

DELEGATION FOR RELATIONS WITH THE UNITED STATES
- THE CHAIRMAN -

Dear Colleague

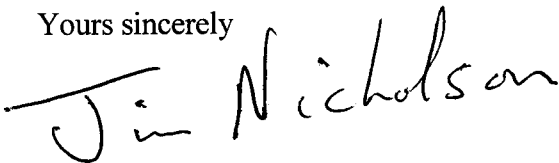
Draft Commission decision noting the adequate level of protection provided for personal data contained in the Passenger Name Records (PNRs) transferred to the US Bureau of Customs and Border Protection (C5-000/2004)

I would like to draw your attention to an important issue in EU/US relations, which was repeatedly discussed in the framework of our regular interparliamentary meetings with the US Congress, as well as in a special videoconference with Members of the US House of Representatives on 2 October 2003; namely the issue of transfer of Passenger Name Record (PNR) data to the US. As you will know, a crucial vote on this issue will take place in plenary on 31 March 2006 (report, J. Boogerd-Quaak, on Passenger Name Records)

According to our internal rules, parliamentary delegations do not deliver opinions; our delegation therefore did not have the opportunity of taking a formal vote on this subject. It has appeared, however, in the course of our discussions, both with our US counterparts and internally within our delegation, that the consequences of interrupting the PNR data transfer to the US would be quite serious. It was therefore decided, at the last meeting of our delegation on 17 March 2004, that I would take the initiative to ask the Commission for a brief overview of the problem and of possible outcomes, and transmit it to all MEPs in order to try and increase awareness of the important issues at stake.

Please find attached the short overview drawn up by the Commission.

Yours sincerely



Jim Nicholson
Encs

PASSENGER NAME RECORDS (PNR)

Since 5th February 2003, US Customs requires airlines flying to the US to give access to them to the data processed by their reservations and departure control systems, and in particular to PNR. This requirement is incompatible with Community and Member States' legislation on data protection. Airlines were in an impossible situation, facing potential sanctions either in the EU or in the US no matter how they proceeded.

In order to reconcile the conflicting requirements, the Commission has proposed a decision on the basis on the Data Protection Directive¹, whereby US Customs and Border Protection is considered as providing an adequate level of protection of PNR data on the basis of a list of US undertakings. This will be complemented by a EU-US bilateral agreement for those matters internal to the EU which cannot be covered by the Adequacy Finding.

The European Parliament is at the moment exercising its 'droit de regard' on the Adequacy Finding decision (resolution expected to be debated and voted on 31 March) and will soon be consulted on the international agreement.

WHAT IS AT STAKE IF THE PACKAGE IS NOT ENDORSED

Failure to conclude an agreement with the US would be to the detriment of airline passengers and airlines. The solution needs to take into account from the EU point of view data protection concerns, the security and convenience of legitimate travellers, the commercial interests of airlines and overall relations with the US, and from the US point of view the need to fight terrorism and law enforcement considerations.

From the passengers' point of view:

- **Collecting all required data at the entry gate would involve considerable delays** and inconvenience for passengers arriving in the US. Using PNR will result in fewer passengers being subjected to "secondary inspections" (or more detailed examination and questioning).
- **The absence of an agreement would lead to no guarantee on the respect of data protection rights.** US authorities could access any type of data available in the PNRs and would have no constraints in the handling of such data.

From the airlines' point of view

- The airlines are currently in a position of **legal vulnerability**. They need to be able to meet US PNR requirements in a legally secure framework.
- Most airlines are under severe **financial strain** and they cannot afford to take the risk of facing US sanctions, such as fines, secondary inspections, possibly even losing landing rights.

WHAT ARE THE INSTRUMENTS

The Adequacy Finding: Art. 25 of the Data Protection Directive (95/46/EC) establishes that the transfer of personal data to a third country may only take place if the third country ensures an adequate level of protection. The Adequacy Finding decision establishes that the protection of data offered by the US is "adequate". A list of unilateral US undertakings is annexed to the decision. The Adequacy Finding is not in itself sufficient to render the transfer "legitimate" according to the Directive. A legal basis needs to be created through an international agreement (see below).

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data

The draft Adequacy Finding decision was adopted by Member States at the Management Committee set in place by the Data Protection Directive and was transmitted to the European Parliament on 2 March. A resolution is expected to be voted at the end of March Plenary session.

The international agreement: The international agreement would create the **legal basis for the transfer** of data to the US, by imposing a legal obligation on the airlines to do so, and would **resolve the extra-territoriality problem** caused by the fact that the US authorities are in a first stage accessing European data bases in the EU.

In addition to these two legal aims, the international agreement would seek to ensure non-discriminatory treatment for EU travellers, regardless of their nationality or country of residence, and to ensure that the US Customs would support the EU, on a reciprocal basis, if in the future it were to introduce a PNR system.

This international agreement would need to be approved by the Council under Articles 95 (the legal basis of the data protection directive) and 300, paragraph 2, of the Treaty of the European Community, which, *per* article 300(3) 1st indent, requires consultation of the European Parliament.

The Council will shortly transmit the draft international agreement to the European Parliament.

WHAT HAVE WE GAINED SINCE THE BEGINNING OF THE DIALOGUE

- A EU-US **Joint Statement** agreed in February 2003 **marked the beginning of a dialogue with the US** to improve data protection and provided for an interim arrangement for the transfer of data on the basis of some undertakings by the US.
- **We have made tangible progress in the talks with the US** aimed at ensuring that the highest possible standards of data protection apply to PNR transfers.
 - a) **US agreement to receive a more limited amount of data:**
 - i) Only flights to, from or through the US
 - ii) A close list of 34 data elements (the entire PNR can have 60 or more fields);
 - iii) Deletion of sensitive data (revealing religion, political beliefs, concerning health etc).
 - b) **Satisfactory undertakings about data sharing** – no automatic or electronic access by agencies other than US Bureau of Customs and Border Protection. Sharing of data with other agencies can only be done on a case by case basis.
 - c) **Data retention period reduced** from 50 to 3.5 years.
 - d) A **more precisely defined statement of the purposes** for which the data will be used (combating terrorism and related crimes and other serious crimes of transnational nature).
 - e) **Personal information** linked to PNR data (e.g. expenses made on a credit card) **not to be accessed directly by US authorities**. Access to such information on a case by case basis would be subject to judicial control for a particular inquiry.
 - f) **Redress:** EU Data Protection Authorities will have direct access to the **Chief Privacy Officer** of the US Department of Homeland Security if any individual feels that his complaints have not been dealt with in a satisfactory way.
 - g) **Periodic joint review of the implementation** of the US undertakings involving authorities from the EU.
 - h) **Time-limited adequacy finding and the international agreement** to be re-visited in the light of experience before it expires in 3.5 years.

- i) **Move to a 'push' system:** After an initial stage during which the US will have access to the data processed by EU air carriers reservation and departure control systems ('pull' system), we will shift to a system by which European airlines will selectively 'push' the data to the US as soon as this is technically feasible.
- j) **Passengers are entitled to full and accurate information** on the use of their data in order to exercise some judgement about the amount of data that they provide when making a reservation.