



## **BACKGROUND NOTE ON THE TRANSFER OF PNR DATA CASE**

### **I. INTRODUCTION**

1. In its Resolution of 31 March the EP considered that the importance of the matter of the protection provided for personal data contained in the Passenger Name Records transferred to the US called for an international agreement with due respect for fundamental rights (point 2) and reserved the right to bring an action before the Court of Justice in order to seek "verification of the legality of the projected international agreement and, in particular, the compatibility thereof with the protection of fundamental rights" (point 8) and "reserves the right to appeal to the Court of Justice should the Draft decision be adopted by the Commission" (point 7).
2. In the meantime the EP sought, on the recommendation of its JURI committee, the opinion of the ECJ on the EU-US agreement. After the last May plenary, the President addressed two letters to the Commission and the Council explaining that the adoption of the agreement and the decision would be unacceptable for Parliament.
3. The agreement was nevertheless signed on 28 May in Washington disregarding the petition made expressly by Parliament to wait the opinion of the Court of Justice under Article 300 (6). The Commission's Decision had been adopted on 14 May and the Council decision on the agreement was adopted on 17 May.
4. An extraordinary meeting of the JURI committee has been convened on Wednesday 16 June 2004 in order to provide the EP President, prior to the meeting of the Conference of Presidents which is scheduled later the same day, with the committee's recommendation pursuant to Rule 91 on the appropriateness to bring an action against the Council and/or the Commission for review of the legality of the Council decision concerning the conclusion of the agreement on the transmission of personal data of air transport passengers to third countries and the Commission decision on adequacy finding.

### **II. COMMISSION DECISION C/2004/1914 OF 14 MAY 2004 ON THE ADEQUATE PROTECTION OF PERSONAL DATA CONTAINED IN THE PNR OF AIR PASSENGERS TRANSFERRED TO THE US BUREAU OF CUSTOMS AND BORDER PROTECTION (CBP)**

**Object :** to consider the CBP, for the purposes of Article 25(2) of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, as providing an adequate level of protection for PNR data transferred

from the EU concerning flights to or from the US, in accordance with the Undertakings annexed to this decision.

**Legal base :** Article 25 (6) of the above-mentioned Directive that enables the Commission to take such adequacy decisions (with a comitology procedure).

**Possible appeal :** annulment procedure of Article 230 EC Treaty. Since the Commission decision has not yet been published in the Official Journal nor notified to the Member States, which are starting points for the deadline to bring an action, this deadline is still unknown.

**Arguments to bring an action :**

- the decision is not compatible with the fundamental right of protection of the private life (that includes the protection of personal data), laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which is part of the Community legal order. This includes the respect of the principles of proportionality and necessity and of the 'democratic society criterion'<sup>1</sup> ;
- the Commission cannot derogate by an implementing decision from the provisions of the directive

<b>III. THE COUNCIL DECISION OF 17 MAY 2004 ON THE CONCLUSION OF AN AGREEMENT BETWEEN THE EC AND THE USA ON THE PROCESSING AND TRANSFER OF PNR DATA BY AIR CARRIERS TO THE US DEPARTMENT OF HOMELAND SECURITY, BUREAU OF CUSTOMS AND BORDER PROTECTION</b>
--

**Legal base :** Article 95 and Article 300 (2) EC Treaty.

**Possible appeal :** annulment procedure of Article 230 EC Treaty.

Since the Council decision was published in the OJ of 20 May 2004, the deadline to bring an action is 3 August 2004.

The opinion on the compatibility of this Council decision with the Treaty that the EP was seeking from the Court of Justice according to Article 300 (6) EC Treaty has according to previous case law of the Court lost its relevancy now that the Council has actually taken the decision on the conclusion of this agreement between the EC and the USA. According to the same case law in such circumstances an annulment procedure can be introduced

**Arguments to bring an action :**

- the decision is not compatible with the fundamental right of protection of the private life (that includes the protection of personal data), laid down in Article 8 of the ECHR which is part of the Community legal order;
- the procedure for adopting the international agreement was not appropriate (violation of forms and of EU law)

Frank Ingelaere 15/06/04

---

<sup>1</sup> Article 8(2) of the ECHR as interpreted by the European Court of Human Rights allows interference in private life only where it is provided for by law, where it is necessary in a democratic society to the pursuit of legitimate aims and where it is not disproportionate in relation to the objective pursued.