Transcription (from the English interpretation) of the intervention of Stefano RODOTA ([1]*), LIBE-Committee meeting of 18th February 2004 (Original : IT)

Thank you, chairman,

I'd like to thank you again on behalf of the Article 29 Working Party because as you said it is not the first time that we have worked together. In my opinion, our collaboration has been positive, as without the group's initiative and the prompt reaction from Parliament, I think that it would not have been possible last year to stop that curious document, the so-called "joint statement" between the American administration and the Commission services. Also, it would not have been possible to make even the modest progress achieved in negotiations during the last twelve months.

As this Committee knows, the Article 29 Working Party has adopted 3 opinions on the subject of Passenger Name Records ([2]). Furthermore, by letter of 29 January of this year, it has informed the President of the European Commission and the President of the European Parliament that the Group had to reiterate its negative opinion on the possibility of expressing an adequacy finding as regards the US data protection system, which means that the results of negotiations, although lengthy, seem to us unsatisfactory on the whole.

The Article 29 WP encountered some difficulties in getting information on the so-called "light international agreement" which will complete the Draft Commission Decision concerning an "adequacy finding". The same difficulties arose as regards the other documents made available on 16th February to the Article 31 Working Party, including a document of 6 February from the Secretary General of the Council.

I would now like to sum up the last opinion of the Article 29 Working Party, dated 29th January, which, like the previous ones, was adopted unanimously.

As I have already announced, we consider that there are still not the right conditions for an "adequacy finding"; such finding can only be made if a series of minimum conditions have previously been meet.

A failure to respect the essential principles of data protection would create a conflict with the Community and Union's legal framework.

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[1] President of the Data Protection Working Party (established by Article 29 of Directive 95/46/EC and composed of the supervisory authorities designated by each Member State and of the authority established for the Community institutions and bodies, and of a representative of the Commission). http://www.europa.eu.int/comm/internal_market/privacy/workingroup_en.htm

[2] http://www.europa.eu.int/comm/internal_market/privacy/adequacy_en.htm

In essence, the Article 29 Working Party highlights the fact that we do not have the legal conditions for an adequacy finding from two points of view:
- firstly, the respect of Community legislation and
- secondly, the level of commitments by the Americans.

As regards the European legal base, with reference to article 25 of the Directive, it has to be stressed that this is the first case of a transfer outside the EU of personal data, not to the private sector but to public authorities, in a third country and on the basis of a legal obligation imposed by that country.

This is a change in the purpose for which the data was collected in the first place, since the data were collected for commercial purposes to enable the passengers to travel, and the purpose for which they will be transferred is different (namely, the fight against terrorism and other crimes).

For this reason the Article 29 Working Party opinion stresses the fact that such a change of purpose could only be possible if it complies both with Article 8 of the European Convention on Human Rights and Article 13 in the Directive. According to WP29 analysis, there is a failure to respect these principles: Article 8 of the European Convention of Human Rights has not been respected because the future measures have to be compatible with what is necessary in a democratic society and this finding has a reflection on the circumstances indicated in article 13 in the directive. We have to conclude that the minimum conditions based on the European legal principles for an adequacy finding are not fulfilled.

Even more serious concerns arise from the nature of the US administration commitments. The latest version of the "Undertakings" (dated 12th January) could be considered less satisfactory than the previous versions. The latest version states very clearly that they do not produce any right for the benefit of the people to whom the data refer. Let me say that this is almost paradoxical, because we are talking about commitments, which ought to guarantee some rights to the people to whom the data refer. However, they declare that the protection for this particular people is excluded.... I must express great concern about this attitude, in particular, since, last year, during a meeting with the Privacy Officer of the Department of Homeland Security, I was told on the contrary that they would be explicit legal commitments for the benefit of the people to whom the data refer, published in the federal register, but that point has now been excluded.

Let us remind ourselves that these are new autonomous fundamental rights, as set out in article 8 of the Charter of Fundamental Rights in the EU. The importance of these rights can be inferred from the fact that even in the draft EU Constitutional Treaty, the first paragraph of Article 50, refers explicitly to the content of Article 8 of the ECHR. Could I also remind you that immediately after that the

Charter of Fundamental Rights was proclaimed in Nice and signed by President Prodi and Commissioner Vitorino, the Commission in a Communication adopted in February 2001, undertook the commitment to respect the rights and principles in the Charter and stated that all the legislation of the EU will be brought in line with these rights. So in the EU, this is an obligation. In contrast, the situation being sought by the American authorities means that none of the fundamental rights to have access to and to rectify data, to appeal against any possible violations and to obtain compensation for damage (pursuant to what is explicitly provided for in the Directive 96/46) is granted. Furthermore, not even the rights which American citizens benefit, on the basis of the Privacy Act of '74 and other laws, are granted to non-residents of the USA. So far these undertakings would exclude recourse to a Court and there is even no commitment for the future to extend these rights (as was accepted, for instance, by the Canadian representative in a similar situation of PNR data transfer)

We are confronted by a situation in which EU run the risk of abandoning its model of data protection which was very successfully drawn up and which is having influence in various parts of the world.

This lack of declared guarantees is exacerbated by the enormous discretionary powers which the American administration has conferred upon itself as is made clear from the criticisms levelled against the undertakings, in the opinion of the WP29:
- there are general expressions such as the one concerning crimes for which data are usable. They are not crimes of terrorism, but other "serious crimes" which is a very broad interpretation ...
- there is the mechanism concerning the period during which the data can be kept beyond what was proposed by the article 29 group. Three and a half years has been proposed, but the period for which the data can be kept can go up to 8 years without any motivation or particular need (which renders useless the guarantee for regarding the period during which the data can be kept...).
- the possibility of further uses is not excluded; on the contrary, it is explicitly permitted for law enforcement purposes, but there is no list of authorities to whom the data can be transferred and it is possible for the Customer Board Protection to communicate data in all cases otherwise provided for by law.

These are all such broad interpretations that they grant the US administration uncontrollable discretionary power so that they can manipulate the weak system of guarantees provided by the undertakings.

So, in this context we have to situate the numerous reservations put forward by article 29 group, which are summed up in the conclusion to the opinion.

For the WP29 there are 13 different conditions which, if they are not respected, the three fundamental principles of data protection: the principle of necessity, the principle of purpose and the principle of proportionality, would be violated. Moreover, the need to establish a rigorous legal framework is even more necessary since the American administration is not hiding the fact that, in the near future, these data could be used in the context of further "surveillance" programs such as "CAPPS II" and other programs. In the opinion, it is said that *"...transferred data should not be used without further negotiations in the article WP29, both in the context of the CAPPS II program and in the context of other programs such as Terrorism Information Awareness, the US VISIT or other programs which concern biometrics data."*

Of course all these remarks have to be understood in context and we draw attention to the very important need to exclude all sensitive data, to move from the "PULL" system to the "PUSH" system and to respect the principle of purpose. Unfortunately all these requirements are violated by the imposed obligation to give access to 34 data of the PNR.

Finally, I would draw your attention to the fact that there is no possibility to make an appeal to an independent authority. This is a key point in the European system of guarantees and the third indent of Article 8 of the ECHR refers to it, as does the 95/46/EC Directive, and it is reiterated in article 50 of the draft Constitutional Treaty. A true independent authority can not be avoided. As you know the Court of Justice is now discussing a case concerning the real independence of some European authorities which certainly fulfil much higher conditions than that those of the privacy office appointed by the government in the Homeland Security Department. This, in my opinion, is another point which gives rise to considerable concern.

In conclusion, I'd like to raise one question because very frequently it has been said in public and in private that the article 29 Working Party should have been much firmer and much more intransigent. In this context, I would like to remind you that the same criticisms and concerns have been expressed by other institutions, in particular regarding the limitation of the objective of data collection for terrorism.

Even in the Congress of the US, the same request has been put forward as has been put forward by the article 29 group. Last week a report from the General Accounting Office said that the treatment of data in the Transport Security Agency gives rise to the risk of abuse and violation by the administration. So we have to be very cautious in transferring data and that need is emphasised by the fact that the GAO recognises the risks for the data concerning American citizens which are already considerably protected.

When we have received a reasonable request such as that PNR transfer to Australian authorities, we immediately gave a favourable opinion. I hope that as the article 29 group has already given its opinion it will be put soon on the agenda of the article 31 Working Party.

I'd like to remind you that a few days ago, the chairman of the select committee on the European Union in the House of Lords, Lord Greenfield, wrote to the government, picking up almost to the letter the opinion of the article 29 Working Party, and I quote *"it is unacceptable that the imposition of the US legal obligation on EU carriers appears to a 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"* and it also says that there will be a clear danger *"by a certain state that is not bound by EU safeguards"*.

I am quoting that declaration and I am not quoting the many documents from the USA which are extremely critical of these undertakings and show that the concerns expressed by the article 29 group are the same as the discussions which have been going on during the last few years thanks to this initiative to scrutinise the negotiations between the US administration and the EU.

I know very well that it is said that the negotiations are difficult because the USA is taking a very intransigent position, but that is not a valid argument, particularly when we are discussing fundamental rights. You cannot say that there is a political misunderstanding or this is a question of simply power or strength when we are talking about respecting a framework of rights which has been drawn up by the EU on the bases of a supranational model of discipline which is at present influencing trends on data protection throughout the world.

We are not only discussing this subject of PNR, although extremely important, but we are also discussing the possibility of the EU to propose to the whole world more advanced models of data protection.

Now, I will finish on that note but I was very taken aback by the final words in a document from a very important American association for civil rights commentating on the latest undertakings. They used the following words *"to join Europe, not to have them join us" I think that that* is something we should all bare seriously in mind.

Thank you.