**EXPLANATORY MEMORANDUM TO**

**THE AIR NAVIGATION (AMENDMENT) ORDER 2006**

**2006 No. 2316**

**1.** This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

## 2. Description

2.1 This Order empowers the Secretary of State for Transport to direct aircraft operators to make available certain data on passengers and crew to the authorities of a country outside the EEA to which the aircraft is being flown.

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

## 4. Legislative Background

4.1 Section 60 of the Civil Aviation Act 1982 enables an Order in Council to be made for the purpose of carrying out the Chicago Convention or generally for regulating air navigation. The present Order is made for the latter purpose, and in particular for securing the safety of aircraft and of people and property carried in aircraft, and for preventing aircraft endangering other people and property (section 60(3)(h). Making passenger and crew data available electronically to the authorities in another country for use by the security or border control services can assist in fighting terrorism and therefore securing aircraft safety.

4.2 The Order will enable the Secretary of State to make a direction to operators of aircraft being flown from the UK to a country outside the EEA, requiring them to make certain data in respect of passengers and crew available to the authorities of the foreign country. Those data will then be used for risk assessment and intelligence purposes to protect the people and property in the aircraft, and to protect other people and property from being endangered by the aircraft.

4.3 The need for this Order follows a judgment of the European Court of Justice on 30 May 2006[1], which struck down an agreement between the European Community and the United States of America on the transfer of Passenger Name Record (PNR) data from the EU to the USA. The ECJ found that the legal basis for the agreement was flawed but in order to maintain a period of legal certainty preserved the agreement until 30 September 2006.

4.4 The European Commission has responded to the ECJ's ruling by bringing forward an identical proposal, but based on a different legal basis, under the Justice and Home Affairs Title of the Treaty on European Union. Their aim is to ensure that the replacement agreement is in force by 30 September 2006.

[1] Judgment of the Court of Justice in Joined Cases C-317/04 and C-318/04

4.5 It is necessary to ensure that there is in place a domestic provision by which the new agreement, and any other similar agreement with a country outside the EEA, can be implemented in practice. (The old EU-US PNR agreement was directly applicable to Member States and did not require a similar implementing Order.) In the foreseeable future similar agreements are likely to be made with Canada and Australia. Canada has an EU level agreement that will need to be replaced because of the same legal difficulties referred to above. Australia has been negotiating an agreement with the EU on access to PNR data for some time. It is anticipated that other countries will introduce similar PNR requirements.

4.6 This Order comes into force on 30 September 2006 and it is intended that the Secretary of State's first direction will be with respect to data transfers to the USA.

4.7 Where operators are directed to transfer data under the Order it is considered that processing for the purposes of such transfers would be compliant with the first data protection principle in Schedule 1 to the UK Data Protection Act 1998. Because the transfer would be necessary for carrier's performance of their contracts with passengers it is considered that the eighth data protection principle does not apply to any such transfer.

## 5. Extent

5.1 This instrument applies to all of the United Kingdom.

## 6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 7. Policy background

7.1 Three countries – Australia, Canada, USA – have in place or are developing plans to require airlines to make available PNR data and it is expected that more countries will do so in the future. The UK also has the power to require access to PNR data. PNRs contain data about passengers collected by airlines for their own commercial and operational purposes but border control and security agencies have found that PNR data also provides useful material to assist in screening in-bound visitors.

7.2 Following the events of 11 September 2001, the USA was the first country to require by law access to airlines' PNR data, but found there was a conflict between their requirements and European Community law on data protection. Consequently an agreement was made in May 2004 between the European Community and the USA that PNR data transferred from the EU to the USA would be protected in accordance with undertakings given by the US Department of Homeland Security Bureau of Customs and Border Protection (CBP). The European Commission declared that those undertakings in the EU-US PNR agreement provided an "adequate" degree of protection for the data in terms of European data protection law.

7.3 The EU-US PNR agreement was subsequently found by the ECJ to have been made on an inappropriate legal basis, but a replacement agreement is currently being negotiated, as indicated above, which should be in place by 30 September 2006. That

agreement will oblige Member States to require aircraft carriers to provide PNR data to CBP.

7.4 Airlines and the relevant industry bodies have urged the Department to find a solution to the imminent loss of the legal basis for PNR data transfers following the ECJ ruling, so that there can be an obligation in UK law to transfer data where required by a foreign country. The industry has been consulted about the proposed Order and is supportive of it.

7.5 The Department has consulted: the two airline representative organisations in the UK – the British Air Transport Association and the Board of Airline Representatives UK (BARUK); UK airlines; and third country airlines that operate to the US (14 airlines in total). In addition the US Embassy was sent the consultation documents and they were forwarded to the US Air Transport Association.

7.6 One substantive response was received from BARUK, which triggered two subsequent comments from UK airlines.

7.7 BARUK sought clarification on some points of the draft Order. Their main point of concern was that the Order may give other countries the power to demand access to all data in their reservation systems, although some of those data were not readily accessible. The Department responded that the data required would be specified in the Directions for each separate country that required data. In addition the Secretary of State would need to be satisfied that appropriate measures would be taken to ensure the security of the data. In any event a Direction would only be made after extensive negotiations, generally at EU level, on an agreement on the handling of passenger data. The fine detail in the Directions would flow from those agreements.

## 8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has a negligible impact on business, charities or voluntary bodies.

8.2 There is no impact on the public sector.

## 9. Contact

**James Gilderoy** at the Department for Transport (Tel: 020 7944 5807 or e-mail: james.gilderoy@dft.gsi.gov.uk) can answer any queries regarding the instrument.