COUNCIL OF THE EUROPEAN UNION

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NOTE

from :	General Secretariat of the Council
to :	Delegations
Subject:	**Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament** Information meeting with the participation of the national parliaments of the Member States: **"The consequences of the judgment of the European Court of Justice on the 'Passenger Name Records' (PNR) at the national and European level (Joined Cases C-317/04 and C-318/04)"** Brussels, 22 June 2006

The meeting was chaired by Mr LAMBRINIDIS (PSE, EL), Vice-Chairman of the European Parliament Committee on Civil Liberties, Justice and Home Affairs

I. Introduction

After 11 September 2001, the United States passed legislation providing that air carriers operating flights to, from and across US territory have to provide the USA authorities with electronic access to the data (PNR) contained in their reservation and departure systems. After negotiations with the US authorities, the Commission adopted, on 14 May 2004, a Decision finding that the US Bureau of Customs and Border Protection (CBP) ensured an adequate level of protection for PNR data transferred from the EU. On 17 May 2004 the Council adopted a Decision approving the conclusion of an agreement between the European Community and the USA on the processing and transfer of

PNR data by air carriers to the CBP. In July 2004, the European Parliament applied to the Court of Justice for annulment of both decisions, contending in particular that their legal basis was not appropriate and that fundamental rights were infringed. On 30 May 2006 the ECJ annulled both decisions, with effect from 30 September 2006, because their legal basis was incorrect. In its judgement, the Court of Justice did not examine the issues of fundamental rights and protection of personal data. The Commission announced on 19 June 2006, that it considered that the agreement would be based on the third pillar, in which there was no European legislation on data protection yet (a proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters is currently being discussed).

In his opening statement, Mr LAMBRINIDIS stated that if a new agreement was concluded under the third pillar, the European Parliament would not be involved. However, it would give more competence to national parliaments. According to the official position of the European Parliament presented at the Conference of Presidents on 15 June in Strasbourg, the EP recognized that, given the deadline fixed by the Court of Justice, there was an urgent need to conclude a new agreement; otherwise there was a risk that Member States would seek to sign bilateral agreements with the USA. However, the agreement must be temporary. The Parliament should insist on the "passerelle" clause of Article 42 of TEU being applied and on the agreement being negotiated under the codecision procedure. He regretted that in its position the Commission had not clearly stated that the agreement must terminate in 2007.

II. The new Commission proposal

Mr FAULL, Director-General for Justice, Freedom and Security (European Commission), gave an assurance that, regardless of the legal basis, the Commission would work in close cooperation with the EP and with national parliaments. There is a common understanding that the main aim of the temporary agreement is to provide continuity and legal certainty until the new agreement is signed. The Commission decided to start with the legal position of the Court of Justice, which did not analyse the content of the agreement. He also gave an assurance that the Commission was in favour of the "passerelle" clause. As regards the legal basis of the temporary agreement, Articles 24 and 38 TEU may be used, even if they do not constitute a perfect legal basis for this kind of agreement.

However, a uniform transitional regime was essential, as it would be unfortunate if some Member States have measures to cover transfer of PNR data to the USA and others not. The Commission has therefore proposed to the Council that the existing agreement be denounced and a new one with the same content negotiated. The EU must obtain assurance from the US authorities that the undertakings will be appropriately applied, especially that data protection system does not cover the third pillar. He expressed a hope that the Council would be able to adopt the two measures proposed by the Commission in the coming days and that by the end of September at the latest the new agreement would be in place. He added that provisional application would be needed in the Member States if ratification by national parliaments was required.

On behalf of the Austrian Presidency, Mr HAGER, Chairman of Article 36 Committee, recalled the origins of the agreement with the USA, which was negotiated and concluded in response to the lack of a legal framework (the USA was exerting pressure on air companies to transfer PNR data). Individual agreements signed by air companies with US authorities would mean lack of governmental control and would constitute a danger for a European data protection system. The Council noted that, in accordance with the ruling of the Court of Justice, the current agreement must be repealed and a new one concluded before 30 September 2006. The Austrian Presidency will encourage the Council to adopt the appropriate acts by the end of June, as it is Council's utmost concern that a new agreement be in force on 1st October 2006. As to its time, it is generally agreed that the temporary agreement should be in force until November 2007. However, it is not the aim of the Council to change the content of the agreement. He added that the USA are unlikely to change their position because of the ECJ's ruling. As regards the "passerelle" clause, the Finnish presidency intends to open a debate on this issue. He added that eventually there would be a possibility of including specific provisions concerning the protection of personal data in the agreement, but it is doubtful whether the USA would accept such a solution.

Mrs in 't VELD (ALDE, NL), rapporteur for the LIBE committee, expressed the hope that the European Parliament would be involved, even though it did not participate in the formal procedure. She was not in favour of including the same content in the new temporary agreement. She did not agree that there was full application of undertakings by the USA and suggested that undertakings be included in the new agreement instead of a sole reference. Moreover, there should be an annual joint evaluation with public conclusions.

The EU should obtain a clear assurance from the US authorities that data would be used exclusively for the purposes of the agreement, which did not seem to be the case at present. The EU should insist that the USA move to the "push" system before signing the temporary agreement.[1] Finally, she asked what the risk of legal actions by individuals was if national parliaments did not ratify the temporary agreement before 30 September 2006.

M. CASHMAN (PSE, UK) stressed the need for an EU agreement in order to avoid the risk of having 25 conflicting agreements.

III. Data protection

Mr HUSTINX, European Data Protection Supervisor, recalled that he had intervened before the Court of Justice in the case concerning PNR, on the basis of concerns about the commitments undertaken by the USA (e.g. unsatisfactory rights of access by the subjects of the data). However, the substance was not considered by the ECJ. The Court stated that although the data was collected for commercial purposes, it was transferred for purposes which fall outside the scope of Directive 95/46/CE, which was a restrictive interpretation of the scope of application of the Directive. The judgment proves that there is a need for a consistent horizontal approach to data protection, with no distinction between the first and the third pillars, and especially because the amount of exchanged information is increasing. At present, there is a double loophole resulting from the restrictive interpretation of the Directive 95/46/CE and the lack of a third pillar data protection instrument. He concluded that he would issue an opinion on the draft agreement, which should be of short duration and which should take into account the pull/push dimension.

Mr. SCHAAR, German Federal Data Protection Commissioner and Chairman of the Art. 29 Working Party of the European Data Protection Commissioners, stated that it was particularly important to find a European solution. In the negotiations with the US authorities the EU must press for the push/pull element. Finally, he raised the question of retransmission of data to police and judicial authorities in Europe and said that the question of a proper basis and of how data is protected in that case must be considered.

[1] According to paragraph 13 of Undertakings of the CBP annexed to the Commission Decision of 14 May 2004, "CBP will "pull" passenger information from air carrier reservation systems until such time as air carriers are able to implement a system to "push" the data to CBP".

IV. Consequences for the airlines

Mrs EGERER, Association of European Airlines (AEA), stated that it was important for passengers to have a secure international legal framework for transfer of data to third countries, especially because requests for PNR data come also from other countries like India, Thailand or Korea. She also raised the problem of costs which are very high, airlines paying for security which is a government responsibility (additional costs of 1.8 billion between 11.9.2001 and the end of 2002, born exclusively by airlines). For the moment, it is crucial for airlines that an agreement be in force on 1 October 2006. She assured that airlines take the question of data protection very seriously.

Mr. CAMUS, Chairman of the AEA PNR Working Group, explained that the agreements imposed on airlines an obligation to transmit only the data which they actually collected - usually between 8 and 10, 34 data being a maximum that might be required. These are data delivered on a voluntary basis by passengers. He also referred to a question of reciprocity and expressed a view that before imposing the same obligation on US authorities, the EU should agree on common standards to avoid 25 different requirements.

Mr FAULL remarked that the relevant agreement with Canada, based on the first pillar, is also defective given the ruling of the Court of Justice, even if that agreement was not challenged. He stated that given the deadline established by the ECJ, it was not realistic to do more than reproduce the current agreement. It emerged from the joint review undertaken last September with the US authorities that the situation was reasonably satisfactory as regards undertakings.

Mrs in 't VELD did not agree that there was substantial compliance with undertakings no 13 (concerning push and pull systems) and no 43 (concerning evaluation).

Mr HAGER expressed concerns about whether national parliaments were properly informed and urged national ministers to deliver relevant information concerning the PNR agreement to their parliaments; lack of such information may lead to failure of ratification.

Referring to push/pull provisions, Mr. SCHAAR and said that the conditions for moving to the "push" might not have been fulfilled when the agreement was concluded, but now the conditions were in place for this move.

For further information: Mrs Jaśkowiak (tel. 3607)