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COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

Termination of the 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

Following the terrorist attacks of 11 September 2001, the United States passed legislation in November 2001 providing that air carriers operating flights to or from the United States had to provide the United States Bureau of Customs and Border Protection (hereinafter 'CBP') with electronic access to the data contained in their automated reservation and departure control systems, referred to as 'Passenger Name Records' (hereinafter 'PNR data'). While acknowledging the legitimacy of the security interests at stake, the Commission informed the United States authorities, in June 2002, that those provisions could come into conflict with Community and Member State legislation on data protection. The United States authorities postponed the entry into force of the new provisions but, ultimately, refused to waive the right to impose penalties on airlines failing to comply with the legislation on electronic access to PNR data after 5 March 2003. Since then, a number of large airlines in the European Union have granted the United States authorities access to their PNR data.

The Commission entered into negotiations with the United States authorities, which gave rise to a document containing undertakings on the part of CBP, with a view to the adoption by the Commission of a decision on adequacy pursuant to Article 25(6) of 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). At the same time the Commission negotiated an international agreement with the United States which was intended as a companion to the Adequacy Decision and inter alia contained provisions permitting the US authorities to "pull" PNR data from airline reservation systems located in the EC, obliging airlines to transmit PNR data to the US authorities in a certain format and assuring a grounding in international law of the CBP commitments. This draft agreement was sent to the Council for approval. On 1 March 2004 the Commission placed before the Parliament the draft decision on adequacy under Article 25(6) of the Directive, together with the draft undertakings of CBP.

On 17 March 2004 the Commission submitted to the Parliament, with a view to its consultation in accordance with the first subparagraph of Article 300(3) EC, a proposal for a Council decision concerning the conclusion of an agreement with the United States.

On 31 March 2004 the Parliament, acting pursuant to Article 8 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), adopted a resolution setting out a number of reservations of a legal nature regarding the proposal which had been submitted to it. In particular, the Parliament considered that the draft decision on adequacy exceeded the powers conferred on the Commission by Article 25 of the Directive. It called for the conclusion of an appropriate international agreement respecting fundamental rights that would cover a number of points set out in detail in the resolution, and asked the Commission to submit a new draft decision to it. It also reserved the right to refer the matter to the Court for review of the legality of the projected international agreement and, in particular, of its compatibility with protection of the right to privacy.

On 28 April 2004 the Council, acting on the basis of the first subparagraph of Article 300(3) EC, sent a letter to the Parliament asking it to deliver as a matter of urgency its opinion on the proposal for a decision relating to the conclusion of the Agreement by 5 May 2004. On 4 May 2004 the Parliament rejected the Council's request to it of 28 April for urgent consideration of that proposal.

On 14 May 2004 the Commission adopted the Decision on Adequacy 2004/535/CE pursuant to Article 25(6) of Directive 95/46/EC (OJ 2004, L 235, p.11). On 17 May 2004 the Council adopted Decision 2004/496/EC on the basis of Article 95 EC Treaty (OJ 2004, L 183, p.83), authorising the President of the council to sign the Agreement on behalf of the Community. The Agreement was signed on 28 May 2004 and entered into force on the same day. The European Parliament sought the annulment of both Commission and Council decisions. The Parliament argued, amongst others, that the choice of the legal basis for the decisions was incorrect.

On 30 May 2006 the Court of Justice annulled the Commission's Adequacy Decision of 14 May 2004. The Court stated that there is no competence for the Commission to take the Decision, since the transfer of PNR data to CBP constitutes processing operations concerning public security and activities of the State in areas of criminal law, which pursuant to Article 3 of Directive 95/46/EC fall outside its scope and, therefore, cannot be based on Article 95 of the EC Treaty. The Court also annulled the Council decision approving the companion agreement to the Adequacy Decision because the two were extremely closely linked. Hence, according to the Court, the Agreement could not be based on Article 95 EC for the same reason.

In its judgment the Court explicitly discussed the consequences of the annulment of both decisions, in particular in the light of the rule of international law that internal law cannot be invoked as a reason not to honour one's international obligations. In this connection the Court noted that Article 7 of the Agreement provides that either party may terminate the agreement with effect as from 90 days after notification of termination. It is this period of 90 days that the Court took as a reference in determining, essentially, that the Agreement and the Adequacy Decision shall not have further legal effect after 30 September 2006. In this respect the Court has recognised the very close link between the Adequacy Decision, including the Undertakings of CBP, and the Agreement.

Article 233 of the EC Treaty states that the institution or institutions whose act has been declared void shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

In view of the above the Commission

RECOMMENDS that the Council and the Commission act together in order to notify the United States of the denunciation of the Agreement in accordance with Article 7 thereof. Since this is an action in compliance with a Court annulment under Article 233 and the EC Treaty furthermore does not provide for specific rules for the termination of international agreements, it would seem to be sufficient if the two institutions together address a letter or note verbale to the US authorities notifying them of the denunciation. This should mention the date of 30 September 2006 as the effective date of the denunciation so as to coincide with the date referred to by the Court. A draft text is attached.

ANNEX

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The Presidency of the Council of the European Union and the European Commission present their compliments to and have the honour to state the following.

As you are undoubtedly aware, the Court of Justice of the European Communities in its Judgment of 30 May 2006 in cases C- 317 and C-318/04 has annulled the Council Decision of 17 May 2004 approving the Agreement between the European Community and the United States of America on the treatment and the transfer of PNR data (*complete title*), as well as the Commission Decision of 14 May 2004 (the so-called Adequacy Decision) which was closely linked to that agreement. As you will also be aware, the Court expressed itself explicitly on the continued validity under international law of the agreement, effectively prescribing to the defending institutions in these court cases that they should avail themselves of the provisions of Article 7 of the Agreement.

In the light of this judgment and the provision of the EC Treaty that enjoins the institutions whose act has been annulled to take all the necessary measures for the execution of the Court's judgment, the Council of the European Union and the European Commission hereby, pursuant to Article 7 denounce the Agreement (*full title*) with September 30, 2006, as effective date.

(Diplomatic formula of politeness)

For the Council of the European Union

For the European Commission

Presidency