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EUROPEAN PARLIAMENT [redacted] EUROPAPARLAMENTET

COMISIÓN DE LIBERTADES Y DERECHOS DE LOS CIUDADANOS, JUSTICIA Y ASUNTOS INTERIORES

EL PRESIDENTE

M. Giuseppe GARGANI
Président de la commission
juridique et du marché intérieur
LOW T12036
STRASBOURG

Cher Président et cher Collègue,

la commission que j'ai l'honneur de présider vient d'être saisie d'une Proposition de Décision du Conseil concernant la conclusion d'un accord entre la Communauté européenne et les Etats-Unis d'Amérique sur le traitement et le transfert de données PNR par des transporteurs aériens au bureau des douanes et de la protection des frontières du ministère américain de la sécurité intérieure.

Ce texte constitue le corollaire indispensable d'un projet de Décision par laquelle la Commission entend déclarer comme adéquate la protection des données existante aux Etats Unis dans ce domaine. Lors du vote sur cette décision la plénière vient d'exprimer une série de réserves quant à la légitimité de ces propositions ainsi que de l'approche suivi par la Commission et le Conseil pour réglementer la question.

Dans cette perspective Je vous serais reconnaissant si vous pourriez inscrire d'urgence ce point à l'ordre du jour de votre commission afin d'examiner:

- si l'accord tel que proposé est compatible avec les dispositions des Traités, notamment pour ce qui est de la procédure de conclusion par simple consultation du Parlement au lieu de la procédure d'avis conforme prévue à l'article 300, 3ème paragraphe, 2ème alinéa du TCE;

- si par son contenu l'accord ne risque de porter atteinte à la protection du droit fondamental à la protection des données tel que garanti par le droit communautaire.

A' cet égard j'attire votre attention sur le fait que le Parlement s'est réservé de demander un avis à la Cour de justice sur la compatibilité de ce projet d'accord avec le Traité (art. 300 du TCE). De l'avis de LIBE la demande d'un tel avis préalable se justifie notamment en raison du fait qu'il est préférable de déceler toute vice de droit lors de la procédure interne menant à la conclusion d'un accord internationale au lieu d'en demander l'annulation par la suite. En effet l'annulation d'un Traité international en vigueur par voie de jugement d'une juridiction interne d'une des parties contractantes poserait des problèmes évidentes en droit international.

À tout fins utiles je me permet de vous annexer aussi une première analyse de l'accord effectuée par le secrétariat de la commission parlementaire.

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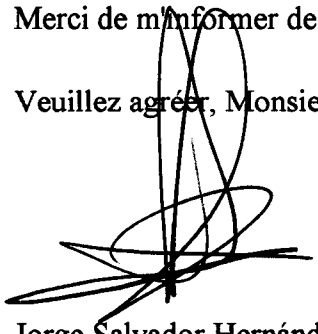
Merci de m'informer de la suite que votre Commission entend donner à cette demande.

Veuillez agréer, Monsieur le Président et cher collègue, l'expression de mes sentiments dévoués.



Jorge Salvador Hernández Mollar

Annexe

Note for the file

The EC/US "light" international agreement: first remarks

1. The explanatory statement of the draft Council Decision is rather elliptic on the reasons why an international agreement is needed for the issue of PNR. It only says that "*The latter is necessary to deal with such legal problems as are not addressed by the adequacy finding.*" The reasons are more clearly stated in a Commission Staff Working Paper ( ) which has been submitted to the Council and not transmitted to the EP (emphasis added):

" OBJECTIVES OF THE INTERNATIONAL AGREEMENT
There are two legal problems that need to be addressed in the international agreement.
Firstly, access by US law enforcement authorities to PNR databases situated on Community territory ('pull') amounts to exercise of US sovereign power in Community territory. *The exercise of extra-territorial authority is only possible under international law if there is consent. An international agreement would thus be required to authorise US authorities to pull PNR data from the EU, as long as a system whereby PNR data would be 'pushed' from the Community to the US is not in place.*
Secondly, Article 7 of Directive 95/46/EC establishes a list of circumstances under which, and only under which, personal data may be processed. *One of the circumstances foreseen (under paragraph (c)) is that processing be necessary for compliance with a legal obligation to which the controller is subject. However,* ***the legal obligations in question are understood to be those imposed by Community or Member States' law and not by a third country. Hence, an international agreement imposing an obligation on air carriers and CRS to process PNR data as required by CBP and TSA, insofar as they are covered by an adequacy finding,*** *would be an appropriate way of achieving the aim of providing a legitimate basis for air carriers and CRS to process data in accordance with Directive 95/46/EC.*

Beyond these concrete legal issues, the objective of this Agreement would also be to enshrine general principles such as non-discrimination (i.e. the way in which PNR data are used by the US should not unlawfully discriminate against EU passengers) and reciprocity (i.e. the Agreement should ensure reciprocal support from the US for any European passenger identification system that may be adopted in the future). In addition, the Agreement could incorporate the mechanism of joint reviews of the implementation of the US Undertakings on the protection of PNR data that has already been agreed with the US (as will be reflected in the US Undertakings)."

2. The most important point in this reasoning is the assumption that this international agreement could be considered by the airlines as a Community "legal obligation" under which, according to Article 7 (c) of Council Directive 95/46/EC they will be obliged to transfer (or give access to) the PNR data to the US administration. If this assumption is confirmed, the second main object of the agreement (the authorisation of the US administration to collect the data directly on the EC territory) could be considered as merely a procedural question.

3. Could this draft agreement be considered a valid legal obligation under Article 7 (c) of Directive 95/46/EC? If one looks at the form of the act, nobody can contest that a Community international agreement can create legal obligations and even modify, if necessary, the Directive itself, but if one looks at the content of the obligations set out in the draft Agreement, it is far from clear that they correspond to the obligations foreseen under Article 7 (c) of Directive 95/46.

In fact, the "obligation" to which the Article 7 of the Directive refers, has to be compliant with the principles outlined in Article 6 of the same Directive. According to Article 6 data must be *"...processed fairly and lawfully,... collected for specified, explicit and legitimate purposes and not*

further processed... adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed... accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified... kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processe..".
These principles **resume the jurisprudence of the Court of Justice and of the Court of Human rights in relation to data protection;** so, if they were taken up in the international agreement, nobody could contest that this solution would be sound both from a formal and from a substantive point of view. But none of these elements are enshrined in the draft agreement, which refers to the "adequacy finding" of the Commission, which itself refers to the "Undertakings" of the US administration, which furthermore refer to US legal statutes and regulations...

But as the Parliament stated several times :
- the "adequacy finding" itself could not be a legal basis for defining the level of protection inside the Union (if this was the case, the international legal agreement will no longer be necessary)
- the "Undertakings" of the US administration are not "legislative" in nature but are only administrative commitments (nor does their publication in the Federal Register make any difference in this respect)
- the US administration regulations to which reference is made in the Adequacy finding are not clearly defined, and can evolve under the discretionary powers of the US administration. Nor, for that matter, are the US statutes, also referred to in the Preamble to the draft Agreement, any further identified.

4. For these reasons, the EP's first concern could be that this "mirroring" technique between legal texts of different nature and sources is contrary to the general principles of transparency and rule of law on which the EU is founded (Article 6, para. 1 TUE).
But what is more worrying is that :
- the level of protection defined by the US administration will become a Community obligation *(in so far as the Commission does not suspend its "adequacy finding")*
- the real scope of the international agreement will evolve *following* the willingness of the US legislator and administration without any legally binding participation from the EC side (the Commission's delegated powers being only of administrative nature).

5. One can wonder whether by adopting such an agreement does not risk to undermine the protection of fundamental rights as it is regulated in the European Union by Directive 95/46/EC and by the principles outlined by the European Courts in Luxembourg and Strasbourg dealing with art. 8 of the European Convention of Human Rights. For this reason it could be envisagedto ask an opinion of the Court of Justice on the compatibility of the Agreement with the EC Treaty according to Article 300, para. 6 thereof, , as a precautionary measure, a step whichwould be highly advisable.
Another possibility, if the Parliament is convinced that there is ground to do so, would be to challenge before the Court the adequacy finding and the agreement after their adoption and to ask to the Court to suspend the application of these acts.

Even the procedure followed by the Council to consult the European Parliament instead of asking its assent could raise some concerns. The Treaty foresee sthe EP assent when an international agreement modifies an act which has been adopted under the codecision procedure; the light international agreement transfer sat Community level a Member State's discretionary

legal power to use for security purposes data that have been collected for commercial purposes. These powers are explicitly conferred on the Member States and not on the European institutions (art. 13th of the Directive). The draft International agreement amends the directive and therefore needs the assent of the EP for its conclusion. As the EP has only been consulted, the procedure can be challenged according to art. 230 of the EC Treaty before the Court of Justice for violation of the prerogatives of the EP.

All these possibilities have to be evaluated as soon as possible with the Legal Affairs Committee in accordance with art. 91 of our internal rules.

5. A general question still remains: if the Commission and the US administration agree on some common principles on data protection for security purposes, why are these principles not enshrined in the international agreement itself and are hidden behind unilateral declarations?

EDC / 31st March 2004

ANNEX

Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection

THE EUROPEAN COMMUNITY AND THE UNITED STATES OF AMERICA,

TEXT	REMARKS
Recognizing the importance of respecting fundamental rights and freedoms, notably privacy, and the importance of respecting these values, while preventing and combating terrorism and related crimes and other serious crimes that are transnational in nature, including organized crime;	" terrorism and related crimes" and "other serious crimes that are transnational in nature" are rather generic descriptions. A reference to the (already signed) EU/US agreement on extradition and mutual cooperation in judicial matters would be a more precise reference.
Having regard to U.S. statutes and regulations requiring each air carrier operating passenger flights in foreign air transportation to or from the United States to provide the Department of Homeland Security (hereinafter, "DHS"), Bureau of Customs and Border Protection (hereinafter "CBP") with electronic access to Passenger Name Record (hereinafter "PNR") data to the extent it is collected and contained in the air carrier's automated reservation/departure control systems;	To which current and future US statutes and regulations does it refer?
Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and in particular Article 7(c) thereof;	Why is reference only made to art. 7 c (legal obligation) and not to art. 6 (quality data) and art. 13 (exceptions for security purposes) of the same directive?
Having regard to the Undertakings of CBP issued on ... 2004, which will be published in the Federal Register (hereinafter "the Undertakings");	The publication on the federal register does not change the administrative nature of the text and does not render it legally binding.
Having regard to Commission Decision ... adopted on ...., pursuant to article 25(6) of Directive 95/46/EC, whereby CBP is considered as providing an adequate	The links between this agreement and the Commission decision are not clear neither as regards the content nor the legal status of these acts. The signatories accept to

level of protection for PNR data transferred from the European Community (hereinafter "Community") concerning flights to or from the U.S. in accordance with the Undertakings, which are annexed thereto (hereinafter "the Decision");	be bound by unilateral decision from their counterpart (!?)
Noting that air carriers with reservation/departure control systems located within the territory of the Member States of the European Community should arrange for transmission of PNR data to CBP as soon as this is technically feasible but that, until then, the US authorities should be allowed to access the data directly, in accordance with the provisions of this Agreement;	Could a Community act create an exception to the principle of territoriality of the Member States in relation to a question of public security?
Affirming that this Agreement does not constitute a precedent for any future discussions and negotiations between the United States and the European Community, or between either of the Parties and any State regarding the transfer of any other form of data;	
Having regard to the commitment of both sides to work together to reach an appropriate and mutually satisfactory solution, without delay, on the processing of Advance Passenger Information (API) data from the Community to the U.S.;	Would it not have been more logical to start with the API system and possibly deal with the PNR only in a second phase?
HAVE AGREED AS FOLLOWS: 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 transmission of such data by the air carriers.	"extraterritorial" exception for US administration, see remarks above
2. Air carriers operating passenger flights in foreign air transportation to or from the United States shall process PNR data contained in their automated reservation systems as required by CBP pursuant to US law and strictly in accordance with the Decision and for so long as the Decision is applicable.	As a result of this article, airlines will be bound for US transatlantic flights by the US legislation and by the Community rules for all the other flights.
3. CBP takes note of the Decision and states that it is implementing the Undertakings annexed thereto.	The consequences of this article are far from clear.
4. CBP shall process PNR data received and treat data subjects concerned by such processing in accordance with applicable U.S. laws and constitutional requirements, without unlawful discrimination, in particular on the basis of nationality and country of residence.	What is the added value of such a statement from an EU perspective, for instance, as far as the Privacy Act is concerned?
5. CBP and the European Commission shall jointly and regularly review the implementation of this Agreement.	The Member States, through their national data authorities, should be mentioned explicitly.

6. In the event that an airline passenger identification system is implemented in the European Union which requires air carriers to provide authorities with access to PNR data for persons whose current travel itinerary includes a flight to or from the European Union, DHS shall, in so far as practicable and strictly on the basis of reciprocity, actively promote the cooperation of airlines within its jurisdiction	The legal value of this article is questionable.
7. This Agreement shall enter into force upon signature. Either Party may terminate this Agreement at any time by notification through diplomatic channels. The termination shall take effect ninety (90) days from the date of notification of termination to the other Party. This Agreement may be amended at any time by mutual written agreement.	From the EC point of view, the agreement could only enter into force with the Council decision adopting it.
8. This Agreement is not intended to derogate from or amend legislation of the Parties; nor does this Agreement create or confer any right or benefit on any other person or entity, private or public.	The real meaning of this article is far from clear.
Signed at ……, on…… This Agreement is drawn up in duplicate in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic. In case of divergence, the English version shall prevail.... (Signatures)	

15. Les services compétents de la Commission assistent le Contrôleur européen de la protection des données pour l'interprétation, et la mise à disposition de salles de réunion pour des manifestations publiques organisées par le Contrôleur européen de la protection des données.

16. La Commission assiste sur le plan technique le Contrôleur européen de la protection des données pour l'établissement et l'exécution du budget de la section VIII/b du budget général de l'Union et de tout budget rectificatif à compter du présent exercice budgétaire. Cette assistance administrative est fournie dans le respect des procédures en vigueur établies dans chaque domaine et tenant compte de la nécessité d'une programmation et d'une identification des besoins éventuels.

Le Service Financier Central de la Commission fournit une assistance d'information au Contrôleur européen de la protection des données.

17. Pour une période de cinq ans à partir de la date de signature du présent accord, l'Auditeur interne et le Comptable de la Commission exerceront leurs fonctions respectives au titre du budget et du Contrôleur européen de la protection des données. Cette période peut être raccourcie conformément aux dispositions de l'article 20 **[décision des SG requise]**.

18. Le Contrôleur européen de la protection des données arrête à cet effet les actes appropriés.

19. Pendant la durée de cet accord, toute question nécessitant de plus amples précisions devra faire l'objet d'une communication écrite à l'ensemble des parties prenantes. Les dispositions ad hoc qui seraient à prendre d'un commun accord feront partie intégrante de cet accord de coopération.

20. Le présent accord entre en vigueur le jour de sa signature. Il peut être révisé à la demande écrite et motivée d'une des parties prenantes à la deuxième date anniversaire de sa signature.

Le Secrétaire général du Parlement européen	Le Secrétaire général adjoint du Conseil de l'Union	Le Secrétaire général de la Commission

Le Contrôleur européen de la protection des données

Fait à Bruxelles, le