



**Joint Declaration between the Government of the Kingdom of the Netherlands and the Government of the United States of America concerning the interpretation of the Agreement on Enhancing Cooperation in Preventing and Combating Serious Crime**

The Government of the Kingdom of the Netherlands and the Government of the United States of America and (hereinafter referred to as “the two Governments”),

Desiring to enhance cooperation for the purpose of preventing and combating serious crime, while protecting human rights and fundamental freedoms, notably privacy,

Desiring to enter into force and implement expeditiously the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United States of America and on Enhancing Cooperation in Preventing and Combating Serious Crime, signed at The Hague, November 19, 2010 (hereinafter referred to as “the Agreement”),

Recognizing the completion of negotiations between the European Union and the United States of America on an agreement on the Protection of Personal Data when Transferred and Processed for the Purpose of Preventing, Investigating, Detecting or Prosecuting Criminal Offences, including Terrorism (hereinafter referred to as “the DPPA” or “umbrella agreement”),

Have come jointly to the following interpretations:

For purposes of this Joint Declaration, the two Governments refer to the parties to the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United States of America on Enhancing Cooperation in Preventing and Combating Serious Crime, signed November 19, 2010.

**I. Regarding Article 1, paragraph 5 of the Agreement**

The two Governments understand the Agreement to mean that a party may make a query only when the crimes giving rise to the inquiry are serious under the laws of the querying party; if there is a hit, the queried party determines if the crime is serious under its law



and if the data have been collected and stored in a database in accord with its national law. The queried party may refuse to provide further information if the crime is not serious or the data were unlawfully collected or stored. In the Netherlands “serious crime” means an offence for which pretrial detention is possible. In the United States of America “serious crime” means that the offence is a felony. In no event are crimes punishable by a maximum sentence of one year of imprisonment or less to be considered within the scope of the Agreement.

## **II. Regarding Article 2 of the Agreement**

The two Governments reaffirm that the use limitation that applies to the data transferred is set forth in Article 13 of the Agreement. Article 13 includes a reference to the limitations on use contained in the Agreement comprising the instrument as contemplated by Article 3(2) of the Agreement on Mutual Legal Assistance between the United States of America and the European Union signed at Washington on 25 June 2003, as to the application of the Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters signed at the Hague on 12 June 1981, signed at The Hague September 29, 2004.

The two Governments recognize that the uses authorized under Article 13 of the Agreement are all compatible with the original purpose of the Agreement as set forth in Article 2: prevention and investigation of serious crime. The two Governments confirm that the Agreement does not permit data to be used for any purpose other than those set forth in Article 13.

## **III. Regarding Article 3 of the Agreement**

The two Governments interpret the standard set forth in Article 3 to mean that queries can be made only on a case-by-case basis for the prevention and investigation of serious crimes. Article 3 specifically mandates that a query can take place only where particular circumstances give reason to inquire whether the data subject(s) will commit or has committed a criminal offence as set forth in the Agreement. The Agreement does not permit queries to be made arbitrarily, or without a basis in national law, or be based on unlawful discrimination.





#### **IV. Regarding Article 7, paragraph 3, third sentence of the Agreement**

The two Governments reaffirm that information exchanged between the Netherlands and the United States of America pursuant to the Agreement is to be used only in accordance with Article 13, paragraph 1 of the Agreement, and thus is to be used only in judicial proceedings of the querying party if the data obtained is supplied pursuant to a mutual legal assistance treaty request.

The two Governments recognize and confirm the continued application of the above mentioned mutual legal assistance treaty between the Kingdom of the Netherlands and the United States of America for transferring or providing evidence to be used in criminal proceedings. The two Governments further recognize that for police information regarding investigation and prevention of crimes, mutual legal assistance and other cooperation channels are to be used as authorized by the respective law of the Netherlands and the United States of America.

The two Governments recognize that for the purposes of implementing the Agreement, appropriate and effective safeguards in accordance with Article 13 of *the Council Framework Decision 2008/977/JHA* (Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters) have been established for the effective application of Article 7, paragraph 3, second sentence of the Agreement, regarding the use of legal assistance channels. These safeguards include as a prerequisite for data transmission to a non-EU state, that this state ensures an adequate level of protection for the intended data processing.

The two Governments intend to adopt an Interface Control Document pursuant to Article 7, paragraph 2 of the Agreement, and the two Governments intend that level of security to be comparable to that which is being implemented through EU Council *Decisions 2008/615/JHA* (“the Prüm Decision”) and *2008/616/JHA* (Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime). The two Governments intend to accomplish that comparable level of security through a combination of modern technologies, including encryption.





## **V. Regarding Articles 12 and 13 of the Agreement**

The two Governments understand that the text of Article 13, paragraph 4, second sentence of the Agreement is based on Article 26, paragraph 2, last sentence, of the aforementioned Prüm Decision (2008/615/JHA). Both articles concern the use of data for comparison or automated replies to searches (unless further processing is necessary to prepare and submit a police or judicial request for legal assistance in compliance with national law if those data match or if processing is necessary for record keeping and auditing). Aside from this type of use the two Governments understand that Article 13, paragraph 4, second sentence of the Agreement requires the data to be deleted immediately following data comparison or automated replies.

The two Governments recognize that the text in Article 12 of the Agreement is similar to Article 28, paragraph 3, sub (a) of the Prüm Decision. These texts regard a general rule on the protection of personal data, which is relevant apart from the comparison in search of a possible hit, notably in a later stage after the detection of a hit. In this phase data that have been supplied lawfully and received are to be deleted if they are no longer necessary for the purpose for which they were supplied.

The text also states that data is processed in accordance with the respective laws of the Netherlands and the United States of America, and the two Governments understand that data (other than the queried fingerprint or DNA profile) that is required to be stored for certain periods of time under national law are to be stored in accordance with that legal requirement.

The two Governments interpret the limitation of “so long as necessary” to mean as long as required under national law and when the data are no longer needed for the purpose they were supplied. Queried fingerprints or DNA-profiles however, are to be deleted immediately if there is no hit, and if there is a match they are kept only in accordance with Article 13, paragraph 4.

The two Governments interpret Article 13, paragraph 4, together with Article 12, paragraph 2 to mean that queried fingerprints and queried DNA profiles are to be deleted immediately if there is no hit, and if there is a match they are kept only in accordance with Article 13, paragraph 4 together with paragraph 3, to prepare follow up requests for information, to prepare a follow-up request for assistance or to conduct audits or record



keeping as required by the Agreement. The two Governments confirm that other data transferred pursuant to the Agreement is only kept so long as necessary in accordance with their respective national law.

## **VI. Regarding Article 14 of the Agreement**

The two Governments take note that individual rights of European data subjects concerning the processing of their personal data transferred on the basis of the Agreement, have been established in the following U.S. statutes and regulations:

Freedom of Information Act (FOIA), 5 U.S.C. 552

Computer Fraud and Abuse Act, 18 U.S.C. § 1030;

Fair Credit Reporting Act, 15 U.S.C. §§ 1681n;

Administrative Procedure Act, 5 U.S.C. §500 *et seq.*

Right to Financial Privacy Act, 12 U.S.C. §§ 3401 *et seq.*;

Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.*;

Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*;

eGovernment Act, 44 U.S.C. § 101, *et seq.*

Video Privacy Protection Act, 18 U.S.C. § 2710;

Drivers License Protection Act, 18 U.S.C. §§ 2721 *et seq*

49 U.S.C. § 44926 (appeal and redress process for passengers wrongly delayed or prohibited from boarding a flight).

28 C.F.R. Part 16, Subpart C, Production of FBI Identification Records

28 C.F.R. Part 16, Subpart A, Procedures for Disclosure of Records under the FOIA





The two Governments expect the DPPA, upon its entry into force, to supplement, as appropriate, the data protection provisions of the Agreement. Accordingly, the two Governments expect judicial redress as set forth in the DPPA and relevant U.S. law to be available to persons whose data are transferred pursuant to the Agreement, provided that the Netherlands is designated pursuant to that law.

The Agreement and this Joint Declaration are intended to be supplemented by the application of the DPPA concerning access to and rectification of data if and insofar as the DPPA enters into force, thereby reinforcing the rights of all data subjects whose data is transferred pursuant to the Agreement.

## **VII. Regarding necessity and proportionality standards**

In accordance with the Agreement, the two Governments intend to seek only information that is relevant and needed for the detection, investigation, and prevention of serious crimes. The two Governments are committed to the principle that all requests for data under the Agreement are to be reasonable in scope and related to a specific matter under examination by a competent authority, and carried out on an individual basis. The information requested is not to be excessive or overbroad in relation to the purposes of the Agreement.

The two Governments further understand that after a 'hit' on any fingerprint or on any DNA match, the queried party is to learn the reason for the query before any follow up data about the fingerprint or DNA match is transferred. The two Governments confirm that this procedure constitutes an appropriate safeguard against any unreasonable requests or requests that are not linked to a specific individual or criminal activity.



### VIII. Regarding Consultations

The two Governments intend to consult each other shortly after the Agreement has been operational for one year and regularly thereafter on the implementation of the Agreement. Consultations may also be held due to special circumstances.

The entry into force of the US-EU DPPA is an issue to be addressed by the two Governments in the framework of their regular consultations under article 21, paragraph 2, of the Agreement.

Signed in duplicate in the English language at Washington on April 19<sup>th</sup> 2016.

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Kingdom of the Netherlands

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