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on Transfer of personal data by airlines in the case of transatlantic flights

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

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INTRODUCTION

Since 5 March 2003 airline companies operating in Europe found themselves caught in a dilemma where on the one hand they are obliged to observe the EU legislation on data protection (principally Directive 95/46/EC) while on the other hand US legislation obliges them to allow the US Customs and Border Protection to have unrestricted access¹ to the personal data of passengers travelling to or via the USA. This is a flagrant violation of EU data protection legislation, as laid down in Directive 95/46 EC and Regulation 2299/89

Noting that the Parliament expressed a serious criticism of the Commission in its resolution of 13 March 2003, your rapporteur is of the opinion that in the 6 months since the adoption of Parliament's resolution the Commission has made very little progress with regard to ensuring that EU data protection legislation is observed.

The negotiations between the Commission and the USA are still ongoing. By letter, Commissioner Bolkenstein has informed the Secretary of the Department of Homeland Security, Tom Ridge, that the US undertakings are "not adequate". Regrettably, neither the negotiations nor the pressure from the European Commissioner have resulted in an acceptable solution.

Your rapporteur therefore believes that the European Commission must make a decision that is long overdue, namely whether or not the US commitments provide adequate protection. If adequate protection is not offered, your rapporteur believes that the Commission must pursue a two-tiered course of action.

First, as Guardian of the Treaties the European Commission must ensure that airline companies operating in Europe comply with EU data protection legislation and ensure that all data transfers to the US Customs and Border Protection is stopped within a very short period of time. Secondly, your rapporteur believes that the Commission must start negotiations with the USA with a view to reaching an international agreement that fully respects EU data protection legislation.

The current situation is such that action must be taken. The violation of EU legislation is continuing and with it the rights of European citizens are being violated.

Ultimately, if the Commission does not take adequate action, the European Parliament may face itself in a situation where it is bound to give the European Commission an official warning, based on the procedure, as laid down in Article 232 of the EC Treaty. Following this procedure, an action may be brought before the European Court of Justice.

To avoid such a scenario, your rapporteur believes that it is of utmost importance that the

¹ It should also be noticed that while airlines have been threatened by severe penalties, in particular loss of landing rights and the payment of substantial fines for failing to forward information required by the US authorities or forwarding incorrect or incomplete information some airlines have refused access to passenger data. As an example, the Italian national privacy watchdog banned the airline company Alitalia from passing on the information requested by the USA (apart from the passport data). Your rapporteur believes that until an agreement is reached with the USA it would be a preferable if all airline companies operating in Europe were requested to respect the European legislation and allow unrestricted access to passenger information

Commission immediately embarks on the strategy proposed above. Your rapporteur believes that in order to avoid losing more time, it is important that the European Parliament itself comes up with a provisional standard, which can serve as the basis for the negotiations with the USA. Your rapporteur will make a proposal for a standard which will serve as a guideline for the European Commission in its actions, below.

FURTHER STEPS

The Parliament already decided, in its resolution on 13 March 2003, to instructs its President to activate the procedure provided for in Rule 91 of the Rules of Procedure with a view to determining as far as the ECC-US joint declarations where concerned whether an action may be brought before the European Court of Justice.

In further discussions within the LIBE Committee it has been clarified that the joint declaration could not be considered as a legal base allowing the transfer of data to the US services. Furthermore, the Regulation 2299/98 (see the Background below, Annex I) has not yet been enforced by the Commission, so that six months after the EP resolution data continues to be accessible to the US administration.

In this respect the Chairman of the LIBE Committee has on 2 September 2003 by letter asked the Chairman of the JURI Committee to examine if the Commission is failing to apply the EU legislation and if this is the case to call the Commission to act according to Article 232 of the EC treaty. Ultimately, failing that, Parliament would be forced to bring an action to the European Court of Justice according to the same Article 232.

Your rapporteur believes that the US commitments do not offer adequate protection and urges the Commission to follow the strategy outlined in Parliament's oral question (attached below) as follows:

1. To ensure that airline companies operating in Europe comply with EU data protection legislation, principally Directive 95/46 EC and Regulation 2299/89, and ensure that all data transfers to the US Customs and Border Protection (pull system) is stopped as of 1 October 2003
2. To define at a European level, in line with the recommendation of the Article 29 Working Party, what information that can be regarded as non-sensitive following the definition of Directive 95/46 EC and therefore transferred. This information should be limited to information that can also be obtained via the passport and flight ticket (such a name, date of birth, destination, duration of stay).
3. To ensure that electronic transfer of data conform to the following criteria:
 - that the storage of data is no longer than the duration of the passenger's stay in the United States and without discriminating vis-à-vis US citizens
 - that passengers are informed at the time of purchasing the ticket that this data is transferred and that they give their consent to the transfer
 - that the passengers have access to a speedy and efficient remedy of the correcting erroneous data
4. To start immediate negotiations with the US authorities with a view to reaching an international agreement that fully respects EU data protection legislation.

BACKGROUND

The processing of personal data by airline companies within the framework of their economic activities is regulated by Community law in accordance with article 3 ('Scope') of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 concerning the protection of natural persons in connection with processing personal data and concerning the free transport of that data.

The processing of personal data by airline companies also falls under Regulation 2299/89. This Regulation provides a code of conduct for computerised booking systems. The Member States of the EU are responsible for the execution of Directive 95/46/EC. The European Commission, however, is directly responsible for the execution of Regulation 2299/89.

Since November 2002 the European Commission has been negotiating with the US authorities. On February 2003, the Commission subscribed -at "senior level"- to a Joint Statement basically accepting the US requirements.

EU Member States were not directly involved in the decision-making process that resulted in the Joint Statement of 18 February 2003. According to the Commission, this statement was meant only to determine a method for holding negotiations with the American authorities, to eventually arrive at a solution which complies with Community law.

Within this framework, the Commission above all paid attention to the situation of the European airline companies, which were confronted with conflicting requirements of two different legal systems and threatened with serious economic sanctions which could even lead to the revocation of their landing rights in the United States of America. This in itself is a type of blackmail, which should not exist between these trading partners.

The first solution considered by the Commission is based on Article 25, paragraph 6, of Directive 95/46/EC. On the grounds of this provision, the Commission can recognise that a third country guarantees a suitable level of protection for the information that is passed on to that country. The decision-making process entails participation by the member states that are represented in the Article 31 Committee that was founded with Directive 95/46/EC. The committee must in accordance with the rules of committee procedures make recommendations about the subjects of measures to be taken. According to our information, the Article 31 Committee will meet in September 2003.

Passenger information can be collected in two ways: via the so-called push system, whereby information is selected by the airline companies themselves and then passed on to the authorities in the USA, or via the so-called pull system, whereby the authorities in the USA have direct access to the databases of airline companies and reservation systems.

In a pull system, the authorities of the USA fall directly and fully under certain articles of the Directive and Regulation. This cannot be reconciled with European regulations for reservation systems and the privacy of personal data.

The only acceptable approach is therefore the 'push' approach, which is based on specific requests with regard to retrieving certain data. The USA has in the meantime shown that it is prepared to agree to a push system. The Irish airline company Aer Lingus currently uses such

a system. Claims that the push system is too technically complicated are therefore unfounded. However, the question remains of who is to bear the costs of setting up such a system.

ASSESSMENT

If a European standard had already existed in this field, the European Commission would have been able to negotiate more effectively with the USA. In the meantime, however, a certain standard can be laid down from the various recommendations made by data protection organisations, above all the recommendation of the Article 29 Working Party.

- **Collecting the data**

The only permissible approach is the 'push' approach, in which specific information is selected by airline companies themselves and then pass on to the authorities in the USA. Too many airline companies in Europe are for the time being still using the pull system.

- **Rights of the persons involved and access to one's own data**

The formula for the flexible functioning of the system and for dealing with complaints from the people involved currently offered by the USA is insufficient. Citizens have to pass by 3 bodies: the so-called Privacy Advocate at the airport, then the Homeland Security Ombudsman and after that the Privacy Officer of the Homeland Security Department (namely Mrs O'Connor Kelly). The first two bodies that citizens will have to deal with the most cannot be considered independent.

- **Duration of keeping the personal data**

Until now no progress has been made by the European Commission for reducing the term of 7 years proposed by the USA.

- **Proportionality**

The question is whether the method applied here will achieve the desired result. Will such collection and storage of information be effective in the legitimate fight against terrorism? Are there not other, more specific or adequate methods for combating terrorists? In your rapporteur's opinion, it is doubtful whether such an information system will really be a solution against terrorism. We must guard against throwing out the baby with the bath water. It can be said that the structure of cooperation between certain agencies in the USA in the field of security could firstly be improved. And specialist organisations in the USA and the EU, such as the CIA and Europol, should collaborate far better in this area. These organisations are after all best equipped to do so.