Intervention of Mr. Rodotà
(unofficial translation and transcription)

Mr Rodota is chair of the Article 29 Committee.
Address to the Committee on Citizens Freedoms and Rights (LIBE) on 25 November 2003.

Thank you Chairman.

I shall try to be as brief as possible among other things, because members are already familiar with the subject on which two important resolutions have been passed in March and in October this year.

As you have reminded us, Mr. Chairman, the Article 29, Working Party, is addressing not just a matter of passenger data being transferred to the United States, but also to other countries, i.e. Canada and Australia, at the moment, and then there are other countries, such as South Africa and South Corea, which are put in similar requests. The subject was addressed only a few days ago by the Working Party in its meeting at the 20 and 21 November. Views are widely different at the moment, as between the three cases that I've mentioned, the United States, Canada and Australia.

Let me first of all, take a moment to deal with Australia, in order to answer the Chairman's specific question and also because, I think the way that the Australian issue has been dealt with and solved, shows that the Article 29, Working Party, has no prejudices as regards the way of finding a balanced solution to security requirements. The Working Party, as it is its duty, works first of all to ensure respect for directive 95/46. Therefore, to ensure that there is the necessary reliable legal base for agreements having entered into and Commissioner Mr. Bolkestein himself has stressed this point.

Lastly, let's not forget that since we are talking here about personal data, we are in what is now a constitutional field, because the protection of personal data is a fundamental independent individual right as stated by article 8 of the Charta of Fundamental Rights and therefore, in the future, this position is going to be strengthened by the fact that the draft Constitutional treaty, first part, article fifty, (and this is the sole case in the whole draft treaty), repeats precisely the need for constitutional protection for personal data. So as far as the Article 29 Working Party, is concerned, there is a very real, not an abstract need for vigorous respect of the provisions contained in the draft constitutional treaty.

Now as regards Australia, I think I can say already, because there is no sense in which I would be revealing any secret of the Article 29, Working Party's work, I can tell you that the written procedure, is already going forward to bring a statement that the Australian system is in line and therefore the passenger data can be transferred to it.

So, the Article 29, Working Party, is not hostile, *a priori*, to such transfer of data; simply we have rigorously to analyse the conditions under which this data is being transferred. And the transfer of data to Australia, I can give you a brief account of this, happens only for 15 of the 39 categories of data in the PNR, as the United States started off asking for all 39 and have now come down to asking for 34.

Now, whereas the Article 29, Working Party, was suggesting 19 data, so the Australians are asking for an even smaller number of categories and what this means is between 95 and 97 % of passengers involved, are cut out of the system as far as they are concerned, their data is instantly deleted.

Then the next three, five per cent of passengers are screened and it's only if they are considered to represent a risk for Australian security, because they have committed serious crimes. It's only in those cases that the data is kept and for that, as long as is strictly necessary, for the purpose indicated.

So there is a second point. The purpose for which the data is collected is very precisely defined and cut down to a reasonable number of cases. So there is a limited number of cases. Much data is not kept at all and in further and in the remaining cases, it's kept for a very short time and the purpose is very accurately and tightly defined. Then, citizens are entitled to accept the data and to correct the data that the Australian authorities may have kept on them.

Let me quote the opinion on Australian position on this specific point: "*Customs will retain personal data that is accessed from the PNR, only if the passenger has committed an offence against a border protection Act administered by Customs. Where an offence is alleged, the data will be temporarily held during investigation of the alleged offence. If the investigation does not result in prosecution or no offence is proven, the PNR data are destroyed.*" So the data are kept only by the customs authority and if passed on to other authorities, subject to strict conditions. Furthermore in Australia, there is a federal privacy commission, which is an independent authority, ensuring enforcement and therefore providing further safeguards, which the Article 29, Working Party, has always insisted on. So this is a very important precedent and I think, the Commissioners and Parliament should bear it in mind, when they look at other situations.

As to negotiations with the United States on 21 November and following a debate discussion on the morning of the 20, the working party sent a letter to President Mr. Prodi, acknowledging the information that the Commission gave it on the state of progress of negotiations and added: *"The Working Party would like to stress that, although some progress has been made, safeguards proposed by the US authorities are still far from satisfactory. The Working Party reaffirms its views as expressed in its opinion 4/2003"* (which is our opinion of June this year).

Now why did we reach this apparently radical conclusion? Because on the essential points in the opinion of Article 29 Working Party and in the European Parliament's resolution of October this year, the information given us by the Commission does not provide the necessary guarantees. Although there is progress on some points, but there is not a progress towards meeting the working parties conditions, the list of categories of data is still too long, the statement that sensitive data are not going to be dealt with is contradicted by the fact that the American authorities themselves say that there are not at the moment in a position to filter that data out and therefore exclude them from the data treatment.

They've considerably cut down the period they want to keep the data from seven years to three and a half years, but that is still a long way from the weeks or months that the working parties opinion called for. And then the list of purposes still goes far beyond fighting terrorism and I have to say that we have observed with some surprise that in the most recent negotiations, and this brings me to reply to the chairman's second question, in the most recent negotiations, it is being taken for granted, the data will be transferred to the Transportation Security Agency.

Whereas in the past, the recipient of the data was supposed to be only the Bureau of Customs and Border Protection. So a further step has been taken away from what the European Parliament has called for and it is stated explicitly that in the future following further negotiations, the data will be made available to CAPPS II. In other words we have a system that

uses data collected, even if only a little data is collected and then crosscheck it with all the data available in other data banks which are available to the American authorities including data managed by private agencies.

So alright then. Categories of data have been reduced, but they can then be used as the starting point for further searches getting passenger profiles which go far further than the data properly transferred in the future when an agreement has been struck with the United States and this is a matter of serious concern. And what still remains to be dealt with is the question of citizens' rights and the existence of a genuinely independent monitoring authority.

So, according to our information as of today, of course I can't speak for the future, there are no grounds for saying that the American system is proper and suitable. Other suggestions have been made about international agreements. Obviously, I can't hear or anticipate an opinion that the working party has not yet issued. As you'd expect, the working party is in favour of international agreements according to the rules established by the Treaty. Obviously, these are not things that we can rule out in advance.

That would be to overstep our powers, but still in the same connection, there has never been a suggestion which the working party has never addressed in depth of a reference to Article 13 of the directive and this was another of the chairman's questions. Now it seems to me that a reference to Article 13 of the directive, which is one that offers waivers to member states for reasons of internal order and security, does not apply here, because it's a matter of public order issue being transferred from the member states to some third state and Article 13 does not offer any waiver from the other rules about treatment of data Article 7 of the directive which talks about consent. And then there is a further argument that strikes me as extremely pertinent. Article 13 talks only about treatment of data on the national territory. It doesn't say anything about transferring data to third countries, at which point the provisions of Articles 25 and 26 of the directive remain in force.

And as regards your last question, Mr. Chairman, and I'll conclude on this, the Spanish proposal. The Spanish proposal has not yet been directly considered by the Article 29, Working Party.