



PRESIDENT OF THE REPUBLIC OF HUNGARY

To Dr. Katalin Szili, Speaker of the House

Parliament

BUDAPEST

Madam Speaker,

On its session of 20 November 2006, the Parliament passed the bill on the promulgation of the Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security, as well as, on the amendment of Act XCVII of 1995 on Air Transport (No.T/1097). Madam Speaker sent me the Act on 24 November 2006 for promulgation with a motion of urgency.

In my view the act does not include all the necessary and possible guarantees related to its subject, thus in this form, I do not agree with it. Therefore, I avail myself of the power ensured by Article 26 Paragraph (2) of the Constitution and within the time specified for the promulgation I return the Act to Parliament for reconsideration.

Honourable Parliament,

In the name of the Government the Minister of Justice and Law Enforcement introduced to the Parliament the bill on the promulgation of the Agreement between the European Union and the United States of America on the processing and transfer Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security. According to the preamble of the bill, the essentials of the international treaty to be promulgated (in the followings: Agreement) is that it makes possible for the United States

Department of Homeland Security (DHS) and some entities that directly support it at federal administration level, the direct access to certain data of passengers contained in the reservation system of air carriers. These data can be processed and treated by the DHS in accordance with applicable US laws and constitutional requirements. In terms of data protection, the procedure of the DHS is limited by its voluntarily undertakings published in the US Federal Register.

Article (6) of the Agreement declares that for the purpose of applying the agreement, DHS is deemed to ensure an adequate level of protection for PNR data transferred from the European Union concerning passenger flights in foreign air transportation to or from the United States. At the same time, the Article 4 of Council Decision 2006/729/CFSP/JHA on the signing of the Agreement makes possible in some cases for the national data protection authorities to suspend data flows to DHS. In relation to this, Section 5 Paragraph 4 of the Act passed by Parliament explicitly refers to the data protection commissioner's competency of suspending data transfer abroad.

The data to be transferred according to the Agreement are personal data by virtue of Act No. LXIII of 1992 on the protection of personal data and on publicity of data of public interest (Avtv.), and part of them are special data, as far as these refer to the religion, or to the health of the concerned person. According to Section 9 paragraph (1) of Avtv. personal data (including special data) can be transferred from Hungary to a data administrator or processor in a third country only in two distinct cases. One is when the concerned person has explicitly consented to the transfer of his/her data. In the other case, it is by law that the transfer of data should be made possible, and in the third country, protection of personal data should be ensured at an adequate level in the course of treating and processing of the data transferred. In relation to this, Section 9 Paragraph (2) of Avtv. defines the cases when protection of personal data can be considered as being of an adequate level in the third country.

Honourable Parliament,

In my view, it is not unambiguous that the conditions in connection with the Agreement are met, on the basis of which it could be established in the sense of Section 9 Paragraph 2 of Avtv that the protection of personal data is of adequate level in a third country in question. This does not necessarily result in that the Agreement would limit unconstitutionally the right to protection of personal data. However, I consider it necessary that Parliament make it unambiguous in the Act promulgating the Agreement that the guarantees of Avtv. continue prevailing. In my view, this can be ensured in the present case if the promulgating Act – in harmony with the Avtv. – makes possible the data transfer on the basis of the Agreement on the condition that the person concerned has explicitly consented to such transfer. A rule of such content would not be inconsistent with the Agreement since it would only mandate the application of legal guarantees otherwise prevailing in Hungary. The more so, since the text of the Agreement makes it unambiguous that is not intended to derogate from or amend legislation of the European Union or its Member States.

Considering the above – by virtue of Article 26. Paragraph 2 of the Constitution – I return the Act to Parliament for reconsideration within the time specified for its promulgation. I ask Parliament to complete the Act in the course of its re-discussion and re-approval with a provision requiring the explicit consent of the person concerned to the data transfer abroad.

Budapest, 29 November 2006

Yours sincerely,

László Sólyom