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## **DRAFT RECOMMENDATION TO THE COUNCIL**

on an agreement with the United States of America on the use of passenger name records (PNR) data to prevent and combat terrorism and transnational crime, including organised crime  
(2006/\*\*\*\*(INI))

Committee on Civil Liberties, Justice and Home Affairs

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## PROPOSAL FOR A EUROPEAN PARLIAMENT RECOMMENDATION TO THE COUNCIL

### **on an agreement with the United States of America on the use of passenger name records (PNR) data to prevent and combat terrorism and transnational crime, including organised crime (2006/\*\*\*\*(INI))**

*The European Parliament,*

- having regard to Rule 94 of its Rules of Procedure,
  - having regard to the recommendation of the Committee on Civil Liberties, Justice and Home Affairs (A6-0000/2006),
- A. recalling its previous resolutions on the PNR issue<sup>1</sup>, in which Parliament expressed from the outset:
- on the one hand, its readiness to authorise access by public authorities to passengers' personal data for security purposes when necessary for the purposes of identification and cross-checking them against a "watch list" of dangerous persons or known criminals and terrorists (as is done in the EU in connection with Schengen Convention or under Directive 2004/82/EC<sup>2</sup>, which give access to identification data managed by airlines through the "APIS" system\*,
  - on the other hand, its deep concerns about the systematic access by the public authorities to data linked to the behaviour (credit card number, e-mail address, affiliation to a particular group, frequent flyer information, ...) of "normal" passengers (i.e. people not recorded as dangerous or criminal in the receiving country) in order only to check against a theoretical pattern whether such a passenger might constitute a "potential" threat to the flight, his or her country of destination or a country through which he or she will transit;
- B. being aware that systematic access to "behaviour" data, even if not acceptable in the European Union, is actually required by countries including the USA, Canada and Australia for the protection of their internal security, but pointing out that:
- in the case of Canada and Australia domestic legislation provides for access to such data which is limited in scope and time and as regards the number of data covered and is under the control of a judicial authority, on account of which those systems have been considered adequate by Parliament and by the national data protection authorities in the EU,

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<sup>1</sup> Resolution on transfer of personal data by airlines in the case of transatlantic flights (Thursday, 13 March 2003) doc. P5\_TA(2003)0097, Resolution on transfer of personal data by airlines in the case of transatlantic flights: state of negotiations with the USA (Thursday, 9 October 2003) doc. P5\_TA(2003)0429 and the Resolution on the draft Commission decision noting the adequate level of protection provided for personal data contained in the Passenger Name Records (PNRs) transferred to the US Bureau of Customs and Border Protection (2004/2011(INI)) (Wednesday, 31 March 2004) doc. P5\_TA(2004)0245

<sup>2</sup> OJ L 261, 6.8.2004, p. 24.

- in the case of the US, even after long negotiations with the Commission and some goodwill stated in the “undertakings”, there is still no legal US data protection in the field of air transport; therefore, all PNR data can be accessed, with the sole exception of “sensitive” data, and they can be retained for years after the security check has been carried out; furthermore, there is no judicial protection for non-US citizens,
- C recalling that Parliament decided to challenge before the Court of Justice Decision 2004/296/EC<sup>1</sup> on the conclusion of an Agreement with the USA negotiated by the Council on the basis of the Commission's “adequacy finding” decision because it lacked a legal basis and legal clarity and because the collection of personal data authorised under the Agreement was excessive when weighed against the need to fight organised crime and terrorism,
- D. welcoming the annulment by the Court of Justice (judgment of 30 May 2006 in Joined Cases C-317/04 and 318/04) of Decision 2004/496/EC and the Commission's abovementioned adequacy decision<sup>2</sup>,
- E. regretting that the Court of Justice did not respond to Parliament's concerns about the legal structure of the agreement and on the congruency of its content with the data protection principles laid down in Article 7 of the ECHR;
- F. sharing the opinion adopted on 14 June 2006 by the Article 29 Working Party on the necessary follow-up to Court of Justice's judgment<sup>3</sup>,
- G. considering the importance of the issue to be such that the European Union should, in any event, come to an arrangement with the USA on a proper international agreement which, with due respect for fundamental rights, would lay down:
  - (a) which data are necessary for identification purposes and should be transferred systematically in an automated way (APIS) and which data relating to passenger “behaviour” could be transferred on a case-by-case basis in respect of people recorded on public security “watch lists” as “dangerous” on account of criminal or terrorist activity,
  - (b) the list of serious crimes in respect of which any additional request could be made,
  - (c) the list of authorities and agencies which could share the data and the data-protection conditions to be respected,
  - (d) the data-retention period for the two kinds of data, it being clear that data relating to the prevention of serious crimes must be exchanged in accordance with the EU-US agreement on judicial cooperation and extradition,
  - (e) the role to be played by airlines, the CRS or private organisations (such as the SITA) in

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<sup>1</sup> OJ L 183, 20.5.2004, p. 83.

<sup>2</sup> European Court of Justice judgment on Passenger Name Records: The court annuls the council decision concerning the conclusion of an agreement between the European Community and the United States of America on the processing and transfer of personal data and the Commission decision on the adequate protection of those data [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/adequacy/pnr/judgement\\_ej\\_30\\_05\\_06\\_pnr\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/pnr/judgement_ej_30_05_06_pnr_en.pdf)

<sup>3</sup> (see: [http://ec.europa.eu/justice\\_home/fsj/privacy/workinggroup/wpdocs/2006\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/wpdocs/2006_en.htm))

- transferring passengers' data and the means envisaged (APIS, PNR, etc.) for public-security purposes,
- (f) the guarantees to be afforded to passengers in order to enable them to correct the data relating to them or provide an explanation in the event of a discrepancy between the data relating to a travel contract and the data shown in identity documents, visas, passports and so on,
  - (g) the airlines' responsibilities vis-à-vis passengers and the public authorities in the event of transcription or encoding errors and as regards protection of the data processed,
  - (h) the right to appeal to an independent authority and redress mechanisms in the event of infringements of passengers' rights;

1. Addresses the following recommendations to the Council:

*General principles*

- (a) to avoid a legal lacuna at European level from 1 October 2006 for the transfer of passenger data and to ensure that the rights and freedoms of passengers are protected to an even greater degree than they are at present under the unilateral "undertakings" submitted by the US administration,
- (b) to provide the EU with a clear legal framework, namely by adopting, as a matter of urgency, the Draft Data Protection Framework Decision,
- (c) to base any new Agreements in this field on the EU principles on data protection as drawn from Article 8 ECHR
- (d) to avoid the artificial division between the "pillars" by creating a consistent cross-pillar data protection framework in the Union by activating the *passarelle* clause under Article 42 TEU so as to ensure that the new Agreement is concluded in association with Parliament and is subject to the scrutiny of the Court of Justice,

*As regards the negotiation procedure:*

- (e) to negotiate, owing to calendar constraints,
  - a new short-term international agreement to cover the period between 1 October 2006 and November 2007 (the period originally covered by the US/EU agreement annulled by the Court),
  - for the medium to long term, a more coherent approach at ICAO level towards the exchange of passenger data in order to ensure both air traffic security and the respect of human rights at global level;
- (f) to mandate the Presidency, assisted by the Commission, to inform the European Parliament of the negotiations on the Agreement and to involve representatives of the relevant committee as observers in the dialogue with the US administration;

*As regards the content*

- (g) to overcome, in the first instance, the shortcomings outlined in the first joint EU/US review of the agreement<sup>1</sup> and to take into account the recommendations of the European Data Protection Supervisor and the Article 29 Working Party<sup>2</sup>;
- (h) to limit the number of data that may be requested and to filter at source sensitive data as required by Article 8 of Directive 95/46/EC; notes that carriers are required only to submit the data available to them, so that in practice the US CBP rarely receives the full set of 34 requested data; concludes that for the purposes of the Agreement, namely to prevent and combat terrorism and transnational crime, including organised crime, even APIS data would be sufficient; calls on the Council Presidency and the Commission to raise this matter in the negotiations;
- (i) to include the content of the "Undertakings" in the body of the agreement so that they may become legally binding, as a result of which it will be necessary for the two parties to establish or modify any existing legislation and for the judiciary to protect persons covered by the agreement;
- (j) to incorporate immediately, as proof of good faith on the part of the US administration, into the new agreement the commitments (which are still not fully implemented over two years after the entry into force of the agreement) as follows:
- the strict purpose limitation, as formerly provided for in Undertaking 3, so that behaviour data may not be used for checking financial crimes or to prevent avian flu; such a limitation should also be laid down for the onward transfer of such data;
  - the shift to a PUSH system (as provided for in Undertaking 13) as in the case of the agreements with Canada and Australia, since all the technical requirements are in place and this is already done, for instance by SITA;
  - provision of information to passengers on the PNR rules, and the introduction of proper judicial complaint procedures, as provided for in Undertakings 36-42 and by the PNR agreements with Canada and Australia;
  - the need to ensure adequate instructions and training of the staff who handle the data, and the need to secure the IT systems;
  - the annual joint review, as provided for in Undertaking 43, should indeed take place annually, be conducted in cooperation with the national data protection authorities and be published;
2. Reiterates its previous demand that the new agreement should grant to European passengers the same level of data protection as US citizens enjoy;
3. Stresses its previous position that the European Union should avoid the indirect creation of a European PNR system through the transfer of the relevant data by the US CBP to police and judicial authorities in the Member States; considers that the systematic collection of the data of "normal" citizens outside the framework of a judicial procedure

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<sup>1</sup> Joint Review of the implementation by the U.S. Bureau of Customs and Border Protection of the Undertakings set out in Commission Decision 2004/535/EC of 14 May 2004 (Redacted version - 2005)  
[http://ec.europa.eu/justice\\_home/fsj/privacy/docs/adequacy/pnr/review\\_2005.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/pnr/review_2005.pdf)

<sup>2</sup> (see: [http://ec.europa.eu/justice\\_home/fsj/privacy/workinggroup/wpdocs/2006\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/wpdocs/2006_en.htm))

or police investigation should remain forbidden in the European Union and that data should be exchanged where necessary in accordance with the existing EU/US agreement on mutual legal assistance and extradition;

4. Proposes that a dialogue, in which parliamentary representatives would take part, be launched before the end of 2006 between the EU, the US, Canada and Australia with a view to preparing jointly the 2007 review and establishing a global standard for the transmission of PNR, if that is deemed necessary;
5. Instructs its President to forward this resolution to the Council and, for information, to the Commission.

## EXPLANATORY STATEMENT

After the Court's judgment: A new EU/USA Agreement?

1. It is still preferable to have a European Agreement rather than 25 bilateral agreements (it is, moreover, in the interests of European citizens, which is what we ought to be concerned for). If the EU is united, it obviously has more "weight" than the Member States have individually. There are already examples of this from the past (see the former EU/US agreement on extradition and judicial cooperation in criminal matters) and others which are currently being negotiated, as witness the negotiations on reciprocal treatment of Visas (see the VISA waiver programme).

2. Any European agreement, however, must be a genuine international agreement and not merely an "envelope" containing unilateral, non-binding undertakings, as in the case of the agreement which has just been annulled. From this point of view, a mere reference to "undertakings" is unsatisfactory because it leaves doubts as to their character of binding, judiciable acts (N.B.: Undertakings of a purely administrative nature on the part of the USA would not satisfy the requirement for "legislative" measures prescribed by Article 8 of the ECHR, which the Member States - and the EU institutions - have to respect both in domestic legislation and in international agreements).

3. Since it would be international agreement affecting an area falling within the competence of the Member States and dealing with fundamental rights, it would have to be ratified by the national Parliaments. Technically, that requirement would have to be raised with their governments by the national Parliaments themselves by activating the declaration provided for in Article 24(5) of the EU Treaty.

4. It would be necessary to effect a legal evaluation as to whether, in the event of ratification only by some Member States, the agreement could be applied provisionally. The situation which is going to come about will be the same as the situation obtaining with the EU/US agreement on extradition and judicial cooperation in criminal matters.

The content

5. The draft mandate of the CEC and the Governments have provided that the agreement to be negotiated must assure at least the same level of protection as the agreement which has just been annulled.

Both politically and logically, that proposition does not stand up. After two years' application, both the Community and the US administration recognise that the agreement could be improved. The Article 29 Group refers to the fact that the future agreement must provide at least the level of data protection formally referred to in the agreement which has just been annulled.

Improvements are certainly possible:

- in terms of a better definition of the aim for which the data are collected. At the beginning it was a question of combating terrorism, then it was combating "transnational" crime and

recently it was controlling avian influenza ... Are we to expect that there will in future be blanket security screening and catching a plane will license the screening of passengers for any sort of crime, for instance tax offences or detention for the personal use of drugs? Such a state of affairs would be hard to square with the need to derogate only in exception cases from data protection as it emerges from Article 8 of the ECHR, which both Member States and the EU have to respect. A rule providing for so many exceptions as to cover those connected with the prevention of any sort of crime would be without any effective scope.

- in terms of the number of data to be processed (it would now be easy to check whether, of the 34 types of PNR data, the ones that are really used are those relating to passenger identity - data which are already used by the Member States in connection with the directive for the control of illegal immigration). What point is there in continuing to collect and store for years billions of data which are not even going to be used?

- in terms of the deletion of data once the security check has been carried out (as provided by the Canadian and Australian system which have been accepted by the European Parliament). In a society purporting to be "democratic" it is hard to justify keeping the data of persons who have not raised security issues (condition impliedly laid down by Article 8 of the ECHR).

- in terms of the filters to be incorporated in order to avoid access to sensitive data. This boils down to fact that data must be filtered at source ("PUSH" system) and not by the authorities which are the recipients of the data.

- in terms of the possibility of court proceedings in the event of abuse (here again, European passengers do not have the rights of US passengers; what point is there in an international agreement with an ally if we do not obtain the same level of protection for our own citizens?)

The precautionary principle

6. It could not be more obvious that the EU/US agreement in this sphere is going to become a reference standard both for European legislation and globally. As a result, the prudent approach suggested by Group 29 of envisaging the new agreement as covering only the remaining period of the PNR Agreement annulled by the Court (November 2007) seems completely reasonable.

Before transforming the approach which the US administration seeks to impose in this field into a world standard, it would be extremely desirable to have an in-depth discussion in bodies such as the ICAO and a democratic debate in the national parliaments. Rules making such a substantial change in relations between citizens and the public authorities and affecting hundreds of millions of people every year warrant much more than a "quick fix" as the Member States and the Commission are suggesting even after the judgment of the Court of Justice.

Moreover, the threats of economic reprisals against airlines and passengers must be assessed cautiously in that if they were applied indiscriminately (e.g. in the absence of any persons classed as dangerous), they would expose the US administration to the charge before the WTO of altering air transport abusively as well as causing its own airlines to suffer economic losses. From this point of view, the data which Congress is currently examining in relation to the effectiveness of such preventive screening raises doubts as to its cost-effectiveness.