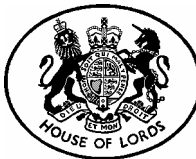


From: **THE LORD GRENFELL**
Chairman of the Select Committee on the European Union



COMMITTEE OFFICE
HOUSE OF LORDS
LONDON SW1A 0PW
Tel: 020 7219 6083
Fax: 020 7219 6715
e-mail: euclords@parliament.uk

12 February 2004

Communication from the Commission to the Council and the Parliament – Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach (doc. 5119/04, COM (03) 0826)

This proposal was examined by both Sub-Committee E (Law and Institutions) and Sub-Committee F (Home Affairs) of the Select Committee on the European Union on 11 February. The transfer of PNR data to the US authorities raises grave concerns, particularly in view of the lower data protection standards applicable in the US. We have previously expressed our concerns on this issue in the context of both the Europol-USA Agreement and the EU-US Agreements on mutual legal assistance in criminal matters.

It is unacceptable that the imposition of US legal obligations on EU carriers appears to have given rise to breaches of EC data protection standards, and may conflict with the right to respect for private life contained in the European Convention on Human Rights. The Commission appears to be satisfied with the adequacy of the undertakings that the US authorities have given and is preparing to adopt a Decision which would confirm that transfer of PNR data is compatible with EC data protection standards. However, the concerns voiced by the Article 29 Working Party in its Opinion 2/2004 clearly demonstrate that the EC standards have not been met.

If adopted on the basis of the Commission's Communication, EU legal instruments would legitimise the transfer of large categories of personal data (including sensitive data) to US authorities, which could then be used for other purposes (preventing or combating serious crime) and combined with other data derived from airlines' databases, which at present they are able to access directly. There is a clear danger that this could lead, as the Working Party notes, to 'generalised surveillance by a third State', a State that is not bound by EU safeguards.

On more specific points, we note that the Communication places great emphasis on informing passengers of the fact that their data will be transmitted, and on the necessity for their consent. The text of the Communication is rather vague on the impact of consent: while the Commission accepts that a legal solution relying entirely on consent would be a poor one from a data protection point of view, it believes that information and a conscious decision on the part of passengers are ‘an essential part of the overall package’. The consequences for passengers who do not consent to the transfer of their data are not specified. Would they be denied boarding? If so, a consent requirement would be a rather empty safeguard.

The Commission states that ‘any possible information exchange with the US authorities should be based on the principle of reciprocity in the transfer of data between the EU and the US, whilst at the same time considering the possibility for the collection and controlled transfer of PNR data through a ‘central European entity’. We would be grateful if you could clarify what is meant by ‘reciprocity’ in this context. If, as we believe, the US proposals are fundamentally unsound, it is unclear why it would be desirable to extend them in this way. Would the Government support the creation of an EU central authority transferring passenger data; and are you satisfied that the Community has competence to establish such a mechanism?

It appears that the Commission has organised a series of meetings bringing together Commission, police and data protection authorities to discuss the formulation of EU policy on data transfers, one of which took place on 9 October 2003. What position did the UK representatives take at that meeting? Has the Information Commissioner taken part in this, or any subsequent meetings? We would welcome any comments that the Commissioner may have on the development of EU policy in this field.

In view of the very serious concerns to which this proposal gives rise, it is of the utmost importance that the Committee is provided with ample time to scrutinise fully the proposal for the Commission ‘adequacy’ Decision, the draft international agreement and any other proposal that the Commission may bring forward arising from this Communication. As regards the Commission Decision, I would draw your attention to the recommendation in our review of scrutiny of European legislation (1st Report, session 2002-03, HL Paper 15) regarding the need for significant comitology proposals to be scrutinised fully. We consider that the ‘adequacy’ Decision would clearly fall in this category.

Finally, the situation regarding the use of PNR data in the CAPPS II. (Computer Assisted Passenger Pre-Screening System) is far from clear. This system—which we note has recently been heavily criticised by the General Accounting Office of Congress—would score passengers by perceived level of risk, using a colour scheme to group them. While the Communication points out that US demands to include EU-transmitted PNR data have not been made, we note that soon afterwards Commissioner Bolkenstein indicated, in a letter of 18 December 2003 to Tom Ridge of the US Homeland Security Department, that he understood that in the meantime US authorities ‘will be permitted to use PNR data... exclusively for the purposes of *testing* the CAPPS II system’ This appears to contradict the Commission’s statement and raises concerns in view of the Working Party’s view that the transmission of data to CAPPS II requires higher data protection safeguards and data should not be transmitted for testing. We can see no justification for the data to be used for testing.

We would welcome your comments on these points. The Committee decided to retain the Communication under scrutiny.

I am copying this letter to Jimmy Hood MP, Chairman of the Commons European Scrutiny Committee; and to Dorian Gerhold, Clerk to the Commons Committee; Michael Carpenter, Legal Adviser to the Commons Committee; Les Saunders (Cabinet Office); and Ed Millicent, Departmental Scrutiny Co-ordinator.

GRENFELL

The Lord Filkin, CBE
Parliamentary Under Secretary of State
Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London
SW1E 6QW