



A *Statewatch* analysis: no 2

US letter from Bush to EU, 16.10.01

- a sweeping agenda covering unregulated and unaccountable powers affecting criminal investigations, suspects' rights, the retention of telecommunications data, border controls and asylum policies

- introduction, text of letter, analysis of implications and secret meeting

Introduction

In a letter to the European Commission (16.10.01) US President, Mr Bush, has presented a lengthy list of more than 40 demands to the European Union for cooperation on anti-terrorism measures. Some do concern anti-terrorism, but many do not - covering criminal investigations, data surveillance, border controls and immigration policies.

The letter addressed to Mr Romano Prodi, the President of the European Commission, from the US President Bush includes a demand that "data protection issues in the context of law enforcement and counter-terrorism imperatives" should be considered and that: "draft privacy directives that call for mandatory destruction to permit the retention of critical data for a reasonable period" should be revised. A US official is quoted as saying that: "This is not an US-EU issue, it is more a question of law enforcement versus a strict interpretation of civil liberties". **But under United States law there is no similar obligation for the general data retention by telecommunications companies.**

The EU data protection directives, and the data protection rules in the Schengen Convention, the Europol Convention, the Customs Information System Convention and the EU Mutual Assistance Convention, already grant extensive derogations from their rules to facilitate law enforcement. Similarly, Article 8 ECHR and the Council of Europe data protection Convention also contain provisions permitting expedited exchange of data by law enforcement agencies.

But the US is not a signatory to any of these instruments.

Under the heading "police and judicial cooperation" the US wants EU:

"police authorities and local magistrates of member and accession states to deal directly with US law enforcement authorities" (emphasis added)

and:

"Whenever possible, permit urgent MLAT requests to be made orally, with follow-up by formal written requests".

Exchanging information solely on the basis of an oral request runs a huge risk that law enforcement authorities will act illegally, if the information is transmitted before the written request is received. This system will also make prior judicial or other official supervision of the legality execution of requests effectively impossible. **These proposal would give unacceptable powers of "self-regulation" to law enforcement agencies.**

On border controls and migration the US makes some extraordinary proposals. First to:

"Explore alternatives to extradition including expulsion and deportation, where legally available and more efficient".

***Statewatch* monitoring the state and civil liberties in the EU**

It is manifestly clear from the case law of the European Convention of Human Rights that it is a breach of the ECHR to use expulsion or deportation proceedings as "disguised" extradition proceedings (Bozano v France (A 111, 1986)).

Second, to: "Establish procedures to share information on immigration lookouts for individuals associated with terrorist organisations". The Schengen Information System is not open to non-Schengen states, and is subject to detailed data protection safeguards. And, third to:

"Improve cooperation on the removal of status violators, criminals and inadmissibles."

There is no reference to the Geneva Convention on refugee status, Articles 3 and 8 ECHR or the UN Convention against Torture, all of which impose limitations on such removals. The demand refers to the "removal" from the US and the EU to the third world of "inadmissibles", a term which has little or no legal meaning. The demand is also clearly not limited to "terrorism" unless it is assumed that "status violators", criminals in general, and so-called "inadmissibles" are all potential terrorists.

Tony Bunyan, Statewatch editor, comments:

"When the US letter was received the European Commission said most of the demands could be met. It is hard to see how many of them could be "met" without abandoning fundamental protections and rights under EU Directives, the European Convention of Human Rights and a number of EU Conventions.

Many of the demands are nothing to do with combating terrorism and would lead to unregulated and unaccountable cooperation and exchanges of data affecting suspects' rights and the rights of asylum-seekers and refugees."

Full text of US letter to the EU

UNITED STATES MISSION
TO THE EUROPEAN UNION

16 October 2001-10-26

Dear President Prodi,

I have the honour to transmit to you, from President Bush, a list of proposed actions that the European Union might undertake to help the United States in the international effort against terrorism. This letter is in response to the request made by Belgian Prime Minister Verhofstadt during the Summit meeting in Washington on 27 September. The list includes suggestions to intensify cooperation in the areas of terrorist financing, law enforcement, non-proliferation, border controls, transport security and multi-lateral/diplomatic support.

The US Government deeply appreciates the offer of the European Union to work closely with us against the scourge of terrorism, and hopes that this list will provide a good basis for future discussion and cooperation.

Sincerely,

James J Foster, Deputy Chief of Mission

Mr Romano Prodi, President, Commission of the European Communities, Brussels

PROPOSALS FOR US-EU COUNTER-TERRORISM COOPERATION

Suppression of Terrorist Financing

- Share with the United States and among member and accession states, through established financial, intelligence and law enforcement channels, all possible information regarding financial activities or accounts of terrorists.
- Expand focus of Financial Action Task Force (FATF), and the Egmont Group of Financial Intelligence Units to include financial flows to terrorists.
- Implement fully UNSC Resolution 1333 targeted at the Taliban and UNSC Resolution 1373.
- Ratify the UN Convention for the Suppression of the Financing of Terrorism.
- Adopt draft EU Directive on prevention of the use of the financial system for money laundering and the framework decision on the execution in the EU of orders freezing assets or evidence (the scope of which should be extended to terrorist related crimes).
- Block activities linked to terrorism within the framework of the draft EU Directive on insider trading currently under discussion in the EU Council.
- Reinforce exchange of information between financial intelligence units in EU member states to enhance ability to take preventative action against terrorism.
- Ask that future members (i.e. candidate countries, Association Agreement countries, others) undertake the above commitments now
- Provide assistance to candidate countries in setting up financial control and tracking systems to implement these commitments.

Police and Judicial Cooperation

- Authorize and encourage police authorities and local magistrates of member and accession states to deal directly with U.S. law enforcement authorities.
- Revise the EU draft framework decision on recognition of arrest warrants to eliminate discrimination against United State and third countries' extradition requests to member states.
- Mandate EU extradition of nationals for terrorist offences and urge member and accession states to remove remaining "political offense" defenses to extradition in terrorism cases.
- Explore alternatives to extradition including expulsion and deportation, where legally available and more efficient.

Mutual Legal Assistance

- Permit expedited access to critical bank records and other financial records in member states.
- Whenever possible, permit urgent MLAT requests to be made orally, with follow-up by formal written requests.
- Overcome dual criminality obstacles to the rendering of mutual legal assistance.

Data protection

- Consider data protection issues in the context of law enforcement and counterterrorism imperatives.
- Establish adequate capabilities for investigating terrorism cases that involve the use of the internet.
- Revise draft privacy directives that call for mandatory destruction to permit the retention of critical data for a reasonable period.

Europol

- Make available to the United States all information, including information on individuals, that Europol may have on relevant terrorist cases, and subsequently broaden such cooperation to other criminal cases.
- Encourage exchanges of information at both the bilateral and Europol level

Eurojust

- Share with U.S. authorities summaries of terrorism cases that are within the Provisional Eurojust Docket and updates thereto.

Export control/Nonproliferation

- Ensure that EU aspirants set up and enforce effective export control systems. (Cyprus and Malta are particularly problematic transshipment states.)
- Improve detection and prosecution of front companies and entities involved in the export or transshipment of sensitive items to countries, programs, and end-users of concern, and block related brokering activities.
- Put in place consistent catch-all controls to deny dual-use equipment to end-users in countries that harbor terrorists.
- Coordinate more closely with the United States on export control assistance to supplier countries, key transshipment states, and countries in the former Soviet Union.
- Participate with the United States in a program to enhance export and border controls in Central Asia.
- Increase EU assistance to Russia, the Newly Independent States, and other at-risk states to help control, protect, and account for sensitive chemical, biological, radiological, and nuclear facilities and material.
- Increase EU voluntary contributions to the IAEA for its nuclear safeguards and material protection programs.
- Develop U.S.-EU cooperative measures to forestall intangible transfers of technology and expertise (inadvertent transfer of weapon-related knowledge through training, conferences, exchanges, etc.)

Border controls

- Establish procedures to share information on immigration lookouts for individuals associated with terrorist organizations.
- Explore ways to strengthen transit procedures to combat terrorism.
- Coordinate external U.S.-EU cooperation projects in the area of border security.
- Coordinate U.S. and EU efforts to encourage other nations to utilize secure, machine-readable passports and visas and explore further use of biometrics.
- Inform the United States and other key partners when a breach of passport or visa security has been detected (especially when passport blanks are lost).
- Coordinate efforts to train airline or other appropriate personnel on false documents.
- Improve cooperation on the removal of status violators, criminals and inadmissibles.

Aviation, transport and security

- Ensure implementation of international aviation security measures imposed in the United States after September 11.
- Support the ICAO Assembly resolution on Airline Security currently being negotiated in Montreal, including a strong action plan to prevent, combat, and eradicate this new threat to civil aviation.
- Work with the United States in ICAO on ways to enhance aviation security and anti-terrorism measures in aviation.
- explore other areas for discussion and cooperation in ICAO, such as: (a) a review of Annex 17 to the Chicago Convention; (b) cockpit security; (c) training and techniques for airport security screeners; (d) enhanced technical detection systems; improved security for airport Identification cars.

Multilateral and Diplomatic Support

- Join with the United States in concerted financial, economic and political isolation of states that continue to harbour terrorists.
- Support U.S. position at the General Assembly plenary debate on terrorism; avoid in particular a divisive debate on defining terrorism
- Take steps, including establishment of a UNSC committee to ensure global implementation of UNSCR 1373 requirement
- Ratify all UN conventions on terrorism. Member States should consider whether they can begin implementing even before ratification
- Provide humanitarian support for Afghan refugees, including through appropriate UN agencies
- Provide specific diplomatic support, including with those countries with which the United States does not have direct diplomatic relations.

Statewatch Analysis of the PROPOSALS FOR US-EU COUNTER-TERRORISM COOPERATION

Comments, where relevant, on the implications for civil liberties, human rights, data protection and accountability are in *italics*

Suppression of Terrorist Financing

- Share with the United States and among member and accession states, through established financial, intelligence and law enforcement channels, all possible information regarding financial activities or accounts of terrorists.

There is no explicit reference to data protection and other safeguards which must apply when sharing such information. In particular, Article 8 ECHR, the Council of Europe data protection convention and EU data protection measures may limit the sharing of such data if the US does not have adequate data protection standards

- Implement fully UNSC Resolution 1333 targeted at the Taliban and UNSC Resolution 1373.

The EU has implemented the additional sanctions imposed by the Security Council via recent adoption of Commission Regulations.

- Adopt draft EU Directive on prevention of the use of the financial system for money laundering and the framework decision on the execution in the EU of orders freezing assets or evidence (the scope of which should be extended to terrorist related crimes).

It should not be forgotten that the EU has had a directive to prevent money laundering since 1991; the recent proposal was intended to amend the existing Directive. While the EP and Council have now reached agreement on this proposed amendment, its explicit extension to terrorism is to be asserted in a declaration of the Commission and the Council. According to consistent case law of the Court of Justice, such declarations are not relevant when interpreting EU legislation.

Article 2(g) of the draft framework decision on freezing assets or evidence refers to freezing funds in connection with "terrorism", but offers no common definition of the term, even by reference to other instruments (doc. 12445/01).

- Block activities linked to terrorism within the framework of the draft EU Directive on insider trading currently under discussion in the EU Council.

No evidence has ever been presented to indicate that any "terrorist" groups were engaged in insider trading in September 2001. It is not at all clear how such activities could be identified and "blocked", as distinct from other measures taken to prevent and punish insider trading. Again, it should be recalled that EC legislation to prevent and punish insider trading was adopted in 1989; the current proposal is intended to update that legislation.

- Reinforce exchange of information between financial intelligence units in EU member states to enhance ability to take preventative action against terrorism.

There is no reference to data protection safeguards.

- Ask that future members (i.e. candidate countries, Association Agreement countries, others) undertake the above commitments now

All of the applicant countries are also bound by Article 8 ECHR, and most have also ratified the Council of Europe data protection Convention.

Police and Judicial Cooperation

- Authorize and encourage police authorities and local magistrates of member and accession

states to deal directly with US law enforcement authorities.

There is no reference to procedures to ensure data protection and the legality and accountability of such contacts, and to provide for liability in the event of illegal conduct, as provided for in the Schengen Convention and the EU Mutual Assistance Convention as regards direct contacts between police and judicial authorities in the EU.

It appears to be a general demand for cooperation and not one limited to terrorism.

- Revise the EU draft framework decision on recognition of arrest warrants to eliminate discrimination against United State and third countries' extradition requests to member states.

This request is based on a wholly false presumption. The proposed Framework Decision would replace the Council of Europe European Convention on Extradition (ECE) with a "backing of warrants" system, as the ECE provides. It would operate by means of sending arrest requests through the Schengen Information System. The case for greatly simplifying extradition proceedings between Member States is based on the shared ratification of the European Convention on Human Rights (ECHR) and the protection of human rights as one of the general principles of EU law, in particular the abolition of the death penalty by all Member States (as confirmed by a Declaration to the Treaty of Amsterdam).

The United States is not a signatory to the ECE, the Schengen Convention or the ECHR, is not a Member State of the EU, and most significantly, has not abolished the death penalty. There is no "discrimination" against United States or other third-country warrants because the United States and other third countries (except Norway and Iceland) are not in the same situation as Member States.

- Mandate EU extradition of nationals for terrorist offences and urge member and accession states to remove remaining "political offense" defenses to extradition in terrorism cases.

The logic of proposing, in the draft framework decision on arrest warrants, that Member States must allow extradition of their own nationals to other EU Member States, is that there is a common "citizenship of the Union" created by the EU Treaty, and that there is a common commitment to the ECHR, including its Sixth Protocol entailing complete abolition of the death penalty. These considerations do not apply to third states, in particular third states which apply the death penalty.

The "political offence" exception was removed for persons carrying out specified and precisely defined violent "terrorist" offences in the Council of Europe Terrorism Convention of 1977, which has been ratified by all Member States. There are exceptions to this Convention, but they are applied stringently in the EU, by virtue of the 1996 extradition convention between the EU Member States. So, within the EU, the "political offence" exception only remains for those persons being persecuted solely on grounds of their opinions or beliefs. There is no convincing case for removing this remaining protection, which is in any event closely connected with the right to asylum.

There is no consideration of the alternative "extradite or prosecute" approach to these issues.

- Explore alternatives to extradition including expulsion and deportation, where legally available and more efficient.

It is manifestly clear from the case law of the European Convention of Human Rights that it is a breach of the ECHR to use expulsion or deportation proceedings as "disguised" extradition proceedings (Bozano v France (A 111, 1986).)

Mutual Legal Assistance

- Permit expedited access to critical bank records and other financial records in member states.

Exchange of this information between Member States will be greatly expedited by the recently signed protocol to the EU Mutual Assistance Convention. Member States are bound by the data

protection provisions of that Convention, Article 8 ECHR and the Council of Europe Convention on data protection, and it is doubtful that it would be legal to exchange such data with third states which do not observe equivalent standards.

- Whenever possible, permit urgent MLAT requests to be made orally, with follow-up by formal written requests.

Exchanging information solely on the basis of an oral request runs a huge risk that law enforcement authorities will act illegally, if the information is transmitted before the written request is received. This system will also make prior judicial or other official supervision of the legality execution of requests effectively impossible.

This proposal would give unacceptable powers of "self-regulation" to law enforcement agencies.

- Overcome dual criminality obstacles to the rendering of mutual legal assistance.

Between EU Member States, there is only a dual criminality requirement as regards search and seizure requests in the context of mutual legal assistance. Since search and seizure requests involve coercive action similar to arrest and extradition, this limitation is appropriate.

Data protection

- Consider data protection issues in the context of law enforcement and counter-terrorism imperatives.

The EU data protection directives, and the data protection rules in the Schengen Convention, the Europol Convention, the Customs Information System Convention and the EU Mutual Assistance Convention, already grant extensive derogations from their rules to facilitate law enforcement. Similarly, Article 8 ECHR and the Council of Europe data protection Convention also contain provisions permitting expedited exchange of data by law enforcement agencies.

However, the US is not a signatory to any of these instruments.

- Establish adequate capabilities for investigating terrorism cases that involve the use of the internet.

There is no reference here to data security and data protection issues, to safeguards that must be provided by judicial supervision, or any recognition that the usefulness of such capabilities to law enforcement agencies must be balanced against privacy rights and the extensive costs to industry. There is extensive case law concerning Article 8 ECHR that must be observed when carrying out any such investigations within the EU.

- Revise draft privacy directives that call for mandatory destruction to permit the retention of critical data for a reasonable period.

Any call to change the EU Directives on data protection and privacy (1995 and 1997) to allow for the mandatory retention of data would greatly undermine rights and liberties. It is doubtful whether this demand is compatible with Article 8 ECHR.

Europol

- Make available to the United States all information, including information on individuals, that Europol may have on relevant terrorist cases, and subsequently broaden such cooperation to other criminal cases.

Europol cannot exchange information unless its partners have an adequate level of data protection. Even if Europol rules are revised to weaken such safeguards, Member States, as the "parents" of Europol, are bound by the data protection safeguards of Article 8 ECHR.

This demand explicitly refers to extending "such cooperation to other criminal cases" which, by implication, have nothing to do with terrorism.

- Encourage exchanges of information at both the bilateral and Europol level

Again there is no reference to data protection safeguards.

Eurojust

- Share with U.S. authorities summaries of terrorism cases that are within the Provisional Eurojust Docket and updates thereto.

Eurojust will be bound by data protection safeguards by its constituent legislation and by Article 8 ECHR.

Export control/Nonproliferation

- Develop U.S.-EU cooperative measures to forestall intangible transfers of technology and expertise (inadvertent transfer of weapon-related knowledge through training, conferences, exchanges, etc.)

It is well known that one of the main stumbling blocks to conclusion of a protocol to the UN biological weapons Convention to ensure its effective enforcement is the objection of the United States, which aims to protect the financial interests of its pharmaceutical industry.

Border controls

- Establish procedures to share information on immigration lookouts for individuals associated with terrorist organizations.

The Schengen Information System is not open to non-Schengen states, and is subject to detailed data protection safeguards.

- Coordinate external US-EU cooperation projects in the area of border security.

It is quite unclear how this relates to terrorism, it appears to refer to "illegal" immigration. It assumes that the US and EU have a common border which defines who is to be denied entry.

- Coordinate U.S. and EU efforts to encourage other nations to utilize secure, machine-readable passports and visas and explore further use of biometrics.

This refers to a form of cooperation which is much wider than dealing with terrorism.

- Inform the United States and other key partners when a breach of passport or visa security has been detected (especially when passport blanks are lost).

Hundreds of thousands of passports or identity cards are lost or stolen every year in the EU and, if reported and recorded, are logged on the Schengen Information System. The Schengen Information System is not open to non-Schengen states, and is subject to detailed data protection safeguards.

- Improve cooperation on the removal of status violators, criminals and inadmissibles.

There is no reference to the Geneva Convention on refugee status, Articles 3 and 8 ECHR or the UN Convention against Torture, all of which impose limitations on such removals. The demand refers to the "removal" from the US and the EU to the third world of "inadmissibles", a term which has little or no legal meaning.

The demand is also clearly not limited to "terrorism" unless it is assumed that "status violators",

criminals in general, and so-called "inadmissibles" are all potential terrorists.

Follow-up secret US-EU meeting on asylum: the construction of a common EU-US area of migration, asylum and borders?

Details of secret discussions between EU and US officials on 26 October 2001 came to light in February 2002 when Jelle van Buuren, Eurowatch, obtained a document refused to him by the Council of the European Union. He was refused access by the Council because US officials assume that "these kind of meetings are of a confidential nature" and that release of the document would be "contrary to the common interest to take effective measures to make travelling safe".

In fact, although the document refers to countering terrorism most of the impact of the measures discussed would radically change the EU's policies on asylum and the rights of asylum-seekers.

The meeting with members of the EU's high-level Strategic Committee on Immigration, Frontiers and Asylum covered eight major areas for joint EU-US action:

1. The US wants the EU to introduce immigration and customs controls in airport transit areas. However, "several" EU member states said that: *"terminating airside transit would have major repercussions for European hub airports and underlined the need to distinguish between intelligence based policing of transit areas and the blanket control of all passengers"*.

2. The US wants a list of data: *"to be exchanged between border management services of the [EU] Member States and of North America"*.

The US delegation listed the data which might be exchanged:

"view to increasing border control capabilities, including intelligence driven data (review of passenger lists), data on persons known to be inadmissible due to involvement in criminal activity (trafficking, dealing in false documents, etc.), customs data (e.g. on drugs smuggling), harder intelligence data on terrorist threats, data on visas, data on migration flows."

The US said that it had a database, drawn from different US agencies, on the 10 million a year visa applications made and the database contained the names of people *"involved in various kinds of activities giving rise to concern."* US consular officials when processing visa applications check names against the database and "signals" are given for: green (OK), red (refuse) and yellow (where a person should be checked/vetted further). A change in the US law meant this information could now be shared with other governments.

The European Commission representative at the meeting said that the EU was intending to create an online database on visas issued but shared a view - expressed by several member states - that *"sharing information could give rise to difficulties at the level of data protection requirements"*. The US responded by saying that *"data concerning US residents was protected"* which begs the obvious question about non-US people.

However, it should be noted that the planned EU visa database will also hold information on people for whom visas are refused, ie. on a visa applications' database.

3. The US wants all EU governments to extend usage of airline passenger details held on APIS (Advanced Passenger Information System). At present, the US said, details on only 85% of passengers were available for checking against the "watch list". Their intention was to

extend the system to cover the entry and exits of all passengers. Moreover, the US was looking into the Australian practice of using APIS: *"for pre-boarding intervention especially in the case of "watch-list" persons"*. This would mean that people on the list, including so-called "inadmissibles" would not be allowed onto a plane going to the USA.

Asked by EU delegation representatives about the "handling of personal data" the US representatives said the data was limited to that a person would have to give on a landing card - the difference of course is that unlike the completion of a landing card by the individual concerned this would be recorded without their knowledge.

4. Under the heading: *"Improve cooperation in the removals of status violators/criminals/inadmissibles"* the US delegation requested:

"greater cooperation from its European partners in assisting in the return of inadmissible persons to their country of origin"

The US said that only 2,000 "returns" to country of origin (out of a total of 180,000 removals from the US) had been effected through using EU airports as transit stop-overs for expulsions to the Middle East and Africa. They complained that the procedures and rules imposed by the EU were hindering the work of the *"US immigration service [which] was under great pressure to carry out removals"*.

The EU representatives responded by saying that the *"role and status of escorts"* had to be clarified and that they had obligations under the Geneva Convention *"(principle of non-refoulement)"* and the European Convention on Human Rights. One EU delegation questioned whether this was an appropriate subject to discuss under "terrorism" measures as it fell into "the area of illegal migration".

5. The US, extraordinarily:

"wanted the [EU] Member States to make fuller use of the expulsion possibilities contained in their aliens legislation rather than having to have recourse to extradition procedures"

The EU representatives explained that expulsion and extradition were quite different procedures since their effect and *"legal consequences were totally different"*.

This US demand is further raised with the statement:

"With regard to expulsion procedures, the aim pursued by the US was not to abridge normal procedures but to make fuller usage of immigration proceedings to avoid having to have recourse to extradition".

This statement is coupled with the explanation of an overall shift in US policy covering the:

"whole system of visas, border controls, management of legal migration etc... and there was a consensus in the US on the need for an effective system across the board, not targeted specifically at terrorism, but taking the events of 11 September as the trigger for developing a new approach"

6. The US is calling for US-EU cooperation on "border security" covering i) training; ii) "enhanced border security infrastructure" and iii) the exchange of "activities underway in third countries".

7. The US wants all travellers not in possession of a visa to have "machine-readable

documents" from October 2003. The EU representatives said this could prove difficult "given the large number of non-machine readable documents still in circulation".

The US also wants an agreement on stolen passports and stolen blank passports with a view to a:

"more regular exchange of information with [EU] Member States with a view to entering such information into its data base in order to facilitate the identification of the holders of such documents"

This demand begs a number of questions because hundreds of thousands of lost or stolen passports are recorded on the Schengen Information System (SIS) every year. Is the EU already sending information of this kind to the US? What guarantees of data protection are being offered? The passing of such information would mean giving the US database personal details of EU citizens whose passports are lost or stolen.

The US delegation concluded by saying that:

"the list of proposals could evolve as the US sought to intensify effects not just to counter terrorism but also to combat all forms of illegal migration movements"

Tony Bunyan, Statewatch editor, commented:

"This secret meeting between the EU and US directly follows up the demands in a letter from President Bush to the European Commission last October. We may be witnessing the creation of a new Northern axis "Fortress Europe-USA" covering the exchange of personal data, criminal investigations, prosecutions, asylum and visa policies and border controls".

For full documentation please see: www.statewatch.org/observatory2.htm

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