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Press and Information

PRESS RELEASE No 98/05

22 November 2005

Opinion of the Advocate General in Cases C-317/04 and C-318/04

*European Parliament v Council of the European Union
and European Parliament v Commission of the European Communities*

**ADVOCATE GENERAL LÉGER PROPOSES ANNULMENT OF THE
COMMISSION AND COUNCIL DECISIONS ON TRANSFER TO THE AMERICAN
AUTHORITIES OF PERSONAL INFORMATION CONCERNING AIR
PASSENGERS**

In his view, neither the Council decision approving the agreement nor the Commission decision holding that information to be sufficiently protected by the United States have an adequate legal basis.

Following the terrorist attacks of 11 September 2001, the United States adopted legislation to the effect that airlines carrying passengers to, from or across United States territory are required to give the American authorities electronic access to the data contained in their system for controlling and monitoring departures (Passenger Name Records).

Taking the view that those provisions might conflict with Community and Member State legislation on the protection of personal data, the Commission began negotiations with the American authorities. At the conclusion of those negotiations, on 14 May 2004, the Commission adopted a decision¹ (the adequacy decision), holding that the United States Bureau of Customs and Border Protection (CBP) offered a sufficient level of protection for personal data transferred from the Community. On 17 May 2004, the Council adopted a decision² approving the conclusion of an agreement between the European Community and the United States on the transfer of data from Passenger Name Records by airlines established in the territory of Community Member States to the CBP. The European Parliament has asked the Court of Justice of the European Communities to annul the Council's decision (Case C-317/04) and the adequacy decision (Case C-318/04).

¹ Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection (OJ 2004 L 235, p. 11)

² Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an 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 (OJ 2004 L 183, p. 83)

In his Opinion today, Advocate General Philippe Léger proposes that the Court should annul those two decisions

The adequacy decision

The Advocate General examines first whether the adequacy decision could be validly based on Directive 95/46³, which is designed to remove obstacles to the free movement of personal data by making the level of protection of the rights and freedoms in relation to those data equivalent in the Member States. He finds that that directive does not apply to the processing of personal data undertaken in pursuance of activities that do not fall within the scope of Community law, particularly the processing of such data for such matters as public security and the activities of the State in relation to areas of criminal law.

Advocate General Léger considers that consultation of air passengers' data, and those data being put at the disposal of, and used by, the CBP, constitutes the processing of personal data concerning public security and the activities of the State in relation to areas of criminal law. Such activity is therefore outside the scope of Directive 95/46. He therefore finds that that directive did not give the Commission the power to adopt a decision concerning the appropriate level of protection for personal data transferred in the context of and with a view to processing expressly excluded from the scope of that directive. The Advocate General therefore concludes that the adequacy decision infringes the underlying measure, namely Directive 95/46, and proposes that the Court should annul that decision.

The Council's decision

Advocate General Léger then examines whether Article 95 EC, which concerns the adoption of measures for approximating the legal, regulatory and administrative provisions of Member States which have as their object the establishment and functioning of the internal market, is an appropriate legal basis for the Council's decision. Examination of the aim and the content of the agreement with the United States, approved by the Council's decision, leads the Advocate General to conclude that it simultaneously pursues two objectives: the fight against terrorism and other serious crime and the protection of personal data. He therefore considers that Article 95 EC does not constitute an appropriate legal basis for the Council's decision and proposes that the Court should annul it.

However, examining the Parliament's other pleas only in the alternative, he considers that those pleas, concerning the procedure for consulting the Parliament and infringement of the right to respect for private life, are unfounded.

REMINDER: The Opinion of the Advocate General is not binding on the Court of Justice. The task of the Advocates General is to propose to the Court, entirely independently, a legal solution in the case submitted to them. The judges of the Court of Justice of the European Communities are now starting to deliberate in this case. The judgment will be delivered at a later date.

³ 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 (OJ 1995 L 281, p. 31)

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Languages available: FR, DE, EN, ES, IT, HU, SL, CS, PL, SK

The full text of the Opinion may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day of delivery.

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*Pictures of the delivery of the Opinion are available on EbS "Europe by Satellite",
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