



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.6.2006
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RESTREINT UE

RECOMMENDATION FROM THE COMMISSION TO THE COUNCIL

for an authorisation to open negotiations for 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

EXPLANATORY MEMORANDUM

1. In the aftermath of the terrorist attacks of 11 September 2001, the Congress of the United States passed a series of laws aiming to enhance domestic security against terrorist threats. The European Union fully supports the United States in the fight against terrorism and transnational crime, including organised crime.
2. The US Aviation and Transportation Security Act (ATSA) of 19 November 2001 provides that air carriers operating passenger flights to or from the United States must make Passenger Name Record (PNR) information available to the Bureau of Customs and Border Protection (CBP) Department of Homeland Security.
3. The «Passenger Name Record» (PNR) is a record of each passenger's travel requirements which contains all information necessary to enable reservations to be processed and controlled by the booking and participating airlines.
4. Since February 2003, CBP requires each carrier operating passenger flight in foreign air transportation to or from the United States to provide CBP with electronic access to PNR to the extent it is collected and contained in the air carrier's automated reservation system.
5. Airlines face sanctions in the United States for non-compliance with U.S. requirements.
6. On 17 May 2004 the Council adopted Decision 2004/496/EC (“the Council Decision”), authorising the President of the Council to sign the Agreement with the United States of America on PNR on behalf of the Community. The Agreement was signed on 28 May 2004 and entered into force on the same day. This decision was taken on the basis of Article 95 of the EC Treaty. On the same day the Adequacy Decision adopted by the Commission on 14 May 2004 (“the Commission Adequacy Decision”) was notified to Member States.
7. The European Parliament sought the annulment of the Council decision. The Parliament argued, inter alia, that the choice of Article 95 EC as legal basis for the decision was incorrect.
8. On 30 May 2006 the Court of Justice ruled in Joined Cases C-317/04 and 318/04 and annulled both Decisions. The Court stated that the Council Decision could not be validly adopted on the basis of Article 95 of the EC Treaty, since the transfer to and the use of PNR data by CBP relates to data processing operations concerning public security and activities of the State in areas of criminal law, which fall outside the scope of Directive 95/46/EC. The Court also annulled the Commission Adequacy Decision for the same reason. The Court noted that the current agreement provides that termination will take place 90 days after its notification to the other party and therefore left the Commission Adequacy Decision in force until 30th of September 2006 pending the adoption of the necessary measures.
9. Following the ruling of the Court of Justice, the Union should open negotiations with the US in order to replace the current agreement by a new agreement to be concluded on a correct legal basis; these negotiations will need to take place in conjunction with the denunciation procedure for the current agreement which has been annulled by the

Court. In view of the ruling of the Court, the current agreement should be terminated by 30th September 2006.

10. The negotiations should take into account that the processing by CBP of personal data contained in the PNR of air passengers travelling to or from the United States is governed by the conditions set out in the Undertakings* of the Department of Homeland Security Bureau of Customs and Border Protection of 11 May 2004 (hereinafter referred to as the Undertakings) and in United States domestic legislation to the extent indicated in the Undertakings.
11. The Commission therefore recommends to the Council to authorise the opening of negotiations with the United States of America to conclude an Agreement on the use of PNR data to prevent and combat terrorism and transnational crime, including organised crime.

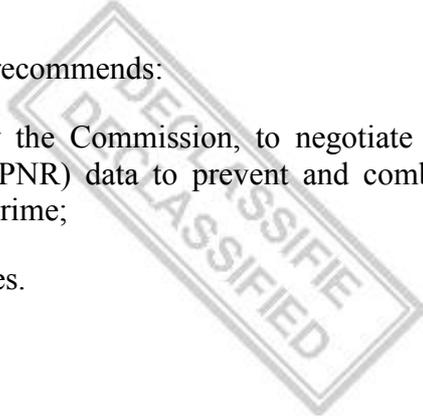
* US Federal Register, volume 69, N° 131, Friday July 9, 2004, p. 41543.

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Taking into account the aforementioned, the Commission recommends:

- that the Council authorise its Presidency, assisted by the Commission, to negotiate an Agreement on the use of Passenger Name Records (PNR) data to prevent and combat terrorism and transnational crime, including organised crime;
- that the Council adopt the enclosed negotiating directives.



ANNEX

NEGOTIATING DIRECTIVES

- The Agreement is to be negotiated and concluded on the basis of articles 24 and 38 of the Treaty on European Union.
- The Agreement must replace with effect from 1 October 2006 the terminated agreement concluded by Council Decision 2004/496/EC.
- To ensure continuity, to provide legal certainty to economic operators and to ensure respect for fundamental rights and freedoms, the content of the Agreement should be the same, in the sense that it should offer the same level of legal certainty and protection of the persons concerned, as the Agreement concluded by Decision 2004/496/EC and the Adequacy Decision adopted by the Commission on 14 May 2004; reference should therefore be made to the US CBP Undertakings of 11 May 2004 in the new Agreement. With regard to police and judicial cooperation it should in particular ensure the possibility of transfer of PNR data by CBP to police and judicial authorities of the Member States.
- To ensure continuity and legal certainty the Agreement should provide a valid basis for air carriers to process PNR data contained in their automated reservation systems as required by CBP.