure the problem, the EU plans to seek authority from the Member States to renegotiate the PNR Agreement under the Third Pillar. The Commission has portrayed this as a technical change that would put the same agreement back in place, albeit under a different legal authority.

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¹ CBP can share PNR data with other law enforcement agencies, on a case-by-case basis and only for the purpose of combating terrorism and serious transnational crimes.

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- PNR can also be used and transferred to address significant health risks under Paragraph 34. As noted below, despite this authorization the EU's Article 29 Working Party has concluded that CDC's plans to retain PNR data for health-related purposes violates EU law.
- This concern is consistent with Executive Order 13388 and the President's Memorandum issued on December 16, 2006 to Heads of Executive Departments and Agencies on "Guidelines and Requirements in Support of Information Sharing Environment."

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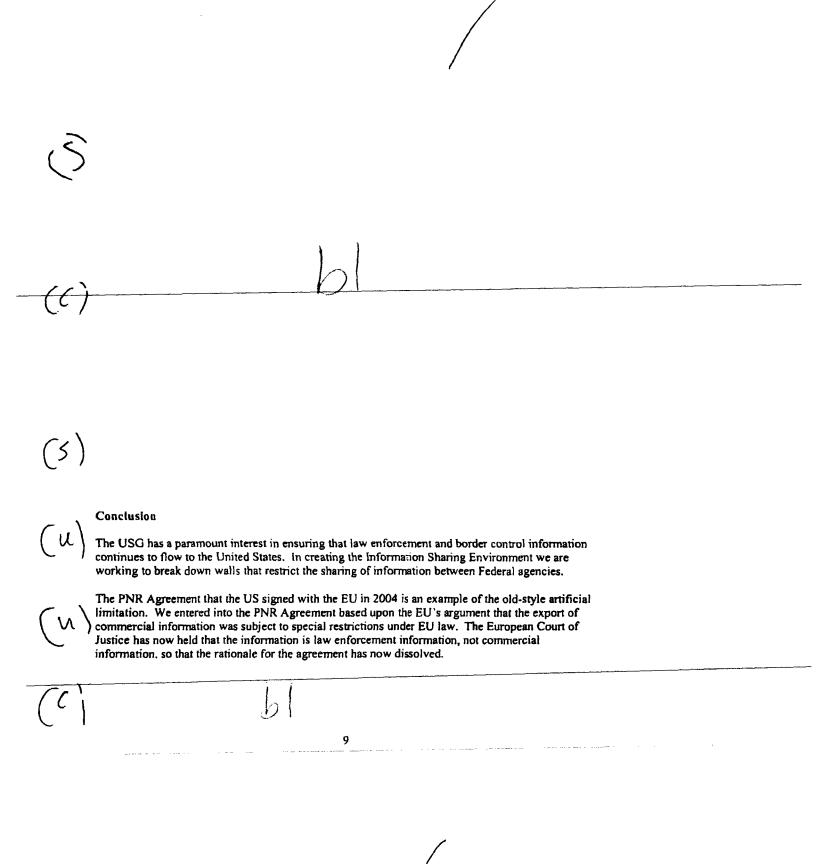
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Conversely, Paragraph 34 of the Undertakings allows for the exchange of PNR for public health purposes and neither the Commission or the Article 29 Committee have challenged the DHS-HHS MOU.

Unlike in 2003, this risk is present now because the Court has conclusively ruled that the transfer of PNR data is a law enforcement matter. While European integration has been the greatest in areas associated with the Common Market, law enforcement and public security is a relatively new area of activity at the community level and many responsibilities still fall to the EU Member States. The ECJ firmly placed PNR in the area of law enforcement and public security, and as result, any actions taken in this area are likely to set precedents for further community involvement in other law enforcement matters.

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| a | by a determination that CBP's protection of PNR is "adequate" by European standards as long as the US adheres to numerous detailed prescriptions (the Undertal ings") worked out with EC negotiators (but unilaterally implemented by DHS). | Deleted: Deleted: Deleted: Deleted: Deleted: Deleted: |
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Communicable Diseases. Are European institutions really willing to limit information sharing with the US in the face of continuing terrorist threats? One clue to the current climate can be found in the European reaction to another US initiative relating to avian flu. If air passengers are exposed to a pandemic strain of avian flu, the government will need to locate all of the passengers and crew, quickly. So the Centers for Disease Control has proposed a rule requiring airlines to retain 🙉 🙉 Deleted: PNR for up to 60 days for that purpose. The top data protection authorities of Europe, known as the "Article 29 Working Party." have now decided that this sort of data retention violates EU privacy directives. If given effect, the Working Party's opinion would place air carriers in legal jeopardy because of inconsistent legal régimes. It reflects a widespread EU view that privacy trumps even critical public health interests, 13 Deletad: de Analysis & Recommendation Deleted: of the Linited States Germany, The United States also has many other ML ATS, executive agreements and memoranda of understanding with member states under which critical information is currently being shared. Under EU law, directives supersede bilateral treaties and agreements and member states must conform their existing agreements with the directive. Unlike in 2003, this risk is present now because the Court has conclusively ruled that the transfer of PNR data is a law enforcement matter. While European integration has been the greatest in areas associated with the Common Market, law enforcement and public security is a relatively new area of activity at the community level and many responsibilities still fall to the EU Member States. The ECJ firmly placed PNR in the area of law enforcement and public security, and as result, any actions taken in this area are likely to set precedents for further community involvement in other law enforcement matters.

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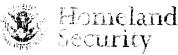
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TO:

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C 62 Memorandum

With The European Umon

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For flights between Europe and the U.S., the data must be made available from Europe. EU law has long prohibited the commercial export of personal data to countries whose legal protections are not "adequate" in the view of European data protection authorities. While the U.S. has many privacy laws, it does not have an overarching data protection regime that corresponds to every aspect of European law. It has therefore been viewed as "inadequate" by European standards, and commercial data transfers to the U.S. have long been restricted. European airlines feared (with reason) that European data protection agencies would view the PNR transfers in the same light and would impose fines and other penalties on airlines that provided the PNR data to the U.S. Government.

To ease these fears, in May 2004, the United States entered into an agreement with the EU regarding the transmission of PNR data from European air carriers to the USG. The Agreement is accompanied by a determination that [65 "adequate" by European standards as long as the US adheres to numerous detailed prescriptions worked out with EU negotiators (but unilaterally implemented by DHS).

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Derived from: Schneder MF, Seclassify on: Dec. 8, 2021

The PNR Agreement was also controversial in Europe. It was challenged by the European Parliament as insufficiently protective of EU privacy mights. On Mity 30 the European Court of Justice (ECI) struck down the Agreement. But it chose a ground that was highly procedural - the equivalent under US law of the Supreme Court dacking a Fourth Amendment challenge by finding a law invalid because it exceeded Congress's Commerce Clause power. Under EU law, commercial issues fall within the jurisdiction of the EU as par, of its "First Pillar" authority. This is the authority that the EU relied on in entering the Agreement. The ECI, however, held that the US wanted PNR data for law enforcement and public security reasons. Law enforcement and public security are only partly within the EU's authority; they fall under the "Third Pillar," where the authority of EU central institutions (the Commission, Parliament and Court of Justice) is more limited and more authority is left to the Member States. Because the agreement was entered under the wrong authority, the Court ruled it invalid but delayed the effective date of its accision until September 30 in the hope that the jurisdictional problem could be quickly solved. To cure the problem, the EU plans to seek authority from the Member States to renegotiate the PNR Agreement under the Third Pillar. The Commission has portrayed this as a technical change that would put the same agreement back in place, albeit under a different legal authority.

³ CBP can share PNR data with other law enforcement agencies, on a case-by-case basis and only for the purpose of combating terrorism and serious transnational crimes

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| () the EC-US PNR Ag | nts in Europe — the recent European Court of Justice decision on the legality of reement and a draft EU Framework Decision on Exchange of Criminal Data — ons for US law enforcement and security. | |
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| The most significant | of these limitations, from our perspective are the following: | |
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PNR can also be used and transferred to address significant health risks under Paragraph 34. As noted below, despite this authorization the EU's Article 29 Working Party has concluded that CDC's plans to retain PNR data for health-related purposes violates EU's av.

This concern is consistent with Executive Order 13388 and the President's Memorandum issued on December 16, 2006 to Heads of Executive Departments and Agencies on "Guidelines and Requirements in Support of Information Sharing Environment."

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| (u) | The ECJ PNR Case. The Agreement was no less controversial in Brussels. Disturbed over what it viewed as an attack on personal privacy and its own authority, the European Parliament (EP) filed two suits in the European Court of Justice (ECJ) challenging the information sharing arrangement. |
| (c) | b) |
| (u) | That is what the EU proposes to do. It is seeking authority to erect substantially the same agreement on a new foundation. In order to meet the European Court of Justice deadline, the Commission will seek to codify its position over the next couple of weeks and then will call for agreement on the new arrangement by September 30. |
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EU Proposals on Sharing Law Enforcement Information. If that were all that is at stake, this would be an interesting diplomatic and legal problem for DHS. But it is not. The PNR negotiations will be closely intertwined with a broader effort L.

Last October the EU put forward two draft documents that concern data sharing and protection in the law enforcement context. They consist of a draft Framework Directive of the European Parhament and Council on the retention of data and a proposed Council decision on the protection of personal data in criminal matters.

between Member States and third countries like the US.

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For example, the Draft Decision contains provisions on time limits for retention of shared data.

ensuring the accuracy of shared data, logging and audit mails, as well as restrictions limiting further use of the data to the original purpose for which it was first transmitted. In effect, it borrows heavily from the PNR Agreement and the Undertakings

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Communicable Diseases. L

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Description to another US initiative relating to avian flu. If air passengers are exposed to a pandemic strain of avian flu, the government will need to locate all of the passengers and crew, quickly. So the Centers for Disease Control has proposed a rule requiring airlines to retain PNR for up to 60 days for that purpose. The top data protection authorities of Europe, known as the "Article 29 Working Party," have now decided that this sort of data retention violates EU privacy directives. If given effect, the Working Party's opinion would place air carriers legal reopardy because of

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The adequacy finding granted to the U.S. was specific to the transfer of PNR data and only extended to its transmission to CBP. The May 30th decision of the ECJ also annuls this decision by the Commission on the grounds that the Commission did not have the legal authority to grant it

If adopted, the Draft Decision could conflict with a number of binding and non-binding information sharing arrangements that the United States has signed. For example, we have signed a 2003 Mutual Legal Assistance Agreement (MLAT) with the European Union and a 2001 information sharing agreement with

Europol (the EU-level police agency), with respect to member states, we signed a 2003 MLAT with Germany, which builds on numerous other MLATs already in force with other EU member states. The United States also has many executive agreements and memoranda of understanding with member states under which critical information is currently being shared. Under EU law, directives supersede bilateral treaties and agreements and member states must conform their existing agreements with the directive.



inconsistent legal régimes. It reflects a widespread EU view that privacy trumps even the critical public health interests of the United States. $^{\rm H}$

Analysis & Recommendation

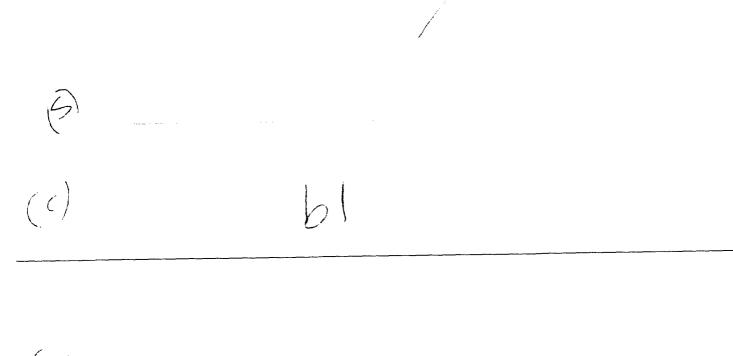
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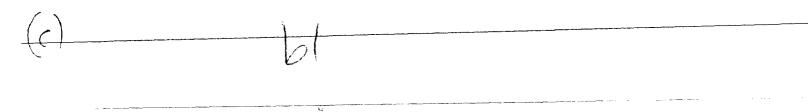
Onversely, Paragraph 34 of the Undertakings allows for the exchange of PNR for public health purposes and neither the Commission or the Article 29 Committee have challenged the DHS-HHS MOU

Unlike in 2003, this risk is present now because the Court has conclusively ruled that the transfer of PNR data is a law enforcement matter. While European integration has been the greatest in areas associated with the Common Market, law enforcement and public security is a relatively new area of activity at the community level and many responsibilities still fall to the EU Member States. The ECJ firmly placed PNR in the area of law enforcement and public security, and as result, any actions taken in this area are likely to set precedents for further community involvement in other law enforcement matters.

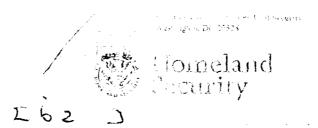


Conclusion

- The USG has a paramount interest in ensuring that law enforcement and border control information continues to flow to the United States. In creating the Information Sharing Environment we are working to break down walls that restrict the sharing of information between Federal agencies.
- The PNR Agreement that the US signed with the EU in 2004 is an example of the old-style artificial limitation. We entered into the PNR Agreement based upon the EU's argument that the export of commercial information was subject to special restrictions under EU law. The European Court of Justice has now held that the information is law enforcement information, not commercial information, so that the rationale for the agreement has now dissolved.



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Memorandum

TO:

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FROM:

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Passenger Name Records and Law Enforcement Information Sharing - Negotiations With The European Union

Purpose

To provide you with background information on the Passenger Name Record (PNR) issue and related developments concerning law enforcement information sharing with the European Union

Summary

(EU) in preparation for a mid-July "un-DC."

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| | institutions (the Commission, Parliament and Court of Justice) is more limited and more authority is | , | eleted: |
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| | from the Member States to renegotiate the PNR Agreement under the Third Pillar. The Commission has portrayed this as a technical change that would put the same agreement back in place, albeit under a different legal authority. | | elected: 65 |
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| | Background |
| (0) | Two converging events in Europe—the recent European Court of Justice decision on the legality of the EC-US PNR Agreement and a draft EU Framework Decision on Exchange of Criminal Data have major implications for US law enforcement and security. |
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| (V) | The most significant of these limitations, from our perspective are the following: • |
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| (0) | The ECJ PNR Case. The Agreement was no less controversial in Brussels. Disturbed over what it viewed as an attack on personal privacy and its own authority, the European Parliament (EP) filed two suits in the European Court of Justice (ECI) challenging the information sharing arrangement. | Deleted: |
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| (ŭ) | Acting under the First Pillar, the EU has also entered into a PNR sharing agreement with Canada. In light of the EU's determination that the US Undertakings provided "adequate" privacy protections, the EU-Canada agreement authorizes Canada to share PNR data received from the EU with the US. Even though the ECI has struck down the FU-US agreement, the EU contends that its similar agreement with Canada remains in effect. Some Canadian government sources are concerned, however, that the absence of an "adequacy" finding (which is a First Pillar concept) may now have the effect of prohibiting US-Canada information sharing derived from EU-originated flights. | |
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| (0) | EU Proposals on Sharing Law Enforcement Information. If that were all that is at stake, this would be an interesting diplomatic and legal problem for DHS. But it is not. The PNR negotiations will be closely intertwined with a broader effort. Lest October the EU put forward two draft documents that concern data sharing and protection in the law enforcement context. They consist of a draft directive of the European Parliament and Council on the retention of data and a proposed Council decision on the protection of personal data in criminal matters. Lest a state and third parties. | | Formatted: Not Highlight Deleted: 65 Deleted: 65 Deleted: 65 Deleted: 65 |
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| | For example, the Draft Decision contains provisions on time limits for retention of shared data. | | |
| (v) | ensuring the accuracy of shared data, logging and audit trails, as well as restrictions limiting further use of the data to the original purpose for which it was first transmitted—in effect, it borrows heavily from the PNR Agreement and the Undertaking's | | |

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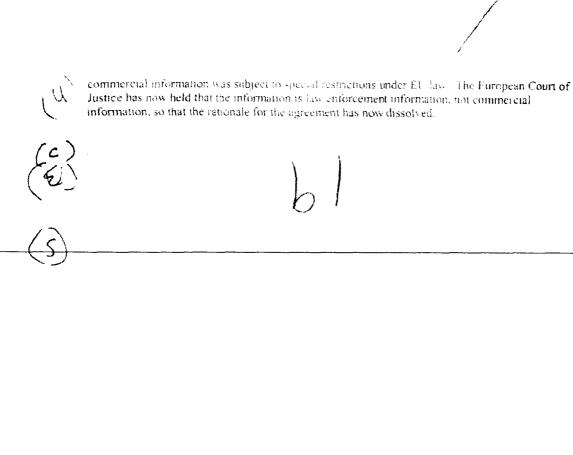
¹² Conversely, Paragraph 34 of the Undertakings allows for the exchange of PNR for public health purposes and neither the Commission or the Article 29 Committee have challenged the DHS-HHS MOU

Conclusion

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light and would impose times and other penalties on airlines that provided the PNR data

to the U.S. Government. L 65 Page 2: [3] Deleted sh 6/26/2006 10:50:00 AM 65 Page 2: [4] Deleted sb 6/26/2006 10:50:00 AM May 2004, the United States entered into an agreement with the EU regarding the transmission of PNR data from European air carriers to the USG. Page 2: [5] Deleted 6/26/2006 10:50:00 AM Page 2: [6] Deleted 6/26/2006 10:50:00 AM rage 2: [7] Deleted sb 6/26/2006 10:50:00 AM

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¹ CBP can share PNR data with other law enforcement agencies, on a case-by-case basis and only for the purpose of combating terrorism and serious transnational crimes.

insufficiently protective of EU privacy rights

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| | RE: | Passenger Name Recor With The European Ur | | ement Information | Sharing - Negotiations | | |
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Period from Echneider MFR Declassify on: Sept. 13 2022

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| (u) | Two converging events in Europe—the recent European Court of Justice decision on the legality of the EC-US PNR Agreement and a draft EU Framework Decision on Exchange of Commal Data base mojor implications Z 65 |
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| (11) | The most significant of these limitations, from our perspective are the following: |
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| (u) | EU Proposals on Sharing Law Enforcement Informatio | uments that concern data sharing and a draft directive of the European Council decision on the protection of |
| 1 | personal data in criminal maters, and - C 63 the exchange of law enforcement data between member sta | a proposed Council decision on les and third research |
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| (a) | For example, the Draft Decision contains provisions on time the accuracy of shared data, logging and audit trails, as well as restricting for which it was first transmitted. In effect it minimitations in the PNR Agreement and the Undertakings. | tions limiting further use of the data to the |

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| critical information agreements and m Unlike in 2003, data is a law enfort the Common Mark community level at the area of law enf | in is currently being shared. Under El Jaw, directives supersede by ember stated must contour, their existing agreements with the directivist is present new because the Court has conclusively raised the cement matter. White Furnipean insectation has been the greatest test, law enforcement and public security is a relatively new area of and many responsibilities still fall to the fill Member States. The Elorement and public security, and as reliable any actions taken in their community involvement in other, and onforcement matters. | that the transfer of PNR In areas associated with Factivity at the CU firmly placed PNR in |

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